Discussion

The First Amendment and the Theology of Republican Government

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David Lowenthal, *No Liberty for License: The Forgotten Logic of the First Amendment* (Dallas: Spence Publishing Company, 1997), xxvi + 315 pp., $27.95.

> License consists in doing what one lists; liberty consists in doing in the right manner the good only; and our knowledge of the good must come from a higher principle, from above.
>
> Leo Strauss[1]

The thesis of David Lowenthal's *No Liberty for License: The Forgotten Logic of the First Amendment* is as bold as it is simple: "the First Amendment, intended as a bulwark of the republic, has become a prime agent of its destruction" (p. xiv). Lowenthal rightly argues that the First Amendment was adopted for a political purpose; it sought to protect only those liberties necessary for the preservation of republican government. Today, however, the focus of the First Amendment is on "individual rights" rather than the common good, and it is this "over-expansion of individual liberty" that Lowenthal believes has led to the vast decline of the "moral and political health of the republic," a decline that undermines the very foundations of liberty itself. Indeed, the Supreme Court has "made individual freedom its god—at the expense of the moral, social, and political needs of ordered society" (p. xiv).

Lowenthal argues that this corruption in First Amendment jurisprudence was caused by the deliberate departure from the intentions of its framers: "the great impetus for movement in the direction of extreme liberty came not from within the system but from new philosophies and theories, mostly imported from abroad. These were thought to be truer than the philosophy of divinely bestowed and inalienable rights explicitly stated in our Declaration of Independence and underlying the Constitution" (p. 267). The main culprit here, according to Lowenthal, is John Stuart Mill who, in the hands of Justices Holmes and Brandeis, became the intellectual guide for a "second, hidden founding" (pp. 54, 45, 248, 250, 253, 267, 273). It was Mill who "supplied a new theoretical foundation for liberty, calling for its vast expansion in the name of freedom of thought," and

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by the middle of the twentieth century, those forces set in motion by modernity, "relativism and subjectivism," had become the dominant mode of thought informing constitutional interpretation (p. 267). Mill and his epigones replaced the founders as the source for understanding the Constitution.

The efforts of Holmes and Brandeis, of course, were a part of the larger Progressive movement. The explicit goal of Progressivism was to free the Constitution from its moorings in the founding, most particularly from the "static" doctrines of the Declaration of Independence and its reliance on the permanent truths of the "laws of nature and nature's God." Progressivism itself was only one strain of modernity, but it shared with the other strains the depreciation of both reason and revelation as sources of moral and political authority. Progressivism was phenomenally successful in its debunking of the founding and its reformist zeal appealed wholly to the passions. It sought to liberate the passions from the constraints of morality, whereas the founders appealed to the "reason . . . of the public" (*The Federalist*, No. 49 [Rossiter, ed.], p. 317) as the foundation of moral and political order. The appeal to reason will always be more difficult than the appeal to passion, especially when the appeal to passion has itself assumed a kind of "moral" authority. It should not be surprising therefore that the "success " of the "Holmes-Brandeis school of jurisprudence," in Lowenthal's estimation, "is completely out of keeping with its intrinsic merits" (p. 61).

Progressivism was a wholly alien doctrine; it derived not from any thought of the founding, but from Continental thought, principally from Hegel. The result was moral relativism verging on nihilism. But Lowenthal rightly questions "whether any alien doctrines, any doctrines other than those of the founders and framers, written into the language of the Constitution, should be so employed" (p. 54). Lowenthal supports original intent jurisprudence because the ideas of the framers and founders "remain constitutionally, politically, and morally superior to those that have displaced them" (p. xxii). Lowenthal does not minimize the difficulty of restoring the founding to its rightful place; he believes the republic is in grave danger and the danger is more than abundantly evident in the current understanding of the First Amendment. Lowenthal's account is not that of a mere intellectual; it is written with a verve, moral passion and deep patriotism that is almost unknown among intellectuals.

Lowenthal correctly notes that "[o]nly the Declaration of Independence contains the definitive statement of American political principles, and it was the single greatest force inspiring the Constitution" (pp. 45, xix, 267, 271; contrast p. 207). And the philosopher "from whom the Declaration drew virtually all of its principles was John Locke" rather than Mill (p. 45). At times, however, Lowenthal argues that the founding was not simply Lockean, but represented an improvement by adding a moral dimension—"an elevated view of virtue"—that "is different from and superior to anything derived from the pages of Locke's political philosophy." Thus, according to Lowenthal, "the founders managed to make an amalgam of Locke and older views, just as the American

people have in practice managed to combine Locke's rationalism with elements of Christianity" (pp. 93, 257). But this "amalgam," however much it may have been the achievement of the founding, was not the achievement of the Declaration of Independence. In Lowenthal's view, the "over expansion of individual liberty" that undermines the moral foundations of the American republic can, in some sense, be traced to the Declaration itself. The critical political-theological problem is to bring the "Declaration's natural theology into broad correspondence with Biblical religion," even though "[t]he philosophy of liberal democracy expressed in the Declaration is not in fact perfectly consistent with Christianity." The inconsistency resides in the fact that the Declaration appeals "to human reason rather than to faith or revelation, and hence to all men on the ground of their natural likeness rather than to a particular set of men chosen by God" (p. 205). Nevertheless, Lowenthal contends that there is a common ground for reconciling these inconsistencies and that this ground, however paradoxical it may appear, is monotheism and the notion of a creator God: "the Declaration retained a crucial element in common with revealed religion by tracing natural rights to the bounty of a Creator and by acknowledging His active interest in protecting His handiwork" (p. 205). It has been the achievement of the American people to bring the two grounds of morality "into mutual reinforcement, complementarity, and interconnection," even though "[l]ogically or philosophically [ ] this might not be possible" (pp. 204–5, 200, 236, 237, 256).

Lowenthal argues that Abraham Lincoln "suggests a criticism of the Declaration's doctrine of the 'rights of man.' The primacy of the individual and his rights (or collectively, of the people and their rights) is at odds with the essential citizen duty to subordinate oneself to the law of the land." Indeed, "the Declaration's emphasis on individual rights" is a "deep problem . . . which must *inevitably* make it more difficult for a society founded on its principles to cohere and endure." It is therefore necessary to "counter this doctrine's anarchic tendencies" (pp. 213 [emphasis added]; 210, 241, 271, 81; contrast pp. 257, 267). The problem is that the Declaration "concerns itself solely with the preservation of our rights," but only "implies" that there are "duties corollary to rights" (pp. 238, 236). This, according to Lowenthal, is an inherent defect of a document that is premised on the idea that "all men are created equal," and it was Lincoln's achievement to complete the founding by articulating the moral prerequisites of democracy that were conspicuously absent from the Declaration. Lincoln succeeded in "repairing some of the defects of the first founding in what amounted to a second [founding]" by adding the elements of revealed religion to "the more restrained rational monotheism of the Declaration of Independence" (pp. 215, 241, 271). "Rational monotheism" alone is inadequate to provide the moral basis for the regime; it needs to be supplemented by revelation, even if in Lincoln's statesmanship, this amounts simply to "political religion."

Lowenthal takes the thesis that Lincoln was not merely the perpetuator of the American founding, but a "re-founder" of the regime, placing it on a moral

foundation that had been missing from the first founding, from Harry Jaffa's *Crisis of the House Divided* (1959). In the intervening forty years since the publication of *Crisis*, however, Jaffa has changed his opinion somewhat on Lincoln's role as a founder. He now sees a greater theoretical unity in the founding and is less inclined now to speak of the Declaration as "wholly a document of the rationalistic tradition." Those "classical" elements of the regime that Jaffa once attributed exclusively to Lincoln's "refounding," are now seen as elements intrinsic to the founding itself, a founding that Lincoln "perpetuated" and extended but without changing its essential character. The change in Jaffa's interpretation is directly related to the development of his thought concerning what Leo Strauss referred to as the "theological-political problem."[2]

THE THEOLOGICAL-POLITICAL PROBLEM

Lowenthal makes much of the fact that in the Declaration of Independence Jefferson doesn't refer to God but to "nature's God," the God of reason and not the God of revelation. He notes that there are four references to God in the Declaration, but that only the first two ("nature's God" and "Creator") were in Jefferson's draft. The subsequent references ("Supreme Judge of the world" and "Divine Providence") were added by the Continental Congress.[3] It was the addition of the latter two references, Lowenthal argues, that "brought the Declaration's natural theology into broad correspondence with Biblical religion and the universal inclinations of mankind" (p. 205). But in saying that "all men are created equal, [and] that they are endowed by their Creator with certain unalienable Rights," the Declaration refers to both a Creator and a creation. Creation, of course, necessarily implies an intelligible universe, an ordered whole. While the whole may always remain elusive, since God works in mysterious ways, man can discover as much of God's plan as is vouchsafed to man's reason. This argument is not wholly incompatible with Aquinas' argument on the relation of natural law to eternal law. According to Aquinas, the natural law is the rational creature's participation in the eternal law, and the eternal law is the law by which God governs the universe. Man participates in the eternal law to the extent that he is rational; and the results of man's reasoning might properly be called the natural law. If the natural law is an integral part of the eternal law there can be no contradiction between them (*Summa Theologica, Treatise on Law*, Q 93, A.1; A3). St. Paul proclaims that

> When Gentiles who have not the law do by nature (*physei*) what the law requires, they are a law to themselves. . . . They show that what the law requires is written in their hearts. (Romans 2:14–15)

Those who do not have the law by revelation may nevertheless know the law by nature. This is certainly not a fully developed theory of natural law, but the germ of natural law and natural right is clearly present. The law is no less a dictate of rational monotheism than it is of revealed monotheism. It may be said to be reason confirmed by revelation and is perfectly consistent with the argument of the Declaration of Independence, particularly in its reference to the "Creator" and to "nature's God."[4]

Harry Jaffa notes that "the American people at the Founding believed that the laws of nature instructed by unassisted human reason and the revealed laws of God as they bore on human conduct were largely in agreement with each other, if not altogether identical. They did not deem it wise to have this moral consensus undermined by sectarian theological differences," because this consensus "was an absolutely necessary condition of the idea of self-government." Jaffa's thesis, which would otherwise appear wholly hyperbolic, is amply borne out by sermons regularly preached in the founding era. The distinguished constitutional historian Andrew McLaughlin wrote that "[d]uring the Revolution and in the process of setting up new governments, the preachers played a conspicuous role. The philosophy of the seventeenth century was repeated over and over again by New England divines who preached about a law of reason and a law of God, the sacredness of covenant and the divine character of government."[5]

The Reverend Samuel West provides a perfect demonstration of McLaughlin's thesis. In his 1776 sermon "On the Right To Rebel Against Governors," Reverend West remarked, in a passage reminiscent of Aquinas, that "a revelation, pretending to be from God, that contradicts any part of natural law, ought immediately to be rejected as an imposture; for the Deity cannot make a law contrary to the law of nature without acting contrary to himself,—a thing in the strictest sense impossible, for that which implies contradiction is not an object of the divine power." "Reason," he proclaimed, "is the voice of God . . . [and] whatever right reason requires as necessary to be done is as much the will and law of God as though it were enjoined us by an immediate revelation from heaven, or commanded in the sacred Scriptures."[6] Another remarkable sermon was delivered by the Reverend Samuel Cooper on October 25, 1780, before Governour Hancock and the legislature on the inauguration of the government under the new constitution of Massachusetts. "We want not, indeed," the Reverend Cooper declared,

> a special revelation from heaven to teach us that men are born equal and free; that no man has a natural claim of dominion over his neighbours, nor one nation any such claim upon another; and that as government is only the administration of the affairs of a number of men combined for their own security and happiness, such a society have a right freely to determine by whom and in what manner their own affairs shall be administered. These are the plain dictates of that reason and common sense with which the common parent of men has informed the human bosom. It is,

> however, a satisfaction to observe such everlasting maxims of equity confirmed, and impressed upon the consciences of men, by the instructions, precepts, and examples given us in the sacred oracles; one internal mark of their divine original, and that they come from him "who hath made of one blood all nations to dwell upon the face of the earth," whose authority sanctifies only those governments that instead of oppressing any part of his family, vindicate the oppressed, and restrain and punish the oppressor.[7]

These sermons, and many others like them, indicated the extent to which the preachers themselves easily combined reason and revelation in the support of morality and politics. The proposition that "all men are created equal" was, in the eyes of the Reverend Cooper, the fulfillment of God's word that He "hath made of one blood all nations." Thus no government can receive God's sanction unless it is based on the universal principle recognizing the equality of men. This is the heart of the "theological-political" problem that the framers faced. With the advent of Christianity, no regime could possibly succeed on any other basis than egalitarian natural right. But the framers must have known—or perhaps divined—what Aristotle taught in the *Nicomachean Ethics*, that natural right is a part of political right.

Some intelligent critics of the Declaration like Lowenthal consider the American founding defective or incomplete because of its concessions to modern natural right. But the success of modernity's attack on classic natural right made it impossible for natural right to appear in any other guise than egalitarian natural right. What constitutes natural right is changeable and depends upon political circumstances. Aristotle could not have anticipated a universal religion in which men's dearest interests were in another world and where men achieved their salvation, not as members of a political community, but as individuals. But the framers found that world already in existence and had to contrive a regime that was at once based on universal principle but also provided solid ground for the political obligations of a particular regime. The principle that "all men are created equal" provided the "abstract truth applicable to all men and all times" (to use Lincoln's language) and the social contract, a deduction from this abstract principle, provided the ground for political obligation.

John Tucker's "Election Sermon" delivered in 1771 is another remarkable example of preaching in the founding era. "Civil government," he declared, "is the dictate of nature:—it is the voice of reason, which may be said to be the voice of God." He continued with an account of the origins of government that almost everyone would have recognized as being drawn directly from Locke's *Second Treatise*:

> All men are naturally in a state of freedom, and have an equal claim to liberty. No one, by nature nor by any special grant from the great Lord of all, has any authority over another. All right therefore in any to rule over others, must originate from those they rule over, and be granted by them. Hence all government, consistent with

> that natural freedom, to which all have an equal claim is founded in compact, or agreement between the parties,—between Rulers and their Subjects, and can be no otherwise. Because Rulers, receiving their authority originally and solely from the people, can be rightfully possessed of no more, than these have consent to, and conveyed to them.[8]

What is noteworthy here is Tucker's unquestioned assumption that social contract is the origin of legitimate government from the point of view of both divine law and natural law. Tucker, no less than Madison or Locke, believed that "all power in just and free Government is derived from compact," a compact which, to use Madison's language, "arms" government "not only with a moral power, but the physical means of executing it."[9]

In saying that "All men are naturally in a state of freedom," Tucker clearly refers to the state of nature, the prepolitical "state of freedom" where everyone has "an equal claim to liberty." One frantic commentator, however, asserts that "the idea of the state of nature is incompatible with Christian doctrine."[10] And if the state of nature is incompatible with Christian doctrine then so too is the idea of social compact as the legitimate origin of civil society. Yet this is clearly not the understanding of the Reverend Tucker and his fellow preachers—nor, I dare say, the framers themselves. Tucker, of course, almost certainly understood the exoteric Locke as fully compatible with Christianity. The apolitical individualism described in Locke's state of nature is simply a mirror of the idea of the direct relationship, unmediated by any political community, between God and the individual that is the hallmark of Christianity itself. The social contract provides a ground of political obligation in reason that would otherwise be unavailable, because unlike the ancient gods, the Christian God is not a legislating God; in Christianity the primacy of the law, and the obligations of the laws, have been replaced by the primacy of faith. "The *State of Nature*," Locke writes

> has a Law of Nature to govern it, which obliges every one· And Reason, which is the Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, Sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one anothers Pleasure (*Second Treatise*, I.6)

Leo Strauss pointed out, of course, that the state of nature of the esoteric Locke had more in common with Hobbes than with Christianity. But neither Tucker nor the framers read Locke the way Leo Strauss read him. Indeed, there is no evidence that anyone ever read Locke with the care and penetration that Strauss did. If we are to understand the framers as they understood themselves, however, it is necessary to read them in the light of the exoteric Locke, not the esoteric Locke revealed by Strauss.

Our frantic commentator has also alleged that "the very idea of natural rights is incompatible with Christian doctrine."[11] But natural rights are the irrefragable dictate of that unity and equality of mankind that is central to Christianity. Individual rights derive from the fact that men are "the Workmanship of one Omnipotent, and infinitely wise Maker" and the fact that men do not depend upon their political communities for their relationship to God. But God's workmanship carries obligations along with rights, i.e., the reciprocal recognition of God's workmanship in other individuals. And these obligations, embodied in the social contract's requirement of reciprocal consent, become the principal ground of the laws in civil society. To argue that the idea of natural rights is incompatible with Christianity is a theoretical view that abstracts from the self-understanding of the political actors themselves; it imposes a wholly theoretical understanding that was not part of the moral or political horizon of the founders or the founding generation.

Many have pointed out that the framers were not political philosophers, but statesmen, *phronemoi* in Aristotle's terms; they were practically wise men. Strauss understood Locke in terms of the distinction between ancients and moderns. The moderns, according to Strauss, tried to undermine both reason and revelation as the source or foundation of moral and political life; for the moderns reason was merely instrumental to the passions and revelation was simply superstition. But for Strauss the distinction between ancients and moderns was a distinction within the history of political philosophy, not of the history of politics. Because the framers came after Hobbes and Locke does not mean, ipso facto, that they were Hobbians any more than they were Lockeans. As *phronemoi*, the framers were free to pick and choose the elements that would contribute to a decent regime, even to combine some elements on a political level that might appear from the perspective of theory to be incompatible.[12] For the colonial preachers, and for the founding generation generally, there does not seem to be any inherent or necessary tension between the "rational monotheism" of the Declaration and the monotheism of Biblical revelation. In the self-understanding of the founding generation reason and revelation were the twin pillars of the moral and political consensus that made both the Revolution and the Constitution possible.

Despite the irresolvable opposition between reason and revelation on a theoretical level, there can be something of a resolution on the level of morality and politics. Strauss argued that there is no necessary conflict between Jerusalem and Athens regarding the issue of morality, or even political morality. "[T]he Bible and Greek philosophy agree in regard to what we may call, and we do call in fact, morality. They agree, if I may say so, regarding the importance of morality, regarding the content of morality, and regarding its ultimate insufficiency" ("Progress or Return?" p. 246). What divides the accounts of the human good given by reason and revelation concerns the "ultimate insufficiency" of morality, i.e., what "supplements or completes morality." On the political level,

however, there is fundamental agreement on both the necessity and the content of morality. The disagreement on what "completes morality" need not dissolve or affect the agreement on morality. Thus a separation of church and state, implying neither the superiority or inferiority of revelation or reason, would seem to be the precondition of politics in the sense that it preserves the ground of morality that is necessary to constitutional government. The utterly wooden and mechanical adherence to the distinction between ancients and moderns by our frantic commentator misses the important point that "the modern efforts were partly based on the premise, which would have been acceptable to the classics, that . . . natural law or natural right should be kept independent of theology and its controversies."[13]

As Harry Jaffa argues, "[t]he unprecedented character of the American Founding is that it provided for the coexistence of the claims of reason and of revelation in all their forms, without requiring or permitting any political decisions concerning them. It refused to make unassisted human reason the arbiter of the claims of revelation, and it refused to make revelation the judge of the claims of reason. It is the first regime in Western civilization to do this. . . ."[14] In giving equal claims both to revelation ("free exercise of religion") and reason ("freedom of speech"), the First Amendment provides a political resolution to the "theological-political problem" on the only grounds available to the founders. Jaffa remarks that "there is no final resolution that we can now imagine between the ultimate differences of Jerusalem and Athens. . . . But the genius of the American Founding consists above all in freely permitting this tension and this conflict to be *the* transcendent end of political life, the end which the activity of moral virtue ultimately serves. In this way, the very differences of Jerusalem and Athens become the highest ground of harmony and peace (*Original Intent*, pp. 351–52 [italics original]; see pp. 96, 315, 321, 345, 350, 352, 356). Indeed, Jaffa argues, contrary to Lowenthal, that the Declaration's central principle that "all men are created equal" was "already implied in Judaeo-Christian ethics. In a sense, it is the ground of that ethics. . . . And this truth is itself a truth no less of unassisted human reason than of divine revelation" (p. 350. Jaffa takes up the question of the relation of the Declaration and Christianity extensively in *A New Birth of Freedom*, chap. 2).

Lowenthal argues that the First Amendment has an "internal coherence." It contains "a basic philosophical and practical logic to it—a good reason why it begins with religious and then goes on to political considerations; a good reason why it links the freedom of speech and press to the freedoms of petition and peaceable assembly. The Amendment states the fundamental requirements of republican government in America" (pp. xvii–xviii, xxiii, 272–73). Lowenthal does not, however, follow the "philosophical and practical logic" in his exposition of the First Amendment; rather he follows the order of "harm done by constitutional misinterpretation" (p. xxiii). The greatest danger to constitutional government stems from the Supreme Court's misinterpretation of the free

speech provisions of the First Amendment which has allowed revolutionary groups to engage in seditious libel with virtual impunity. Courts have also undermined the moral foundations of democracy by including obscenity and pornography within the protection of the First Amendment, and Lowenthal has made the moral dimension his central discussion. There is less danger to the republic stemming from the establishment of religion or abuses of the free exercise of religion, and this issue is treated last. What is therefore prior in the logical order of the First Amendment has sensibly become last in Lowenthal's political ordering.

Presumably the "internal coherence" of the First Amendment is most evident in the implication that constitutional government follows, and can only follow, upon a resolution of the religious question (pp. 272, 19–20). In other words, the "internal coherence" of the First Amendment is premised on a specific understanding of the theological-political problem. Until sectarian religious questions are removed from the political process, constitutional government—government combining majority rule and minority rights—would be impossible. Elections cannot settle sectarian differences, and sectarian differences, if allowed to become political differences, will make constitutional government impossible by undermining the political friendship that forms the basis of every political community. A political solution to the theological-political problem that is peculiar to Christianity is thus a necessary precondition of constitutional government. If Jaffa is correct, as I am convinced that he is, the political resolution was achieved by recognizing the equal claims of reason and revelation in the moral and political life of the nation.

THE FIRST AMENDMENT AND SEDITIOUS LIBEL

Lowenthal notes that in the case of *Brandenburg v. Ohio* (1969), "[w]ith one stroke of the judicial pen, the First Amendment was made to require the toleration of organized threats to freedom." The decision extended protection to "those who would use freedom for the destruction of freedom" (pp. 7, 5). *Brandenburg* was the culmination of the Warren Court activism which had orchestrated a sharp shift "in favor of individual liberty" (p. 5). *Brandenburg* represented the reductio ad absurdum of the "clear and present danger test" because it protected all speech except that speech which is "brigaded with action," that is, speech which is indistinguishable from action. Lowenthal correctly argues that the "clear and present danger" doctrine is wholly alien to the framers' notion of seditious libel. "Clear and present danger" owes its pedigree to Mill rather than the framers (pp. 41, 51). Mill's libertarianism sought "to extend liberty even further than Locke and the Declaration" (p. 45). In order to accomplish his libertarian task, Mill found it necessary to abandon "the doctrine of natural rights" which "originally established a fixed principle" which defined

"the legitimate purposes and limits of government" (p. 49). For the framers, liberty was grounded in the "fixed principle" of natural right; once nature was abandoned as the standard, there were no ends or purposes to give meaning to liberty. As Lowenthal rightly argues, the framers did not regard freedom of speech as an end in itself: speech was considered only a *means* to the establishment and maintenance of republican government.

One could hardly argue with Lowenthal when he says that the Holmes dissent in *Gitlow*, drawn immediately from the liberalism of Mill, was the "single most disgraceful sentence in our jurisprudence" (pp. 35, 73). "If in the long run," Holmes wrote, "the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way" (p. 35). This means, of course, that Holmes believed that the people were free to use freedom of speech and free elections to enslave themselves. Freedom, of course, cannot have as its goal the destruction of freedom. When ends or purposes disappear from the discourse, it is difficult—indeed impossible—to discriminate among the means. Holmes, of course, did not believe that reason could determine moral principles nor in any way settle the question between competing moral claims. Moral principles were in Holmes' language merely "fighting faiths" seeking acceptance in the public arena (pp. 34–35, 20, 24, 55); and the principles of the American Constitution are no less a "fighting faith" than communism or fascism. As Lowenthal sardonically remarks, "Holmes and Brandeis appear to have lost contact with the political philosophy that underlies the Declaration and the Constitution." Indeed, as Lowenthal notes, the self-evident truths of the Declaration were "truths *infallibly* known to be true" by the founding generation (p. 33). "Fighting faiths," merely depend upon "commitment." And it is the strength of the commitment, not truth, that is the basis for acceptance in public opinion and public morality. Thus, constitutional democracy, Nazism, Bolshevism, and a host of other "fighting faiths" must be tolerated because reason cannot decide between them. Toleration seems therefore to be a value that transcends "fighting faiths." But as Lowenthal rightly argues, toleration itself must be understood as simply another "fighting faith," since toleration itself cannot find any ground of exemption in a moral and political universe in which there are only "fighting faiths." The *terminus ad quem* of the Holmes-Brandeis view—a view often expressed by the present-day Court—is that "[u]nder the First Amendment there is no such thing as a false idea."[15]

The depth of the problem described by Lowenthal is evidenced by the fact that two of the most conservative members of the current Supreme Court, Chief Justice Rehnquist and Justice Scalia, share the Holmes-Brandeis view of the First Amendment. In his infamous opinion in *Hustler Magazine v. Falwell* (1988), the Chief Justice, writing for a unaminous Court, cited Holmes' "fighting faiths" dissent in *Abrams* as proof that the First Amendment "recognizes no such thing as a 'false' idea" (485 U.S. 46, at 51). Justice Scalia recently revealed

his "fighting faiths" view of the Constitution when he remarked that "[t]he whole theory of democracy . . . is that the majority rules. . . . You protect minorities only because the majority determines, that there are certain minority positions that deserve protection." Both justices have joined Mill and Holmes-Brandeis in abandoning "the doctrine of natural rights." There is no "intrinsic worth," "natural justice" or "generalized moral rightness or goodness" that in forms popular sovereignty or freedom of speech as the necessary ingredient of popular sovereignty.[16]

Lowenthal himself, however, seems dubious that "the philosophy of natural rights" can provide the necessary qualifications to "individual rights" that are required by a decent First Amendment regime. Lowenthal certainly never seems to waiver in his original intent jurisprudence, but in articulating the framers' intentions, he has some surprises in store. It is not Madison, the Father of the Bill of Rights, or Jefferson, the author of the Declaration, who provide the decisive insights into the meaning of the First Amendment, but Blackstone. The framers of the First Amendment, according to Lowenthal, appealed to the common law as the decisive ground for the proper understanding of freedom of speech and press. "The framers of the First Amendment," Lowenthal argues, "drew their understanding of it from Blackstone. . . . With Blackstone the framers held that the word 'freedom,' or 'liberty,' was a term of distinction, to be contrasted with 'license,' or the abuse of liberty. This view Blackstone held not in order to defend censorship, but as a means of justifying its abolition" (pp. 10, 11–12, 14, 17, 67, 94, 266–67; contrast p. 272). Blackstone had written in his *Commentaries on the Laws of England* that "to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty" (pp. 11, 167). As Lowenthal points out, the common law of England "did not leave the meaning of 'pernicious tendency' to the imagination." It included speech that was "blasphemous, immoral, treasonable, schismatical, seditious, and scandalous" (p. 11). Lowenthal makes a vigorous defense of the Alien and Sedition Acts of 1798, concluding that "[t]he logic of the case is with the Federalists, and it undoubtedly gave additional force to the Blackstonian meaning they found" in the First Amendment (p. 17).

The status of the common law in the founding is, of course, a matter of enduring controversy. Certainly one would have to accept the proposition that anything in the common law contrary to the principles of the Declaration of Independence was repealed by the Revolution. James Wilson in his celebrated "Lectures On Law" delivered in 1790–91, almost contemporaneously with the debate over the ratification of the Bill of Rights, argued that Blackstone and the Constitution "set out from different points of departure" in "regard to the very first principles of government." Indeed, Wilson, who was a prominent member of the constitutional convention, contended that Blackstone cannot be consid-

ered "a zealous friend of republicanism" for the simple reason that he did not believe in the right of revolution, the "principle of the Constitution of the United States, and of every State of the Union."[17] In short, Blackstone did not recognize the natural right origins of republican government, where the right of revolution is the ultimate guarantor of all other rights. Among a host of other considerations, the idea of social contract is alien to the common law. And, surely, no one would argue that the common law of primogeniture and entail survived the Revolution any more than the common law prohibition against blasphemy or schismatical speech.

It is one thing to argue that the First Amendment should be interpreted in the light of well-established common law principles, since presumably both the common law and the "philosophy of natural rights" seek to produce "rational liberty" (*The Federalist*, No. 53, p. 331); it is entirely another matter, however, to argue that the framers understood the First Amendment to be grounded in the common law rather than natural right. The framers of the First Amendment certainly distinguished between liberty and license, but they undoubtedly understood the distinction to derive its principled support from natural right rather than the common law. "Rational liberty" may coincide to some degree with common law conclusions, but its strength in the *novus ordos seclorum* would derive from natural right. During debate in the Senate about the wording of the First Amendment, it was proposed to include the following language after the word "press": "in as ample a manner as hath at any time been secured by the common law." Since there were no recorded debates in the Senate at the time, the record indicates only that the "motion was unsuccessful."[18] Although the evidence is admittedly scant, it seems clear that the Senate explicitly rejected the common law understanding of free speech and press and decided to ground the First Amendment on natural right principles as the framers had admittedly grounded the Constitution in natural right principles. Those elements of the laws of nature that had been incorporated into the common law, of course, were part of those natural right principles. Lowenthal clearly understands the natural right and natural law origins of the founding very well, but he wants to moderate them by recourse to the common law. Lowenthal apparently does not believe that "the philosophy of natural rights" has any principled limits, or at least that those limits are much less effective than the more sober restraints imposed by the common law.

Madison had argued in the Virginia Report that the Alien and Sedition Acts were manifest violations of the principles of natural right and thus of the principles of the Revolution. "[T]he doctrine that the common law is binding on these states as one society," Madison asserted "is evidently repugnant to the fundamental principle of the revolution."[19] The Declaration's invocation of the natural right of revolution was, of course, probably the greatest act of seditious libel in history. If, as Lowenthal alleges, the Declaration provides the principled basis for the First Amendment, it is difficult to see how freedom of speech and

press can be bottomed on the common law of seditious libel. Indeed, Madison derived his natural right argument for freedom of speech and press from regime analysis. "[T]he differences between the nature of the British government, and the nature of the American governments," he concluded, is decisive in rejecting common law standards of seditious libel.

> The nature of governments elective, limited and responsible, in all their branches, may well be supposed to require a greater freedom of animadversion, than might be tolerated by the genius of such a government as that of Great Britain. In the latter. it is a maxim, that the king, an hereditary, not a responsible magistrate, can do no wrong; and that the legislature, which in two thirds of its composition, is also hereditary, not responsible, can do what it pleases. In the United States, the executive magistrates are not held to be infallible, nor the legislatures to be omnipotent; and both being elective, are both responsible. Is it not natural and necessary, under such different circumstances, that a different degree of freedom, in the use of the press, should be contemplated? (Ibid , vol. 17, p. 337. See *The Federalist*, No. 53, p. 331)

In a republic, Madison adds, the "right of freely examining public characters and measures, and of free communication among the people thereon . . . has ever been justly deemed the only effectual guardian of every other right" (ibid., vol. 17, p. 341). And the practice in America "has not been confined to the strict limits of the common law." Indeed, "[i]n every state, probably, in the union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description" (ibid.).

The "philosophy of natural rights," contrary to what Lowenthal seems to imply, does not lead inevitably to the "clear and present danger" test any more than it mandates that the First Amendment may not take cognizance of "false ideas." Indeed, there are probably stronger grounds supporting seditious libel drawn from natural right than from the common law. Freedom of speech itself rests on a consensus about the ends of the regime. As Madison noted in his essay on "Sovereignty," "all power in just & free Gov[ernmen]ts is derived from compact." Compact, of course, "must result from the free consent of *every* individual." A part of the original contract supposes "that the will of the majority was to be deemed the will of the whole." But Madison quickly adds that the original consensus that created the social compact qualifies and limits the "will of the majority."

> Whatever the hypothesis of the origin of the *lex majoris partis*, it is evident that it operates as a plenary substitute of the will of the majority of the society for the will of the whole society; and that the sovereignty of the society as vested in & exercisable by the majority, may do anything that could be *rightfully* done by the unanimous concurrence of the members; the reserved rights of individuals (of conscience for example) in becoming parties to the original compact being beyond the legiti-

> mate reach of sovereignty, wherever vested or however viewed. (*The Writings of James Madison*, vol. 9, pp. 569–70)

Unanimity about the ends of the compact is the necessary foundation of majority rule and also the standard of justice that limits the power of the majority. The majority is a "plenary substitute" for unanimous consent and can "rightfully," i.e., justly, do only what could be done by unanimity. Thus even unanimous consent is limited by "rightful" standards, those that proceed from the requirements of natural law and natural right.

The Declaration of Independence is, as Lowenthal recognizes, a statement about the ends and the Constitution is a statement about the means to secure those ends (pp. 267, 271, 45). The Declaration is thus the final cause of the regime and the Constitution its formal cause. Debate about *how* rights are to be secured is the proper provenance of the First Amendment; but debate about *whether* rights are to be secured is not properly protected by the First Amendment and can, consistently with the principles of natural right, be suppressed; in the regime of natural right, this is seditious libel. Those who would use freedom of speech to destroy free government demand speech as an end in itself. This is an utter confusion of means and ends. Freedom of speech exists only to secure the rightful ends of government, those ends that rest upon unanimous consent. There is no indefeasible right to advocate the overthrow of just government any more than there is an indefeasible right to advocate slavery. Free government rests upon opinion and a change in opinion is tantamount to a change in government: it would be foolish to forbid the overthrow of the government yet allow the "overthrow" of the opinion upon which the government rests. Thus, there is no obligation on the part of free government to extend freedom of speech to groups such as the American Nazi Party or the American Communist Party who would use freedom of speech to destroy free government. A free regime might decide to extend speech protections to such groups, but it is a matter of prudence, not right. A free government might feel confident that such subversive speech would be rejected by a "vigilant and manly" people (*The Federalist*, No. 57, p. 353) and that the dangers of suppressing such speech might be greater than allowing it. But from the point of view of natural right, there is no obligation to allow the advocacy of something that is wrong in itself. Contrary to the Supreme Court, when understood from the principles of natural right, the First Amendment does countenance the prohibition of "false ideas"—those that are intrinsically wrong because they contravene the tenets of "rational liberty"—even when the false ideas are not "brigaded with action."

No one could possibly disagree with Lowenthal that "[c]onstitutionally, philosophically, and prudentially" the clear and present danger rule "has nothing to recommend it." The rule is simply inadequate to protect "the moral and political principles . . . which Jefferson wrote into the Declaration of Independence" (p. 83). The greatest danger today, Lowenthal concludes, is "less from commu-

nists than from the Nazis, Aryan Nation, 'militias,' and the Klan" (p. 7). These groups do indeed pose dangers to "the moral and political principles" of the nation, and it would be unwise to overlook or minimize the potential of these groups for evil. Lowenthal rightly argues that "liberalism requires rigor against [its] enemies" (p. 84), and it is only too painfully obvious "that the 'clear and present danger' rule is in fact no rule at all, no protection against groups that seek to strip others of their rights" (p. 7). Yet Lowenthal curiously abstracts from the real dangers to First Amendment liberties stemming from the administrative state. No right thinking person would disagree with Lowenthal's assessment that "our own government is not the main enemy" (p. 84), but it would be short sighted not to recognize the extent to which the minions of the administrative state have sought, under a variety of guises, to limit political speech.[20]

Lowenthal, for example, argues that the Federal Communications Commission should be given greater power to regulate obscenity on the nation's airwaves. However laudable this sentiment may be, it is clear that as an arm of the administrative state the FCC has always been more interested in regulating political speech. The "fairness doctrine" was used for many years as a weapon to stifle political opinion as was its licensing regime. Much the same could be said of campaign finance regulation, administrative regulations governing sexual harassment, laws regulating hate speech and, the whole universe of "politically correct" speech. These regulations have insinuated themselves into every facet of public (and private) life and represent a massive intrusion on First Amendment liberties.

NATURAL RIGHT, THE DECLARATION AND MORALITY

It has almost become an orthodoxy among conservative constitutional scholars to argue that the principles of the Declaration of Independence do not provide an adequate ground for morality. The Declaration, it is argued, asserts the primacy of rights and makes obligations merely derivative. While Lowenthal is circumspect, and at times equivocal, he clearly shares this orthodoxy. The Declaration, he writes, "does not instruct us how to pursue happiness but concerns itself solely with the preservation of our rights" (p. 238). The "pursuit of happiness" must therefore be understood as something wholly self-regarding and idiosyncratic. This was not the way Jefferson or the founding generation understood the matter. Jefferson called the Declaration "an expression of the American mind." The "American mind," of course, cannot be idiosyncratic because it implies something held in common, a moral consensus, rather than something merely private and idiosyncratic. Surely George Washington's statement in his first inaugural that "there exists in the economy and course of nature an indissoluble union between virtue and happiness" must be counted not only as an expression of the "American mind," but a perfectly Aristotelian expression

of it. Many other public documents during the founding era referred to "public happiness," thus implying a rational and objective rather than a merely private content to happiness. In the context of the laws of nature and nature's God, rights and obligations are reciprocal. This is the essence of the social contract which, as Madison noted, arms free government "with a moral power" (*Writings of James Madison*, vol. 9, p. 569). To conclude that rights are merely idiosyncratic and wholly divorced from obligations is to ignore the extent to which the framers understood rights to exist only within the context of the laws of nature. It was the deliberate and calculated transformation of the founding by the Progressives, a transformation accepted and abetted by the Supreme Court, that disassociated rights and obligations, not any defect inherent in the principles of the founding.

The Supreme Court, of course, has played a powerful role in undermining morality by manufacturing First Amendment protections for obscenity and pornography, both of which helped undermine "democracy's moral prerequisites" (pp. 107, 172). Obscenity and pornography weaken the family by advocating sex outside the confines of marriage and, by obliterating the distinction between private and public, remove shame as a powerful support for morality. In sum, obscenity and pornography dissipate the moderation which "stands very close to justice as the guardian of individual rights" (p. 147). Here the Court merely reflects the extreme moral relativism that is the hallmark of modernity's attack on reason and revelation. The Court has ruled that in the view of the First Amendment "One man's vulgarity is another's lyric" and both must be protected equally (*Cohen v. Calif.*, 403 U.S. 14, 25 [1971]). Not only is the Court incapable of properly distinguishing between the different kinds of speech, but it is incapable or unwilling to distinguish between speech and nonspeech. Thus it prefers to interpret the First Amendment as if it protected "freedom of expression" rather than freedom of speech. Included within freedom of expression are flag burning, nude dancing, reproachful silence, and a host of other nonspeech activities. But, as Lowenthal rightly argues, the only possible result of such moral relativism is tyranny, tyranny of the passions accompanied by the illusion of complete freedom.

Lowenthal writes that "[t]he moral interest of liberal democracy, while in some ways coinciding with elements of religion, is nonetheless wholly independent of it and founded on completely natural and rational grounds" (p. 91). If it is true that morality finds its ultimate ground in reason and nature, it is more than curious that Lowenthal completely ignores the threat to morality posed by the increasingly powerful and aggressive homosexual movement. In addition to the fact that homosexuality is condemned by revelation, it is also contrary to reason and nature. The distinction between the sexes is practically the last natural distinction surviving in the modern world; homosexuality, however, denies that this natural distinction is relevant either to the family or the morality that surrounds the family. Indeed, the homosexual lifestyle is portrayed as morally

superior precisely because it is liberated from constraints that were once thought to be natural but now are known to be only "social constructs." The acceptance of homosexuality provides the greatest contemporary challenge to natural right principles, much more so than the tolerance of obscenity and pornography. It would have been illuminating had Lowenthal decided to turn his considerable powers to the analysis of the Supreme Court's decision in *Romer v. Evans* (1996). That the nation's greatest threat to "the laws of nature and nature's God," goes unrecognized or unreported in Lowenthal's account is remarkable.[21]

ESTABLISHMENT AND FREE EXERCISE

As noted previously, Lowenthal fully understands the extent to which constitutional government depends upon the separation of church and state, the political solution to the theological-political problem. This "solution," according to Lowenthal, was not without costs, however; it "has the effect of both raising and lowering the dignity of religion." The lack of an established religion implies "that there is no one proper establishment, no one true religion—or perhaps no way of proving the superiority of certain religious claims to others." Not only does separation disallow the elevation of one Christian sect over another, but also prevents the establishment of the "superiority . . . of Christianity to non-Christianity, [or] of monotheism to polytheism" (p. 200). But, Lowenthal concludes, "the harm done to oneself and other by exercising a tolerated false religion seems to be outweighed by the good coming from its being the religion of one's own choice—a somewhat peculiar and paradoxical conclusion" (p. 200).

Interpretations of the First Amendment are exacerbated by this particular paradox, and Lowenthal argues that neither Jefferson nor Madison is a reliable guide (p. 256). Jefferson, of course, is famous for having posed these rhetorical queries: "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? That they are not to be violated but with his wrath?" (*Notes on the State of Virginia*, Query 18). Here the atheist could not properly be a citizen, although presumably the adherents of "false religion" could be as long as they believed that natural rights, including the natural right to freedom of conscience, had a divine source. But Jefferson is also infamous for his statement that "[t]he legitimate powers of government extend to such acts only as are injurious to others. But it does no injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg" (Query 17). Here the atheist is to be tolerated along with the polytheist, even though both adhere to views that are not only false but harmful to republican government. From the point of view of the theology of the Declaration, atheism and polytheism are wholly irrational. Atheism would ultimately mean that all law is positive, having no transcendent source or ground; and as every reader of Plato's

Euthyphro knows, polytheism leads to the untenable solution of fighting gods (much like Holmes' "fighting faiths"). Here rational monotheism and revealed monotheism are in complete agreement in rejecting both atheism and polytheism. Yet Jefferson's hatred of sectarian tyranny was so thoroughgoing that he believed that the only solution to atheism and polytheism in a republic is for the man of reason to persuade the atheist and the polytheist of the irrationality of their beliefs. As Jefferson concluded, "Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion" (ibid.).

Jefferson argued that freedom of conscience was not only the reason of the matter but clearly resulted from God's will. In his Bill for Establishing Religious Freedom, Jefferson wrote that "the opinions and belief of men depend not on their own will, but follow involuntarily the evidence proposed to their minds; that Almighty God hath created the mind free, and manifested his supreme will that free it shall remain by making it altogether insusceptible of restraint." It is, of course, wholly within God's power to compel belief, but working in His mysterious way "the holy author of our religion" chose "to extend it by its influence on reason alone." Thus reason and revelation conspire in the support of freedom of conscience. For "legislators and rulers, civil as well as ecclesiastical" to assume "dominion over the faith of others" is therefore merely an "impious presumption."

Madison had given much the same account in his Memorial and Remonstrance, noting that the right of conscience is "in its nature an unalienable right . . . because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society" (*The Papers of James Madison*, vol. 8, p. 299). Both Madison and Jefferson agreed that religion and politics would benefit from separation. Politics would not be corrupted by the constant agitation of politically unresolvable sectarian disputes, and those who worshiped freely according to the dictates of their own conscience would adhere to their religion with greater faith and sincerity. Both Madison and Jefferson knew that the argument against the divine right of kings, a doctrine that held sway in the Christian West until the American Revolution, was simultaneously the argument for the disestablishment of religion. But Lowenthal maintains that neither Madison nor Jefferson is a reliable guide to interpreting the First Amendment; rather we should look to the "founders and framers" (pp. 256, 208, 304 n. 27). Both Jefferson and Madison "make of religion a completely private matter, unconnected with government by either negative or positive ties" (p. 201). Madison had wanted to ban establishments in the States through an amendment specifying "that no state shall violate the equal right of conscience. . . ."

The amendment passed in the House but was defeated in the Senate. The final language of the First Amendment that "Congress shall make no law respecting an establishment of religion" forbids both the establishment of a national religion and the disestablishment of religion in the States. The Father of the Bill of Rights cannot thus claim paternity for the First Amendment! As for Jefferson, his "opinions were in his own day often regarded as extreme" (p. 41).

Lowenthal argues that the First Amendment's ban on establishment does not require government neutrality to religion. Indeed, he provides copious evidence that the framers (including Jefferson and Madison) were not indifferent to the existence of religion; they knew the potential of revealed monotheism for supporting rational monotheism and the salutary influence of both on morality. The framers were well aware that self-governing republics, ruling and being ruled in turn, required virtue to a greater degree than any other form of regime. Lowenthal's argument seems, at bottom, to be something like this: since the framers understood the necessity of morality for republican government there must exist somewhere a constitutional power to promote religion. Lowenthal seems to think that disestablishment or privatization robs religion of its political strength and consequently its power as a moral agent. From Lowenthal's point of view, a proper interpretation of the First Amendment as it was intended by the framers (excluding Jefferson and Madison of course) allows the promotion of religion as long as it stops short of establishment of one sect or preference for one sect. Where among the enumerated powers does Lowenthal find this power to support religion? It obviously cannot come from the First Amendment because, as Leonard Levy has rightly pointed out, this "leads to the impossible conclusion that the First Amendment added to Congress's power. Nothing supports such a conclusion. Every bit of evidence goes to prove that the First Amendment, like the others, was intended to restrict Congress to its enumerated powers."[22] Lowenthal rather weakly suggests that Congress' power to "provide for the general welfare" authorizes it to promote religion.

It is true, however, that schools in the states until recent times taught religion as a supplement to the Declaration's "rational core . . . by a stress on civic duties that are also known through reason to be such, but are better illustrated and more strikingly enjoined by various religions than by the Declaration itself" (p. 238). Thus, according to Lowenthal, the teaching of religion moderated the inherent tendency of the Declaration to emphasize rights at the expense of duties. In other words, "the Declaration's stress on natural rights and rational truths must, within a society dedicated to them, be supplemented and partly submerged by moral education stressing duties and derived from supernatural and supra-rational religion (p. 209). Unmentioned by Lowenthal, however, is the inevitable (and salutary) influence of the Declaration's "rational core" not only in moderating religion but also in revealing the rational ground for the "duty which we owe to our Creator" (to use Madison's phrase from the Memorial and Remonstrance).

In any case, the Supreme Court has forbidden such sectarian activities as a violation of the Fourteenth Amendment's due process clause. In effect, the incorporation of the First Amendment's establishment prohibition has given life to Madison's failed amendment prohibiting State interference with the rights of conscience. Lowenthal thus urges that "it is vital that the Court be made to withdraw its claim to incorporate the First Amendment into the Fourteenth" (p. 273). This would repeal the establishment ban on the states and allow them to use religion as a tool in inculcating the kind of moral education necessary for citizens of a democracy. The extent to which religion could be used in moral education would be a matter of prudence and also a matter of protecting the free exercise rights of individuals who are not Christians, Jews, or Muslims, a much easier task when there was greater homogeneity in the populace. Nevertheless, Christianity seems to be peculiar in providing doctrinal support for a separation of church and state. Surely, Lowenthal argues, "the Declaration's teaching about 'nature's God' and the rights and duties that He supports" can be supplemented by "the Bible or other holy books of other Americans." This would involve some delicacy, however, since the First Amendment "requires a principled selectivity in finding passages that have the desired effect while avoiding passages that do not, whether because their moral point is unsuitable or their spirit sectarian" (p. 237). School boards would be required to edit and expurgate the "holy books" to avoid establishment problems—and to produce the proper "moral point." But the expurgation would immediately implicate free exercise questions. And besides, it would require the wisdom of Solomon to be present in every school board in the nation to keep this otherwise laudable vision from generating religious conflict among citizens.

Lowenthal provides a devastating critique of the Supreme Court's opinion in *Everson v. Board of Education* (1947). This was the case in which the Court accepted Jefferson's "wall of separation" as part of the First Amendment and used Madison's Memorial and Remonstrance to explicate the newly adopted language. Even though *Everson* permitted the use of taxpayer funds to benefit parochial school children, later cases refined the logic of the decision to ban nonsectarian prayers in schools as well as other forms of public funding. The Court, since its decision in *Lemon v. Kurtzman* (1971), requires strict neutrality, not indeed between religions or sects, but between religion and nonreligion. That the government must be neutral to the existence or nonexistence of religion is the core of Lowenthal's complaint against the Court's establishment clause jurisprudence. As Lowenthal remarks, "the greatest error made by liberal interpreters, on and off the Court, is to regard the religious part of the First Amendment as the embodiment of Jefferson's 'wall' or Madison's Memorial and Remonstrance, both of which make of religion a completely private matter, unconnected with government by either negative or positive ties" (pp. 200–201). Indeed, it was from Locke that Jefferson and Madison "had imbibed not only the principle of separating church and state, but a deep hostility toward dogmatic

Christianity, which they too conceived as fostering fanaticism, tyranny, and passive dependence" (p. 206). It is true that Madison and Jefferson believed that separation of church and state was a moral prerequisite to constitutional government; but neither believed that the separation of church and state was the same as the separation of religion and politics. The Declaration and the Bible share the same assumptions about God, man, and the universe. The Declaration thus provides a powerful public philosophy that supports and encourages private religious faith. And if Tocqueville is right, religion will have more influence in America if it remains in the private sphere.

Like Tocqueville, with whom Lowenthal otherwise agrees, Jefferson and Madison understood that religion would be corrupted by its association with government as surely as government would be corrupted by sectarian disputes. Tocqueville attributed the unprecedented strength of religion in America to its "indirect influence."[23] "Religion in America takes no direct part in the government of society," Tocqueville wrote, "but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it" (p. 316). Religion is powerful in democracy, Tocqueville argued, only because it remains aloof from the transient and corrupt world of politics. A universal religion, "when it connects itself with a government, must adopt maxims which are applicable to certain nations. Thus, in forming an alliance with a political power, religion augments its authority over a few and forfeits the hope of reigning over all" (p. 321; part 2, p. 156). Thus a universal, established religion is something of a solecism. Such an establishment would merely corrupt both religion and politics.

Jefferson's and Madison's advocacy of the separation of church and state did not rely entirely on the heady mead provided by Locke, but owed much to the sound interpretation of Scripture provided by the colonial divines who seemed to have understood the theological-political problem somewhat better than Lowenthal. Separation of church and state preserves both politics and religion; its points of inevitable contact must be resolved by prudent judgments, although Lowenthal is correct in demonstrating that the Supreme Court has not supplied such judgment. The Court over the years has been unable to articulate a consistent establishment clause jurisprudence. In *Lee v. Weisman* the Court pushed its neutrality doctrine to a reductio ad absurdum when it ruled a nonsectarian graduation prayer delivered at a public school constitutes an establishment of religion if it expresses "the shared conviction that there is an ethic and a morality which transcend human invention" (505 U.S. 577, 589 [1992]). This means, of course, that no graduation prayer could invoke the Declaration of Independence which, in its invocation of the "laws of nature and nature's God," certainly relies on a morality that "transcends human invention."

Lowenthal writes that "[t]here has been remarkably little religious oppression in this country" because of "the inner logic of the Declaration of Independence and the general spirit of liberty it engendered" (p. 261). Madison had argued in

The Federalist that "[i]n a free government the security for religious civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects" (No. 51, p. 324). Lowenthal comments that "Madison's prediction has probably been borne out by the facts, particularly with the added protection of the First Amendment and similar clauses in state constitutions" (p. 261). Madison's argument here, an argument he detailed in the Memorial and Remonstrance, revealed the extent to which he viewed free exercise as a function of disestablishment. Lowenthal is correct, however, when he argues that the modern Court has pushed free exercise rights too far in the direction of individual rights: free exercise itself is a function of free society, and individual claims that would undermine the strength and vitality of that society must be disallowed. Before the advent of the Holmes-Brandeis First Amendment, the Court did not interpret free exercise to require or allow exemptions from otherwise valid societal obligations. In 1890, the Court refused to countenance a free exercise claim to polygamy, ruling that "it was never intended or supposed that the [First] Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society" (*Davis v. Beason*, 133 U.S. 333, 341–42 [1890]). Free exercise claims cannot be used to insulate what otherwise would be criminal behavior, because this would "make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances" (*Reynolds v. U.S.* 98 U.S. 145, 166 [1878]). In the intervening years, however, the Court has decided that the free exercise clause exempts conscientious objectors from military service, frees Amish from compulsory education, and prevents the denial of unemployment compensation to Seventh Day Adventists who refuse to work on Saturday. And, as Lowenthal clearly demonstrates, the Court has been unable to articulate any coherent principle governing its exemption jurisprudence.

As Lowenthal rightly argues, the most egregious of the Court's "exemption jurisprudence" is in the area of conscientious objection. Strictly speaking, anyone who refuses to fight for the rights of fellow citizens or the community cannot be part of the social contract. Obligations are an inherent part of the rights which the social contract is designed to protect. A government can, if it wishes, make exemptions for religious convictions, but it is not obligated to do so: there is no free exercise right to avoid obligations. Congress has specified the conditions for claiming conscientious objection and one of those is belief in a "supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological or philosophical views or a merely personal moral code" (p. 264). In the Court's construction, however, not much of the Supreme Being survived. Belief in a Supreme Being was transmogrified into "a religious faith in a purely ethical faith" which did not depend on a Supreme Being but could be vouchsafed as a free exercise

exemption if "it is sincere and meaningful" and "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" (p. 246). This is not only a trivialization of religion, but in the language of an older Court, "permit[s] every citizen to become a law unto himself." Here, the Court has, as Lowenthal elegantly points out, taken the notion of individual rights to absurd lengths by a calculated and deliberate misrepresentation of the framers' intent.

The Court in recent years, however, has signaled something of a retreat, holding in *Employment Division v. Smith* (1990) that a generally applicable law which was not adopted with the specific intent of burdening a particular religious practice is not invalid because it has an incidental effect upon the free exercise of religion. This decision provoked a firestorm of opposition from Congress and resulted in the passage of the Religious Freedom Restoration Act in 1993. In the act, Congress attempted to restore the presumptive validity of free exercise claims that had been the basis of the Court's jurisprudence until *Smith*. The act was subsequently ruled unconstitutional as a violation of the separation of powers in *Boerne v. Flores* (1997). Thus the Court, by the narrowest majority, has prevented (or slowed) the extension of radical individualism under the aegis of the free exercise clause. Conservative Republicans in Congress reacted to the *Boerne* decision by proposing legislation protecting individual claims of free exercise under the Commerce Clause rather than the Fourteenth Amendment. These advocates of free exercise exemptions no doubt calculated that the Court would allow Congress greater latitude to exercise its extensive commerce clause powers. The legislation suffered a much deserved, if undistinguished, death. No framer believed that the free exercise of religion could extend beyond the requirements of order, decency, or interfere with the rights of the community. What is lacking, and what is sorely needed, is the prudential wisdom necessary to work out the boundaries between establishment, free exercise, and the requirements of civil society. Neither the Court nor the Congress seems to possess the necessary wisdom to accomplish this crucial task because both are painfully unaware of the natural right principles of the Declaration.

THE PRINCIPAL ACHIEVEMENTS OF THE FIRST AMENDMENT

The First Amendment is remarkable for two crucial achievements. Without its separation of church and state—the equal recognition of the claims of reason and revelation—there would be no constitutional government. The election of 1800 was probably the first act of genuine constitutionalism in history. It was the first election where the reins of power were peacefully passed from one party to another on the basis of an election by the people (see Jaffa, *A New Birth of Freedom*, chap. 1). This would have been impossible without the political resolution of the theological-political problem provided by the First Amendment. Another signal achievement of this political resolution, less remarked but

no less important, was evidenced in the spirit of Washington's letter to the Hebrew Congregation in Newport, August, 1790:

> The citizens of the United States of America have a right to applaud themselves for having given to mankind examples of an enlarged and liberal policy—a policy worthy of imitation. All possess alike liberty of conscience and immunities of citizenship.
>
> It is now no more that toleration is spoken of as if it were the indulgence of one class of people that another enjoyed the exercise of their inherent natural rights, for, happily, the Government of the United States, which gives to bigotry no sanctions, to persecution no assistance, requires only that they who live under its protection should demean themselves as good citizens in giving it on all occasions their effectual support.

Someone has pointed out that this is probably the first time in history that a non-Jewish head of state has addressed Jews as fellow citizens. Once sectarian religious issues were excluded from politics, it was possible for adherents of different religions to form the friendship that is the necessary foundation of political community. This is the spirit and achievement of the First Amendment whose framers, in their practical wisdom, understood the importance of the theological-political problem.

NOTES

1. *What is Political Philosophy?* (New York: The Free Press, 1959), p. 51.

2. See Harry V. Jaffa, *A New Birth of Freedom: Abraham Lincoln and the Civil War* (Lanham, MD: Rowman & Littlefield, in press); Erler, "Introduction," in Harry V. Jaffa, *Equality and Liberty* (1965; reprint Claremont: Claremont Institute, 1999), pp. xiii–xvii.

3. Lowenthal laments that the Constitution omits "all references to God" (p. 257) and "omits making connections with principles of the Declaration, including the existence of God" (p. 207). But in its only reference to the Declaration of Independence, Article VII marks the day of the Constitution's signing as "the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth." There are two other dates in the Constitution neither of which invoke "our Lord". Article I, section 9 specifies that "[t]he migration or importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight [illegible]" and Article V makes this provision unamendable before "the Year One thousand eight hundred and eight." Since these two clauses gave explicit protection to the foreign slave trade, they not only contravened the principles of natural right, but were an abomination in the eyes of "Our Lord," hence the lack here of any reference to the Deity. Violations of natural right are also violations of God's law, and the subtle and careful crafting of the organic law is a demonstration of the framers' understanding of the relation of the natural law and the divine law.

4. *Summa* Q91, A2, See Harry V. Jaffa, "Leo Strauss, the Bible, and Political Philosophy," in Kenneth L. Deutsch and Walter Nicgorski, eds., *Leo Strauss: Political Philosopher and Jewish Thinker* (Lanham, MD: Rowman & Littlefield, 1994), pp. 200–201.

In November 1825 Madison wrote two interesting letters, both in response to theological tracts

that had been sent to him. In the first letter, addressed to the Reverend F Beasely, Madison noted that "the belief in a God, all powerful, wise, and good, is so essential to the moral order of the world, and to the happiness of man, that arguments which enforce it cannot be drawn from too many sources, nor adapted with too much solicitude to the different characters and capacities to be impressed with it. But whatever effect may be produced on some minds by the more abstract train of ideas which you so strongly support, it will probably always be found that the course of reasoning, from the effect to the cause. 'from nature to nature's God.' will be the more universal and more persuasive application " In the second letter, addressed to Doctor C Caldwell, Madison writes that "I concur with you at once in rejecting the idea maintained by some divines, of more zeal than discretion, that there is no road from nature up to nature's God, and that all the knowledge of his existence and attributes which preceded the written revelation of them was derived from oral tradition The doctrine is the more extraordinary, as it so directly contradicts the declarations you have cited from the written authority itself " *Letters and Other Writings of James Madison* (New York R Worthington, 1884), vol 3, pp 503–5.

5 Harry V. Jaffa, *Original Intent and the Framers of the Constitution· A Disputed Question* (Washington, D C Regnery Gateway, 1994), p 96 Andrew McLaughlin, *Foundations of American Constitutionalism* (1932, reprint New York Fawcett Publications, 1961), pp 71, 72, 74–76.

6 Charles S. Hyneman and Donald S Lutz, eds , *American Political Writings During the Founding Era, 1760–1805* (Indianapolis Liberty Fund, 1983), vol. 1, p. 416

7 Ellis Sandoz, ed , *Political Sermons of the American Founding Era* (Indianapolis Liberty Press, 1991), p 637

8 John Tucker, "An Election Sermon," in Hyneman and Lutz, vol. 1, pp. 161–62. The same argument is made by the Reverend West in vol. 1, p. 413.

9. James Madison, "Sovereignty," in Gaillard Hunt, ed , *The Writings of James Madison* (New York G P Putnam's Sons, 1900–10), vol 9, p 569

10 Walter Berns, *The First Amendment and the Future of American Democracy* (New York· Basic Books, 1976), p 16.

11 Walter Berns, "Comment," *This World*, Fall, 1983, p 97, *The First Amendment and the Future of American Democracy*. pp 18. 22

12 See Leo Strauss, "Progress or Return?" in Thomas L Pangle, ed , *The Rebirth of Classical Political Rationalism* (Chicago University of Chicago Press, 1989), pp 242–43 See Gary Rosen, *American Compact James Madison and the Problem of Founding* (Lawrence: University Press of Kansas, 1999), p. 88: "Madison's idea of prudence demonstrates a certain affinity with Aristotle *At the very least*, it is a departure from the broad principles of Hobbes and Locke, from whom Madison otherwise took theoretical guidance" (italics added); see also pp 97, 99–100, 104, 105–7, 116 ("Madison understood [social compact] better than did either of his great teachers [Hobbes and Locke] ")

13 Leo Strauss, *Natural Right and History* (Chicago. University of Chicago Press, 1953), p. 164; Berns, *The First Amendment and the Future of American Democracy*, pp. 24–26.

14 Harry V Jaffa, *The American Founding as the Best Regime. The Bonding of Civil and Religious Liberty* (Claremont The Claremont Institute, 1990), p 15

15 *Gertz v Welch*, 418 U.S 323, 339 (1974); *Barenblatt v. U S.*, 360 U S 109, 146 (1959), *Hustler Magazine v Falwell*, 485 U S 46, 51 (1988), *Waters v. Churchill*, 511 U.S 661, 672 (1994).

16 "Justice Scalia/Rome Address," *Origins, CNS Documentary Service*, Vol. 26, No 6 (June 27, 1996). William H Rehnquist, "The Notion of a Living Constitution," 54 *Texas Law Review* 693, 704 (1976)

17. Robert G. McCloskey, ed , *The Works of James Wilson* (Cambridge Harvard University Press, 1967), vol 1, p 79.

18 Bernard Schwartz, *The Bill of Rights A Documentary History* (New York: Chelsea House, 1971), vol. 2, p 1148

19. "Report of 1800," William T Hutchinson, et al , eds , *The Papers of James Madison* (Chicago and Charlottesville· University of Chicago Press and University Press of Virginia, 1962–), vol. 17, p. 328.

20. See Thomas G. West, "The Decline of Free Speech in Twentieth Century America The View from the Founding," in Kenneth L. Grasso and Cecilia Rodriguez Castillo, eds., *Liberty Under Law* (Lanham, MD: University Press of America, 1997), pp 149–72

21. See Erler, "Homosexuality, Morality and Law," in L. P. Arnn, ed , *Making Sense of Homosexuality* (Claremont The Claremont Institute, 1999), p 27–34.

22 Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York. Macmillan Publishing Company, 1986), pp. 84, 93, 115, 116–17.

23 *Democracy in America*, ed J. P. Mayer and Max Lerner, trans. George Lawrence (New York: Harper and Row, 1966), vol. 1, p. 314.