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The Ten Commandments Controversy

Michael Novak

Director of Social and Political Studies, American Enterprise Institute

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MICHAEL NOVAK, the George Frederick Jewett Scholar in Religion, Philosophy and Public Policy at the American Enterprise Institute and winner of the 1994 Templeton Prize, has served as Ambassador of the U.S. Delegation to the U.N. Human Rights Commission in Geneva (1981-1982) and head of the U.S. Delegation to the Conference on Security and Cooperation in Europe (1986). His essays and reviews have been published in numerous journals, including *The New Republic*, *Commentary*, *Harper's*, *First Things*, *The New York Times Magazine* and *National Review*. He has also written some 25 books, including *Moral Clarity in the Nuclear Age*, *The Spirit of Democratic Capitalism*, *Tell Me Why: A Father Answers His Daughter's Questions About God* (with his daughter Jana Novak), and, most recently, *On Two Wings: Humble Faith and Common Sense at the American Founding*. Among his many honors are the the International Prize by the Institution for World Capitalism (received with Milton Friedman and Vaclav Klaus) and the Antony Fisher Prize for *The Spirit of Democratic Capitalism* (presented by Margaret Thatcher).

The following is adapted from a lecture delivered on October 11, 2003, on board the Crystal Serenity during a Hillsdale College cruise in the Mediterranean Sea.

On August 27 of this year, under the direction of U.S. District Court Judge Myron Thompson, a small monument (not even 4 feet high) of the Ten Commandments was removed from the back end of the towering rotunda in the Alabama state courthouse. Judge Thompson's argument for removing the monument runs as follows: Any recognition by the Alabama Supreme Court of a special role for the God of Judaism and Christianity in this nation's understanding of civil and political rights represents an establishment of religion, and thus violates the First Amendment.

Opposing this argument, now-suspended Alabama Chief Justice Roy S. Moore pointed out that the Virginia Declaration of Rights, James Madison's "Memorial and Remonstrance" and the Virginia Act for Establishing Religious Freedom – founding-era documents defining the idea of religious liberty that is embodied in the First Amendment – all appeal to a particular concept of God, with a fairly narrow range of characteristics. This God is almighty, and created the mind free. Further, He wishes to be worshiped by men and women who do so freely, under no duress or coercion, and solely according to the light of their own conscience.



Any abuse of the right to religious liberty will have to be answered directly to Him in judgment, for it is an abuse against Him, not solely against humans. To worship Him, but solely as conscience directs, is a duty owed to Him as Creator and Judge. This duty owed Him grounds a personal responsibility and, therefore, a right. No one else can perform this responsibility in our place; therefore, the right is inalienable. In creating our minds both duty-bound and yet free, in other words, the Creator endowed us with certain rights, among them the right to religious liberty.

It is a matter of inference whether any other God except the God of Judaism and Christianity fits this required range of characteristics. Undoubtedly, from the founding generation until about 50 years ago, American institutions and courts supposed that this God was the God of the Jewish and Christian Bible, to whom the Founders usually referred as “Creator,” “Judge,” “Providence,” and “Divine Governor of the universe.”

Judge Thompson explained this historical fact by asserting that such usage may have been fitting when most American citizens were Christians or Jews. Nowadays, however, that inference goes too far, because we see more clearly that rights are endowed also in Muslims, Buddhists, atheists, and indeed all humans. (Of course, the Founders expressly affirmed this universality too; it is also implicit in the doctrine of “natural rights.”) Among the many and varied religions, furthermore, Supreme Court precedents of the past half-century insist that the federal government ought not to show favoritism; not even to religion over non-religion. Indeed, the Court has developed an extreme, non-historical version of what constitutes “establishment.” Thus, either the Supreme Court jurisprudence of the past fifty years needed to be overhauled, or the monument had to be moved.

In thinking about who is right on this issue, it might be useful, first, to make some distinctions concerning the particulars of the case. For instance, on the outside wall of the federal courthouse in Montgomery is a much larger statue of Artemis, described in the Court’s brochure as the Greek goddess of justice. No one asserts that that statue represents an establishment of religion. Perhaps that is because no one still believes that Artemis is a real goddess. In any case, the mere stone embodiment of her image obliges no one’s conscience. But then, in similar fashion, Chief Justice Moore’s stone embodiment of a portion of a page from the Book of Exodus also puts no

obligation upon the conscience of anyone who chooses not to accept that text as authoritative.

Second, the controversial text is from the Old Testament, not the New Testament. That made it less sectarian and broader. Furthermore, even if one does not take the Ten Commandments literally, as a gift by the Almighty to Moses, one may take them as a symbol for that higher law (“of Nature and Nature’s God”) reached by reason itself. Such a higher law has traditionally been seen (by Americans from the signers of the Declaration of Independence through Martin Luther King, Jr.) as infusing all man-made law, on the one hand, and upholding a standard beyond the power of governments to alter or abrogate, on the other. Only such a law is a sure foundation for our rights against the changing tempests of political fortune.

Third, the monument stood at least 90 feet distant, maybe more, from the front entrance of the Alabama state courthouse, all the way across the rotunda at the opposite wall. It was impossible at that distance even to make out what it was, let alone what was written upon it. No one was obliged to approach the small marble block close enough to be able to make out the words.

And finally, all fifteen of the texts upon its sides were either already familiar or readily recognizable as classics of U.S. or Alabama law, or quotations from major American Founders. In the sense that Americans are expected to venerate the law, an air of veneration was present, but rather in the form of a history lesson on the American link between religion and law. The four dominant texts came from the Declaration of Independence, the Pledge of Allegiance, the Judiciary Act of 1789, and the U.S. Code.

History Lesson or Establishment?

Still, the main point in this case was the unique character of the Jewish and Christian God. The God of Abraham, Isaac, Jacob, and Jesus is unlike any other God known to the ancient religions of Greece, Rome, or the Middle East, or any other religion known to our Founders. Uniquely, this God wishes to be worshiped in spirit and truth, in whatsoever manner conscience directs, without coercion of any sort. This God reads hearts, and is sat-

ified only with purity of conscience and conviction. Those who belong to any other religion or tradition, or who count themselves among agnostics or atheists, are thereby given by this God equal freedom. They, too, must follow their individual consciences. This God wishes to be worshiped by men and women who are free, not under duress. Arising from His sovereignty, the rights He endows cannot be abrogated by a tyrannical majority among the people, or by the actions of the state in any of its branches.

This conception of religious liberty is spelled out directly in the founding-era documents mentioned above. For example, the Virginia Declaration of Rights affirms that

religion, or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.

This summarizes the classic American definition of religion and the foundation for religious liberty. To this definition, some make one or more objections. For instance, some point out that Christians (and Jews) have not always respected this principle, and thus try to discredit its Jewish and Christian origins. But human failure is no argument against the principle; human weakness is measured by it.

Second, one can say (as did Judge Thompson) that among Muslims, Hindus, Buddhists, and others there have been examples of generations of “tolerance.” But tolerance is a different (and less profound) concept than the *right to religious liberty*. Tolerance may arise merely from a temporary lack of power to enforce conformity; it does not by itself invoke a natural right. The concept of religious liberty, on the other hand, depends upon a particular conception of God, a particular conception of the human person, and a particular conception of liberty. Reaching these conceptions took Jews and Christians many centuries. They had to be learned through failure and sin and error, and at great cost. But they were eventually learned.

Scholars today can easily point to texts in the American tradition for definitions of these concepts, but they would find it difficult to locate analogous texts in other traditions. Rightly did the authors of *Federalist* 14 call attention to their own originality, even as they exerted themselves to pay due respect to the opinions of past ages. For this reason, calling the attention of the public to the Judeo-Christian conception of God’s sovereignty, which grounds the principle of religious liberty, is *not necessarily* the same as “establishing” the Jewish or Christian religions.

In the first place, this conception is by its very nature public, not private, and has historically been invoked in the practice of existing public institutions in countless forms. The public life of our nation has been and is still remarkably religious, as is visible on public occasions such as the inaugural speeches of presidents, the swearing-in of judges, Thanksgiving Day, Independence Day and Memorial Day. The notion that the foundation of our rights lies in God’s work has been officially deployed in many congressional and presidential decrees and proclamations, which recommend religious observances such as fasting, prayers, thanksgiving, and imploring pardon for the nation’s sins.

In the second place, the principle of religious liberty (as witnessed to in countless founding documents and in the public practices of the founding era) requires *two* courses of action: First, one must enunciate the principle clearly, understand it fully, and express it publicly for public guidance. Second, one must not coerce the conscience nor obstruct the free exercise of religion of any.

The specifically American principle of religious liberty, in and of itself, demands that each person’s decision about *how* (if at all) to worship God is inalienable, for it belongs to each alone in his or her own conscience. Everyone must be free in conscience and in public exercise to accept, or to reject, the Judeo-Christian God. Even if unbelievers choose not to recognize this conception of God, conscience, and liberty, but rather to concentrate upon abuses of the principle committed by Christians or others, this particular conception guarantees their freedom of conscience. It is also precious for believers, who are obliged by it to grant to all others exactly the same right to religious liberty that they claim for themselves.

PHOTOS



Classicist Victor Davis Hanson discusses the Acropolis during a presentation.



Venice historian and cruise speaker John Julius Norwich (center) pauses on the Accademia bridge along the Grand Canal with (left to right) current Hillsdale parents Terry and Valerie Applegate, Penny Arnn and Hillsdale College President Larry P. Arnn. The Crystal Serenity is docked in the background.



Dr. Hanson discusses the ruins of the Temple of Pompeii.



Ronald Reagan's U.N. Ambassador and cruise speaker Jeane J. Kirkpatrick (right) and Hillsdale cruiser Shirley Halpern stand amidst the ruins of Pompeii.

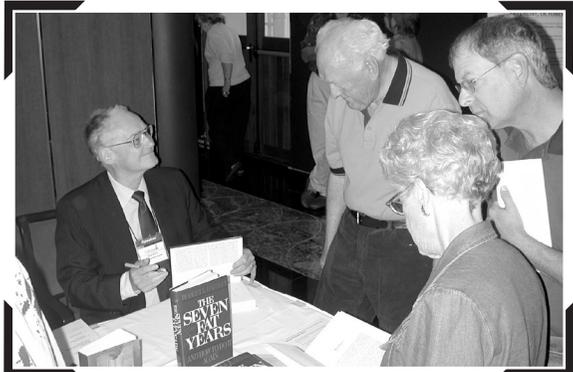


Hillsdale College Trustee and President discusses cooperation between Hillsdale and the Vatican with Frank Shafer.

Hillsdale College Mediterranean Cruise October 1-13, 2003



son speaks to Hillsdale cruisers on
re-cruise tour of Athens, Greece.



Wall Street Journal Editor Emeritus Robert Bartley
participates in a book signing following one of
his on-board lectures.



reek military history at the foot
Poseidon at Cape Sounion.



Ambassador Kirkpatrick enjoys dinner with Hillsdale cruisers
in Crystal Serenity's specialty Italian restaurant Prego.



and Ronald Reagan's ambassador
akespeare discusses the Cold War
Reagan and Pope John Paul II.



nto • Dubrovnik • Venice

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This was exactly the point made by Chief Justice Moore in his oral testimony at last year's trial. He said again and again that he stood for two things, both of them derived from America's founding principles. First, human rights are guaranteed by the sovereignty of God, with the result that any abuse of them will have to be answered for before God in Judgment (as Madison had pointed out). Second, he neither intended to nor could demand that others share these beliefs, since that would violate the principle of religious liberty itself. He wished only "to recur to fundamental principles" (a phrase from the Virginia Declaration of Rights) by calling attention again to the Founders' beliefs about the grounding of our rights.

It is the special virtue of the Jewish and Christian conception of God that it allows us to make a twofold claim: to recognize in public the beliefs on which our rights are founded, and to refuse to mandate for others that they must hold the same beliefs. Thus we should be counted free to call *public* attention to the moral foundation of our rights, without by the same deed trying to force Jewish or Christian belief upon Muslims, Buddhists, atheists, agnostics, or anyone else.

Recurring to Fundamental Principles

In defense of his position on this matter, Chief Justice Moore has fittingly cited George Washington's Proclamation of General Thanksgiving (October 3, 1789), in which, in response to a request from both Houses of Congress, Washington notes:

It is *the duty of all Nations* [note: not only individuals] to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor. . . .

If both houses of Congress and the President of the United States could go so far in 1789, why is it forbidden by the Constitution for a mere Chief Justice of the Supreme Court of Alabama to do even less?

Chief Justice Moore has also cited Abraham Lincoln's beautiful Decree of August 12, 1861, which also followed upon a resolution of both Houses of Congress: Recognizing that "it is fit and becoming in all people, at all times, to acknowledge and revere the Supreme Government of God," Lincoln proclaimed a National Fast Day to ask God's favor. If all *this* was not an establishment of religion in 1861, why does doing far less barely a century and a half later constitute an attempt to establish a religion? Clearly, the meaning of "establish" has now swollen far beyond its historic meaning.

Starting about 60 years ago, the Supreme Court took a half-truth about the meaning of "establishment" and carried it by torturous logic to conclusions that go against the whole of its own prior tradition and against the tradition of American public life. In shifting its focus from the constitutional term "religious liberty" to the much more recent and polemical slogan "separation of church and state," the Court has come to seem radically anti-religious, and in particular, anti-Jewish and anti-Christian.

We should not want the Court to be *pro*-Jewish or *pro*-Christian. But we must insist that it show reverence for the moral foundations of the principle of religious liberty — foundations well located in Jewish and Christian conceptions by the classic documents of the American founding. It is not necessary to embrace these particular conceptions. Unavoidably, however, anyone wishing "to recur to fundamental principles" will have to measure rival conceptions by those historically agreed to in the founding era.

Chief Justice Moore is a profound believer in the principle of religious liberty, and an unusually thoughtful student of the origins and sources of that principle. Whatever one thinks of his early defiance of the Federal Court, the ideas he points to are public and traditional. He is a serious believer in the God who was written of with palpable reverence by our nation's founders and later forebears. All he has sought to do, in a manner fully respectful of the religious liberty of the many new citizens who are of different faiths and traditions, is to underline the originality of America's Founders in the matter of religious liberty — a principle which is not, after all, understood or

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accepted in all cultures of this planet. This idea of religious liberty is part of a precious conceptual heritage that needs to be set forth publicly so that all new immigrants might come easily to learn of it, even as they develop equivalent conceptions from the materials of their own traditions.

Someone might counter that although Chief Justice Moore is correct about the *history* of the American conception of religious liberty, he went too far by giving witness to the truth of this conception – thus to the truth of the sovereignty of God. But how does his official action differ from the official exercise of religion shown by Washington in his Proclamation of 1789 and Lincoln in his Decree of 1861?

The beauty of our forebears' conception of religious liberty is that it can be held as a truth by most Americans, respected by all, commended to newcomers as a model, yet never forced upon the conscience of anyone. That is precisely what the principle of religious liberty demands: Cherish it, teach it, but do not force it upon anyone. In light of this, it seems clearly unreasonable to have equated the silent monument that stood in the Alabama state courthouse with an establishment of religion.



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