Lieberman's support for government-backed religion: an attack on the letter and spirit of the Constitution

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When Democratic vice presidential candidate Joseph Lieberman told his audience at the Fellowship Chapel Church in Detroit last month that "the Constitution guarantees freedom of religion, not freedom from religion," he revealed not only a stunning ignorance of United States history, but also an antipathy to the freedom of thought that the founders made a centerpiece of the Constitution.

Lieberman's statement is a reformulation of the vulgar notion that the First Amendment's prohibition against the "establishment of religion" does little more than protect competing religious sects by prohibiting the government from boosting any one of them. According to this view, although the Constitution precludes government favoritism of one religion over another, it does not outlaw government endorsement of religious ideology in general.

Lieberman could not be more wrong. As disciples of the Enlightenment and dedicated rationalists, the Constitution's framers viewed the injunction against government support of religion as foundational for the democracy they were creating.

To understand what the Constitution "guarantees" in regards to its prohibition against the establishment of religion requires a detailed examination of the relevant text, the circumstances surrounding its creation, and its subsequent interpretation by the Supreme Court. This substantial body of material demonstrates overwhelmingly that Lieberman is standing reality on its head; the Establishment Clause is meant to prohibit all government sponsorship of religious thought, i.e., it establishes freedom *from* religion as well as freedom *of* religion.

The body of the United States Constitution was completed on September 17, 1787. The legislatures of the states would not ratify it, however, absent assurances that it would be amended to create rights invested in the people by imposing specific limitations on the new government's power. Thus, in 1791, the Constitution acquired its first ten amendments, which are known as "The Bill of Rights."

The First Amendment capsulates in a series of memorable phrases the rights of all individuals to freedom of thought and expression:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The framers demonstrated the importance of the prohibition against the establishment of religion by placing it first. Known as the "Establishment Clause," the prohibitory language is directed at religion as a whole, not any particular sect. Thomas Jefferson, the drafter of the Declaration of Independence and third President, explained in a famous 1802 letter that the purpose was to build "a wall of separation between Church and State."

This "wall of separation" was very much a part of the political revolution that accompanied the armed struggle for independence from England. The fight for religious liberty had percolated among the colonialists for decades.

Even though many early settlers fled Europe because of compulsory support for government-established churches, these same practices continued in the colonies. As the Supreme Court once put it, "Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters."

With the declaration of political independence from England in 1776, a wave of Enlightenment-inspired legislation swept through the former colonies. Most importantly for Establishment Clause purposes, James Madison, who would become the fourth President, drafted and pushed through Virginia's Declaration of Rights, which is widely recognized as the first official legislative pronouncement that freedom of conscience and religion are inherent rights of the individual. As a result, on January 1, 1777, the Virginia Episcopalian Church was for the first time denied its tithes.

After the military defeat of England, conservative political forces began to reassert themselves. In Virginia, the Episcopalian Church sought to renew compulsory support, but was met with a firestorm of protests from other sects, the memberships of which had grown to exceed the Episcopals. Deals were made. Eventually, in 1784, the Virginia Legislature proposed the "Assessment Bill," which imposed a tax to support religious education, but gave each taxpayer the right to designate which church was to receive it. In that way, the Assessments Bill was very much an assertion of "freedom of religion," but not "freedom from religion."

Madison steadfastly opposed this bill, precisely because it placed a government imprimatur on religion, and thereby violated not only the separation of Church and State but also the inherent right of each person to determine his or her own beliefs free of governmental interference. He rallied the opposition by publishing his famous "Memorial and Remonstrance Against Religious Assessments," explaining that the "Religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other

men."

Accordingly, "in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance." Madison wrote that "Rulers who are guilty of such an encroachment" are "tyrants," and "people who submit to it . . . are slaves."

Madison saw government sponsorship of religion as violating "that equality which ought to be the basis of every law." "If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all are they to be considered as retaining an 'equal title to the free exercise of Religion according to the dictates of conscience.' Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us."

The Remonstrance leaves no doubt about the importance Madison attributed to defeating the Assessments Bill. In it, he insists that separation of Church and State is fundamental to all other democratic rights:

"Either then, we must say, that the will of the Legislature is the only measure of their authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: Either we must say, that they may control the freedom of the press, may abolish the trial by jury, may swallow up the Executive and Judiciary Powers of the State; nay that they may despoil us of our very right of suffrage, and erect themselves into an independent and hereditary assembly: or we must say, that they have no authority to enact into law the Bill under consideration."

So potent was Madison's Remonstrance that instead of enacting the Assessments Bill, the Virginia Assembly passed Thomas Jefferson's "A Bill for Establishing Religious Freedom." This historic law provided "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burdened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief."

Constitutional scholars are unanimous that Madison's struggle against the Assessment Bill led directly to his selection as the drafter of the First Amendment's Establishment Clause. The Supreme Court has written time and again that the Establishment Clause is itself the product of the Remonstrance, and must be read in the light of it. Only by sweeping away the history of this critical advance in the development of American bourgeois democratic jurisprudence can Lieberman and others of his ilk maintain that the Constitution does not guarantee "freedom from religion."

The Constitution gives to the Supreme Court the role of resolving conflicts over the meaning of its provisions. The High Court has not generally been at the forefront of defending democratic rights. In fact, many of its decisions, from *Dred Scott v. Sandford*, the 1856 decision forcing all the states to recognize slavery, to *Boy Scouts of America v. Dale*, this year's decision overruling a claim that state anti-discrimination laws protect gay scout leaders, have invalidated state and federal laws enacted to protect and expand individual rights. But in its defense of the Establishment Clause, the Supreme Court has consistently echoed the spirit of Madison's Remonstrance.

In an early example, *Watson v. Jones* (1871), the Supreme Court wrote: "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

Justice Hugo Black, a one-time member of the Ku Klux Klan who evolved into an adamant defender of civil liberties during his long tenure on the Supreme Court, wrote in 1947: "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'" *Everson v. Board of Education* (1947).

In *Everson*, the first twentieth century Supreme Court analysis of the Establishment Clause, the court grappled with whether a state could subsidize bus transportation for school children, including those attending religious schools. Referring at length to Madison and the Remonstrance as the origin of the Establishment Clause, Justice Black nevertheless voted with the five-judge majority that upheld a law providing such subsidies.

The four dissenters responded that no governmental assistance whatsoever could flow to religion: "The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."

The *Everson* dissent continued: "No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. . . . The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. . . . For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general."

Following *Everson*, although the Supreme Court has approved some state support for parochial schools, it has refused to tolerate any governmental preference for religious views over non-religious views. In *Torcaso v. Watkins* (1961) the court unanimously struck down a Maryland law requiring notaries public to affirm a belief in God. Justice Black again wrote the decision, stating, "We renew our conviction that we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."

Justice Black left no ambiguity: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."

One year later, in *Engel v. Vitale* (1962), the Court voted 6 to 1 to invalidate a New York law mandating a "non-denominational" prayer at the beginning of the school day. Again, Justice Black wrote the opinion: "It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their

own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five. But the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. . . . By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. . . .The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs."

In 1968 a unanimous Supreme Court ruled unconstitutional an Arkansas law prohibiting the teaching of evolution in public schools. *Epperson v. State of Arkansas* (1968) makes absolutely clear that the First Amendment guarantees "freedom from religion" as well as "freedom of religion." Emphasizing that "The antecedents of today's decision . . . are fundamental to freedom," Justice Arthur Goldberg explained, "Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."

Despite the Supreme Court's roll-back in other areas of civil rights over the last twenty-five years, it has continued to defend the Establishment Clause. In *Wallace v. Jaffree* (1985), for example, Justice Stevens, writing for a 6-3 majority, held that an Alabama statute authorizing a daily period of silence in public schools violated the Establishment Clause. "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among "religions"—to encompass intolerance of the disbeliever and the uncertain."

Even the current Supreme Court—the most reactionary since before World War II—has refused to back down on the court's protection of the Establishment Clause. Just this year, in *Santa Fe Independent School District v. Doe*, the court ruled 6 to 3, with only the three hard-core right-wingers, Rehnquist, Scalia and Thomas, dissenting, that a public high school cannot allow "voluntary" student prayers over its loudspeaker system at football games.

Lieberman's attack on the Establishment Clause may be motivated primarily by immediate political concerns. But his willingness to repudiate such a deeply rooted democratic tradition has its own objective logic. As the ruling elite becomes more and more nervous over the social breach between a wealthy upper crust and the masses of working people, it becomes less and less able to tolerate freedom of thought and expression.