The Constitution and the High Court: The Case for Textual Fidelity

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THE NATIONAL COVENANT

> The American Union will last as long as God pleases. It is the duty of every American Citizen to exert his utmost abilities and endeavors to preserve it as long as possible and to pray with submission to Providence "*esto perpetua*" [may it last forever]. — JOHN ADAMS, Aug. 2, 1820

In the beginning, the people of Israel were ruled by the Ten Commandments, a covenant written by the very finger of God.[1] However, Moses prophesied that there would come a day when the people of Israel would reject God's rule of law and demand a king "like all the nations."[2] In the days of Samuel, this prophesy came to pass when, despite God's warnings, the people insisted that they be ruled by a tyrannical "king like all the nations."[3]

While God gave the people of Israel a king, He did not give them the lawless tyrant that they wanted. Rather, as prophesied in Deuteronomy 17, God graciously gave them a covenant king, under the law, not above it:

> And Samuel said to all the people, See ye him the Lord hath chosen.... And all the people shouted, and said, God save the king. Then Samuel told the people the manner of the kingdom, and wrote it in a book."[4]

From the first king of the united kingdom to the last king of Judah, the kings were governed by the law of this "book." But the history of Israel's kings was largely one of covenant unfaithfulness. Beginning with Saul — who twice violated the written covenant[5] — most of Israel's kings, like Judah's last king, Zedekiah, "did evil in the sight of the Lord."[6] Indeed, toward the end of the southern kingdom of Judah, the book of the law was apparently lost,[7] leaving the people no written standard by which they could hold their rulers accountable. Even though King Josiah valiantly attempted to return the nation of Judah to the rule of the law,[8] God finally destroyed the nation of Judah, as he had previously destroyed Israel, for breach of the written civil covenant.[9]

FIDELITY TO THE TEXT

There is a history lesson here, given by God, not only to the nation of Israel, but to all nations, including the United States of America.[10] To be sure, America's national covenant is not, like Israel's, the Ten Commandments written by the finger of God. Nor is America's form of government either Israel's original rule of divinely-picked judges or its later rule of a heritable monarchy. However, as a constitutional republic, America, like the nation of Israel, is governed by a "book of the law" — the United States Constitution — the purpose of which, as Chief Justice John Marshall wrote over two hundred years ago, is to "establish for their future government ... principles ... deemed fundamental ... supreme [and] permanent."[11] Indeed, as the Chief Justice wrote for a unanimous court, those "supreme and permanent" principles were put in writing so that they would "not be mistaken, or forgotten" — for it is of the very essence of a written constitution that the words therein "form[] the fundamental and paramount law of the nation."[12]

Accordingly, Chief Justice Marshall asserted that the United States Constitution, as it is written, forms the rule of law governing every branch of government, including the judiciary.[13] He,

therefore, he anchored the very legitimacy of judicial review to the proposition that the "framers ... contemplated that instrument as a 'rule of government of the *courts*'":

> Why otherwise does it direct the judges to take an oath to support it? ... Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed to him, and ... not ... inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or take this oath becomes equally a crime.[14]

Given this high view of the constitutional text, the Court adopted a rule of construction, designed to maintain the prevalence of that written text over the courts:

> In expounding the Constitution of the United States, **every word** must have its due force and appropriate meaning; for it is evident from the whole instrument that **no word was unnecessarily used or needlessly added**.... **Every word** appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. **No word** in the instrument, therefore, can be rejected as superfluous or unmeaning....[15]

SUPPLANTING THE TEXT

Today the American people are told quite a different story. Instead of being reminded of Chief Justice Marshall's subordination of the courts to the Constitution as it is written — to ensure that its permanent principles "may not be mistaken or forgotten,"[16] — the people are admonished to obey the courts' opinions as if they were law.[17] In 1958, in support of this proposition of judicial supremacy over the constitutional text, a unanimous Supreme Court in *Cooper* — wrenching out of context Chief Justice Marshall's *Marbury* statement that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[18] — misused the Marshall legacy of judicial review to support the novel proposition that, because it is the court's duty to "say what the law is," what the court says is law. Thus, the Court exalted itself above the Constitution's written text, claiming that its "interpretation" of that text was "the supreme law of the land."[19]

Since *Cooper*, the nation's High Court has paid scant attention to the constitutional text. Notoriously, in *Roe v. Wade*,[20] Justice Harry Blackmun openly admitted that "[t]he Constitution does not explicitly mention any right of privacy, [but] in a line of decisions, however, going back perhaps as far as [1891] the Court has recognized that a right of personal privacy ... does exist **under** the Constitution."[21] By digging **underneath** the Constitution, the *Roe* Court cut itself free from that which is written in the Constitution so that it is no longer governed by the Constitution in any abortion case.[22]

But the Court's claim of supremacy over the written text is not limited to abortion matters. Rather, under the tutelage of the Supreme Court, federal courts routinely deconstruct the language of the Constitution, utilizing an evolutionary philosophy of law — totally foreign to that of Chief Justice Marshall[23] — to adapt the Constitution to changing times.[24] Led by justices such as Oliver Wendell Holmes, Benjamin Cardozo, Felix Frankfurter, William J. Brennan and the late chief justice, William Rehnquist, these legal evolutionists typically read the historic meaning of such time-honored and fixed phrases as "due process of law" right out of the Constitution, substituting

therefor inventive and manipulable slogans, such as "implicit in the concept of ordered liberty."[25]

Freed from the "outworn 18th century 'strait jacket'"[26] of the original constitutional text, the Supreme Court habitually rules that the due process clause of the Fourteenth Amendment "incorporated" most of the federal bill of rights and applied them to the states.[27] This view is so ensconsed in the bosoms of the justices that few dare challenge it,[28] even though the Court has never explained: (a) how the First Amendment that expressly applies to "Congress" can be made applicable to the states via the due process clause of the Fourteenth Amendment; and (b) how the "due process clause" of the Fourteenth Amendment contains the First Amendment's two religion clauses, and the speech, press, assembly and petition guarantees, when the same "due process clause" of the Fifth Amendment, if so construed, would render the language of the First Amendment totally redundant.[29]

IGNORING THE TEXT

In the 1940's,'50's and '60's, Justice Hugo Black tried to rein in the judicial "practice of substituting [the Court's] own concepts of decency and fundamental justice for the language of the Bill of Rights,"[30] but Justice Black, himself, paid little attention to the Constitution's original language. Instead, he wholeheartedly embraced Thomas Jefferson's phrase, "a wall of separation between Church and State," substituting it for the First Amendment text prohibiting laws "respecting an establishment of religion."[31] Relieved of adhering to the Constitution's definition of "religion" and "establishment," the Court invented its three-part *Lemon* test[32] that, if not by design, then certainly by effect, has greatly "secularized" America, almost purging her of her Christian civic heritage,[33] and virtually removing the Bible from her civic life.[34]

Had the courts paid attention to the original meaning of religion, as the Supreme Court did in 1878,[35] it would have discovered that "religion" was a jurisdictional term, designed as a barrier to civil government intrusions upon duties owed exclusively to God, unenforceable by the blunt instrument of force and violence.[36] Instead, from 1946 to the present time, the courts have substituted the word, "religious" for the word "religion," and in the process opened the door to the civil government take-over of the work of the church — such as welfare for the poor and education of the children[37] — and practically closed the door to Christians who would bring Biblical principles into the administration of civic affairs, reducing them to second-class citizens.[38]

This breach of constitutional faith has been compounded by the Court's failure to apply the full reach of the Free Exercise Clause, limiting its scope to a very narrow class of cases of "religious" discrimination.[39] Even then, the Court rarely invokes the Free Exercise Clause, preferring to deal with discriminations against "religious" speech as a subset of its "freedom of expression" doctrine prohibiting "viewpoint discrimination."[40] Yet, the free exercise of religion, as it was originally conceived in the Virginia Bill of Rights of 1776 and implemented by Jefferson's Act for Establishing Religious Freedom in 1785, protected the people from government viewpoint discrimination — religious and otherwise:

> Whereas Almighty God hath **created the mind free**; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our

> religion, who being Lord of both body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do ...; t**hat to suffer a civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy ... because he being judge of that tendency will make his opinions the rule of judgment; and approve or condemn the sentiments of others only as they shall square with his own**....[41]

The true Jefferson legacy of the free exercise of religion, then, is not the separation of church phrase in his letter to the Danbury Baptists. Rather, it is a legacy of the freedom of the mind, embracing the "propagation" of **all** "opinions," not just religious ones, free from viewpoint discrimination by civil government authorities, including professors and school teachers hired and paid by the state and local government school boards.[42]

CONCLUSION

The Supreme Court has not only ignored the wide scope of the First Amendment's Free Exercise Clause, but bastardized the four following freedoms — the freedoms of speech and of the press, and the rights of the people to assemble and petition — lumping them altogether as a single guarantee of "freedom of expression."[43] By substituting this single phrase for four distinct guarantees, the Court has ushered down the aisle of constitutional protection such "expressions" as nude dancing,[44] profanity,[45] and obscenity,[46] which the Court had previously ruled to be outside the protection of the First Amendment.[47] Significantly, under this same "freedom of expression" doctrine, the Court has cut back on the First Amendment protection of "core political speech" in federal election campaigns, prompting Justice Thomas to observe that "defamers," "nude dancers," "pornographers," "flag burners," and "cross burners" have greater access to the "marketplace of ideas" than do candidates for election to public office.[48]

In today's evolutionary world of judicial supremacy, a "compelling," or even some other "significant" government interest, is sufficient to justify relativizing a constitutional principle, notwithstanding the fixed constitutional text. Remarkably, it was Israel's first king, King Saul, who first injected the compelling interest doctrine in his attempt to justify his having usurped the role of the priest in the nation of Israel.[49] Samuel's response to this alleged "compelling interest" to breach the nation's civil covenant separating the jurisdiction of the priest from that of the king[50] was swift and sure:"Thou hast done foolishly: thou hast not kept the commandment of the Lord thy God ... for now would the Lord have established thy kingdom upon Israel forever. But now thy kingdom shall not continue...."[51]

ENDNOTES

1. *See* Exodus 31:17-18; 34:28; and Deuteronomy 9:10.
2. Deuteronomy 17:14.
3. *See* I Samuel 8:5-20.
4. I Samuel 10:24-25.
5. *See* I Samuel 13:8-14 and I Samuel 15:1-24.

6. *See* II Kings 24:19.

7. *See* II Chronicles 34:8-14.

8. II Kings 22 and 23.

9. *See* II Kings 17:1-18 and 23:24-26.

10. *See* I Corinthians 10:11.

11. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

12. *Id.* at 177.

13. *Id.* at 179-80.

14. *Id.* at 180.

15. *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) (emphasis added).

16. Marbury, 5 U.S. at 176.

17. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992). *See also*, C. Stern, *The Common Law and the Religious Foundations of the Rule of Law Before Casey*, 38 U.S.F.L. Rev. 499, 520-23 (2004).

18. *See, e.g.*, *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

19. *Id.* at 18.

20. 410 U.S. 113 (1973).

21. *Id.* at 152.

22. *See, e.g.*, *Stenberg v. Carhart*, 530 U.S. 914, 929-30, 147 L.Ed.2d 743, 758-59 (2000) ("The question before us is whether Nebraska's statute, making criminal the performance of a 'partial birth abortion,' violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey* ... and *Roe v.Wade*....").

23. *See* H. Titus, *Moses, Blackstone and the Law of the Land*, 1 Christian Legal Society Quarterly No. 4, 5-6 (1980).

24. *See, e.g.*, J. Balkin, *Alive and Kicking: Why No One Truly Believes in a Dead Constitution*, http://www.slate.com/id/2125226/ (August 29, 2005).

25. *See, e.g.*, *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

26. *See Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

27. *See Duncan v. Louisiana*, 391 U.S. 145 (1968).

28. Those who do, like U.S. District Judge Brevard Hand, are spanked by the High Court, and buried under an avalanche of precedent. *See Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985).

29. *See, e.g.*, Brief Amicus Curiae of Conservative Legal Defense and Education Fund, et al., filed in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005).

30. *See Adamson*, 332 U.S. at 89 (Black, J., dissenting).

31. *Everson v. Board of Education*, 330 U.S. 1, 15-16, 18 (1947). *See generally* P. Hamburger, Separation of Church and State 454-78 (Harv. Univ. Press: 2002).

32. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

33. *See, e.g.*, *McCreary County v. ACLU*, 125 U.S. 2722, 2748, 162 L.Ed.2d 729, 762-74 (2005) (Scalia, J., dissenting).

34. *See generally* S. Carter, The Culture of Disbelief (HarperCollins: 1993).

35. *See* discussion of *Reynolds v. United States*, 98 U.S. 145 (1878) in H. Titus, *The Free Exercise Clause: Past, Present and Future*, 6 Regent U.L. Rev. 7, 11-13 (1995) (hereinafter Titus,"Free Exercise").

36. *See* Titus, *No Taxation and No Subsidization: Two Indispensable Principles of Freedom of Religion*, 22 Cumb. L.

Rev. 505 (1991-92).

37. *See* Titus, "Free Exercise," at 6 Regent L. Rev. at 56-62.

38. *See* S. Carter, God's Name in Vain 67-81 (Basic Books: 2001).

39. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

40 *See, e.g.*, *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

41. Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 The Founders' Constitution, Doc. No. 44, p. 84 (P. Kurland and R. Lerner, eds, Liberty Fund reprint: Indianapolis 1987).

42. *Id.* "[T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."

43. "Until 1945, 'freedom of expression,' 'free expression,' and 'liberty of expression' were used [by the Supreme Court] sparingly — only fourteen times — .... Between 1945 and 1965, one or the other of the three terms was used in approximately sixty cases. Then, beginning in 1965, the number jumped dramatically so that by the end of 1995 the Court had invoked the term ... in well over two hundred cases." H. Titus with B. Zeerup, *Freedom of Expression*, The Forecast 11 (April 1996).

44. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

45. *Cohen v. California*, 403 U.S. 15, 22-26 (1971).

46. *Jacobellis v. Ohio*, 378 U.S. 184, 187-195 (1964).

47. *See Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-72 (1942).

48. *McConnell v. F.E.C.*, 540 U.S. 93, 265, 157 L.Ed.2d 491, 625 (2003).

49. *See* I Samuel 13:11-12.

50. *See* II Chronicles 19:11.

51. I Samuel 13:13-14a. *See also* II Chronicles 26:16-21.

Other writings by Herbert W. Titus:

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