Religious Freedom:
The War Between Two Faiths

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INTRODUCTION

"Though it be a man's covenant yet if it be confirmed,
no man disannulleth, or addeth thereto." Galatians 3:15

By a vote of 6 to 3, the United States Supreme Court rejected the claim that America's legislatures have been violating the Establishment Clause of the First Amendment of the Constitution by hiring clergymen to act as their chaplains and paying them out of public funds. What is most remarkable about Chief Justice Warren Burger's majority opinion in the case upholding the Nebraska legislature's chaplaincy is that it does not rest upon the Court's three-part test that has dominated the Establishment Clause cases since 1971. Rather, it relies solely upon the constitutional text and its historic meaning:

> "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh v. Chambers* 463 U.S. 783, 792 (1983).

In his dissent, Justice Brennan chides the majority for neglecting the Court's three-part test. He points out that had the majority followed recent case law, "it would have to strike ... (the Nebraska chaplaincy practice) down as a clear violation of the Establishment Clause:"

> "That the purpose of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. 'To invoke Divine guidance on a public body entrusted with making the laws' ... is nothing but a religious act.
>
> The 'primary effect' of legislative prayer is also clearly religious ... [I]nvocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the state ...
>
> Finally, ... the practice of legislative prayer leads to excessive 'entanglement' between the State and religion ....First, ... (in) the case of legislative prayer, the process of choosing a 'suitable' chaplain ... and insuring that the chaplain limits himself or herself to 'suitable' prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid .... Second, excessive 'entanglement' might arise out of 'the divisive political potential' of state statute or program ....The controversy between Senator Chambers and his colleagues ... has split the Nebraska legislature precisely on issues of religion and religious conformity." *Id.* at 797-800.

Because the majority's opinion rests upon such a flagrant disregard of the Court's 1971 *Lemon v. Kurtzman* formula, Justice Brennan bravely contends that the majority has but "carved out an exception to the Establishment Clause rather than reshap[ed] Establishment Clause doctrine to

accommodate legislative prayer."

There is nothing in the majority opinion that even remotely suggests such an analysis. To the contrary, the Chief Justice, having analyzed the case without reference to the three-part test, gives no guidelines for any exception to it. Instead, he focuses exclusively upon the meaning of the word, "establishment," as understood by the Founding Fathers and as illustrated by the history surrounding the legislative chaplaincy:

> "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision for school transportation, *Everson v. Board of Education*, 330 U.S. 1 (1947), beneficial grants for higher education, *Tilton v. Richardson*, 403 U.S. 672 (1971), or tax exemptions for religious organizations, *Walz v. Tax Commission*, 397 U.S. 664 (1970) ..." *Id.* at 791.

By including the 1971 *Tilton* and the 1970 *Walz* cases in his summary, the Chief Justice indicates this majority's willingness to subordinate the Court's three-part test to the constitutional text and its original meaning. In short, the majority has ushered back into the Establishment Clause arena arguments resting upon the constitutional text and its historic meaning, rather than upon recent Court formulae.

Not only does the majority in *Marsh v. Chambers* give primary attention to the constitutional text, but they have assumed that the framers' choice of language absolutely determined the purpose, meaning, and application of the Establishment Clause. They have expressed an unwillingness to reexamine that clause in light of the obvious changes in the political, religious, and social landscape that have occurred in the two centuries that have gone by since the Constitution was written.

The majority's endorsement of such an absolute and fixed meaning of the terms of the Establishment Clause has provoked Justice Brennan to endorse once again his view that constitutional language is fluid and malleable:

> "... (T)he argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers." *Id.* at 816.

Unable to cite an Establishment Clause case to support this proposition, Justice Brennan cites his plurality opinion on sex discrimination in *Frontiero v. Richardson*, 411 U.S. 677 (1973) and the majority opinions on race discrimination in *Brown v. Board of Education*, 347 U.S. 483 (1954), on jury trial in *Colegrove v. Battin*, 413 U.S. 149 (1973), on cruel and unusual punishments in *Trop v. Dulles*, 356 U.S. 86 (1958), and on search and seizure in *Katz v. United States*, 389 U.S. 347 (1967).

The cite to the *Trop* case is most revealing. In that case, Chief Justice Earl Warren claimed that the cruel and unusual punishment clause did not have a "static" meaning, but one rooted in "the

evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

Armed with the Trop precedent, Justice Brennan confidently compares the legislative chaplaincy practice with the presumed unconstitutional status of a 1790 Congressional statute requiring persons who were convicted of certain theft offenses to "be publically whipped, not exceeding thirty-nine stripes." *Marsh v. Chambers*, 463 U.S. at 814, n. 30. As the standards of decency have evolved under the cruel and unusual punishment clause to prohibit such punishment, so must, according to Brennan's constitutional philosophy, the standards of "neutrality" and "separation" evolve under the Establishment Clause to prohibit legislative chaplaincies. Thus, Brennan dismisses past presidential practices, past scholarly expositions, and past Congressional intentions concerning the Establishment Clause as no longer relevant:

> " ... [O]ur religious composition makes us a vastly more diverse people than were our forefathers ....In face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the unbelievers alike." *Schempp*, 374 U.S., at 240-241 (Brennan, J. concurring). *Id.* at 817.

In other words, Justice Brennan firmly believes that the Constitution is what the judges say it is, not what the framers meant it to be.

His colleagues, however, who joined Chief Justice Burger's majority opinion are not quite as convinced. While each one, including the Chief Justice, have endorsed that view in previous Establishment Clause cases, they have in *Marsh v. Chambers* placed themselves once again within the orthodox tradition that was first established by Article VI of the Constitution: "This Constitution ... shall be the supreme law of the land."

Justice Brennan by preferring the Court's three-part test in the 1971 *Lemon* case over the original meaning of the language of the 1791 First Amendment, has firmly rejected Article VI and, consequently, the original justification and practice of judicial review in America. While Brennan's assumption about the nature of a constitution, the role of the court, and the meaning of the Establishment Clause conforms with almost all contemporary constitutional scholarship, his views are diametrically opposed to those of Chief Justice John Marshall, the first great spokesman of constitutional law in the United States.

THE ORIGINAL CONSTITUTIONAL FAITH

Beginning with *Marbury v. Madison*, 1 Cranch. 137,2 L.Ed. 60(1803), Chief Justice Marshall forged a legacy of constitutional law that gave unquestioned primacy to the written text and to its framers' intent. Twenty-four years after that decision, Marshall confidently summarized the "principles of construction, which ought to be applied to the Constitution of the United States," as follows:

> "To say that the intention of the instrument must prevail; that this intention must be

> collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary." *Ogden v. Saunders*, 12 Wheat. 213, 332, 6 L.Ed. 606, 647 (1827).

This rule of construction necessarily followed from Marshall's commitment in Marbury to a constitution that embodies fixed principles that are changeable only through the extraordinary amendment process:

> "The principles ... are deemed fundamental ... {T)hey are designed to be permanent .... The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written ....The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it." *Marbury v. Madison*, 1 Cranch at 176-77.

While Marshall concentrated upon the threat of legislative changes to the Constitution in the Marbury case, it would be a mistake to assume that he thought that the Constitution could be molded as the judicial branch saw fit. Rather, he believed that the Courts were bound by the law stated in that document:

> "Judicial power ... has no existence. Courts are the mere instruments of the law, and can will nothing ....Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the judge; always for the purpose of giving effect ... to the will of the law." *Osborn v. U.S. Bank*, 9 Wheat. 738, 866 (1824).

Marshall's views about the nature of law and the function and role of the judge reflected those of Sir William Blackstone who contended that the fundamental law of all nations was fixed, universal, and unchanging and that the duty of judges was to discover and articulate that law.[1] University of Virginia law professor G. Edward White has captured this belief well in his summary of the Marshall legacy:

> "Marshall's principle justification for independent judicial review was that judges did not make law, but merely 'found' or 'declared' it.
>
> Marshall's argument assumed that 'law' was a universal body of principles, that those principles were 'discoverable' by technically skilled persons, such as judges, that in

1. W. Blackstone, COMMENTARIES 38-44,69-71. For an extensive review of the Blackstone legacy, see Titus, "Moses, Blackstone, and the Law of the Land," I C.L.S. QUARTERLY 5 (Fall 1980) and Titus, "God, Man, Legal Education, and Law," 1980 J. CHRISTIAN JURIS. 11.

> 'discovering,' judges were merely stating 'what the law was.' The only power judges had, under Marshall's view, was their professional power; their technical expertise enabled them to be better 'finders' of law than other persons."[2]

Marshall believed that judges did not make law, but only found it, because he held to a Biblical world view that included a Creator God who had written into his creation laws that govern the societies of men. Therefore, Marshall assumed the role of the judge to be like that of the natural scientist-to discover the laws that govern the moral universe in which God has placed man.

Marshall's faith was shared by his colleagues on the Court and by his contemporaries. Even Thomas Jefferson assumed that God had created the universe and placed man under the rule of universal standards, popularly known as the laws of nature and of nature's God. Those laws of nature included the fundamental principle that all governments are instituted of men and ruled by the law of the social compact.

> "When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.
>
> We hold these truths to be self-evident, That all men are created equal, that they are endowed by their Creator, with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed ...[3]

This idea of the social compact undergirded all of the early writings on constitutional law, especially those of Marshall. And that idea came not from the Enlightenment by way of the pens of the French philosophers, but from the Old Testament by way of the pens of such men as Samuel Rutherford and John Locke. David Hoffman, well known in his time and well-thought of by such legal giants as Kent and Story, stated the conventional wisdom of early America about the origin of the social compact:

> "The Bible ... affords the only authentic history of the origin and multiplication of mankind; and by exhibiting the actual manner in which society was generated, and communities were formed, offers the best theory of the social compact. These remarks apply of course chiefly to those portions of the Bible connected with the origin and polity

2. White, "Reflections on the Role of the Supreme Court," 63 JUDICATURE 162, 163 (1979).

3. For a careful examination of the Godly principles in America's Declaration of Independence, see Titus, "America's Declaration of Independence: A Christian Legacy." (Available in typescript form from the author.)

of the Jews."[4]

Very few modern scholars have acknowledged these Biblical roots. One notable exception, however, has been Helen Silving who traced the Biblical idea of compact or covenant to the United States Constitution:

> "The words 'compact' and 'consent' are not of recent vintage in political and legal thought. They rather derive meaning from the history of ideas traceable to remote ages of the development of Judaeo-Christian culture. The law of the Old Testament was based upon a 'Compact' (*brith*) between Jahweh and the Children of Israel, and the ethics of the New Testament were reformulated in terms of a New Covenant or Compact, as first conceived by Jeremiah. In this original religious form, the principle of 'compact' was imported into this country by the early colonists who came 'carrying their Bibles both in heart and hand.' The religious views of the State Contract were translated into political principles in the writings of Hobbes, Locke and Rousseau, and in the United States particularly in those of Jefferson. As political principles, they were adopted by the framers of American political and constitutional doctrine. The idea of 'compact' covers more than a page of history. That of 'consent of the governed' was indeed incorporated into the Declaration of Independence, which though no longer part of our law, is yet the basis of our federal Constitution, for it is presupposed in the phrase, 'We, the People of the United States'."[5]

At the heart of these Biblical covenant principles has been a fixed standard of law that governs all future generations. In the Old Testament book of Deuteronomy, God made a covenant with Israel to establish them as a nation (Deut. 5:2). This covenant included not only the Israelites alive at the time but their descendants as well (Deut. 5:3). The Ten Commandments, written by the very hand of God, contained the terms of the covenant. See Deut. 5:6-21 and Deut. 9:9. After the elders of Israel agreed to its terms, God revealed to Moses that the nation of Israel was bound to keep that exact covenant (Deut. 5:27-33). Even before this agreement was made, God warned the people of Israel neither to add to nor to subtract from the covenant (Deut. 4:1-3).

God, also, ordained that the same covenantal principles that governed His agreement with Israel would govern a covenant that the elders of Israel would later make with Kings Saul and David. In Deuteronomy 17, Moses prophesied that Israel would ask for a king "like as all the nations," but that they would get a "covenant" king bound by the Laws of God (Deut. 17:14-20).

This prophecy came to pass in the days of Samuel. After the elders of Israel sought a king "like all the nations," God gave them a king bound by a written covenant that Samuel prepared and laid before the Lord (I Sam. 8:5, I Sam. 10:25). That covenant bound the king to God's Law as Israel's first king, Saul, would soon discover. Twice Saul violated the terms of the covenant and twice

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4. D. Hoffman, A COURSE OF LEGAL STUDY 64-65 (1846). The Bible was of singular importance to lawyers in early America. *See, e.g.*, Shaffer, "David Hoffman on the Bible as a Law Book," 2 C.L.S. QUARTERLY 5 (Fa11 1981).

5. H. Silving, SOURCES OF LAW at 56 (1968).

Samuel exercised the authority of judicial review to hold Saul accountable to that covenant (I Sam. 13:13, I Sam. 15:11).

The lesson of I Samuel is clear: In order to insure the rule of law in a nation, the ruling authority shall be legally bound by a written covenant with the people. That lesson was taught to the English people by men like Samuel Rutherford who drew directly on the Biblical sources:

> "... (T)he general covenant of nature is presupposed in making a King, where there is no vocal or written covenant, if there be no conditions betwixt a Christian King and his people, then those things which are just and right according to the law of God, and the rule of God in moulding the first King, are understood to regulate both King and People, as if they had been written: and here we produce our written covenant. Deut. 17.15. Josh. 1.8,9. 2 Chr. 31,32.1."[6]

This lesson was mediated to the American people through John Locke whose social compact theory contributed to the Declaration of Independence and the several state and the United States Constitutions.[7] It was implemented by John Marshall when he, as Samuel had done in Israel, exercised the authority of judicial review in *Marbury v. Madison*.

At the heart of Marshall's justification of judicial review was his reliance upon one fact: that the United States Constitution was a written document. Over five times, Marshall referred to the written nature of the agreement, and then concluded:

> "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation ... Those then who contradict the principle that the constitution is to be considered, in court, as a paramount law ... would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory ... (l)t thus reduces to nothing what we have deemed to be the greatest improvement in political institutions - a written constitution ..." *Marbury v. Madison*, 1 Cranch 137, 177-78,2 L.Ed. 60,73-74 (1803).

The Marshall legacy, then, has not only been a commitment to the unquestioned primacy of the written constitutional text as understood by the framers, but to a world view that posited a Creator God who had given man universal and unchanging law, and who had guided man to establish civil government under a written covenant containing fixed principles. Thus, Marshall believed that the task of the judge was to discover and to apply the law written in the Constitution, not to create it and to change it as the judge saw fit.

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6. S. Rutherford, LEX REX at 106 (1644).

7. *See, e.g.*, T. Pearson, "Introduction" to J. Locke, SECOND TREATISE OF GOVERNMENT xx (Liberal Arts Press: 1952) and Titus, "America's Declaration of Independence: A Christian Legacy" (Unpublished manuscript available from the author.)

THE NEW CONSTITUTIONAL FAITH

In his book, JUDICIAL LEGISLATION, Fred Cahill, Professor of Political Science at Yale, documented the influence of Blackstone on early American constitutional theory:

> "... Americans tended to justify judicial review in Blackstonian terms .... And it can be hazarded that at the outset of our history under the Constitution, judicial review was acceptable because of general adherence to Blackstone's notion of the judicial function.[8]

According to Blackstone, judges were "the living oracles ... who are bound by oath to decide according to the law of the land ..."[9] Thus, Alexander Hamilton assured the people in THE FEDERALIST, No. 78, that the judges were bound by the Constitution as fundamental law, even as they exercised their authority of judicial review:

> "The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.
>
> Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both: and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

Beginning with the mid-19th century, scholars became dissatisfied with Blackstone's and Hamilton's descriptions of the judicial function. Under the influence of Darwin's new evolutionary theory about the origin of the universe and of man, scholars began to question the assumption that judges only discovered law. According to Professor Cahill's study, "the concept of evolution was an event of transcending importance to the development of American jurisprudence"[10] and led directly to a new assumption that judges did not discover law, but that they, in fact, made it.

That has become today's conventional wisdom taught in almost every law school in America. Moreover, it has been presumed to be true about judicial review and constitutional law as Professor G. Edward White has pointed out in his article on the Supreme Court in the JUDICATURE magazine:

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8. F. Cahill, JUDICIAL LEGISLATION at 10 (1952).

9. W. Blackstone, COMMENTARIES 69.

10. F. Cahill, *supra* note 8, at 22.

> "Law is no longer seen as a finite body of universal principles, and judges are no longer seen as persons who merely find and declare those principles. Twentieth-century perspectives on the Court start with two different assumptions. Law is seen as a fluid mix of established principles and changing social values, and judges, in constitutional law and elsewhere, are seen as persons who make law by creating new principles, often in response to changes in social values."[11]

This new evolutionary faith has been endorsed by scholars, judges, and lawyers alike. Not only did Justice Brennan's dissent in the *Marsh* case endorse this new faith, but the Court's opinions in the religious freedom area for the past twenty years have embraced it. Not surprisingly the first such opinion that rested squarely upon such evolutionary premises was written by Justice Brennan in 1963.

In *Sherbert v. Verner*, 374 U.S. 398 (1963), a majority of the Court for the first time utilized the "compelling state interest" test to resolve a claim under the Free Exercise Clause of the First Amendment. Justice Brennan derived this new test from *Thomas v. Collins*, 323 U.S. 516 (1945), an early free speech case resolved by the Court under the old case-by-case due process methodology that was championed by Justice Felix Frankfurter. According to Frankfurter, the due process clause was a term of "convenient vagueness" that allowed judges to define and redefine its meaning depending upon the circumstances:

> "Great concepts like ... 'due process of law' ... were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact." *National Ins. Co. v. Tidewater Co.*, 337 U.S. 582, 646 (1949) (Dissenting opinion.)[12]

Justice Brennan did not even pause in his Sherbert opinion to ask whether a rule anchored to a 1945 case fit into the newly emerging selective incorporation doctrine soon to be embraced by the Court in *Duncan v. Louisiana*, 391 U.S. 145 (1968). Nor did he ask whether the language of the Free Exercise Clause was intended to be as open-ended as the Due Process Clause. Whatever the reason for these omissions, the Sherbert opinion presaged what would soon become the explicitly stated conventional view of the whole constitutional document.

In 1978, Harvard Law Professor Laurence Tribe published his treatise on AMERICAN CONSTITUTIONAL LAW. Widely read and acclaimed by legal scholars and practitioners alike, the book skyrocketed Professor Tribe into a position of unquestioned prominence in constitutional law. In fact, he has become the leading spokesman for the new constitutional faith that has dominated the Court over the past 20 years:

> "... (T)he Constitution is an intentionally incomplete, often deliberately indeterminate

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11. White, "Reflections on the Role of the Supreme Court," 63 JUDICATURE, *supra* note 2, at 164.

12. Wallace Mendelson in his book on Justices Black and Frankfurter wrote: "Due Process of law (is among the terms that) doubtless were designed to have the chameleon capacity to change their color with changing moods and circumstances.") W. Mendelson, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT viii (1961).

structure for the participatory evolution of political ideals and governmental practices."[13]

The compelling state interest test has been deliberately tailored to impose this new evolutionary faith upon the Free Exercise Clause. As can best be illustrated by an analysis of the Sherbert case along with *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *United States v. Lee*, 101 U.S. 1051 (1982), and in *Bob Jones Univ. v. United States*, 461 U.S. 574, (1983).

In each of these four cases, the Court conceded that the Free Exercise claims were rooted in the bona fide religious beliefs of the claimants: In *Sherbert*, the refusal to work on Saturday, the Sabbath of the Seventh-Day Adventist claimant; in *Yoder*, the refusal of the Amish claimants to send their children to school past the eighth grade; in *Lee*, the refusal of the Amish claimant to participate in the social security system; and in *Bob Jones*, the refusal to allow interracial dating and marriage among its students. Yet the Court upheld the Free Exercise claims in *Sherbert* and in *Yoder*, but struck them down in *Lee* and *Bob Jones*.

The claims in *Sherbert* and *Yoder* survived the Court's balancing test because the Court did not believe the government interests to be of sufficient weight to override the claimant's religious convictions. For example, in *Sherbert*, the state's interest in denying unemployment benefits to those who "feigned religious objections to Saturday work" was not considered of such magnitude as to relieve the state from the administrative burden to determine if a Seventh-Day Adventist's claim was genuine. In *Yoder*, the state's interest in preparing a "child for life in modern society" was not considered of such magnitude as to require education past the eighth grade for an Amish child who would live in a separated and self-sufficient agrarian community.

But the Amish, even though living in that same self-sufficient and separated agrarian community, must pay the social security tax because the social security system's demand for money is, according to the Court in *Lee*, of such magnitude as to require his participation. Likewise, after *Bob Jones*, a person with religious convictions about race relations must subordinate those to the government which "has a fundamental, overriding interest in eradicating racial discrimination in education discrimination that prevailed, with official approval, for the first 165 years of this nation's history." *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983).

As this quote from Bob Jones reveals, the compelling state interest test has enabled the Court to assess every Free Exercise claim in light of "changing values." Indeed, it has invited the Court to make its own value assessment and to impose its own will under the auspices of the Constitution. What may have been protected under the Free Exercise Clause in the past may not be today because

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13. L. Tribe, CONSTITUTIONAL LAW iii (1978) Whatever differences others may have with Tribe, almost no one has contested his faith premise. Even those who place more confidence in the constitutional text than in Tribe's or the Court's modern formulations have adopted the same evolutionary assumptions. Consider, for example, the following: "The Constitution has been written in a language, and a user of language must be taken to know and intend that the language is open to interpretation. Although a user of language has intentions that are relevant in determining what the user meant to say, the user has no power to veto the conventions of the language that have been used. Constitutional interpretations can change because linguistic conventions and presuppositions change, even though the words remain the same." Schauer, "An Essay on Constitutional Language," 29 U.C.L.A. L. REV. 797, 831 (1982).

the value picture painted by the Court has changed.

One need only read the *Yoder* opinion to determine what arguments a state could make next time when its compulsory education system is refused by another Amish or other minority religious family in another place at another time. The Court has literally telegraphed a message to the state's attorney on how to prepare and to argue that future case:

> "The State argues that if Amish children leave their church they should not be in the position of making their way in the world without the education available in the one or two additional years the state requires. However, on this record, that argument is highly speculative. There is no specific evidence of the loss of Amish adherents by attrition, nor is there any showing that upon leaving the Amish community Amish children, with their practical agricultural training and habits of industry and self-reliance would become burdens on society because of educational shortcomings." *Wisconsin v. Yoder*, 406 U.S. 205, 224 (1971).

The current three-part Establishment Clause test has also embraced the same evolutionary faith. The third prong has called for the same kind of balancing. The prohibition against fostering "an excessive government entanglement of religion" has required the Court to assess the degree of state supervision of religious activities to determine if the required monitoring and oversight is "impermissible." One need only examine the Court's opinions concerning government aid to parochial schools to see that this test has given the Court free reign to make factual and value judgments based upon their own preconceived views of the appropriate relationship between church and state. *See, e.g.*, *Wolman v. Walter*, 433 U.S. 229 (1977). Those justices who oppose any form of aid to parochial schools (even the transportation and textbook subsidies that have been approved by the Court) have taken great care to find some fact situation, hypothetical or real, to support their conclusion of "excessive entanglement." On the other hand, the justices who favor some aid to such schools have avoided careful scrutiny of the same fact situations in order to support their conclusion of permissible monitoring and oversight.

For example, in the *Wolman* case, Justice Blackmun scrutinized with great care the possible government entanglements that might arise in financially supporting non-public school field trips. He emphasized that field trips are meaningful primarily because of the involvement of the teacher and that teachers at sectarian schools would inevitably integrate their faith with the trip which, in turn, would call for close state supervision and monitoring to insure that field trips are kept secularly pure. Justice Powell, on the other hand, simply ignored the involvement of the teacher in the field trip and emphasized that the state tax money supported only the use of a bus and driver. Justice Blackmun was joined by Brennan, Marshall, Stevens and Stewart who tend to oppose all state aid to parochial schools. Justice Powell was joined by the Chief Justice, Rehnquist and White who tend to favor some aid in order to foster pluralism in American education.

The second issue addressed by the "excessive governmental entanglements" prong has been the prevention of potential political divisiveness along religious lines. This concern has been quickly

dismissed in most cases since it was first articulated in *Lemon*.[14] Nevertheless, Justice Brennan utilized it in his analysis of the Nebraska legislature chaplaincy program. His analysis has proved conclusively that this part of the excessive entanglements test has been designed specifically to accommodate the Court's desire to adjust constitutional standards to its perception of changing circumstances over the course of time.

In support of his conclusion that "the history of legislative prayer has been ... divisive," Justice Brennan included a footnote documenting such controversies "at points in the 19th century" and "[i]n more recent years." One of Brennan's examples from the latter period is an event that took place in Oregon when several state legislators walked out in protest over a prayer offered by an eastern religious guru. Obviously, such a religiously divisive controversy could not have occurred at the time the Constitution was written when a more homogeneously religious group populated America's legislative bodies. But under this second branch of the excessive entanglements test, the Constitution must change to accommodate changes in the religious preferences of the American people.

But the evolutionary bias of the three-part test has not been confined to its third prong. Even the second prong, that the primary effect of law neither advance nor inhibit religion, has allowed the Court to engage in factual and statistical analyses that camouflage a changing Court's value preferences. In 1983, the Court upheld a Minnesota tax deduction scheme for tuition, textbook, and transportation expenses incurred by parents sending their children to primary and secondary schools. *Mueller v. Allen*, 463 U.S. 388 (1983). Justice Rehnquist, writing for a majority of five, refused to consider in any detail the contention that almost all of the tax benefits from this deduction accrued to parents who sent their children to religious schools. *Id.* at 400-403. Justice Marshall in dissent placed great emphasis upon such facts. *Id.* at 404-408. Underlying this difference of opinion was the current majority of five's obvious preference for a state-encouraged, and where possible a state-supported, pluralistic education system over its concern for excessive state support for the proselytizing activities of religious groups. The minority of four was, of course, much more concerned about neutralizing any state efforts that provided any assistance whatsoever to religious groups. Compare *Id.* at 400-403 with *Id.* at 412-415.

These extra constitutional value and factual assessments have clearly allowed the Court not only to adjust the second prong to changes in the composition of the Court but to changes in the political marketplace. For example, Justice Rehnquist in the Mueller case distinguished an earlier case in which a New York tax deduction scheme had been disallowed on the grounds that the Minnesota tax deduction was available to all parents not just to those who send their children to non-public schools and that the total Minnesota tax scheme channeled the benefits to the parents rather than to the schools. *Id.* at 397-400. Respect for such niceties have encouraged legislatures to make law according to a changing factual and political landscape rather than conforming its law to a principled and previously ascertained standard.

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14. *See, e.g.*, Justice Powell's concurring and dissenting opinion in *Wolman v. Walter*, 433 U.S. 263 (1978): "The risk of significant religious or denominational control over our democratic processes - or even of deep political division along religious lines - is remote...."

Finally, the Court has accommodated the evolutionary bias in its failure to make definite the meaning of the two key words in the first and second prongs of its three-part test: religious and secular. By not defining them, the Court has found no difficulty with a state statute that grants religious Sabbatarians an exemption from Sunday closing laws, but not "non-religious Sabbatarians." *Arlan's Dept. Store v. Ky.*, 371 U.S. 218 (1962). And it has been able to affirm a Congressional exemption from military service for religious objectors to all wars but not for religious objectors to unjust wars, much less for non-religious objectors to all wars. See *Gillette v. United States*, 401 U.S. 437 (1971). Moreover, the Court has been able to reaffirm school board released time off-campus religious programs and at the same time disallow that same program on campus as having a "religious purpose" or "primary effect of advancing religion." Compare *Zorach v. Clauson*, 343 U.S. 306 (1951) with *McCollum v. Board of Education*, 333 U.S. 203 (1948). Only an open-ended definition of religion without restrictive guidelines for the Court can explain such results.

Moreover, words without definite content have enabled the justices to play verbal gymnastics to reach the desired result as Justice Thurgood Marshall's opinion in the selective conscientious objector case reveals:

> "Properly phrased, petitioners' contention is that the special statutory status accorded conscientious objection to all war, but not objection to a particular war, works a de facto discrimination among religions. This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in 'just' and in 'unjust' wars ... and therefore adherents of some religious faiths-and individuals whose personal beliefs of a religious nature include the distinction-cannot object to all wars consistently with what is regarded as the true imperative of conscience. Of course this contention ... cannot simply be brushed aside ... for the Establishment Clause forbids subtle departures from neutrality, 'religious gerrymanders,' as well as obvious abuses. Still a claimant alleging 'gerrymander' must be able to show the absence of a neutral, secular basis for the lines government has drawn.
>
> Section 6(j) serves a numb~r of valid purposes having nothing to do with a design to foster or favor any sect, religion, or cluster of religion. There are considerations of a pragmatic nature, such as the hopelessness of converting a sincere conscientious objector into an effective fighting man, but no doubt the section reflects as well ... respect for the value of conscientious action and for the principle of supremacy of conscience.
>
> Naturally the considerations just mentioned ... support the existence of an exemption rather than its restriction specifically to persons who object to all war. The point is that these affirmative purposes are1 neutral in the sense of the Establishment Clause. *Gillette v. U.S.*, *supra*, at 451-453."

Just how "religiously neutral" this preference for absolute conscientious objection is, Marshall never said. Nor did he say what neutral means in the "Establishment Clause sense." "Neutrality" like "religion, and "secular" has remained also an undefined term. Thus, the Court has been able to

avoid making any absolute and final judgments that may jeopardize its flexibility to take into account future societal values.

Only one Supreme Court justice has been brave enough to attempt an authoritative definition of the "secular" and the "religious." Justice Stevens in his concurring and dissenting opinion in *Wolman v. Walter*, *supra*, at 264, offered the following:

> "The distinction between the religious and secular is a fundamental one. To quote from Clarence Darrow's argument in the Scopes case:
>
> 'The realm of religion ... is where knowledge leaves off, and where faith begins, and it never has needed the arm of the State for support and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.'"

It should come as no surprise that Stevens borrowed his definition from Clarence Darrow. Not only was Darrow not a framer of the Constitution, but he was an ardent supporter of Darwin's theory of evolution. If the Court is to implement its evolutionary faith through the Establishment Clause, Stevens could have chosen no better champion than the advocate for the side of evolution in the very case in which the statement was made.

CONSTITUTIONAL FAITHS IN CONFLICT

The religious clause tests that have been utilized by the Court in the last 20 years have promoted an evolutionary faith far removed from the creationist faith of America's forefathers. That faith has brought the Court into direct conflict with the constitutional guarantees in the First Amendment religious clauses that the Court is bound by oath to defend.

As Chief Justice Burger discovered in the Nebraska chaplaincy case, rigid adherence to the Court's own Establishment Clause three-part test would have brought the Court into direct conflict with the Constitution. But that conflict has not been limited to the Establishment Clause nor to the single issue of the constitutionality of the legislative chaplaincies. To the contrary, the Free Exercise-compelling state interest test and the Establishment Clause three-part formula have been designed without regard to the First Amendment religious guarantees as they were originally intended by the framers.

Upon ratifying the United States Constitution several states urged the new national government to include a bill of rights in the new constitution. Among the provisions suggested as amendments were articles dealing with religion. Virginia and North Carolina, for example, proposed a "free exercise" guarantee modeled after the already existing one in the Virginia constitution coupled with a "no preference" establishment clause modeled on other state constitutions.[15] New Hampshire

15. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 659 (J. Elliot, ed., 2d ed. 1836) (Virginia) [Hereinafter THE DEBATES). 4 THE DEBATES 1244 (North Carolina).

proposed one that prohibited any law "touching religion" or infringing "the rights of conscience."[16]

James Madison took these suggestions and introduced into Congress the following proposal:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be¶ in any manner, or on any pretext, infringed."[17]

Madison's proposal obviously did not become the final text. Both the House and the Senate offered significant amendments that ultimately produced the familiar text: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..."

While the Congressional record has shed precious little light on the reasons for the substitution of the phrase, "prohibiting the free exercise (of religion)" for Madison's original phraseology in the beginning portion of his proposal, it has been clearly demonstrated that the "free exercise of religion" language was borrowed from the "free exercise of religion" clause in the 1776 Virginia Constitution. That language first appeared in the Virginia document and in only one other state constitution, that of Georgia.[18] Section 16 of the 1776 Virginia Declaration of Rights read as follows:

> "That religion, or the duty 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 toward each other."[19]

This provision was put to its first serious test in Virginia by a¶ bill that, if enacted, would have levied a tax on the people to support teachers of the Christian religion. It was in response to this proposed legislation that Madison wrote his famous July 1785 "Memorial and Remonstrance on the Religious Rights of Man."[20]

In his Remonstrance, Madison analyzed the proposed legislation in light of the textual meaning of the word, *religion*, as set forth in the Virginia Constitution:

> "We remonstrate against said Bill, ...Because we hold it for a fundamental and undeniable truth, 'that Religion or the duty which we owe to our Creator and the Manner of

16. l THE DEBATES, *supra* note 15, at 362.

17. I ANNALS OF CONGRESS 434 (June 8, 1789).

18. GA. CONST. OF 1789, art. IV, section 5.

19. SOURCES OF OUR LIBERTIES 312 (R. Perry ed. 1972).

20. M. Malbin, RELIGION AND POLITICS 22-25 (1978).

> discharging it, can be directed only by reason and conviction, not by force or violence.' The Religion then 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: 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 degree of obligation, to the claims of Civil Society."

As this language demonstrates, Madison and his Congressional colleagues held a creationist world view and that world view shaped their definition of religion. Therefore, to remain true to the original intent, one cannot embrace Darwin's theory of evolution lest the fundamental meaning of religion be lost.

Second, as this language reveals, Madison and his colleagues believed that the Creator had ordained a legal order that pre-existed all civil societies and that order included the unalienable right to perform those duties owed exclusively to the Creator free from civil government interference. Again, to remain true to the original intent, one cannot embrace late nineteenth~century and twentieth-century ideas that man is the maker of law or that impersonal nature is law's author.

Third, as this language reveals, Madison and his colleagues believed that free exercise of religion was a matter of jurisdiction. There were some activities from which the civil government was absolutely excluded. One of these, Madison believed to be the right to be free from any civil government authority over beliefs and opinions:

> "... (T)he opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men; ... (they are within) a duty towards the creator ... this duty is precedent, both in order of time and degree of obligation, to the claims of civil society. Before any man can be considered as a member of civil society, he must be considered as a subject of the governor of the universe, and if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular civil society do it with the saving allegiance to the universal sovereign. We maintain, therefore, that 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."[21]

Once Congress adopted this jurisdictional approach to religious freedom, it dropped Madison's proposed concluding phrase on the "rights of conscience." After all, the provision for conscience was subsumed under the broad free exercise language as is clear from the reference to it in the

21. *Id.*

Virginia Constitution and others.[22]

Moreover, Congress did not desire to recognize a right of conscience divorced from man's duties to his Creator lest unnecessary conflicts with the rightful jurisdiction of civil society arise. Such a right of autonomous individual conscience existed in no state constitution. Congress rejected Madison's conscience proposal along with another one proposing a constitutional exemption for religious conscientious objectors from militia duty as ill-conceived and dangerous.[23]

Despite this clear rejection of Madison's original "conscience" proposal, the United States Supreme Court, beginning with *Sherbert v. Verner*, when it first applied the "compelling state interest" test has transformed the Free Exercise Clause into a "religious conscience" guarantee. In order to claim Free Exercise protection before today's Court, a claimant must first prove that his personal belief is a religious one and then pit that individual commitment against the civil government's program that allows for no such deviations.

Consider, for example, the Bob Jones case. The lawyers argued that Bob Jones University's collective religious conscience against interracial dating and marriage would be violated by the Internal Revenue Service's insistence that it abandon that commitment or lose its tax exemption. This appeal to conscience was overwhelmed by the government's commitment to eradicate racial discrimination from education.

This kind of contention and analysis did not even address the true religious freedom issue in the case, namely, whether the federal government has any authority to tax the gifts and offerings dedicated by people to fostering and inculcating religious beliefs and opinions in a University setting. Was that a duty owed exclusively to the Creator and, therefore, immune from the I.R.S. taxing authority? Because of the Court's evolutionary faith, it has no longer addressed the question that Madison and his colleagues believed they had phrased by the constitutional language. Therefore, the Court's new faith has led it to disregard the Constitutional text and historic meaning.

Not only has this been so with respect to the Free Exercise Clause, it has been equally true of the Establishment Clause. There is no reason not, indeed, there has been every reason to, believe that religion means the same thing in the Establishment Clause as it does in the Free Exercise Clause. The text of the latter has referred specifically to the word, "religion," in the former. Therefore, religion in the Establishment Clause must have the same jurisdictional meaning as does religion in the Free Exercise Clause.

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22. *See, e.g.*, Section 2 of the 1776 DELAWARE CONSTITUTION: That all men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner control the right of conscience in the free exercise of religious worship.

23. Titus, "Education, Caesar's or God's: A Constitutional Question of Jurisdiction," 1982 J. CHRISTIAN JURIS. 101, 145 and M. Malbin, RELIGION AND POLITICS, *supra* note 20, at 39, n. 4.

The word, *establishment*, also, has given jurisdictional significance. The Church of England was known as the "established church" under the authority of the King or Queen.[24] It, therefore; had available to it the enforcement powers of the state in matters of doctrine and Christian living. That practice had been brought to the colony of Virginia by its Anglican settlers. Hence, the tithe was imposed by law to support the clergy until 1776 when that practice was suspended one year. That suspension was extended through the Revolutionary War until it was abolished in 1779. By 1794, however, supporters of the establishment of the Christian religion in the Commonwealth of Virginia gained a majority in the Assembly of Delegates. Their first effort to reinstate an established religion was a bill to use the Commonwealth's taxing power to raise money to support Christian teachers. Because of Madison's cry of no jurisdiction in his Remonstrance, the bill failed.[25]

That experience revealed the need for more than a Free Exercise guarantee in the Virginia's constitutional arsenal. Other state constitutions had addressed the problem of establishment of religion by adopting prohibitions against favored treatment of one denomination or sect over another. For example, Article 19 of the 1776 New Jersey Constitution read: "That there shall be no establishment of any one religious sect in this Province, in preference to another ..."Therefore, Madison's initial proposal embraced this "no preference" principle as the solution at the national level. Thus he inserted the adjective, "national," in front of "religion" in order "to prohibit a national religious policy that allowed 'one sect ... (to) obtain pre-eminence, or two (to) combine together and establish a religion to which they would compel others to conform."'[26]

Madison's House colleagues objected to this no preference idea. They feared that any exercise of national authority to establish religion, however non-preferential, would threaten the existing state-established religions and the very existence of the federal union. Their solution was to delete the word, "national," and make the establishment prohibition an absolute one.[27] Members of the Senate attempted to substitute a "no preference" establishment clause provision, but they failed.[28] Ultimately, the two bodies of Congress agreed to the absolute exclusion of the federal government from any establishment of religion.

Early Congresses understood the true jurisdictional meaning of the Establishment Clause. For the most part, they steered clear from those activities that belonged exclusively to God. In those areas where they clearly had jurisdiction, they did not hesitate to make religious preferences. As Chief Justice Burger pointed out in *Marsh v. Chambers*, the same Congress that approved the Bill of Rights authorized the appointment of paid chaplains. *Marsh v. Chambers*, 463 U.S. 783 (1983).

In the first century, the Court, too, understood this jurisdictional purpose of the Establishment

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24. N. Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

25. M. Malbin, RELIGION AND POLITICS, *supra* note 20, at 22-24.

26. Titus, "Education, Caesar's or God's," *supra* note 23, at 144.

27. *Id.*

28. M. Malbin, RELIGION AND POLITICS, *supra* note 20, at 12.

Clause. It did not even bother to suggest that a law prohibiting polygamy in fact preferred orthodox Christianity over other religions. Such preferences were axiomatic if Congress were to exercise its jurisdiction over marriage in the federally-owned territories. See *Reynolds v. United States*, 98 U.S. 145 (1879).

Even as late as the 1940's and 1950's, the Court acknowledged that the Establishment Clause permitted religious preferences in the legitimate exercise of government jurisdiction:

> "... (W)e do not see how New York by this type of 'released time' program has made a law respecting an establishment of religion within the meaning of the First Amendment ....Otherwise ... [p]rayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oath - these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment." *Zorach v. Clausen*, 343 U.S. 306, 312, 313 (1951).

But with *Engel v. Vitale*, 370 U.S. 421 (1962) and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), the Court embarked upon an entirely new course to make "neutrality" the governing principle of the Establishment Clause. The Schempp case gave rise to the first two prongs of the Establishment Clause three-part test and Chief Justice Burger added the third prong in the 1970 case of *Walz v. Tax Comm'n.*, 397 U.S. 664 (1970).

The word, "secular," in these tests was designed to achieve the Court's goal of neutrality. That goal was comparable to that embodied in a "no preference" type establishment clause, namely, to eliminate all religious favoritism from the law. Once again the Court has adopted a principle that was explicitly rejected by the framers. Not only has it invited attacks upon religious practices such as the legislative chaplaincies, but upon laws that have long been based upon values that rest upon religious preferences. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 319-20 (1980). Even lawyers representing orthodox Christian clients have been lured into arguing that all laws must be rid of any hint of religious bias. See *Bob Jones Univ. v. United States*, 561 U.S. 574, 604, n. 30 (1983).

While the Court has refused to embrace such contentions, they have attempted to impose their own view of religious neutrality that, in fact, has been leading inexorably to the complete and total excision of this country's Christian heritage from the public schools. For example, Justice Clark in the Schempp case has allowed that the Bible can be taught in the public schools, but not if it is presented as the inspired Word of God. That can be "neutral" only if one adopted the Court's implicit religious faith, that God need not be consulted in man's search for truth. That was not the religious faith of America's forefathers. This difference in faith inevitably has brought the Court into conflict with the Constitution and to disregard the constitutional text and historic meaning.

TRUE RELIGIOUS FREEDOM

Chief Justice Burger's opinion affirming the Nebraska legislative chaplaincy endorses the true principles of religious freedom in the Establishment and Free Exercise Clauses by affirming the

legitimacy of religious preferences in areas in which the civil government obviously has jurisdiction. Longstanding practices such as Presidential prayer, proclamations, ceremonial references to God in court proceedings, and acknowledgments of God's authority over the legislative process are no longer threatened if the Marsh opinion is followed. While such practices "encourage" religion, they do not "establish" religion so long as they are administered in such a way that the government does not step outside its designated role in the executive, judicial, and legislative processes. The distinction between "encouragement" or "accommodation" and "establishment" is a legitimate one that has been recognized by the Congress and by the Court for nearly two centuries.

For example, Article III of the Northwest Ordinance enacted by Congress on July 13, 1787, includes the sentence: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." The United States Court opinion in the 1951 case of *Zorach v. Clauson*, still considered good law today, stands squarely within this early principle:

> "The government ... may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction."

Under guidelines such as these, the government may continue to supply chaplains, to build chapels, and to provide other opportunities for religious worship to members of the armed forces so long as no coercive measures accompany such programs and so long as they are within the jurisdiction of the government to raise, support, maintain, regulate, and discipline those forces. See Article I, Section 8, Clauses 12, 13, 14, and 16 of the U.S. Constitution. Moreover, if a government has jurisdiction to prohibit any or all business activities on one day of the week in order to protect the health and welfare of the people by insuring them at least one day a week rest, then it may choose Sunday as that day of rest and, thereby, encourage people to attend Christian services. *McGowan v. Maryland*, 366 U.S. 420 (1961).

Other religious preferences fall within this analytical group. The federal government is authorized "to coin money." It may, therefore, affix the inscription "In God We Trust." Such a saying has not been placed there to remind the people to put their trust in the Almighty as our Forefathers did. Rather, that inscription is there as the official statement of the government's monetary policy, namely, that the people trust in God not mammon.

On the other hand, the phrase "under God," in the Pledge of Allegiance resembles the references to God that have been historically invoked in the oaths of office of the Presidency, the Congress, and the Courts. These do constitute legitimate concerns of the civil government to ascertain the loyalty of its citizenry to the constituted polity. War memorials and other artistic endeavors that reflect religious themes are, also, permissible so long as those are suitable to the purpose for which the land or buildings have been dedicated and within the proprietary authority granted to the government as owner.

In summary, religious encouragements such as the ones reviewed need no longer be defrocked of all religious significance, as Justice Brennan has suggested. *See e.g.*, *Marsh v. Chambers*, *supra* at 815-818. Instead, they may be openly and freely engaged in so long as they do not exceed rightful jurisdictional boundaries of government action.

Where the civil government has taken action that coerces compliance with religious norms, then proof of "establishment., has been made. The issue now is whether the act required is a duty owed exclusively to the Creator or one owed to the civil government. For several centuries, one of the key jurisdictional battlegrounds between God and Caesar was the one over marriage and divorce. Prior to the Reformation, the church maintained that marriage, like baptisms and communion, were sacraments subject to the exclusive jurisdiction of God. After the Reformation, marriage, and with it divorce, child support, and other family legal obligations came within the civil government's jurisdiction.

It is the latter view that clearly undergirds the Court's opinion that laws prohibiting polygamy do not violate the Free Exercise Clause:

> " ... (T)here never has been a time in any State of the Union when polygamy has not been an offense against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guarantee of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law." *Reynolds v. U.S.*, 98 U.S. 145,165 (1879}.

Subsequent polygamy cases have followed this jurisdictional pattern as Justice Field's opinion in *Davis v. Beason*, 133 U.S. 333, 342 (1889) attests:

> "The term 'religion' has reference to one's views of his relations to this Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will.... The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper.... It was never intended or supposed that the Amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society."

Under analytical schemes such as these, arguments based upon "religious conscience" are quickly disposed of whether they be religious convictions supporting human sacrifice as against the laws prohibiting murder or religious beliefs supporting the use of peyote as against the laws prohibiting such use or, even objections to war as against a law conscripting a person to military service.

As Justice Field points out, there are, however, areas totally outside ¶ the jurisdiction of the civil government. These enjoy protection of the Constitution. Among the protected areas are opinions and beliefs, worship, evangelization, qualifications of pastors, pastoral counseling, and the tithes and offerings of the people. These are duties owed to God over which Caesar has no jurisdiction because they are matters subject to "reason and conviction" and not to "force or violence" as the 1776 Virginia Constitution reminds us.

Given this jurisdictional distinction, we have yet to see contested the constitutionality of programs in which the civil government has exercised authority only within the past few years. For example, not yet has there been a resolution of the constitutionality of a zoning law's application preventing the location of a church building. Is that a matter of conscience and reason? What about day care centers and Christian schools?

In an earlier article, I have argued that education, because it involves the opinions and beliefs of men, is among those duties owed exclusively to the Creator and, hence, immune from the State's jurisdiction.[29] That argument has never been made to any court. If successful, it would result in a dramatic return of educational responsibility and freedom to the people.

Not only is the current state-operated educational system vulnerable to jurisdictional attack, but so is the entire state-supported welfare system. The assumption of cases like *United States v. Lee*, *supra*, is that social security and other like programs for the handicapped, the poor, the aged, the unemployed, and the dependent are subject to the jurisdiction of the State. But is man's duty to feed, to clothe, and to house the destitute a duty owed exclusively to God, our Creator?

God, as Creator, commands people to take care of the needs of the destitute out of love for them. At common law, no one has ever been held liable for failure to come to the aid of another in distress. The courts recognize that such a duty is a moral one that is owed exclusively to God, not a legal one that is owed to God through the coercive power of the state. That distinction should also prevail when the state attempts to force people to support the destitute through taxes and by hiring welfare workers to act as the "Good Samaritans." The imposition of a tax, like the threat of liability, invokes the coercive power of the state.

The duty to support the destitute rests upon God's commandment to love thy neighbor as thyself (Luke 10:27-37). Love is a voluntary act and, by definition, is destroyed by the interposition of the government's taxing power. Under this analysis, America's current tax-supported welfare system violates man's free exercise of religion by subjecting a duty owed exclusively to God and conscience to the coercive power of the state. That is the clear witness of the Virginia Constitution's Free Exercise article: "It is the mutual duty of all to practice Christian forbearance, love and charity towards each other."

The proposed jurisdictional analysis would bring the religious freedom guarantees into harmony not only with the Constitutional text and its original meaning, but with each other. Under current court

29. Titus, "Education, God's or Caesar's," *supra* note 23.

tests, the Establishment and Free Exercise Clauses sometimes collide. *See, e.g.*, *Sherbert v. Verner*, *supra*, at 413-418. (Stewart, J., concurring.) Even Justice Brennan has admitted that the "neutrality" and "separation" goals of the Establishment Clause cannot be reached because of"certain tensions inherent in the First Amendment itself ..." *Marsh v. Chambers*, *supra*, at 809.

Either the government has jurisdiction over an activity or it does not. If it does, then there can be no Free Exercise claim unless the government exceeds its jurisdiction by breaching the Establishment Clause. Moreover, if any activity is outside the government's jurisdiction, it is outside for both Free Exercise and Establishment Clause purposes. For example, because it violates the Establishment Clause to use the state's taxing power to collect the tithes and offerings for the church, then it violates the Free Exercise Clause to tax those same tithes and offerings.

In harmony with the Constitution, its text and historic purpose, only this analytical approach that separates Caesar's jurisdiction from that belonging exclusively to God, the Creator, will bring true religious freedom back to America.

CONCLUSION

Jesus said: "Render therefore unto Caesar the things which be Caesar's and unto God the things which be God's" (Luke 20:25). The early church applied this lesson in jurisdiction and won the victory over the opposition of the Roman Empire's religious rulers in Jerusalem:

> "Did not we straitly command you that you should not teach in this name? And, behold, ye have filled Jerusalem with your doctrine, and intend to bring this man's blood upon us. Then Peter and the other apostles answered and said, We ought to obey God rather than man" (Acts 5:28-29).

This Biblical lesson in jurisdiction is the bedrock of religious freedom. It is a lesson that inspired America's forefathers to write a constitutional guarantee of religious freedom that would protect future generations. Only if that jurisdictional principle remains fixed and absolute in American constitutional law will the people remain free. Changing constitutional principles in order to accommodate changes in circumstances and values does not yield a "living constitution" as some believe. To the contrary, adhering strictly to the original terms, neither adding to nor subtracting from them, is the only assurance of the true liberty and prosperity. It is as Moses spoke to the people of Israel:

> "Keep ... the words of this covenant, and do them, that ye may prosper in all that ye do" (Deut. 29:9).

Other writings by Herbert W. Titus:

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