Unalienable Rights, Equality and the Free Exercise of Religion

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INTRODUCTION

This Article explains the law of unalienable rights, equality and the free exercise of religion.[1] The origin of this law is found in the laws of nature and of nature's God. Various essential elements of this law are reiterated in the Declaration of Independence and are given legal force and effect in the United States Constitution and the constitutions of the several states, *pro tanto*.

It is rare, however, to find a lawyer who understands or will argue unalienable rights, equality or religious liberty in light of the laws of nature, the Declaration or a written constitutional provision. The preferred approach is to skillfully arrange judicial cases in support of the desired conclusion without regard to inconvenient principle. Such an approach, however, demeans and politicizes the nature of law, the meaning of equality and the scope of unalienable rights. Trampled in the fashionable process are at least five of the foundational principles that govern all religious liberty litigation. These principles are examined *infra* in greater detail, but essentially include the ideas that:

1) certain rights are unalienable because they are directly given by God,
2) the free exercise of religion is an unalienable right,
3) every human being may exercise any unalienable right on an equal and absolute basis, free from the interference or regulation of civil government,
4) civil rights may not be expanded or contracted on account of religious practice or religious belief, and
5) civil acknowledgment of God the Creator in an oath or other official capacity, is not an unconstitutional religious test or establishment of religion.

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1. Various Articles and books have examined the topic of religious liberty emphasizing America's religious pluralism and accommodation of religious belief. *See,* P. SCHAFF, CHURCH AND STATE IN THE UNITED STATES (1888), and D. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT (1987). *But see* L. PFEFFER, CHURCH STATE AND FREEDOM (1953).
Others have examined the framer's intentions, the historical setting and the records of the Constitutional and Congressional debate. *See,* I. CORNELISON, THE RELATION OF RELIGION TO THE CIVIL GOVERNMENT IN THE UNITED STATES OF AMERICA (1895); C. JAMES, A DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (Da Capo Press, reprint ed., 1971) (Lynchburg 1900); S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (Cooper Square Publishers, reprint ed., 1968) (New York 1902); M. MALBIN, RELIGION & POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); *Report to the Attorney General, Religious Liberty under the Free Exercise Clause,* United States Department of Justice, Office of Legal Policy (August 13, 1986); R. CORD, SEPARATION OF CHURCH AND STATE (1982). Professor Cord examines several significant documents including Virginia's *A Bill Establishing A Provision For Teachers of the Christian Religion*, *Id*. at 242-243; James Madison's unrefuted *Memorial and Remonstrance Against Religious Assessments*, *Id*. at 244-49, and Thomas Jefferson's *A Bill for Establishing Religious Freedom*, *Id*. at 249; McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990).
Others have examined and analyzed Supreme Court opinions. *See,* Malbin, *The Supreme Court and the Definition of Religion* (Ph.D. diss., Cornell University, 1973); McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990); THE CONSTITUTION OF THE UNITED STATES, ANALYSIS AND INTERPRETATION, S. DOC. NO. 99-16, 99th Cong., 1st Sess. at 963 *et seq*. (1986).

This Article examines these principles in five sections. Section I of this Article focuses on the supreme law of the American regime--the laws of nature and of nature's God. It explains this law, its origins and its relevance for legal and Constitutional adjudication.

Section II highlights the Declaration of Independence as an expression of the laws of nature and nature's God. It chronicles the Declaration's succinct restatement of America's first principles: that all human beings are "created equal," they are "endowed by their Creator with certain unalienable rights," and civil governments are instituted to secure those rights.

Sections III and IV expand on the preceding analysis and explain how the People created a federal government, constitutionally limited its power, and adopted a Bill of Rights with the purpose of expressly forbidding the federal government from exercising its constitutionally limited power in such a way so as to deny or disparage equality or unalienable rights, including the unalienable right to the free exercise of religion.

Section V surveys contemporary religious liberty decisions handed down by the Supreme Court during the 1980's and early 1990's. This section examines the Court's "case law" and its neglect of the laws of nature and of nature's God, and unalienable rights in general. Section V also considers the Court's adoption of the flawed concept of balancing of rights against governmental interests. It discusses how state balancing of rights is contrary to unalienable God given rights. The section also discusses how state balancing of rights is contrary to the obligation of civil government to secure unalienable rights, and how balancing tends to nullify or marginalize such rights. Finally, the section discusses some positive developments with the Court's fledgling recognition of equality in matters pertaining to religious rights and liberties.

It is hoped that this Article will impress upon the reader the legal rule that every person enjoys in equal measure the same unalienable rights from God as their fellow human being, irrespective of their differing religious belief or lack thereof. But absent civil recognition and respect of *both* the principle of equality and unalienable rights, there can be no genuine liberty for any person or citizen. Enforcement of equality without a regard for unalienable rights has the effect of reducing all people to a condition of oppressive servitude where none enjoy fixed rights except under the illusory pledge of civil indulgence. Likewise, governmental regard for unalienable rights without an accompanying recognition of their equal endowment by God, has the fearful effect of justifying civil inquiry into a person's individual beliefs in order to "protect" those persons alone whose profession of belief shall square with that of the civil government or magistrate. Neither approach, however, is consistent with the laws of nature, the principles of the Declaration, federalism or the object of the first amendment.

I. THE LAWS OF NATURE AND OF NATURE'S GOD

Law is a rule of conduct that distinguishes between right and wrong. In the root, law is based on the idea that right and wrong never change, that common rules exist which are perpetual, universal and invariable. Where do these legal rules ultimately come from and what do they require? Every student of government knows that Congress and state legislatures make law. The executive branch

enforces the law. The Supreme Court has even declared its opinion are the Supreme law of the land, supposedly on par with the Constitution and the Bill of Rights.

The people of the United States, however, have declared that the source of its fundamental law comes from God. This assertion is plainly stated in the Declaration of Independence.[2] In drafting that document the framers expressed the unanimous legal sentiment of their newly created "united States." They declared that:

> When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with one 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 entitles them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

By referring to the "Laws of Nature and of Nature's God" in the Declaration of Independence, the signers of that document did not establish religion in any sense of the word. They established a nation and set its foundations upon a set of universal and perpetual legal rules laid down by God. They adopted certain rules that are essential to American liberty when they affirmed that America's right to be a nation among nations was based upon the "Laws of Nature and of Nature's God."

The phrase "Laws of Nature and of Nature's God" was not some mystical incantation or transitory deistic mishmash. It was placed in the Declaration to establish the legitimacy of American revolution and nationhood. The phrase referred to and incorporated the laws which God as the Creator of nature and nations,[3] had established to govern mankind, nations and the Universe.[4] The

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2. The legal title of the Declaration is "The Unanimous Declaration of the thirteen united States of America." For an in-depth historical analysis of the Declaration, *see* G. AMOS, DEFENDING THE DECLARATION (1989).

3. The French have coined the legal maxim: *Le ley de dieu et ley de terre sont tout un; et l'un et l'autre preferre et favor le common et publique bien del terre.* The law of God and of the law of the land are all one; and both preserve and favor the common and public good of the land. The Declaration affirms the idea that the law of God and the law of the land are all one. The term "Creator," found in the second paragraph of the Declaration, and the terms "Supreme Judge" and "divine Providence" in the last paragraph, refer to God in the first paragraph, *i.e.*, the "Laws of Nature and of Nature's God." These various references to God and the law of God in their most basic sense, serve as a foundation upon which the law of the constitution was subsequently erected.
The Supreme Court has also acknowledged the significance of these provisions of the Declaration by recognition of "the presence of the Divine in human affairs." Church of the Holy Trinity v. United States, 143 U.S. 457, 467 (1891). *See also*, H. LONG, THE AMERICAN IDEAL OF 1776 (1976); S. ROBINSON, AND . . . WE MUTUALLY PLEDGE (1964), and W. SKOUSEN, THE MAKING OF AMERICA (1985).

4. Sir William Blackstone recognized that when God created the universe, He impressed upon it certain laws. Blackstone included among the fixed laws those of motion, of gravitation, of optics, and of mechanics. Likewise when God created mankind, He endowed him with "certain immutable laws of human nature, whereby [man's] freewill is in some degree regulated and restrained." 1 W. BLACKSTONE, COMMENTARIES 39-40 (The Legal Classics Library, 1983) (London 1765). God gave man the ability to reason and thereby discover the essence of the laws of his Creator--laws that would contribute to his "substantial happiness." According to Blackstone, the accuracy of the conclusions that

framers could confidently rely on this law not only because it authorized revolution under certain limited conditions which the framers asserted were met, but because the laws of nature were themselves unchangeable over time. *Jura naturæ sunt immutabilia.*

These unchanging laws were ascertained through an examination of history, which when combined with a willingness to reason about that history in the unchanging light of Revelation,[5] eventually resulted in a legal consensus about the purpose of the "united States" and its various governments with respect to the security of rights and equality under law. The Bible was a natural book to consult because it discussed legal concepts from God's point of view over significant historical periods. The Bible also presented evidence about the universal object of law, civil government and its limited jurisdiction, and the nature and exercise of rights. To the extent that all the evidence, whatever its origin, was refined and tested in the crucible of human history and experience, and examined throughout the long process of public debate and in convention, such evidence was considered worthy of recognition and inclusion in the organic document of the new American order.[6]

II. THE DECLARATION OF INDEPENDENCE, EQUALITY AND UNALIENABLE RIGHTS

The framers, however, did not finish their work with a declaration that the laws of nature and of nature's God authorized the United States to "assume among the powers of the earth, the separate and equal station" of nationhood. The framers went beyond revolution and nationhood. They identified some of the most essential principles of the "Laws of Nature and of Nature's God." The Declaration then translated these principles into positive law. The framers understood that the Declaration's cardinal significance lay in the fact that it articulated universal legal ideas in concrete readable terms. It reduced philosophical and natural law concepts to positive law.[7]

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reason produced were suspect unless informed by the revealed will of God in the Bible.
For an excellent discourse and background on the principles of the laws of nature and of nature's God, *see* J.Q. Adams, *The Jubilee of the Constitution, a Discourse delivered at the request of the New York Historical Society, on Tuesday, the 30th of April, 1839*, reprinted in 6 J. OF CHRISTIAN JURIS. 1 (1987) (hereinafter J.Q. Adams).

5. *Lex est dictamen rationis.* Law is the dictate of reason. This maxim implies that "the common law will judge according to the law of nature and the public good."

6. For reference to the framer's discussion pertaining to reliance on the idea of the laws of nature, *see* 2 THE WORKS OF JOHN ADAMS, DELEGATES IN THE CONTINENTAL CONGRESS OF 1774, 371-374. John Adams also wrote in the Boston Gazette exhorting Bostonians to become attentive to the general grounds and principles of their civil government. He began, "Let us study the law of nature . . . ." 3 THE WORKS OF JOHN ADAMS, THE DISSERTATION ON THE CANON AND FEUDAL LAW 462 (1765).
The Declaration did not reflect a peculiarly American concept of law. In 1751 the French Baron de Montesquieu, whose legal treatise, "The Spirit of Laws," was well known to the framers. Montesquieu had also acknowledged that God was the lawgiver and was the Creator of the universe. He wrote, "God is related to the universe as creator and preserver; the laws by which he has created all things are those by which he preserves them." BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 2 (The Legal Classics Library, 1984) (Dublin 1751).

7. The reduction of principle to positive law refers to the universal principles that were reduced to writing and given legal force and effect in the 1776 Declaration. In this sense, this Article's reference to Positive law does not embrace positivism--that system of philosophy founded after the Declaration, by Auguste Comte (1798-1857) which rejects all

Thus, the Declaration declared the essential legal rules necessary to institute, organize and dedicate a civil government under law. It outlined and explained the object and duty of civil government. It declared that civil government was instituted to secure unalienable rights and to do so on an equal basis. These principles are the same for all persons everywhere. They are common, unchanging and universal. *Jus naturale est quod apud homines eandem habet potentiam.*[8] The Declaration did all these thing, but it did not establish religion.

A. Equal Rights

One of the first principles articulated in the Declaration of Independence is that of equality. The Declaration asserts that "we hold these truths to be self-evident, that all men are created equal." The rule of equality is tied to the creation of mankind by God. This proposition is not the incantation of a religious establishment. It is a legal fact acknowledged to be "self-evident." The Declaration is a legal instrument. It is intended for a legal object. It speaks of equality in a legal sense. The Declaration asserts that mankind is created and that as far as the law is concerned, mankind is created equally human by God.[9]

There are at least two consequences of this proposition. The first is that all human beings are endowed with the right to enjoy equal legal rights, legal opportunity and legal protection.[10] The second consequence of the rule of legal equality is that it neither mandates nor permits the civil government to ensure equal social position, economic well-being or political power. The Declaration's recognition that "all men are created equal" does not mean that the civil government must treat each person the same on the basis of what they do or on the basis of their conduct. Social and economic achievement is a function of behavior or conduct. It is a function of individual labor and enterprise. Political power is a function of political involvement and knowledge of the political system. As long as the law guarantees the right of an individual to participate on an equal basis with other individuals in achieving the desired social position, economic condition or political strength, then differences in outcome or result do not contravene the rule of legal equality.

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speculation concerning ultimate origins or causes.
So widespread is the Declaration's significance as the positive foundation of American law that it has even been likened to the Magna Carta. "If the Declaration of Independence is not obligatory, our entire political fabric has lost its magna carta, and is without any solid foundation. But if it is the basis of our form of government, it is the true expositor of the principles and terms we have employed." J. TAYLOR, NEW VIEWS OF THE CONSTITUTION OF THE UNITED STATES 2 (Da Capo Press, reprint ed., 1971) (Washington 1823).

8. Natural right is that which has the same force among all mankind.

9. Virginia's 1776 Constitution declared that "all men are by nature free and independent, and have certain inherent rights . . . ." R. PERRY & J. COOPER, SOURCES OF OUR LIBERTIES 311 (1978) (hereinafter R. PERRY). Pennsylvania's 1776 Constitution stated that "all men are born equally free and independent, and have certain natural, inherent and inalienable rights . . . ." *Id*. at 329. Delaware and North Carolina's 1776 Declaration of Rights proclaimed that "all men have a natural and unalienable right to worship Almighty God . . . ." *Id*. at 338, 356.

10. For a digest examining the equality principle as expressed in various state constitutional provisions and guarantees, *see* THE AMERICAN BENCH 2491-2493 (S. Livermore ed. 1985).

In essence, the rule of legal equality requires that the law be no respecter of persons. A law is a respecter of persons if it treats persons differently because of their immutable status or belief. The law is not a respecter of persons, however, if it treats persons differently on the basis of their acts or conduct.[11] The law looks to what a person does, not who they are. Those who deny the rule of equality or its origins in the law of God, or who argue that equality is subject to changing cultural or social conditions, or who twist the meaning of equality to require government mandated quotas, do so in contravention of the principle of equality.

President Abraham Lincoln, referring to the Declaration of Independence, affirmed that the United States was "conceived in liberty, and dedicated to the proposition that 'all men are created equal'."[12] Lincoln realized that the rule of equality applied to all men and nations without regard to the age in which they lived, their location on the globe, or the circumstances of history which surrounded them. He spoke of this rule in a speech at Springfield in 1857. He said that through the Declaration, the framers,

> meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence and augmenting the happiness and value of life to all people of all colors everywhere.[13]

Unfortunately, in many contexts including religious liberty litigation (as will be explored shortly) the principle of equality has been constantly ignored and labored against. The notion of rights conditioned upon status and religious belief has been much more preferred. It is quite common, therefore, that contrary to the rule of equality, litigants seek to diminish the rights of others because of the other's belief, or expand their own rights because of their own beliefs.

B. Unalienable Rights

The Declaration of Independence restates a second principle of the laws of nature and of nature's God. It declares that all men[14] are "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness . . . ." Unalienable (or inalienable) means undeniable or inherent. Unalienable rights are incapable of being lost or sold. Unalienable rights are retained despite government decrees to the contrary because civil government does not grant them in the first case. Moreover, no future generation may be disenfranchised of any unalienable right by the present generation. The protection of unalienable rights is common in many

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11. *See* Thompson, *Legal Equality: No Respecter of Persons*, 7 J. CHRISTIAN JURIS. 139 (1987) (hereinafter *Legal Equality*).

12. Lincoln, *Gettysburg Address*, in A DOCUMENTARY HISTORY OF THE AMERICAN PEOPLE 409 (A. Craven, W. Johnson and F. Dunn ed. 1951) *quoting* the Declaration of Independence.

13. A. Lincoln, *Speech at Springfield, 1857*, in LIVING IDEAS IN AMERICA 234 (H. Commanger ed. 1964).

14. The reference to "men" is a reference to human beings, not a designation or restriction of gender.

state constitutions.[15]

The Declaration tells us why these permanent characteristics attach to unalienable rights. It recognizes that unalienable rights are defined by God, not by the civil government.[16] Civil recognition of the idea that unalienable rights come from God is a fundamental element of the laws of nature. Whether it is also is a tenet of religion is quite beside the framer's legal concern. In the legal sense, therefore, the law of unalienable rights is not a religious establishment, but is rather a legal convention from eternity. *Lex est ab æterno.*[17]

The Declaration defines other unalienable rights besides life, liberty and the pursuit of happiness.[18]

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15. For state constitutional provisions referring to unalienable, inalienable, inherent or natural rights *see* Appendix A. *See also infra* text accompanying notes 99-110 for additional discussion of the relationship between unalienable rights guarantees in state constitutions and parental rights to direct the education of their children. For a discussion on the unalienable right of property, *see* Huenefeld, *The Challenge to Secure Unalienable Property Rights in the United States* (Masters Thesis, Regent Univ., 1989).

16. Federal courts do not have any general jurisdiction to define or construe the "Laws of Nature" and thus the substance of un-enumerated unalienable rights. Federal courts only have jurisdiction to construe those rights which are constitutionally enumerated (including offenses against the law of nations) and are properly before the courts in an article III case or controversy, or come within the court's jurisdiction as a result of being enumerated in a treaty, or as otherwise defined in article III. Federal courts, do not have jurisdiction to, *sua sponte*, discover and declare any other rights. That power is rather, reserved to the states or the people as recognized in the tenth amendment. It is the legislature or the people *qua* people which are empowered to discover and adopt their many rights that God has given. *Jus dicere, et non jus dare* [The province of a court or judge is to declare the law, not to make it].

This view, however, is not presently a majority position, though it was articulated with clarity in the context of a federal court presuming to void state laws it considered contrary to natural justice. In the case of *Loan Association v. Topeka*, dissenting Justice Nathan Clifford observed that:

> where the Constitution of the State contains no prohibition upon the subject, express or implied, neither the State nor Federal courts can declare a statute of the State void as unwise, unjust, or inexpedient, nor for any other cause, unless it be repugnant to the Federal Constitution. Except where the Constitution has imposed limits upon the legislative power, the rule of law appears to be that the power of legislation must be considered as practically absolute, whether the law operates according to natural justice or not in any particular case, for the reason that courts are not the guardians of the rights of the people of the State, save where those rights are secured by some constitutional provision which comes within judicial cognizance; or, in the language of Marshall, C.J., "The interest, wisdom, and justice of the representative body furnish the only security in a large class of cases not regulated by any constitutional provision."

87 U.S. (20 Wall.) 655, 667, 668-69 (1874). Justice Clifford warned that disregard of this rule would "make the courts sovereign over both the constitution and the people, and convert the government into a judicial despotism." Whether a court is politically liberal or conservative does not alter the despotic nature which pertains to the exercise of another's power. If a court exercises the power of unilateral amendment through its opinions, it is despotic irrespective of its political composition.
See infra notes 111-114 and accompanying text for an additional examination of federal jurisdiction.

17. Law is from everlasting. This is a strong expression to denote the remote antiquity of the law.

18. Neither the Declaration or any constitution could enumerate all the unalienable rights which God has given to all persons. Nor should they. These instruments, however, point to the source of rights--God our Creator. Future generations can look to that source and adopt through constitutional or statutory mechanisms, the particular rights God has granted which that generation considers are most suitable to assuring its own safety and happiness.
Several commentators recognize that the people retain rights not enumerated in the Constitution's Bill of Rights, but

It discusses the right of the people to select the form of government that will serve them and protect their rights. It explains that "Governments are instituted among Men, deriving their just powers from the consent of the governed." President George Washington declared that, "The basis of our political systems is the right of the people to make and to alter their constitutions of government."[19] Abraham Lincoln described the idea in nautical terms declaring government by consent "the leading principle--the sheet anchor of American republicanism."[20]

Since the people have an unalienable right to choose their own form of government and define its powers under law, the Declaration also recognized that the people have an unalienable right to alter or abolish that form of government under the law. The Declaration acknowledges the legal preconditions:

> That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The phrase "destructive of these Ends" refers to destruction of the unalienable rights which civil government is originally instituted to preserve. It was the right to alter or abolish the form of government which the people exercised when independence was declared from Great Britain and the Revolutionary War was subsequently waged.[21]

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many are reluctant to turn to the laws of nature or the idea that some rights are unalienable, in order to determine the definitive substance of those rights. *See generally* Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1981); Caplan, *The History and Meaning of The Ninth Amendment*, 69 VA. L. REV. 223 (1983), and THE RIGHTS RETAINED BY THE PEOPLE (R. Barnett ed. 1989). *See also* Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1984). *But see*, Lumsden, *The Ninth Amendment in Light of The Declaration of Independence,* (Masters Thesis, Regent Univ., 1990).

19. *Farewell Address of George Washington, September 17, 1796* in 1 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 217 (J. Richardson ed. 1896) (hereinafter MESSAGES AND PAPERS).

20. 2 THE COLLECTED WORKS OF ABRAHAM LINCOLN 266 (R. Basler ed. 1953). The principle of government by consent also requires that civil government exercise only those powers which are specifically granted. For instance, if the people desire the federal government to engage in an activity or pass some legislation which would require the exercise of a power not Constitutionally enumerated or extended to the Congress, then the people need to proceed through the proper channels and amend the Constitution. This will ensure that there is no mistake as to the nature, extent and type of power given, the proper scope of its exercise, or the branch to which it has been entrusted.
President James Monroe affirmed the supreme importance of trusting the people's judgment in matters of altering the power or jurisdiction of the civil government. He acknowledged that "it comports with the nature and origin of our institutions, and will contribute much to preserve them, to apply to our constituents for an explicit grant of power. We may confidently rely that if it appears to their satisfaction that the power is necessary, it will always be granted." *First Annual Message of James Monroe, December 7, 1817* in 2 MESSAGES AND PAPERS, *supra* note 19 at 181. To presume otherwise would allow the civil government to self-expand and define its own powers resulting in a practical attack on the people's unalienable right of government by consent--a right the civil government was created to protect, not destroy.

21. President Lincoln recognized the right of revolution. He remarked that:
> This country, with its institutions, belongs to the people who inhabit it. Whenever they shall grow weary of the existing government, they can exercise their *constitutional* right of amending it, or their *revolutionary* right to

Thus, the Declaration established a legal consensus on several principles derived from the laws of nature and of nature's God. The Declaration translated the common principles of equality and unalienable rights into positive law. Civil government was and is obliged to observe the rule of legal equality. It must recognize that all human beings enjoy certain unalienable rights from God--rights that are not created by the civil government, but which that government is nevertheless obligated to protect to the extent that the people articulate such rights in their constitutions or statutes.

C. Undermining the Legal Consensus

The equal security of unalienable God-given rights defines the backbone of the American legal consensus. The equal security of unalienable God-given rights by the civil government does not constitute a religious establishment. The American legal consensus, however, has always had its detractors. Former President John Quincy Adams lamented in 1839 that "there are still philosophers who deny the principles asserted in the Declaration, as self-evident truths--who deny the natural equality and inalienable rights of man."[22] The modern lament is even more sweeping. Not only are there philosophers who deny these principles, but their proteges are appointed to the judicial bench, they percolate through the state legislature and through Congress, they occupy the state house and the White House, and they teach and are taught in the law schools.

This onslaught of denial was accelerated most notably in the United States, during the generation in which Oliver Wendell Holmes, Jr., published his book The Common Law.[23] Holmes' thesis was

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> dismember or overthrow it . . . Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?

First Inaugural Address of Abraham Lincoln, March 4, 1861 in 6 MESSAGES AND PAPERS, *supra* note 19 at 10 (emphasis in original).

The Declaration of Independence discusses the steps of revolution quite closely. It asserted that, "[p]rudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." The framers recognized that "[s]uch has been the patient sufferance of these Colonies." They noted that in "every stage of these Oppressions we have Petitioned for Redress in the most humble terms." Petitioning, however, was not a sufficient remedy for the people, for "when a long train of abuses and usurpations, pursuing invariably the same Object, evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." Lincoln also recognized that God's laws govern in the affairs of nations. "If the Almighty Ruler of nations, with his eternal truth and justice, be on your side of the North, on yours of the South, that truth, and that justice, will surely prevail, by the judgement of this great tribunal, the American people." *Id*. at 11.

22. *See* J.Q. Adams, *supra* note 4 at 19.

23. O.W. HOLMES, JR., THE COMMON LAW & OTHER WRITINGS (The Legal Classics Library, 1982) (Boston 1881). An analogy to baseball may illustrate in a limited way, the differences between the American historical consensus and the modern legal usurpers. When two baseball teams play each other they both agree prior to the game that definite rules of the game apply to each other on an equal basis. If Team A claimed its batters get four instead of three strikes before an out is called, but insisted on three strikes for the batters on Team B, we could say that Team A isn't playing by the rules. It would be also unfair if team A simply changed the rules in the fifth inning because it considered a new baseball methodology had then evolved into being (*i.e.*, they were losing) or that the psychological or political impact of losing should, as a matter of law, prevent the other Team from winning.

that law was subject to an evolutionary framework and methodology. This approach permitted its expositors in the law schools and in the various branches of civil government, to adjust the scope, meaning and basis of law to mirror their own view of what society should be. The adjustments were not limited to those choices available between legitimate competing legal options--options allowed by the laws of nature and of nature's God, the positive law of the Declaration, or written constitutions based thereon. The radical adjustments focused on altering the American legal consensus itself--on fundamentally altering the nature and source of American law.

The evolutionary approach ultimately rejected the consensus about the laws of nature and of nature's God. It rejected that law's legal conceptualization of equality--that all men are created equal. The approach jettisoned the consensus that every human being had certain rights from God that were unalienable. It also rejected the notion that government should secure those rights subsequently defined in a written constitution.

As such, Holmes' subsequent conservative and liberal philosophical converts rejected the idea that indisputable and perpetual rules exist. Given the passage of time, chance and cultural circumstances, the most universal doctrines of the law, of right and wrong, could be undone or changed. In a now famous reference, Holmes re-conceptualized the life of the law as "power, not logic." The American legal consensus, however, accepted neither precept. The American legal consensus affirmed in the Declaration that the life of the law is Revelation, both natural and Divine--Revelation with a common Author, God the Creator. When logically understood and applied taking into account past human history and experience, this view of the life of the law remains vibrant and alive, a result not possible with either power or logic alone.

The logical extension, however, of recasting the law in evolutionary terms and public policy terms,

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If Team B had any sense at all, it would declare: "We will not play Team A if it won't play by the rules." The decisive and controlling principle that "three strikes and you're out," cannot be ignored if the game is to proceed. Moreover, if the umpire said that "Four strikes for Team A is implied in the ordered concept of baseball liberty or essential to fundamental baseball fairness" we would rightly conclude that the game was ideologically rigged or the umpire was bribed or dishonest. Our remedy would be to "throw the ump out" and get someone else in there to do the job according to the rules.

Likewise, respect for the law and the ensuing Constitutional adjudication of rights, cannot long continue if the decisive and controlling ground rules are ignored, judicially altered in mid-Constitutional regime or crudely politicized. Though we may certainly "throw the judges or justices out" through impeachment, the better long term solution is to discard the defective evolutionary legal monocle through which courts view the law and the Constitution. Revive the law first, then appoint knowledgeable *and willing* men and women who will not be bribed with self-importance or be a party to the lucre of political approbation.

Now if fixed ground rules for a game are crucial to its continuance, how much more crucial are the common ground rules which govern rights, equality and the Constitution itself? Just as the umpire does not make the rules of the game, but is obligated to secure the rights of the players under the rules, so too the civil government is obligated under the law to secure the unalienable rights of the people to the extent those rights have found a foothold in a constitution or the written statute law. And just as defiance and disregard of the rights of the players by the umpire merits the umpires dismissal, so too civil defiance and disregard of the civil obligation to secure the constitutionally or statutorily enumerated unalienable God-given rights of the people, must eventually warrant the appropriate exercise of the people's right to alter or abolish that government.

produces a jurisprudence that embraces a legal standard of "acceptable and unacceptable conduct" governed by a gimmicky psychological and political frame of reference. No longer able to recognize or quote the law, most legal and judicial discourse has been reduced to squabbling over the uncertain meaning of relative opinions. The Supreme Court's Constitutional and religious case decisions are no exception to this trend as shall now be considered.

III. CONSTITUTIONAL ACKNOWLEDGMENT OF GOD AND PROHIBITION OF RELIGIOUS TESTS

We have examined the laws of nature and of nature's God and two of its positive prescriptions in the Declaration of Independence: equality and unalienable rights. The rules of legal equality and of unalienable rights impact many different substantive areas of the United States Constitution and the constitutions of the several states. This Article has elected to generally focus consideration of the rule of legal equality and unalienable rights in the context of religious tests and free exercise as expressed in the Constitution and the Bill of Rights. Thus, section III examines the requirements and prohibitions of the United States Constitution's oath requirement in article VI, and section IV explores the first amendment.[24]

A. An Oath Implies an Appeal to God

Article VI of The United States Constitution requires that certain public officers "shall be bound by Oath or Affirmation, to support this Constitution, but no religious test shall ever be required as a qualification to an office or public trust under the United States." What is an oath? What does it do and why is it required? How does it differ from a religious test?

In its most basic sense, an oath serves as the strongest guarantee of good faith performance that can be given between two parties. The oath creates a unity of intent, words and conduct. It binds the three together into one. Hugo Grotius, the distinguished father of international law has observed that "[t]he person who takes an oath is bound in two ways: that his words should agree with his intent, . . . and secondly, that his actions should be consistent with his words."[25] If a man's words do not agree with his intent then he swears falsely. If his actions do not agree with his words then he perjures himself.

Noah Webster's 1828 American Dictionary of the English Language also defines the law of oaths. It defines an oath as,

> a solemn affirmation or declaration, made with an appeal to God for the truth of what is affirmed. The appeal to God in an oath, implies that the person imprecates his [God's] vengeance and renounces his favor if the declaration is false, or if the

24. For an expression of the equality principle in the context of state constitutions, *see supra* note 10. For an expression of the unalienable rights principle in the context of state constitutions, *see supra* note 15 and Appendix A.

25. H. GROTIUS, ON THE LAW OF WAR AND PEACE, (The Legal Classics Library, 1984)(Oxford 1925) 370.

> declaration is a promise, the person invokes the vengeance of God if he should fail to fulfill it.[26]

An oath is not a naked affirmation or promise. An oath is an affirmation or promise made "with an appeal to God." If no appeal to God is present, the affirmation cannot be solemn, nor the truth of what is affirmed made secure to remove controversy. What is the substance of such an appeal to God? The appeal to God implies that the person seeks God's favor to fulfill the terms of the oath. The appeal also implies that the person taking the oath renounces God's blessing and should rightfully come under God's direct judgment or punishment if there should be a failure to fulfill the terms of the promise.

Black's Law Dictionary mirrors this definition's essential features. "The central idea of an oath would seem to be, however, that of a recognition of God's authority by the party taking it, and an undertaking to accomplish the transaction to which it refers as required by his laws."[27] The legal maxim *Jus Jurandi Forma Verbis Differt, Re Convenit; Hunc Enim Sensum Habere Debet: Ut Deus Invocetur* is instructive. "The form of taking an oath differs in language, agrees in meaning; for it ought to have this sense: that the Deity is invoked."[28] The general sense of an oath or affirmation is that the Deity is invoked, his blessing is sought, and his vengeance is warranted if the deponent (or affiant) should fail to fulfill his or her obligations.

While an oath by definition is taken before God and presumes that God is relevant to its object, Hugo Grotius adds that an oath sworn in the name of a thing created by God has the same effect, though the words differ. Thus, to swear by heaven or earth or the universe is to swear by the things which God has created. Grotius even says that an oath is binding even if sworn to by a false god. He remarks:

> if any one has sworn by false gods the oath will be binding. For although possessed of false notions, he nevertheless has a respect for divinity under a general aspect; and so, if perjury has been committed, the true God interprets it as done to His harm.[29]

Grotius is quick to add, however, that the general custom was not to propose an oath in such a form. He says:

> holy men never proposed an oath in such a form, and still less swore in that way . . . ; but nevertheless, if those with whom they had dealings could not be induced to

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26. N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New Haven 1828).

27. BLACK'S LAW DICTIONARY (4th ed. 1968).

28. This maxim appears to be derived from that which Hugo Grotius wrote: "In regard to form, oaths differ in words, but agree in substance. An oath ought to contain this element, that God is invoked, as, for example, in this way: 'God be my witness', or 'God be my judge', two expressions which amount to the same thing." H. GROTIUS, ON THE LAW OF WAR AND PEACE, (The Legal Classics Library, 1984) (Oxford 1925) 370.

29. *Id.* at 371.

> take an oath in any other way, they made contracts with them, and they themselves would swear as their duty required, but they would accept from the others such an oath as could be procured.[30]

What can be gleaned from these observations? First, that an oath is by definition, a mechanism that is intended to demonstrate good faith performance by reference to something or someone greater than the affiant or deponent. Second, the something or someone reflects a divine being or his creation. Third, that in arm's length transactions (contract), parties were free to swear by anything or anyone greater, at their own discretion, though the general rule was to swear by Almighty God, the Creator. Fourth, that perjury triggered a penalty including curses or the divine judgment of God. Fifth, a naked unhallowed promise is not an oath in either form or substance for it invokes nothing or no one greater than the one who promises.

B. The Constitution's Article VI Oath Implies An Appeal to God

It has already been noted that Article VI of The United States Constitution contains an oath that certain public officers "shall be bound by Oath or Affirmation, to support this Constitution, but no religious test shall ever be required as a qualification to an office or public trust under the United States."[31] This oath requires support for the federal Constitution as the supreme law of the land. Senators, Representatives, the members of state legislatures, and all executive and judicial officers are required to take the oath to support the supremacy of the Constitution, and not their own opinions or the platforms of their political parties.

The oath is also a *condition* that must be met prior to assumption of an office of public trust. If an individual is elected or appointed to a public office, he or she must take an oath prior to entering into the office. If an official refuses or is unable to take the oath, then he or she fails to meet the condition and is ineligible to assume the office though he or she may otherwise be qualified. Thus, the requirement of an oath can preclude otherwise qualified individuals from assuming office. It is clear that an individual who refuses "to support this Constitution" will be ineligible for office.

In electing to secure fidelity to the Constitution, the framers recognized that civil government has a legitimate interest in ensuring officials support the Constitution, but could this interest be secured by *requiring* that the affiant to: 1) swear by God or "show respect for divinity under a general aspect," and/or 2) affirm various religious tenets?

It is clear that an oath is compulsory by definition. Anyone who seeks to hold public office must swear or affirm to its terms. On the question of compulsion, therefore, it must be acknowledged that *requiring* that the affiant to swear or affirm support for the Constitution was regarded by the framers

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30. *Id.* at 371-372.

31. Article II also contains an oath requiring the President to "solemnly swear (or affirm) that I will faithfully execute the Office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." U.S. CONST., art. 2, § 1.

as entirely appropriate. The only question that remained, therefore, pertained to the means of performance. What means would constitute a suitable guarantee of performance? What mechanism would best ensure that the oath to support the Constitution would be taken with integrity--that the unity of intent, words, and conduct would be bonded together to remove all doubt about performance?

At least three options were available. Let us consider them as questions. First, would an unhallowed naked promise be sufficient to guarantee support of the Constitution? Second, would acknowledgment of God or "respect for divinity under a general aspect" constitute a sufficient guarantor? Or third, should affirmation of various religious tenets be required unto the end of ensuring that the oath is taken with integrity and that good faith performance could be expected?

In answering these question the framers of the federal Constitution rejected the mechanism of an unhallowed naked promise as a sufficient guarantor of the integrity of swearing or of performance. By asserting that officials "shall be bound by Oath or Affirmation, to support this Constitution," they selected the legal device of an oath as a condition of eligibility, and therefore, by definition (or default), elected to make acknowledgment of God or "respect for divinity under a general aspect" a sufficient guarantor of performance. By adding, however, "but no religious test shall ever be required as a qualification to an office or public trust under the United States," they rejected affirmation of various religious tenets as a mechanism of ensuring that the oath would be properly performed with integrity.

The oath articulated in article VI therefore carries with it this sense: that God is invoked, his blessing sought and his vengeance justified if the deponent should fail to fulfill his or her obligation "to support this Constitution." The oath or affirmation "to support this Constitution," however does not incorporate an affirmation of religious tenets or doctrine and therefore avoids the indica of a religious establishment.

If the article VI oath is taken without the sense that God is invoked, then the oath is either sworn to falsely in that the words do not agree with the intent, or is susceptible to the charge of perjury if actions do not agree with words. If the unity of intent, words and conduct cannot be maintained then false swearing becomes perjurious. Upon conviction, removal from office is warranted for perjury because perjury renders the official's word hypocritical and untrustworthy. The official's guarantee becomes worthless.

If, on the other hand an individual takes the "oath" with the publicly declared intention that he is not making an appeal to God, or that God's blessing is not sought or that God's vengeance is not justified, then such an individual does not commit false swearing or perjury. Such an individual, however, has not taken an oath. For while the form of taking an oath may differ in language, it must have "this sense: that the Deity is invoked." An oath taken contrary to this sense is no oath at all. It is but an unhallowed naked promise and contains no guarantee of performance that satisfies the legal predicate.

Article VI of the Constitution requires more than a promise. It requires an oath. An unhallowed

naked promise (irrespective of its form) will not suffice. If an individual fails to conform his declaration to the sense of an oath, he fails to take an oath in the sense the Constitution requires. Consequently, that individual must be denied admission to the public office he or she seeks.

C. Requiring an Appeal to God is not an Unconstitutional Religious Test

What is apparent from the preceding discussion is that the Constitutional requirement of an oath rightly understood as involving an appeal to God as a guarantee of performance, cannot be construed to be a religious test. The Constitution requires an oath "but" prohibits a religious test as a qualification for public office. The key word is "but"--"but no religious test shall ever be required as a qualification . . . ." The word "but" indicates that the oath retains its essential feature--an appeal to God as a guarantee of performance of what is asserted--*but* the terms of the oath are not to be clouded by the sectarian tenets of any particular religion. The required oath may embrace only the essence of its purpose--invocation of the Creator God as a guarantee of performance.[32] The Article VI oath cannot be made to expand the guarantee to some other purpose such as questions relating to eternal security, the infallibility of the Bible, belief or disbelief in Jesus Christ or points of doctrine. The federal Constitutional oath is limited to affirmation that the official will support the Constitution, and not that he or she will support the tenets of any particular religious teaching.

D. Prohibiting a Religious Test is Consistent with the Law of Nature

Article VI's ban on a religious test protects the religious liberty of otherwise qualified public officials who happen to adhere to the tenets of a religion (or no religion) which is at variance with the beliefs of those who control the various legislatures. Without this Constitutional protection, legislative officials could rewrite the oath to suit their own sectarian or political ends. An otherwise qualified official could be excluded through statutory imposition of a religious test, the terms of which that party who controlled the legislature know would render an otherwise qualified official ineligible. For instance, the 1682 Frame of Government of Pennsylvania required that officials profess "faith in Jesus Christ" as a necessary qualification for public office.[33]

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32. South Carolina recommended that the clause [article VI] be amended to read that certain public officers "shall be bound by Oath or Affirmation, to support this Constitution, but no *other* religious test shall ever be required as a qualification to an office or public trust under the United States." The addition of the word "other" indicates that from South Carolina's point of view, the taking of an a oath to support the Constitution was a religious test, presumably because it equated accountability to God with religion *per se*. Even inclusion of the word "other," however, does not indicate that the oath was something to be properly stripped of recognition that the affiant was accountable to God. *See Ratification of the Constitution by The Legislature of the State of South Carolina, May 3, 1788*, in DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 398, 69th Cong., 1st Sess. at 1023 (1927) (hereinafter DOCUMENTS).
Maryland's Constitution of 1776 recognized that sectarian religious differences were not to defeat the administration of an oath. Article 36 provided for attestation of the "Divine Being" without prescribing any specific form or manner of oath. *See* R. PERRY, *supra* note 9 at 350.

33. *The Frame of Government of Pennsylvania, (Section 34, April 25, 1682)* in R. PERRY, *supra* note 9 at 220. *See also The Pennsylvania Charter of Privileges, (Article First, October 28, 1701), Id.* at 256. The question of whether a state can require one to swear or affirm "faith in Jesus Christ" as a necessary qualification to public office as did

The federal Constitution, however, took a different approach. Public officials may not be required to, or prohibited from, professing "faith in Jesus Christ." A public official may not be required to subscribe or required to renounce the substance of any particular religious tenet. A public official may only be required to subscribe "to support this Constitution" and to do so by "Oath or Affirmation" which by definition requires an appeal to God the Creator.

Thus, the prohibition on a religious test protects the free exercise of religion of a public official in two ways. First, the official's religious liberty is protected from those who seek to force a profession of doctrinal belief. Second, religious liberty is protected from those who seek to compel a renunciation of doctrinal belief. Moreover, by providing that no one religious body or sectarian teaching could be made orthodox in matters of civil administration, the prohibition on religious tests equally precluded official sectarian control over the faith of civil officials. The idea that civil governments were instituted to protect religious liberty on an equal basis and prohibit civil coercion or interference with the free exercise of religion was effectively in place well before the first amendment came along.[34]

President Thomas Jefferson understood that religious liberty was a natural or unalienable right. He also recognized that such a right would be secured if religious tests were disallowed. This view, however, did not emasculate the nature or purpose of an oath.[35]

Pennsylvania, on the grounds that Jesus is God, is a question upon which the colonies were divided. The central concern about the oath, however, and one which must be observed, is that God the Creator is invoked. Emphasis on God as Creator of mankind (as distinguished from Jesus Christ as redeemer of mankind) tips the question to the negative because it is in the capacity as created beings that men as God's creation are answerable to God and his laws, and which as a consequence of the Declaration's restatement and the Constitution's incorporation of those laws or the principles derived therefrom, permit the civil government to pre-condition public service upon an oath taken with acknowledgment of accountability to God in his capacity of Creator. *See infra* note 179.

34. *See* McDaniel v. Paty, 435 U.S. 618 (1978). *McDaniel* involved a Tennessee constitutional and a statutory provision which precluded ministers from serving in certain public offices. Tennessee took the ignorant position that it had a compelling interest in maintaining separation of church and state that warranted the clergy disqualification. The assumption was that anyone holding religious convictions and expressing them by choosing a vocation as a clergyman, would have to renounce that calling in order to qualify for public office. The Court disagreed with this assumption and struck down Tennessee's statutory provision on first amendment grounds, a plurality holding that the mere status of being a clergyman was not related to any danger to the political process. While concurring in the result, three Justices reasoned that imposition of restrictions upon one's status as a clergyman also penalized religious belief and religious practice. *Id.* at 629, 633 (Justices Brennan, Marshall and Stevens, concurring).

35. Thomas Jefferson recognized the difficulties that attended religious test oaths. He said that deeming,

> any citizen as unworthy [of] the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which, in common with his fellow citizens, he has a natural right.

R. CORD, *supra* note 1 at 250. Jefferson also recognized that religious tests tended to degrade religion itself and noted that compulsory profession or renunciation "tends also to corrupt the principles of that *very* religion it is meant to encourage, by bribing, with a monopoly of worldly honors and emoluments those who will externally profess and conform to it." R. CORD, *supra* note 1 at 250 (emphasis in original).

E. The Supreme Court has Confused an Oath with a Religious Test

The Declaration of Independence referred to the importance of the "Creator," the laws of "Nature's God," the "Supreme Judge of the World," and "divine Providence" in establishing the United States. The Declaration's reliance upon the "Creator," laws of "Nature's God," the "Supreme Judge of the World," and "divine Providence" was considered by its framers to be an entirely lawful and appropriate *civil* declaration. These were not the sum and substance of any religious establishment. The Constitution's article VI required an oath to support the Constitution that carried with it a necessary appeal to God as a guarantor of performance to support the Constitution. This requirement was also considered by its framers to be an entirely appropriate *civil* requirement. Article VI, however, prohibited the civil government from imposing a religious test. The imposition of a religious test was not considered a lawful or appropriate concern of civil government.

It is quite natural that these references in the Declaration should be followed by a Constitution that requires an oath which indicates that an appeal to God in taking the oath is necessary. Nevertheless, the Supreme Court has arrived at precisely the opposite conclusion in *Torcaso v. Watson.*[36]

In *Torcaso* the Court had to decide the federal Constitutionality of Article 37 of Maryland's Constitution. That provision required that "[N]o religious test ought ever to be required as a qualification for any office of profit or trust in this State, other than a declaration of belief in the existence of God . . . ." When considered in light of the previous discussion, Maryland's Article 37 clearly equated belief in the existence of God with a religious test as a matter of state constitutional law. If a person wanted to serve in an office (at issue was a notary public) in Maryland, he or she had to first declare a belief in the existence of God. This requirement, however, was objected to on the grounds that it constituted a religious test as a matter of federal constitutional law, *i.e.*, it violated article VI's requirement that "no religious test shall ever be required as a qualification to an office or public trust under the United States."

The Court held that refusal to affirm belief in God was not a valid disqualification for holding a state commission as a notary. In other words, those individuals who would not acknowledge belief in God, could not be denied their office if they were otherwise qualified. Mr. Justice Black declared that the state's constitutional requirement "sets up a religious test which was designed to . . . bar every person who refuses to declare a belief in God" from holding public office in Maryland.[37]

Justice Black was correct in pointing out that the state's constitutional requirement "was designed

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36. 367 U.S. 488 (1961).

37. *Id*. at 489-90. The Court went to great length to argue that Maryland's "belief in God" provision is the sort of invidious religious persecution the framers sought to avoid. The Court can only reach this result, however, by wrongfully equating belief in God as a mechanism for attesting to the truth of a promise, with religious tenets and sectarian doctrine (specifically the Oath of Supremacy). *See Id*. at 490-91. But see Texas Constitution, Article 1, section 4: "No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being."

to . . . bar every person who refuses to declare a belief in God" from holding public office in Maryland. This, however, was not the issue. The issue was whether as a matter of federal Constitutional law under article VI, Maryland's belief and declaration requirement was a prohibited religious test. When Maryland's constitutional provision and its characterization are considered in light of the historical recognition that an oath by definition involves an appeal to God as a guarantor of performance, then emphatically neither Maryland's own constitutional characterization of its oath as an exempt religious test, nor its requirement that officials must declare a belief in God, can be said to control the construction of article VI.

The Court's holding in *Torcaso* cannot be reconciled with the purpose of an oath. An oath "ought to have this sense: that the Deity is invoked." If an oath is intended to be secured by an appeal to God as a mechanism to ensure the faithful discharge of the office, an official that refuses to acknowledge God's existence cannot be said to have complied with that means. Belief in or an appeal to God is a necessary prerequisite to taking an oath. The *Torcaso* Court, however, incorrectly equated an oath that by definition requires its terms to be affirmed by invocation of the Deity, with a sectarian or religious test.

It could be argued, as Grotius observed, that an oath allows "respect for divinity under a general aspect," and cannot be confined to a declaration in the existence of God alone, and therefore Maryland's constitutional requirement was too narrow. It may also be argued that if those whom the people of the State of Maryland called to public office "could not be induced" to take an oath through the invocation of God, then it is permissible to accept from that official such an oath as can be procured and thus Maryland's constitution cannot require the invocation of God or a deity, but only such an invocation as the official is willing to give.[38]

While these arguments carry some weight as policy measures, they do not make any inroads on the proposition that the framers were free to select among the means which they considered best to secure performance of the office's obligations. They could have adopted any one of a number of mechanisms to remove doubt from among the people about whether or not a given official would actually perform the obligations of his or her office or simply be a tyrant. They elected, however, to achieve this objective by an appeal to God as reflected in the choice of an oath. They rejected religious tests since such were too amenable to partisan abuse. They rejected naked promises since such were not guarantors of much of anything (as any first year contracts student should know). The

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38. An atheist may object that calling upon a man to acknowledge God compels a profession of belief and that government ought not compel profession. It may be answered that this objection reaches too far. It reaches to the requirement of the oath itself. For the oath, even a pagan or secularized one, requires a profession of some type. Not even the Court has object to oaths *per se*. The requirement of an oath may disqualify an atheist if the oath which he or she refuses to take has this meaning--that God is invoked as security of performance for the promise given. Civil government may call upon a public official to acknowledge God as a guarantee that the official will discharge the requirements of his or her office. That the atheist is a person of exceeding integrity is no more germane to the question than an equal finding with respect to the believer. (Indeed, who sets out to do business with persons of no integrity?) Insofar as an acknowledgment of God is a condition of holding public office and *never* a condition for the exercise or security of any unalienable or other civil right, it is a proper civil requirement. Any who fail to meet the condition irrespective of their sectarian belief or lack thereof is barred from the office.

framers selected the oath as the mechanism and figured that this would serve as the strongest guarantee of good faith performance that can be given between two parties. Whether the framers chose wisely or foolishly is an interesting question. It is not, however, a question over which an Article III court has jurisdiction.

If Maryland, however, wished to select a simple naked promise as a guarantor of its own state functions and for some reason thought it wise to do so, it could certainly do so without interference from article VI. If Maryland simply adopted a promise as its guarantee mechanism, its officials would nevertheless be required to also conform to the federal standard of article VI which invokes God because that article applies to officers both of the United States and the several states. Maryland, however, could not adopt the more rigorous religious test criteria without running afoul of article VI.

The practical effect of the Court's reasoning in *Torcaso* is two fold. First, the Court obliterated the definition of an oath through secularization. The oath was obliterated through secularization by mistakenly equating belief in God with specific religious tenets and tests. The word "but" in article VI was intended to preclude such a result, but it was neglected.

Second, the Court voided the oath's purpose of guaranteeing performance of a civil office through invocation of the Creator. This occurs when the deponent, no longer required to swear or affirm before the Creator, now only promises that *he* will guarantee *his own* performance on the weight of *his* own word. This "guarantee" has the practical effect of reducing an oath taken with an appeal to God, into an unhallowed naked promise--precisely what the Constitution avoids. How wise is it for a nation to be governed by public officials whose promise of constitutional fidelity is based only upon an unhallowed naked promise? Not even the performance of contracts are assured in such a pointless manner. Consideration is needed. What nation, therefore, would willingly choose to be governed by such hollow promises?

In effect, the Court has declared the broader evolutionary and humanistic principle that the Creator of the Universe is Constitutionally constrained to a narrowing and centripetal sphere of religious dogma. Having abandoned the roots of the American Order in the laws of nature and of nature's God, the Court no longer has an adequate legal framework for distinguishing between the universal necessary and proper relationship between God and civil government discussed in sections I and II *supra*, and the Constitutionally impermissible relationship between religion and the civil government.

The Supreme Court, with the untiring assistance of lawyers urging evolutionary and humanistic notions of religious liberty upon it, has lumped God and religion all together for Constitutional purposes. While God is certainly expressed through religion, the Creator of the universe and lawgiver of nations is not limited to religion. Neither, as the Court is predisposed to conclude, is every reference to God an unconstitutional establishment, or as the Court's dissenters habitually argue, is every reference to God Constitutional simply because it comports with American history

and tradition.[39]

F. Article VI is a Prelude to Free Exercise and Non-Establishment

The laws of nature, the Declaration's rule of equality and unalienable rights, and article VI's requirements and prohibition are conceptual preludes to the first amendment. The Declaration's reliance on equality and unalienable rights, and article VI's recognition of God, yet prohibition on a religious test, contain the seeds that also animate the first amendment.

Article VI's prohibition on religious tests protected public officers from compulsory profession or renunciation of religious belief as a prerequisite to holding public office, thereby protecting their unalienable right to the free exercise of religion and effectuating the no-establishment principle. Moreover, by providing that no one religious body or sectarian teaching could be made orthodox in matters of civil administration, the prohibition on religious tests equally disestablished official sectarian control over the faith of civil officials. The idea that civil governments were instituted to protect religious liberty on an equal basis and prohibit civil coercion or interference with the free exercise of religion was effectively in place.

The foundations of the first amendment were laid in article VI to the extent that it Constitutionalized the decisive and controlling distinction between the proper relationship of God to civil government, and the prohibited relationship of religion to civil government. Unfortunately, the Supreme Court in *Torcaso* blurred this distinction early on and therefore the distinction is not clearly understood today. Consequently, cases decided under the first amendment follow obscure conceptual suit with a vengeance.

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39. If an appeal to God implied in the oath of office were a religious establishment or test, then the Declaration's express appeal to the "Creator," the laws of "Nature's God," the "Supreme Judge of the World," and "divine Providence" would render that instrument religious. Going a step further, reducing an appeal to God in any context to a religious proposition would not only implicate the Declaration of Independence, but Congressional statutes admitting several states into the Union providing that their constitutions should be republican in form and "not repugnant to the principles of the Declaration of Independence," would of absurd necessity constitute the quintessence of an unconstitutional establishment of religion. Enabling legislation which binds states to the requirement that their respective constitutions should "not be repugnant to the principles of the Declaration of Independence" include Alaska, July 7, 1958, P.L. 85-508, 72 Stat. 339; Arizona, June 20, 1910, c. 310, 36 Stat. 557, Aug. 21, 1911, No. 8, 37 Stat. 39, Feb. 14, 1912, 37 Stat. 1728; Colorado, Mar. 21, 1864, c. 37, 13 Stat. 32, Mar. 3, 1875, c. 139, 18 Stat. 474, Aug. 1, 1876, 19 Stat. 665; Hawaii, Mar. 18, 1959, P.L. 86-3, 73 Stat. 4; Montana, Feb. 22, 1889, c. 180, 25 Stat. 676, Nov. 8, 1889, No. 7, 26 Stat. 1551; Nebraska, Apr. 19, 1864, c. 59, 13 Stat. 47, Feb. 9, 1867, c. 36, 14 Stat. 391, Mar. 1, 1867, No. 9, 14 Stat. 820; Nevada, March 21, 1864, c. 36, 13 Stat. 30, Oct. 31, 1864, No. 22, 13 Stat. 749; New Mexico, June 20, 1910, c. 310, 36 Stat. 557, §§1 to 18, Aug. 21, 1911, No. 8, 37 Stat. 39, Jan. 6, 1912, 37 Stat. 1723; North Dakota, Feb. 22, 1889, c. 180, 25 Stat. 676, Nov. 2, 1889, No. 5, 26 Stat. 1548; South Dakota, Feb. 22, 1889, c. 180, 25 Stat. 676, Nov. 2, 1889, No. 6, 26 Stat. 1549; Utah, July 16, 1894, c. 138, 28 Stat. 107, Jan. 4, 1896, No. 9, 29 Stat. 876; Washington, Feb. 22, 1889, c. 180, 25 Stat. 676. Vermont, admitted, Feb. 18, 1791, c. 7, 1 Stat. 191, adopted a constitution that recited much of the Declaration of Independence therein.
See generally E. DUMBALD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 63 (1950).

IV. A BILL OF RIGHTS TO PROTECT RELIGIOUS LIBERTY

Thus far, this Article has identified the unbending laws of nature and of nature's God as the foundation upon which the principles of the Declaration are reposed. The principle that all human beings are created equal and the grant of unalienable rights referred to in the Declaration are derived from and animated by that law. As this law is unchanging, so too its principles are unchanging. While the applications of these principles differ, the principle of equality or the nature of unalienable rights is constant.

Nor does the existence of the rule of *stare decisis* (which is almost never applied as far back as the Declaration) diminish one iota the civil government's obligation to secure equality and unalienable rights as far as its respective constitution will admit. *Stare decisis* is actually short for *stare decisis, et non quieta movere,* which means "to stand by decisions and not disturb settled matters." Note that the doctrine is concerned with judicial decisions not legislative matters. It is also a policy proposition and not a fixed rule of law itself. The doctrine also implies that principles laid down in previous judicial decisions ought to be followed unless they contravene the ordinary principles of justice. We ought to affirm *stare decisis,* but reject judicial supremacy. Judicial opinions are evidence of law. Some opinions, however, are not good evidence because they usurp power not given, are badly reasoned or trample down the Constitution itself. The rule of *stare decisis* would have us stand by the rule of law first and then decisions based upon the rule of law thereafter. If a case decision does not first stand upon the rule of law, the doctrine simply does not apply.

This Article has also examined Constitutional expressions of the laws of nature and of nature's God. Article VI of the Constitution implicitly acknowledges that God is the Creator of the universe and the maker of nations, and that as a consequence of this understanding, he should be acknowledged by an oath as a condition to holding public office. Equally as a consequence, compulsory profession or renunciation of religious doctrine as a condition of public office is prohibited.

The framers, however, did not limit the implications of the laws of nature and of nature's God to article VI, for that law animated many different provisions of the United States Constitution as well as of the several states. It is well beyond the scope of this Article, however, to catalogue the relationship, let alone the ramifications of that law for each article of the Constitution. That task is briefly undertaken elsewhere.[40] This section will simply examine one additional implication of the laws of nature's God with respect to the first amendment's religion clauses.

When the framers of the first amendment declared that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," they did not depart from the legal foundation of the law of God they had so meticulously identified. They did not create an entirely new legal theory about equality, rights and religion. Indeed, they did not spin a legal web of humanistic or evolutionary convictions about the reach and scope of Congressional power into the

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40. *See* Morgan, *The Laws of Nature and of Nature's God: The True Foundation of American Law* (Simon Greenleaf Press, The Simon Greenleaf School Of Law) 1992.

religion clauses of the first amendment. It was not Holmes or humanism that animated the philosophy of the founding. In fact, the framers carried the ideas of the Declaration about law and about unalienable rights, and about the equality of the unalienable right of religious freedom, into the first amendment. This progression, however, is far from any modern judicial pleading, proceeding or decision.

On the technical side of ingrafting the implications about equality and unalienable rights into the Constitution, James Madison proposed that the Bill of Rights in general not be appended to the end of the Constitution as is the present case, but be interlined into the original text of the Constitution itself. The amendments would read much better in context and would follow the general train of thought of the document. If the amendments were approached from this point of view, most would have found their way into article I, section 9, since that section already contained a short list of several rights and their corresponding limitations on the power of Congress.[41]

The first amendment in particular, protects religious liberty from the *federal government's* general imposition of standards of religious belief and conduct. It was not written or intended to protect religion from state government impositions or establishments. The amendment also refined the jurisdictional relationship between religion and civil government touched upon in article VI. The religion clauses of the amendment did not introduce a new definition or meaning of rights or religion. The amendment reflected the rules of equality and rights which have been previously articulated and were then being further refined in the federal context.

A. Defining Religion as an Unalienable Right to be Freely Exercised

In examining the religion clauses of the first amendment, the question arises: "Is the right to the free exercise of religion an unalienable right?" This Article has heretofore indicated that unalienable rights exist and that they are given to all human beings from God. It has implied that the right to the free exercise of religion is an unalienable right of equal stature as the unalienable rights specifically enumerated in the Declaration of Independence. Ample evidence, however, is available to convert this implication into fact.

The legal definition of "unalienable," "rights" and "religion" all support the view that religious liberty is an unalienable right. Consider the word "unalienable." By definition unalienable means incapable of transfer or being taken away. In other words an unalienable right cannot be given away. More importantly, however, that which is unalienable cannot be taken or balanced away,

41. R. PERRY, *supra* note 9 at 422-423. Madison proposed to insert various amendments at the end of the first clause of article 1, section 6, amendments between the third and fourth paragraphs of article 1, section 9, amendments between the first and second paragraphs of article 1, section 10, amendments to article III, section 2, and amendments to article VI. The provisions for religious liberty were to be found between the third and fourth paragraphs of article 1, section 9. That section provides for limitations on Congressional power. The second [keep and bear arms] and third amendments [no quartering soldiers] could have also been considered in the context of article I, section 8 after clause 16.

especially by the civil government.[42]

The idea of rights as unalienable, indefeasible, indubitable or inherent was part and parcel of the framers' worldview and proceeds mathematically from the laws of nature and of nature's God. Though these different words may not have precisely the same meaning, they carry the same essence--that human beings have certain rights from their Creator which civil government is not authorized to deny or disparage.[43]

The idea of unalienability is easier to grasp than the idea of rights. This condition is owing to the modern deterioration of the definition of rights. The definition has been alloyed through impure construction and mishandling. Such is the fruit of an evolutionary approach. Unalienability on the other hand, has simply been ignored and thus has not suffered as much corrosion of its meaning. To the modern jurist, a right is considered as such simply because it is asserted as a right. For instance, Black's Law Dictionary declares that a right is "a power, privilege, faculty, or demand, inherent in one person and incident upon another."[44] In other words, the life of the law and of its rights, is power, not Revelation.

Black's notes that "the primal rights pertaining to men are enjoyed by human beings purely as such, being grounded in personality, and existing antecedently to their recognition by positive law." It is true that rights exist "antecedently to their recognition by positive law." The reference to "personality" and the "primal" aspect of man *qua* man, however, is entirely a different matter. The reference to "personality" and the "primal" is the modern response to figuring out how to have rights without using the words "Creator" or "Laws of Nature and of Nature's God."

To understand this modern primal view must one think like a primate?[45] The reader will quickly perceive the worldview difference between the original legal consensus and its primal usurpers. The modern approach reflects a confused (often termed complex) humanistic and evolutionary jurisprudence and is an absolute *non sequitur* from the laws of nature and of nature's God. It is the antithesis of the Declaration's consensus that human beings are created equal and "endowed" with

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42. Noah Webster's 1828 Dictionary defines unalienable as that which "cannot be legally or justly alienated or transferred to another." The concept of unalienability (assuming due process), however, does not preclude civil government from alienating human life in punishment for murder, from alienating a man's liberty through imprisonment upon conviction of crimes, or alienating a man's property through levy and execution for payment of legal judgments. The concept of unalienable rights does, however, preclude civil government from balancing such rights against governmental interests, whether such interests are compelling, rational or otherwise.

43. Virginia 1776 Constitution declared that "all men are by nature free and independent, and have certain inherent rights . . . ." R. PERRY, *supra* note 9 at 311. Pennsylvania's 1776 Constitution stated that "all men are born equally free and independent, and have certain natural, inherent and inalienable rights . . . ." *Id.* at 329. Delaware and North Carolina's 1776 Declaration of Rights proclaimed that "all men have a natural and unalienable right to worship Almighty God . . . ." *Id.* at 338 and 356. *See also* Appendix A.

44. BLACK'S LAW DICTIONARY (5th ed. 1979).

45. The primal vision of law, government, rights and ultimately justice is contrary to the laws of nature and of natures God as well as it established rule that *jus ex injuria non oritur:* A right does (or can) not rise out of a wrong.

unalienable rights by their Creator.[46]

Evidence that the exercise or practice of religion is an unalienable right according to the laws of nature and of nature's God (and not in the humanistic sense), is found by examining religion's definition in Article 16 of Virginia's Constitution of 1776. It declares:

> That Religion, or the duty which we owe our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.[47]

This legal definition was adopted by Virginia in 1776. It is significant in at least two key ways. First, religion is defined as an actual duty or obligation, not a primal "power, privilege, faculty, or demand." This duty attaches to every man and woman because they are human beings made by their Creator. The duty does not arise from one's religious belief or lack of belief, but rather from being a created human being. Nor does this obligation arise from thinking like a primate about rights.

Second, the manner of discharging that obligation or duty is voluntary. The definition articulates and preserves the voluntary nature of the obligation. Performance of these duties cannot be compelled by the civil government. The civil government is prohibited from using force or coercion to effect the exercise of religious duties to the Creator. Civil government is prohibited from employing a legal mechanism to compel the manner of discharging the obligation or duty to God.

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46. Also compare the humanist view with Noah Webster's 1828 dictionary definition. Webster did not declare that rights are primal or grounded in personality. He observed that a right is:

> conformity to the will of God, or to his law, the perfect standard of truth and justice. In the literal sense, right is a straight line of conduct, and wrong a crooked one. Right therefore is rectitude or straightness, and perfect rectitude is found only in an infinite being and his will.

Webster defines a right as conformity to the law of God--to rectitude. Humanist jurisprudence founded upon the primate approach, however, discards the need for rectitude. It envision a system of justice in which rights may be wrongs. The right of "privacy," for instance, permits abortion, an act which is historically regarded as a criminal wrong and subject to criminal sanction. The right of "privacy" is also invoked to excuse common law crimes such as adultery, fornication, and prostitution. Conduct such as sodomy and bestiality, which are crimes "against nature" have also been found to be rights and are consistent with the idea of rights as power. Thirty years after *Roe* the Supreme Court used the same pseudo-constitutional deceit to “strike down” the anti-sodomy laws of thirteen states on the basis that the Constitution guaranteed such a right. See *Lawrence* v. *Texas*, No. 02-102, June 26, 2003. This is more fruit of the failure to defend the rule of law. See unpublished Article by Kerry L. Morgan, First we Defend Law, Then we Defend Life, What the Pro-Life Movement needs after 30 Years of Failure (2004).

47. In 1784 James Madison, looking back to 1776, declared in his Memorial and Remonstrance on the Religious Rights of Man, that religion so defined was a "fundamental and undeniable truth" and "in its nature, an unalienable right." Madison understood and accepted the proposition that all men are endowed by God with unalienable rights. The Commonwealth of Virginia acknowledged this unalienable right in their 1786 Bill to disestablish the state church. The author of that measure, Thomas Jefferson, with the concurrence of the General Assembly, declared that "the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present . . . (it) will be an infringement of natural rights." R. CORD, *supra* note 1 at 250.

Compulsion is the essence of establishment.

James Madison also characterized religion in 1785 as an unalienable right. He wrote in his *Memorial and Remonstrance Against Religious Assessments* that,

> [t]he 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 toward the Creator.[48]

Madison's understanding of religion carries at least three distinct facets. It is concerned with the mind and opinions. It is concerned with the dictates or coercions of other men. And it is concerned with rights toward other men which invariably include the sphere of action. These facets describe the context where conflict between religion and civil government arise and which will be considered in greater detail when Supreme Court cases are examined in section V *infra*.

B. Defining Religion as Toleration is Rejected

Defining religion as an unalienable right or liberty was not the only approach available to Congress during the formation of the Bill of Rights. The idea of defining religion in terms of toleration was also very popular. Prior to independence in 1776, George Mason sought to write the guarantees of the English Acts of Toleration into the Virginia Declaration of Rights. As the English were entitled to the "advantages" of religious toleration under these acts, it seemed appropriate that their American counterparts should also enjoy the same degree of toleration. Thus, in 1776 Mason argued "that all Men should enjoy the fullest Toleration in the Exercise of Religion, according to the Dictates of Conscience, unpunished and unrestrained by the Magistrate, unless, under Color of Religion, any Man disturb the Peace, the Happiness, or Safety of Society, or of Individuals."[49]

Rather than seeking religious toleration, however, James Madison sought religion's free exercise. Madison realized that English privileges did not descend from the idea of unalienable rights and therefore could only result in degrees of toleration. Privileges were by definition, dependent upon executive, legislative or judicial grace or the grace of the Crown's operatives and employees in the Anglican Church. Such privileges could be subject to a balancing test as they are presently. Religious liberty, however, was consistent with unalienable rights. It was Madison's view, however, and not that of Mason, that eventually prevailed in the federal context.

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48. R. CORD, *supra* note 1 at 244. *See also* I. BACKUS, AN APPEAL TO THE PUBLIC FOR RELIGIOUS LIBERTY AGAINST THE OPPRESSIONS OF THE PRESENT DAY (Boston 1773). Backus examined the differences between ecclesiastical and civil government and showed how their combination leads to loss of religious freedom.

49. 1 THE PAPERS OF GEORGE MASON 278 (R. Rutland, ed. 1970).

C. Defining Religion in the Context of Equality and Unalienability

After the Constitution was ratified, Congress immediately began to entertain petitions from the states proposing language to protect religious liberty. Would the states attempt to write God, the laws of nature's God, the rule of legal equality or unalienable rights out of the future first amendment equation? Would they attempt to establish an entirely new framework of law? Did they think like primates or modern Justices? Certainly not.

Armed with the backdrop and definitions of "unalienable" and "rights" previously discussed, the Commonwealth of Virginia urged that a declaration of rights be added which would secure,

> from encroachment the essential and unalienable Rights of the People in some such manner as the following; . . . That religion or the duty which we owe to our Creator, and the manner of discharging it can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by Law in preference to others.[50]

New Hampshire urged Congress to add a provision stating that "Congress shall make no Laws touching Religion, or to infringe the Rights of Conscience."[51] New York requested Congress adopt the following language: "That the people have an equal, natural and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favored or established by Law in preference of others."[52] North Carolina sought a "Declaration of Right, asserting and securing from encroachment the great Principles of civil and religious Liberty, and the unalienable Rights of the People."[53] Among these rights were found those pertaining to religion and North Carolina followed Virginia's petition almost verbatim.[54] Rhode Island also followed suit with identical language as North Carolina as it pertained to the

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50. *Ratification of the Constitution in Convention of the People of the Commonwealth of Virginia, June 26-27, 1788* in DOCUMENTS, *supra* note 32 at 1030-1031.

51. *Ratification of the Constitution in Convention of the People of the State of New Hampshire, June 21, 1788* in DOCUMENTS, *supra* note 32 at 1026.

52. *Ratification of the Constitution in Convention of the People of the State of New York, July 26, 1788* in DOCUMENTS, *supra* note 32 at 1035.

53. *Conditions of Ratification of the Constitution in Convention of the People of the State of North Carolina, August 1, 1788, Ratified November 21, 1789* in DOCUMENTS, *supra* note 32 at 1044.

54. Religion is defined as follows:

> That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.

Conditions of Ratification of the Constitution in Convention of the People of the State of North Carolina, August 1, 1788, Ratified November 21, 1789 in DOCUMENTS, *supra* note 32 at 1047.

"equal, natural and unalienable right to the free exercise of religion."[55]

Several state Declaration of Rights also articulate the essence of religious liberty *and* the rule of equality. Pennsylvania observed in 1776 that no man "who acknowledges the existence of a God, [can] be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of worship."[56]

Delaware harkened back to Mason's toleration approach and combined it with the equality principle. It observed; "That all persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless, under color of religion, any man disturb the peace, the happiness or safety of society."[57] And Virginia stated the broadest rule of all, not limiting its application to those who acknowledged God or professed Christianity. It declared that "all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."[58]

Overall, Virginia came the closest to articulating both a definition of religion and an understanding of equality. First, it recognized that religion was a universal obligation. All men and women whether or not they believed in God were bound to render to God that which he required. Second, Virginia recognized intellectual freedom. The process of forming religious beliefs about those duties owed to God were among a man's mental processes and were not to be coerced or interfered with by the civil government.

Third, Virginia also recognized that the exercise of religious obligations should be free, *i.e.*, not subject to civil or private compulsion or coercion. Freedom from civil coercion and private interference from other men, translated into an unalienable right to the free exercise of religion; unalienable in that it was endowed by God, and free because the exercise of duties to God was legally guaranteed by his will to be free from civil coercion or human interference. The civil government was responsible only to ensure that the unalienable right to the exercise of religion, was free from its own coercion or from private interference. The civil government was responsible for the security of this right because "in order to secure these [unalienable rights], governments are instituted among men . . . ."

Fourth, Virginia recognized equality of civil rights. Irrespective of whether or not any given person exercised their duties to God, it did not change any other civil rights or capacities shared in common with their fellow citizens. Other states fell short in recognizing this ground rule. They wanted to

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55. *Ratification of the Constitution in Convention of the People of the State of Rhode Island, May 29, 1790* in DOCUMENTS, *supra* note 32 at 1053.

56. *Constitution of Pennsylvania, August 16, 1776, Article 2* in R. PERRY, *supra* note 9 at 329.

57. *Delaware Declaration of Rights, September 11, 1776, Section 3* in R. PERRY, *supra* note 9 at 338. *See also, The Constitution of Maryland, November 3, 1776, Article 33, Id*. at 349; and *The Constitution of Vermont, July 8, 1777, Chapter 1, section 3, Id*. at 365.

58. R. CORD, *supra* note 1 at 250.

condition equality of civil rights on sectarian religious belief or profession. (This approach is still very much a part of our first amendment religious jurisprudence today, though it was then rejected at the federal level.) To condition equality of rights on the profession or renunciation of religious belief, however, is contrary to the principle that "all men are created equal; that they are endowed with certain unalienable rights." Thus, Virginia lead the way in carrying into practical construction the basic jurisprudential implications of equality and unalienable rights inherent in the Declaration's invocation of the laws of nature and of nature's God.

When Congress eventually focused on the Bill of Rights, they considered the various state proposals and initially entertained Madison's assimilation of them, that; "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 pretence, infringed."[59] Madison assimilated many of the state's suggestions but relied on Virginia's approach as controlling. He stated the equality principle first. He stressed equal civil rights irrespective of belief. He referred indirectly to the principle of "no civil compulsion of duties to God" through reference to those duties generally governed under the auspices of the established church (and thus his reference to no national establishment). Madison also included the principle of intellectual freedom, *i.e.*, non-coercion or interference in the process of forming religious beliefs about those duties owed to God. His assimilation did not expressly declare that religion was a universal obligation but this can be fairly implied from the history and context of state submissions and all that had gone before.

The House of Representatives condensed the terminology to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[60] The Senate approached the matter differently declaring that "Congress shall make no law establishing Articles of faith, or a mode of worship, or prohibiting the free exercise of religion . . . ."[61] Throughout the entire process, the central focus of the changes in wording was not to eliminate any major principle, but to adopt an overall economy of language reflecting the underlying meaning to be conveyed.

Having received the ratifications and petitions from the states and then debated the various versions favored by each house, Congress subsequently submitted twelve amendments to the states for their consideration. Congress recognized that the amendments were sought by the states "in order to prevent misconstruction or abuse" of Congressional power.[62] Eventually the states adopted ten of the proposed amendments. The religion provision agreed upon declared that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" and became part of the first amendment.

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59. 1 ANNALS OF CONG. 434 (June 8, 1789). *See also* R. CORD, *supra* note 1 at 25.

60. 1 ANNALS OF CONG. 766 (August 15, 1789).

61. *Senate Journal of September 9, 1789* in 2 THE BILL OF RIGHTS, A DOCUMENTARY HISTORY 1153 (B. Schwartz ed. 1971).

62. *Id*. at 1063. Resolution of The First Congress Submitting Twelve Amendments To the Constitution.

D. The First Amendment United the Rule of Legal Equality and the Unalienable Right to Free Exercise of Religion

The essence of the state proposals and the resulting amendment recognized, ensured or involved five concepts.

- First, religion involves those universal obligations owed by all human beings to God;

- Second, intellectual freedom prevents civil coercion or interference with the process or formation of opinions or beliefs. Civil government must secure intellectual freedom from civil coercion and private interference;

- Third, the exercise of said universal obligations may not be coerced. Civil government must secure the free exercise of religious obligations from civil coercion or private interference.

- Fourth, equality of civil rights is not dependent on religious belief or exercise. Civil rights are not expanded or contracted based on religious belief.

- Fifth, the prohibition on establishing religion does not reach, and therefore does not prohibit, civil recognition or acknowledgment of God the Creator and his jurisdiction over nations. God, his nature, attributes and power are not confined to religion, religious belief or exercise, or religious doctrine. Civil acknowledgment of these is not an establishment.

The first amendment is based upon and presumes that religion involves universal obligations owed by all human beings to God. The amendment's no establishment clause corresponds and reflects a limitation on the power of the civil government to coerce or interfere with the process of forming beliefs about religious obligations owed to God and the exercise of those obligations. The amendment's free exercise guarantee states the corollary: civil government must secure from civil coercion or private interference, intellectual freedom and its corresponding exercise of religious duties.

The framers recognized that the major institution of coercion and interference in their day was the official church propped up by the power of the state. The problem was not the church *per se*, but the *state established church*. Much like today's state established public school, the state established church interfered with the process of forming beliefs about religious obligations owed to God. The state established church interfered with the exercise of those obligations. Rather than recognizing that the civil government must secure intellectual freedom and the free exercise of corresponding religious obligations, the civil government had given to the church the civil power of coercion and private interference. So too with public schools and governmental control of private, religious and home schools and education today

Consequently, the no-establishment principle was chiefly, though not entirely understood in an institutional context. No Congressional use of a government established church to perpetuate a national religion, national articles of faith or national mode of worship was permitted. No

Congressional use of a government established church to prevent or interfere with religious belief or worship was permitted. No Congressional use of a government established church to infringe the equal civil capacities or equal rights on account of an individual's belief or worship was permitted.

The framers also recognized that despite the institutional battle, coercion and interference also had other dimensions. The amendment was therefore intended to block direct Congressional adoption (and thereby bypass the institutional church) of its own national religion, national articles of faith or national mode of worship. No direct Congressional prevention of, or interference with, individual religious belief or worship was allowed. No Congressional infringement of the equal civil capacities or equal rights of individuals on account of that individual's belief or worship allowed. Equality of civil rights could not be made by federal law to be dependent on an individual's religious profession, belief or exercise.

In adopting the religion clauses, neither the states or Congress sought to write God, the laws of nature's God, equality or unalienable rights out of the first amendment equation. The framers sought to ensure that the national government not encroach upon the God-given "essential and unalienable Rights of the People." Religion is among these rights and the first amendment was designed to secure its free and equal exercise from federal interference. The clause did not alter or upset the necessary and proper relationship between God and civil government which in turn, is based on the law of nature and of nature's God.

V. THE SUPREME COURT, EQUALITY, UNALIENABLE RIGHTS AND RELIGIOUS LIBERTY

Section V surveys notable Supreme Court opinions decided from 1980 to 1993. The era was chosen because with the passage of time the principles of the law transgressed by the case decisions are easier to see and the exigencies or the moment which tend to cloud principles are long past. The author has also considered an analysis of the period from 1994 to the end of the 2004-2005 term and has elected not to pursue such an undertaking at this time. The reasons are several. First, the Court's jurisprudence has not changed fundamentally in the last dozen years with respect to unalienable rights, equality, the incorporation doctrine or the *Lemon* test. Second, the expanded analysis would become repetitive as the Court keeps making the exact same errors over and over again. Third, this Article is an analysis, not a treatise.

Turning to the instant analysis , each decision is examined with an eye toward whether or not the Court has recognized the laws of nature and of nature's God for what they are, acknowledged the Declaration for is positive restatement of that law, and preserved where its Constitutional jurisdiction allows and appropriate judicial review permits, the God-given "equal, natural and unalienable right[s]" of the people to freely and peaceably exercise their religion according to the dictates of conscience. If the Court's actual references to the law of nature or the Declaration were examined, section V would be a very short section. But legal analysis can nevertheless show how far these principles have been neglected and what may be done to remedy the situation.

The cases are arranged into three categories. This arrangement is intentional and purposeful. The organization of the cases is critical to understanding how the cases fit into larger concepts of Federalism, enumerated powers, unalienable and reserved rights, and equality. Organization in this fashion also provides a guide by which subsequent and future cases can be analyzed and decided on correct principles. Most treatises on the first amendment arrange the cases topically, rather than conceptually. This is one reason why they are unhelpful as an analytical tool and tend to follow the Court rather than reinvigorate the law.

The first category of religion cases pertains to conflicts between compulsory education laws and the unalienable rights of parents to direct the education of their own children,[63] including governmental recognition of God at non-compulsory high-school graduation exercises.[64] These cases are not really religion cases at all, they are parental unalienable rights cases. But since the Court and litigators treat them as religion cases under the first amendment (since they don't know what other provision to claim a violation of with the exception of the free speech clause) they are included herein so that it can be better understood how they should be handled.

A second division of cases involves the much maligned, misunderstood and misapplied equality principle. These cases in turn, are of two sub-varieties:

a) cases litigated consistent with the equality principle. Such cases include equal access to schools,[65] equal access to public places,[66] and equal access to benefits,[67] and;

b) cases where preferential civil privileges based on religious belief, conduct or status are granted or sought, contrary to the principle of equality. These cases include decisions in the area of unemployment compensation,[68] special privileges for religious organizations,[69] and religious

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63. *See* Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646 (1980); Grand Rapids School District v. Ball, 473 U.S. 373 (1985); Aguilar v. Felton, 473 U.S. 402 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Edwards v. Aguillard, 482 U.S. 578 (1987), and Stone v. Graham, 449 U.S. 39 (1980).

64. *See* Lee v. Weisman, 505 U.S. 577 (1992).

65. *See* Widmar v. Vincent, 454 U.S. 263 (1981);Board of Education v. Mergens, 496 U.S. 226 (1990); Zobrest v. Catalina Foothill School District, 509 U.S. 1 (1993), and Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

66. *See* Board of Trustees v. McCreary, 471 U.S. 83 (1985)(affirmed without opinion by an equally divided Court); Board of Airport Commissioners of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987); and International Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

67. *See* Witters v. Washington Department of Social Services for the Blind, 474 U.S. 481 (1986).

68. *See* Thomas v. Review Board, 450 U.S. 707 (1981); Hobbie v. Unemployment Appeals Commission, 480 U.S. 136 (1986); Frazee v. Unemployment Compensation Commission, 489 U.S. 829 (1989), and Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

69. *See* Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Larsen v. Valente, 456 U.S. 288 (1982); Tony and Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290 (1985); Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439 (1988); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982), and

individuals,[70] as well as tax deduction,[71] and tax exemption cases.[72]

A third category of cases arises where discharge of civil functions involves necessary and proper reliance on God the Creator, such as use of legislative chaplains,[73] cases involving official celebration of holy days,[74] and governmental recognition of God or his attributes at public events.[75] These cases discuss the proper relationship between God and civil government without also delving into the prohibited relationship between religion and civil government.

A. Unalienable Rights Can Not be Compelled or Coerced in Education

1. Congress, Education and Religion

Before we can jump into the subject of unalienable rights and education, a little exposure to Constitutional law and federalism is required. First of all, a Congressional statute implicating education and religion is not properly framed for litigation under the religion clauses of the first amendment unless the statute is first sustained under the Constitution's enumerated powers doctrine. This doctrine is elementary to testing the Constitutionality of Congressional power. The doctrine of enumerated powers indicates that the Constitution extends Congress authority to exercise only those important, well-defined but few powers actually enumerated in the Constitution, mostly in article I, section 8. If the power at issue is not given to Congress, the statute exercising same, is unconstitutional as beyond the scope of delegated Congressional power.

We live in an age where neither the Congress, the President or the Courts believe their power is limited in any but the most extreme sense by the Constitution's express terms. The enumerated powers doctrine has been judicially anesthetized and no court appears interested in its revival. Nevertheless, the doctrine must be revived. Congress must be confined to its enumerated powers if for no other reason than the fact "that power which is not given by the Constitution, which the Convention refused to give, and which has been taken or recommended to be taken in contempt of

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Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987).

70. *See* Goldman v. Weinberger, 475 U.S. 503 (1986); O'Lone v. Shabbazz, 482 U.S. 342 (1987); Jensen v. Quaring, 472 U.S. 478 (1985)(affirmed without opinion by an equally divided Court); Bowen v. Roy, 476 U.S. 693 (1986), and Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

71. *See* Mueller v. Allen, 463 U.S. 388 (1983); Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989); and Davis v. United States, 496 U.S. 226 (1990).

72. *See* Bob Jones University v. United States, 461 U.S. 574 (1983); Jimmy Swaggart Ministries v. Board of Equalization of California, 493 U.S. 378 (1990); United States v. Lee, 455 U.S. 252 (1982), and Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

73. *See* Marsh v. Chambers, 463 U.S. 783 (1983).

74. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) and ACLU Greater Pittsburgh Chapter v. County of Allegheny, 492 U.S. 573 (1989).

75. *See* Lee v. Weisman, 505 U.S. 577 (1992).

it, is the offspring of rank usurpation."[76]

In response to this usurpation, attorneys have tended to turn to the Bill of Rights and invoke it as a check on Congressional or other governmental abuse, as if the Constitution's first three articles provided no real limitations on federal power whatsoever. This pattern is often repeated and expanded upon as a defense against Congressional excess through an invocation of rights which simply do not appear in the Bill of Rights itself. The Court has shown itself willing to let Congress do just about whatever it will as far as the doctrine of enumerated powers is concerned, imposing restraint on Congress chiefly by adjusting its construction of the Bill of Rights, as primate pleading and thinking may periodically, psychologically or politically dictate.

In fact, however, the first line of defense against a Congress that will not restrain or control itself, is to demand that the exercise of such power be based on a specific Constitutional delegation. This approach keeps the exercise of Congressional power within its constituted limits and does not encourage attorneys, judges or Justices to deface the Constitution's Bill of Rights with their own version of a politically correct or socially desirable result. The remedy for a party, religious or not, with some complaint about education and a Congressional statute, is to first demand that Congress justify the exercise of its power by proving that it was granted a general power over education. This is a burden Congress cannot possibly meet, at least under the Constitution as it drafted by the framers, established by the people and interpreted by the early Presidents and Congress itself.[77]

2. The States, Education and Unalienable Rights

But Congressional statutes that affect education are not the usual sum and substance of litigation that comes under the first amendment religion clauses. The overwhelming number of religious liberty

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76. THOMAS COOPER, TWO ESSAYS: ON THE FOUNDATION OF CIVIL GOVERNMENT AND ON THE CONSTITUTION OF THE UNITED STATES (Columbia: D & J. M. Faust, 1826; reprint ed., New York: Da Capo Press, 1970) 32.

77. *See* Kerry L. Morgan, *The Constitution and Federal Jurisdiction Over Education* (Masters Thesis, Regent Univ., 1985) (hereinafter *Federal Jurisdiction*). Congressional statutes such as those pertaining to Indian education, education of the children of military personnel or education in the District of Columbia fall within various powers expressly given to the federal government, while Congressional statutes that reach the education of children beyond these enumerations exceed the Constitutional power of Congress and violate the enumerated powers doctrine. Provided the Congressional statute passes this hurdle, it may then be examined under the first amendment to determine if it is a law "respecting an establishment of religion, or prohibiting the free exercise thereof."
It could also be argued that the first amendment which serves to check Congressional abuse of religious liberty, includes the unalienable right of religious parents to educate their children free from Congressional control, even though the unalienable right of a parent is not enumerated in the first amendment. It is arguable that parental rights are implied within the scope of the religion clauses and this implication would permit a non-activist federal judiciary acting within its own article III limitations, to guarantee that religious parents could be free from Congressional interference with their unalienable right to educate their children.
The principled and therefore stronger argument, however, is that unalienable parental rights are not implied within the scope of the religion clauses since the non-religious parent is equally endowed with the unalienable right to direct the education of their own children as is the religious parent. The former argument would reduce the unalienable right to a privilege enjoyed only by the religious parent thereby destroying the universal characteristic of the right itself. *See also* K. L. MORGAN, REAL CHOICE, REAL FREEDOM IN AMERICAN EDUCATION (1997).

and establishment clause litigation is not tied up with a Congressional statute very often, but rather with various state or local laws relating to public education. This process is the result of the Court applying the scope and meaning of the first amendment to the states as well as the federal government. The Court reached this result by claiming that the fourteenth amendment's prohibitions on the exercise of state power also legitimately incorporated the first amendment's restraints on Congress against the states. The Court's approach is know as the incorporation doctrine and it found effect in *Palko v. Connecticut* and in *Cantwell v. Connecticut* since it is not found in the Constitution.[78]

In other words, the Supreme Court decided in 1940 that the First Amendment, which up until that time had not been recognized as a limitation on the power of a state government, was then and thereafter a limit on the states by virtue of the due process clause in the fourteenth amendment. A review for the Court's source of authority in *Cantwell* for this groundless assertion is that "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment."[79] What is this "concept of liberty?" Is it the liberty which all persons enjoy in the form of unalienable rights? No, the Court does not discuss the matter with this view in mind. It states:

> Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.[80]

If a right is unalienable, however, it cannot be duly infringed, balanced or reduced to mere toleration. No, the Court is not talking about freedom of religion as an unalienable right. It is discussing the right as something which may be regulated under certain conditions. This is not religious freedom, but rather toleration.

Does the Fourteenth Amendment due process clause refer to "the fundamental concept of liberty?" Is this concept "embodied in that Amendment?" Does the Amendment specifically embrace "the liberties guaranteed by the First Amendment?" Of course not. None of this is specifically written

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78. In Palko v. Connecticut, 302 U.S. 319 (1937), the Court bound the legislative power of the states to those restrictions in the Bill of Rights which a majority of the justices believed in their own minds, were meant to protect a fundamental aspect of liberty. Subsequently, in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) the Court, without any Constitutional basis and in excess of its article III power decided to apply the first amendment's restrictions to the exercise of state power.

79. 310 U.S. at 303.

80. 310 U.S. at 303-304.

or fairly implied.

Cantwell is an unconstitutional effort by the Court to amend and also distort the meaning of the First Amendment Religion clause from one which recognized that the Creator granted unalienable rights and that civil government ought to protect them from infringement, to one which protected only Constitutionally granted fundamental rights of action or conduct which could then be legislatively infringed..

Application of the first amendment, rather than state constitutional provisions, against state education laws that offend religious parents concerned about the education of their children is a common occurrence. The Court's pseudo-constitution policy directives of *Palko* and *Cantwell* are not consistent with the Constitution. These directives are in the manner of an illegal amendment. Article V, however, defines the amendment process, not Article III. Accordingly, *Cantwell* is an unconstitutional judicial decision. To continue litigating and judging, therefore, as if these decisions are part and parcel of the original or properly amended Constitutional arrangement when they are really un-ratified judicial policy or political directives, cannot be helpful to the conscientious litigant who makes an appeal to law (as opposed to judicial policy or politics) in his or her case.[81]

To the extent that a legitimate concern exists that states would run roughshod over the rights of the people if not protected by judicial incorporation of federal Constitutional provisions against the states, then a legal remedy is appropriate. Incorporation by judicial usurpation, however, is not that remedy. The incorporation by usurpation approach must be rejected because the amending power lies with the people and not the courts. Moreover, the unalienable right of the people to be governed by their own written consent through their elective representatives is a right of the people, not of the government or the courts. When the Court signals that usurpation is a legitimate way of doing Constitutional business, however, then it encourages litigants to follow suit. Consequently, litigants in turn plead the first amendment every which way they can in order to be freed from legislative suppression of their rights at the state level.

When it comes to a remedy for state legislative abuse of rights, the remedy does not lie with altering the arrangement of powers by judicial shifting of more power to itself. The remedy lies with recognizing that the state constitutions themselves, by and large, already contain express protection of unalienable rights. The remedy lies in the Court and courts recognizing that those state constitutional provisions provide far more protection of rights that the incorporation doctrine and present first amendment balancing jurisprudence ever can or will.

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81. Modern legal pleading and practice generally fails to interject state constitutional provisions and their reliance on unalienable rights into the education/religion litigation equation. When the United States was established in 1776, however, the state protection of unalienable rights was common, while a system of public education as it functions today, did not then exist. In Abington School District v. Schempp, 374 U.S. 203 (1963), the Supreme Court observed that "[i]n the North American Colonies, education was almost without exception under private sponsorship and supervision. . . . This condition prevailed after the revolution and into the first quarter of the nineteenth century." The Court noted that "[i]t was not until the 1820's and 1830's . . . that a system of public education really took root in the United States." *Id.* at 237 n. 6. The key word here is "system." Education was not neglected in either the north or the south. The difference between the two regions, however, pertained to the existence of a system of government education.

The way out of the Constitutional thicket is to recognize that state legislative suppression of rights exists because the courts (both state and federal) have refused to enforce, and have, therefore, rejected the idea that, 1) God gives certain unalienable rights to every man and woman because they are human beings, 2) that the purpose of state governments is to secure these rights on an equal basis (rather than balance or alienate those rights) and, 3) that state constitutions are far more amenable to amendment to protect the specific right at issue, than taking a case to the Supreme Court and winning ever will be.

The religious litigant's faith and fear when combined with the tempting of their primate worldview trained legal counsel, has brought them to an un-elected Court for legal salvation--the same Court that has despoiled the legal scope and effect of most state Constitutional guarantees pertaining to unalienable rights (as articulated and defined by the people's elected representatives) through incorporation of the first amendment against the states. Does it make sense to ask the fox to enter the hen house for protection after it has sealed off all the exits?

3. Parental Rights are Unalienable Rights

Given the previous admonishments, a full understanding the Court's education/religion cases begins with the recognition that a parent's right to direct the education of his or her own children is an unalienable right. It is axiomatic from all which has been observed thus far that unalienable rights are not subject to alienation. This unalienability feature means that such rights are not subject to restriction, compulsion or deprivation by the civil government. The prohibition against civil restriction, compulsion or deprivation applies whether the unalienable right involved is life, or is a liberty such as speech, press, association, or intellectual freedom.[82]

In the context of education by parents *irrespective* of their religious beliefs or lack thereof, unalienable rights also include the right of parents to direct the education and upbringing of their children. The crucial element in education/religion cases, should be that the right at issue is the unalienable right of a parent to direct the education and upbringing of their children free from state interference, regulation or control. This right, however, does not receive the slightest attention because the usual strategy or litigation approach is to defend the right of *religious* parents because of their *religious* beliefs.[83] Thus, the universal unalienable right argument derived from the laws of nature and of nature's God lies dormant, while the special privileges argument based on religious belief gets its day in court (and then usually loses). The "special privileges based on belief" argument, however, deserves to lose since religious belief should not be used to expand or diminish either civil or unalienable rights. Such an approach is contrary to the equality principle as discussed shortly.

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82. Thomas Jefferson maintained the unalienable nature of intellectual freedom when he observed that "Almighty God hath created the mind free." From this he concluded that "all attempts to influence it [the mind] by temporal punishments, or bur[d]ens, 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 . . . ." R. CORD, *supra* note 1 at 249.

83. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972).

While it is beyond the scope of this Article to fully analyze the right of parents to direct the education of their children,[84] it is nevertheless appropriate to recognize that parents have an unalienable right to direct the education and upbringing of their own children. This is the historical and universal rule and it is based on the laws of nature and of nature's God. James Kent, for example, in his famous *Commentaries on American Law*, observed this universal precept, stating that:

> The duties of parents to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation.[85]

It was later observed that "every standard writer on the subject of either laws or morals proclaims with one voice that parents are bound by the natural law to feed, clothe, and educate their children."[86] It was understood that the laws of God established an absolute standard of freedom for parents with respect to the education and upbringing of their children. This rule recognized:

> The law of nature and nature's God, which ordains that it is both the right and duty of parents to educate their children 'in such manner as they believe will be most for their future happiness' is utterly disregarded and set at naught by the State, which ordains that it is neither the right nor the duty of parents, but of the State, to say when, where, by whom, and in what manner our children shall be educated.[87]

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84. These ideas are more fully developed in A. HERBERT, THE RIGHT AND WRONG OF COMPULSION BY THE STATE, Essays 2 and 4 (1978). *See also*, J. WHITEHEAD, PARENTS RIGHTS (1986). *See generally*, THEORIES OF EDUCATION IN EARLY AMERICA 1655-1819 (W. Smith ed. 1973); C. JOHNSON, OLD-TIME SCHOOLS AND SCHOOL-BOOKS (1963); K. L. MORGAN, REAL CHOICE, REAL FREEDOM IN AMERICAN EDUCATION (1997).

85. 2 J. KENT, COMMENTARIES ON AMERICAN LAW 159 (Da Capo Press, reprint ed., 1971) (New York 1826).
> The next domestic relation which we are to consider, is that of parent and child. The duties that reciprocally result from this connection, are prescribed, as well as those feelings of parental, home and fetal reverence which Providence has implanted in the human breast, as by the positive precepts of religion and of our municipal law . . . . The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of Universal law.

Id. This domestic relationship was by definition, an essential ingredient of education. In Noah Webster's 1828 dictionary education is defined as:
> The bringing up, as of a child; instruction; formation of manners. Education comprehends all that series of instruction and discipline which is intended to enlighten the understanding, correct the temper, and form the manners and habits of youth, and fit them for usefulness in their future station. To give children a good education in manners, arts and science, is important; to give them a religious education is indispensable; and an immense responsibility rests on parents and guardians who neglect these duties.

86. Z. MONTGOMERY, THE SCHOOL QUESTION FROM A PARENTAL AND NON-SECTARIAN STAND POINT 50 (Arno reprint ed., 1972) (4th ed. Washington 1889).

87. *Id*. at 52.

The Supreme Court has recognized that: "Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life."[88] The Court, however, "modified" this "natural" right in order to reconcile it with compulsion by the state. Even though, if the truth be admitted, it is impossible for a man-made institution to modify God given rights, the Court nevertheless took the proposition that, "Corresponding to the [parent's] right of control, it is the natural duty of the parent to give his children education suitable to their station in life" and added on its own that "and nearly all the States, including Nebraska, enforce this obligation by compulsory laws."[89]

The Court submitted that the legal object of state compulsory attendance laws is to enforce the natural right of parents as they discharge their parental duty to educate their own children. Every parent instinctively recognizes this rationale to be ridiculous. The real purpose of compulsory attendance/education laws is to empower the state to filter, regulate or exterminate the unalienable right of parents to discharge their parental duty to educate their own children. Its theoretical purpose may at one time have been to enforce the natural or unalienable right of parents as they educated their own children, but it never worked that way in practice.

Far from actually securing the unalienable right of a parent to direct the education of his or her child, compulsory attendance and education laws actually secure the will of the minority or majority group that controls the community instruction mechanism. In actual practice, compulsory attendance and education laws have alienated from parents their unalienable right to say "when, where, by whom, and in what manner" their own children shall be educated. The parent's unalienable right is on an inevitable and on-going legal collision course with those of the state as it adopts and implements laws that require compulsory attendance, compulsory exposure to pre-approved state sanctioned ideas, compulsory suppression of non-approved ideas, and compulsory extraction of tax funds to compel propagation of those state-controlled ideas.

4. State Education Laws Enforce the Will of the Community Irrespective of the Rights of Individual Parents

The steady direction of education in the last 150 years has been away from parental rights and decentralized familial education, and toward secularized, humanistic and centralized education. The present approach to education employs the power of the state to enforce on students the will of the

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88. *Meyer v. Nebraska*, 262 U.S. 390 (1922). *Meyer* is an example of the Court finding rights not enumerated in the Constitution. As long as litigators continue to rely on an un-elected Court creating un-enumerated rights, they will have to be satisfied with its expansion or contraction by subsequent Justices. The Court created the right. It can make of it what it will. The correct approach, however, is to revive constitutions of the states and secure the right there.

89. *Id*. at 400. The natural right of parents was raised in oral argument on February 23, 1923 by Arthur F. Mullen, Attorney in Behalf of Plaintiffs-In-Error, The District of Evangelical Lutheran Synod of Missouri, Ohio and other States, et al. Mr. Mullen argued; "I deny that a State can, by a majority of the legislature, require me to send my child to the public school." 21 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 769 (P. Kurland & G. Caspers ed. 1975). Also see the brief of William A. Williams as *Amicus Curiae* in Pierce v. The Society of Sisters, *Id*. 25 LANDMARK BRIEFS 417, 423.

community, or more precisely, those who claim to speak for the community. A predominantly secular community can prescribe through their legislative representatives, the curriculum, funding arrangements and services which public schools will authorize or enforce. In some instances, however, the community may adopt a subtly religious practice. Either way, the community defines who must attend schools and for how long. The community defines who may teach and determines teacher qualifications.

Generally, when an education/religion case comes before the Supreme Court, one of these prescriptions or regulations has come under attack. The Court usually responds with an establishment clause analysis and finds the decision, action, or statute sometimes valid but more often unconstitutional.

From the point of view of parental rights, however, it is quite irrelevant whether the state's citizens (religious or secular) enforce their will as it pertains to curriculum, funding, taxation, teacher qualifications and school services. The issue of which faction controls these matters is irrelevant. To the extent that a secular cadre implements its coercive educational mandates, then to that extent an individual parent is divested of his or her God-given unalienable right to say when, where, by whom, and in what manner their own child shall be educated. To the extent that a religiously minded group makes the decision about the education of a parent's child, that parent is also deprived of their unalienable right to say when, where, by whom, and in what manner their child shall be educated.

Today, however, education/religion establishment clause cases are not decided on the grounds of state constitutions or where declared therein, on the basis of the unalienable rights of parents to control the education of their own children. That right is more often than not, generally ignored and rarely argued as a legal right.[90]

For instance, in *Committee for Public Education & Religious Liberty v. Regan,*[91] the state of New York had enacted a law mandating a variety of student testing including pupil evaluation, achievement and college qualification tests. Church operated schools were also required to administer the state mandated tests. All schools were entitled to reimbursement from the state of the costs incurred in complying with the state's testing mandate. This reimbursement scheme was challenged as an unconstitutional establishment of religion. The Court, however, rejected the challenge, holding that church operated schools were entitled to reimbursement for the costs of state mandated testing. The Court held that this type of aid did not violate the first amendment's[92] three

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90. An exception to this trend was Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987), *cert. denied* 484 U.S. 1066 (1989).

91. 444 U.S. 646 (1980).

92. It has been observed that the first amendment was enacted as a limitation on Congressional power and not the power of state governments such as Michigan or New York. The Supreme Court, however, has judicially extended the religious prohibitions of the first amendment to the states through it's the incorporation doctrine. Under the original federal scenario, however, state constitutions would control where state law and religion intersected, not the federal

part test for establishment decided in the 1971 case of *Lemon v. Kurtzman*.[93] In *Lemon* the Court held that a legislative enactment does not contravene the establishment clause if it has a secular legislative purpose, if its principle or primary effect neither advances or inhibits religion, and if it does not foster an excessive entanglement with religion.

A word should be said about the Court's temporary rebuff to *Lemon* by use of a historical test as reflected in *Marsh v. Chambers*.[94] The dissenters presently rely on this test, *i.e.,* (if I may paraphrase) 'if we can only find some historical example of the framers doing this or that public or civil religious practice, then it can't be unconstitutional under the establishment clause.' The problem here is the same as *Lemon*. No present Justice either yet takes the principles of the Declaration or unalienable rights seriously. None has yet brought their legal perspective to the point of seeing that God has given the right to the free exercise of religion to human beings, or that the civil government has an appropriate civil relationship with the Creator of nations, or a duty to secure unalienable rights. The dissenters neither talk or write like this (and neither do the religious

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Constitution. Though the Supreme Court has not yet retraced its steps in this area, some district court judges have shown a willingness to reconsider the constitutionality of incorporation. *See* Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983) *rev'd*, 705 F.2d 1526 (11th Cir. 1983) *aff'd*, 466 U.S. 924 (1984). *See also* Brief of Amicus Curiae of Conservative Legal Defense Fund, et. al.,in Support of Petitioners in McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, No. 03-1693, filed December 8, 2004.

93. 403 U.S. 602 (1971). Each component of the test was intended to secure the purpose of the no-establishment clause--to maintain a jurisdictional separation between the legitimate objects of religion and those of the civil government. The test, however, falls well short of this goal. As applied, it is not well informed by the laws of nature and of nature's God or the principles of the Declaration of Independence.

The central problem is an old one--the Court is of the mistaken *legal* view that God is confined to religion, and that apart from religion he has no legitimate function in the civil realm. This is a mistake the framers did not make. The Court has rejected the fact that the Declaration itself, which created the legal entity known as the "united States," asserts that God gives the law by which nations are established, that God defines the purpose of governments instituted under that law and that God gives all human beings certain rights which civil government is established to secure. The *Lemon* test, however, demands that courts and litigants turn a blind pair of eyes to these elementary propositions.

This is not to say that religion has a legitimate function enforced by the civil realm. It does not. But in deciding whether or not religion is advanced, inhibited or entangled under the *Lemon* test, the Court has not limited its analysis of religion to religion alone. It has expanded establishment jurisprudence to also envelop God's claim of jurisdiction over nations as recognized by the Declaration's reliance on the laws of nature and of nature's God. The no-establishment clause reaches religious objects alone. It swallows no more.

If tested under the *Lemon* test, the Declaration itself would fail as would Virginia's religious disestablishment statute. Both would offend the federal establishment clause, the latter especially since its very "unsecular purpose" was to secure that freedom of the mind which "Almighty God hath created" and which the "Holy Author of our religion, who, being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do." VA. CODE ANN. § 57-1 (1950). The absurdity of America's first disestablishment statute being found to violate the Court's *Lemon* test of establishment under the first amendment should not be missed. Arrive early for that oral argument. What is needed is not a simple rearrangement of the *Lemon* test with a scaled down view of religion, but rather a reorientation about the nature of law, the principles of unalienable rights, the equal security of those rights by the civil government and an understanding of the distinctions between the Constitutionally permissible inter-relationship between God the Creator and civil government, and the jurisdictionally separate and therefore constitutionally impermissible interrelationship between religion and civil government. Congress ought to hold hearings on the alternatives to lemon from an historical point of view and of original meaning.

94. 463 U.S. 783 (1983).

litigators who brief them). True, some members of the Court are less intolerant than the majority, and are therefore willing to let some historical religious practices through the *Lemon* net. But this difference is one of degree, not principle.

Justice Scalia, to his credit, however, has noted the Court's dirty little secret about the *Lemon* test. He writes in *Lamb's Chapel v. Center Moriches Union Free School:*

> The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting instances in which Court has not applied Lemon test). When we wish to strike down a practice it forbids, we invoke it, see, e.g., Aguilar v. Fenton, 473 U.S. 402 (1985) (striking down state remedial education program administered in part in parochial schools); when we wish to uphold a practice it forbids, we ignore it entirely, see Marsh v. Chambers, 463 U.S. 783 (1983) (upholding state legislative chaplains). Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts," Hunt v. McNair, 413 U.S. 734, 741 (1973). Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[95]

In other words, the high and lofty process of Constitutional interpretation is a sham. The Court simply makes up the test as its goes along and when it does not suit its purpose, it simply ignores the test until it is more useful. This candid admission is also helpful in understanding and explaining how the *Cantwell* Court found in the due process clause the incorporation doctrine. Yet despite this admission, still noticeably lacking from *Committee for Public Education & Religious Liberty v. Regan* was any discussion that no Congressional statute was present and that consequently the first amendment was simply not implicated. New York's constitution, not the federal Constitution was dispositive. With respect to the unalienable right of parents, the issue of whether New York could compel students to be tested, and whether a state could compel its taxpayers to fund that testing was entirely ignored. The proper argument to be made was that these types of compulsion contravened the unalienable rights of parents. It is for parents and not the state to say when, where, and how their children are to be educated including if, when and how often they will be tested as well as the *test criteria*.

Of course, the parties would have to base this argument on a state statutory or constitutional provision that recognized the unalienable right of parents. Such a provision, however, is non-existent under New York law.[96] So, in this case the unalienable rights of parents could not be vindicated through the judiciary. The correct remedy is with the New York legislature. It would

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95. 508 U.S. 384, 399 (1993)(Scalia, J. concurring).

96. New York courts have recognized that the state legislature may not impair any inalienable right provided that it is constitutionally enumerated. "The legislature may not declare that to be a crime which in its nature is and must be under all circumstances innocent, nor can it in defining crimes, or in declaring their punishment, take away or impair any inalienable right secured by the Constitution." Lawton v Steele, 23 N.E. 878, *reh. den.* 23 N.E. 1151 and *aff'd*, 152 U.S. 133 (1893). *See* N.Y. CONST., Art. III, § 1 (1992).

be wrong for the Supreme Court to simply invoke a legislative power to find parental rights. The Court is a judicial body and must accept the law as laid down in constitutions and conforming statutes.

More of the same disorientation about what law applies reigned in *Grand Rapids School District v. Ball.*[97] In this case the Court was presented with a challenge to the use of tax funds to pay Grand Rapids, Michigan, public school teachers to teach non-public school students at church operated schools leased by the city during the time of instruction. The students were taught secular remedial subjects. The Court ruled that the use of public tax funds to pay public school teachers to teach at leased church schools was an unconstitutional establishment of religion in that the program unduly entangled and promoted religion. Likewise in *Aguilar v. Felton,*[98] the use of federal funds under Title I,[99] to pay New York public school teachers to visit church operated schools in order to teach remedial secular subjects was also held unconstitutional.

In both *Grand Rapids School District* and *Aguilar,* public funds made their way to church schools contrary to the test in *Lemon*. Since the Michigan case involved no Congressional statute, the first amendment was inapplicable. The analysis in *Grand Rapids School District* should have rather focused on a discussion of whether the constitution of Michigan permitted or prohibited such a funding arrangement. *Grand Rapids School District* is not a first amendment case. It is a state constitution case.

With respect to the unalienable right of parents, no state can force individual parents through taxation, to underwrite the compulsory propagation of state-controlled ideas, *i.e.*, the public school curriculum. The unalienable rights argument is that financial compulsion for the object of underwriting government approved ideas contravenes the unalienable rights of parents to contribute money only to those teachers who will most closely reflect the point of view that they believe should be taught to their child. It is for parents and not the state to say who will teach their children. It is for parents and not the state to freely negotiate compensation for instruction.

In *Grand Rapids School District* the law compelled parents and residents to "contribute" sums of money for the propagation of ideas and opinion over which they have no control. Unfortunately, the unalienable rights argument would have been very difficult to make in the state of Michigan because the people had not then articulated that right in Michigan law. In 1995, however, the legislature enacted a law that recognized both the fundamental and the inalienable right of parents to direct the education of their children. It observed in MCL 380.10 that:

> It is the natural, fundamental right of parents and legal guardians to direct the care, teaching, and education of their children. The public schools of this state serve the needs of the pupils by cooperating with the pupil's parents and legal guardians to develop the pupil's intellectual

97. 473 U.S. 373 (1985).

98. 473 U.S. 402 (1985).

99. 20 U.S.C. § 2701 (1988).

capabilities and vocational skills in a safe and positive manner.

Though the legislature did not go so far as to observe that the right of parents included the right to contribute money to support only those teaches whom they preferred, it nevertheless affirmed the right in some degree. The point, however, is that identification of the unalienable rights of parents ought to be vindicated through the legislature itself.

In *Aguilar*, which did involve a federal law, the Court never considered the first question that attaches to the exercise of Congressional power: Does the Constitution extend to Congress the power to legislate in this area? The Court never questioned that Congress simply lacked power under the enumerated powers doctrine to enact a law providing financial assistance to local educational agencies which serve children of low-income families as provided for in Title I. Only if the Court first found such a power, then it would be entitled to examine the first amendment to determine if any unalienable right to the free exercise of religion was abridged, or Congress in establishing Title I passed a law respecting an establishment of religion. Such an analysis, however, would have found that Congress is without power to provide financial assistance to local educational agencies and that Title I is unconstitutional. *Aguilar* is not a religion or first amendment case. It is an enumerated powers case.

In addition to cases involving forced financial "contributions," several cases completely ignored the issue of whether forced exposure of a child to any state approved idea is consistent with the unalienable right of their parents to direct the education of their children, or is consistent with the unalienable right of intellectual freedom which is possessed by a child who is of age or legally emancipated, yet still in attendance at a public school.

For instance, in *Wallace v. Jaffree,*[100] the Court struck down an Alabama statute that attempted to designate a one-minute period of silence in all public schools "for meditation or voluntary prayer." The Court sanctioned voluntary student-initiated prayer but found the statute's one-minute designation an unconstitutional attempt to return prayer to the public schools. The law, therefore, did not advance a secular purpose and consequently failed the establishment clause test announced in *Lemon.*

And in *Edwards v. Aguillard,*[101] an establishment clause challenge to a Louisiana law which required equal time for teaching creation science and evolution also fell before the Court's *Lemon* test. Creation science holds that God created the earth including mankind and that evidence of a creation scheme is supported by the scientific method. Creation science differs from the theory of evolution which emphasizes gradual development of mankind from lower forms of life. The Court struck down the equal time provision because it lacked a clear secular purpose. The Court, however, did not preclude the state from requiring the teaching of alternate theories of origins other than evolution under certain circumstances.

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100. 472 U.S. 38 (1985).

101. 482 U.S. 578 (1987).

In *Stone v. Graham*,[102] the Court struck down a Kentucky state law requiring the posting of the Ten Commandments on the wall of every public school classroom. The Court held that the law had an insufficient secular legislative purpose and thus violated the establishment clause. The Court, however, did not bar the use of the Ten Commandments as well as the Bible where their inclusion constituted the appropriate study of history, civilization, ethics, or comparative religions.

5. Compulsion, Not Content is the First Issue

In reviewing the specific issues of *Wallace v. Jaffree*, *Edwards v. Aguillard* and *Stone v. Graham*, each has at least one point in common: the state has wrongfully suppressed, by compelling mandatory exposure to government selected and approved ideas, the unalienable right *of parents* to select the ideas to which their children shall be exposed. In *Wallace v. Jaffree* for instance, the unalienable right of parents to define the ideas to which their child shall be exposed was trampled under foot when the state of Alabama declared all children shall be forcibly exposed to a minute of silence.

But lest the law be unequally applied in principle, if a minute of forced exposure to silence was too dangerous to permit, then how much more an entire day of instruction? Would not the damage be incalculable? Forcible exposure of any type to select pre-approved and state sanctioned silence or ideas, contravenes the right of parents to direct their child's mind to those ideas and those ideas alone which parents alone deem appropriate.

The unalienable right of a parent is transgressed by the fact that the state of Alabama decided what the child will learn, how long the child will learn it, and has compelled others to pay for it irrespective of individual parental desires. Intellectual freedom was violated when the state engaged in compulsion in the realm of ideas. It makes no difference in principle that the state coerces a student to be quiet for one minute or coerces the student to be exposed to its state-approved curriculum each day and every day of the school year. It makes no difference in principle that the state coerces a student into one minute of state approved religious ideas or coerces the student to be exposed to its state-approved non-religious humanistic curriculum.

From the point of view of parental rights (and intellectual freedom for emancipated students), the content of the coercion is irrelevant. Neither agreeable or abhorrent content can be redeemed from the unlawful taint of state compulsion. When the state compels or coerces students to be exposed to its selected ideas, the unalienable right of a parent and the intellectual freedom of a student is trampled.

In *Aguillard* the state of Louisiana declared that students may be exposed to evolution but generally not to creation science. It made no difference to Louisiana that a parent may have approved or dissented from this exposure. The unalienable right of a parent to select that curriculum which is best in keeping with each parent's educational objectives for his own child is by such a law,

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102. 449 U.S. 39 (1980).

wrongfully yielded to the collective will of the government of Louisiana. The state recognized a right in itself, not individual parents to define the content to which a child shall be forcibly exposed. The unalienable right of a parent to choose the curriculum for his or her child was crushed by the legislature in the name of balanced treatment.

The *Stone* decision is of the same legal pedigree--it permits the state of Kentucky to continue engaging in the forcible exposure of students to its own pagan ideas and the exclusion of all others such as the ten commandments. The decision is faulty, however, not because all points of view were not allowed, but because the right of all parents to select *and* exclude those idea to which their children shall be exposed, was preempted.

Objections will no doubt arise that a minute of silence for prayer, the teaching of creation science and posting the Ten Commandments involve good and true ideas. This cannot and is not disputed. But the *first* issue is jurisdiction, not content. The first issue is not whether the ideas are good or bad, but rather, does the civil government have jurisdiction to force exposure to ideas. State governments are instituted, *inter alia*, to secure the unalienable rights of parents. The state tramples this right when it takes from the parent the very power to define the ideas to which parents desire their child to be exposed. Legislators, lobbyists, litigators and judges ought not be willing to concede unalienable rights in order to legitimate the power of the state to force children to be exposed now and then to some good ideas. Such a concession strikes at the very heart of unalienable rights.

6. Many State Constitutions Protect Unalienable Rights

Wallace v. Jaffree, Edwards v. Aguillard and *Stone v. Graham* do not involve any Congressional statute. They are not first amendment cases. They are unalienable rights cases and should have been disposed of under relevant state constitutional provisions. The court in incorporating the first amendment against the states suggested that anything other than a uniform standard would not sufficiently protect the rights of the people. This approach, however, erroneously assumes that the people of the states cannot quite bring themselves to constitutionally secure their most obvious unalienable rights. While New York may not have the picture clear, many of the states have some constitutional reference to unalienable rights.

In fact, state constitutional and statutory protection of unalienable rights is more common than is recognized.[103] The problem is that the Court refuses to take those state unalienable rights provisions seriously when it has jurisdiction to do so.[104] The effect of this flaw is to provide *less* protection nationally through nationwide application of the first amendment which according to the Court does not guarantee any unalienable right, than would otherwise be available if state unalienable rights provisions were construed as written. Not even Justice Scalia appears willing to hold the Court's

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103. *See supra* note 15.

104. The Court may entertain pendant jurisdiction to construe state constitutional provisions protecting unalienable rights provided otherwise has federal jurisdiction.

feet to the fire regarding the incorporation doctrine. He seems content to warm his judicial hands over the flame of *stare decisis* as it burns the Constitution's text from his fingers.

Wallace v. Jaffree should have been considered under the Alabama constitution which provides that "all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness."[105] The unalienable right of parents and of intellectual freedom should have been linked to this substantive constitutional provision as a basis for striking down Alabama laws that employed coercion in attendance, ideas, and financing of public education.

Edwards v. Aguillard should have been considered under the constitution of Louisiana which provides that:

> All government, of right, originates with the people, is founded on their will alone, and is instituted to protect the rights of the individual and for the good of the whole. Its only legitimate ends are to secure justice for all, preserve peace, protect the rights, and promote the happiness and general welfare of the people. The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.[106]

To the extent that the rights enumerated in Article 1 of the Louisiana constitution support the unalienable right of a parent or of intellectual freedom, then to that extent those rights should have been considered.[107]

Stone v. Graham should have considered Kentucky's constitutional provision on inherent and inalienable rights which declares that:

> All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. Second: The right of worshiping Almighty God according to the dictates of their consciences. Third: The right of seeking and pursuing their safety and happiness. Fourth: The right of freely communicating their thoughts and

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105. ALA. CONST., Art. I, § 1 (1991). Sections 1, 6 and 22 of the constitution, taken together, guarantee the equal protection of the laws, protect persons as to their inalienable rights, prohibit one from being deprived of his inalienable rights without due process and prohibit irrevocable or exclusive grants of special privileges or immunities. *See* Pickett v. Matthews, 238 Ala. 542, 192 So. 261 (1939).

106. LA. CONST., Art. I, § 1 (1992).

107. Article 1, section 5 [security of household communication], section 7 [freedom of expression], and section 24 [unenumerated rights may not be infringed] of the Louisiana constitution could aid in supporting the assertion that parents have an unalienable right and that state education laws may not impair that right. Section 24 [unenumerated rights may not be infringed] in particular could be employed to permit a state court to identify that right if the people of Louisiana have elsewhere extended their judges the power to make that determination.

> opinions. Fifth: The right of acquiring and protecting property . . . .[108]

The fourth enumeration is especially significant in advancing the unalienable right of parents to direct the education of their own children and should have been argued vigorously.

The preceding cases focused on the relationship between religion and the government as they battled each other over money, power and curriculum. The natural conflict between parental rights and the state to compel attendance and support is absent. The absence of this element has resulted in the use of public schools to carry out the will of the community irrespective of individual parental rights.

When faced with this will the litigation community's response has not been to examine state constitutions for declarations of unalienable rights. Quite the contrary. Their remedy is to build on the illegitimate foundation of judicial incorporation, ignore to a large degree state constitutional provisions and utilize the state to compel its citizens to be exposed to their brand of atheistic, moral or religious curriculum. This conspiracy with the modern usurpers is often rationalized in the mind of the religious litigant on the basis that morality is preferable to the present immorality. While this analysis is correct, the pursued remedy is wrong.

Indeed, when religious parents sense that their child's public school education is too secular (or insufficiently religious) they respond by pressuring the school board or state legislature to accommodate their desire to infuse some measure of religion into the curriculum, or through a variety of arrangements they infuse some type of state aid into religious or church run schools. This reaction to secularization, however, uses the public schools to carry out the will of the broader community irrespective of specific individual God-given parental rights.[109]

More recently the case of *Lee v. Weisman*,[110] brought the conflict between the right of parents into conflict with that of other parents and the community. Mr. Weisman sought to enjoin the state of Rhode Island from permitting prayers to be offered at his daughter's public school graduation. The Court agreed with Mr. Weisman that the prayers offended the establishment clause of the first amendment and enjoined their subsequent use.

As usual, the first amendment is not germane since no Congressional statute is present. *Lee* is not a first amendment case. *Lee* is an unalienable rights case. The parties should have looked at Rhode

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108. KY. CONST., § 1 (1992).

109. In the context of disestablishing state control over religious education and compulsory financial support, the Commonwealth of Virginia rightly observed that it is an;

> impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world and through all time.

R. CORD, *supra* note 1 at 249. *See also An Act for Religious Freedom*, adopted by the Virginia General Assembly on January 16, 1786, VA. CODE ANN. § 57-1 (1950).

110. 505 U.S. 577 (1992).

Island's constitution to find if every parent present had an unalienable right to direct the education of their children and that by their voluntary attendance at this ceremony they elected to expose their children to the program that was offered including a prayer.

And had the ceremony been compulsory, then the real issue would have been that parents and not the state have the power to expose their children to those ideas which parents determine are suitable to their own child's education. If a non-sectarian prayer is appropriate, then parents may select or organize a ceremony in which such a prayer is offered. If a sectarian prayer is appropriate, then parents may select or organize a ceremony in which such a prayer is offered. If no prayer is appropriate, then parents may select or organize a ceremony in which no prayer is offered. What all this assumes is not that this prayer or no prayer should be offered, but that government compulsion should not attach itself to the realm of ideas whether those ideas are expressed in the form of a prayer or the state mandated curriculum. The unalienable rights of each parent, not just the nonconformist choices of Mr. Weisman must be defended.[111]

The case should have actually turned on the state constitution of Rhode Island in the Rhode Island Supreme Court. That court would have found that the state constitution declares that God made the mind of mankind free and warns against all attempts by the legislature to influence the mind of its citizens and their children by "temporal punishments or burdens, or by civil incapacitations."[112] A court would have to consider whether the constitution's recognition that God made the mind free has an application beyond its implications for a state established church to a state established school.

If it was the state constitution's objective to protect the mind from state coercion then the state's educational system of compulsory exposure and financing would be unconstitutional.[113] If this construction, however, is beyond the state constitution's meaning, then the remedy for parents who object to prayers or who want prayers said for their children in Rhode Island is in adding a state constitutional amendment, not in a judicial case.[114] A state constitutional solution would return the choice over education and funding to each parent for their own child.

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111. For additional discussion and analysis of this case *see infra* notes 221-232 and accompanying text.

112. R.I. CONST., Art. 1 § 3 (1987). Note that "temporal punishments or burdens, or by civil incapacitations" are a far (and embarrassing) cry from the Court's "social pressure" and "psycho-coercion" test to determine establishment. 120 L.Ed 2d at 485, 518.

113. Virginia was also concerned about the proper use of taxes to fund state propagation of ideas. It observed "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." And "that even the forcing [of] him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose power he feels [is] most persuasive to righteousness." R. CORD, *supra* note 1 at 249-50. *See also An Act for Religious Freedom,* VA. CODE ANN. § 57-1.

114. Those who argue that a state constitutional provision is too difficult to plead or ratify, ought to reconsider their improbable chance of success under the first amendment after rereading the Court's holding in *Lee*.

7. Federal Jurisdiction and Enumerated Unalienable Rights

To the extent that the preceding cases looked to state constitutional provisions protecting unalienable rights, a state court could have construed the relevant provision. But what about federal courts? What is the actual federal jurisdictional basis to construe unalienable right?

Article IV, section 4 of the United States Constitution may provide a basis for original federal jurisdiction. It states; "The United States shall guarantee to every state in this union a Republican form of government . . . ." The reference to republican government guarantees limits not only on the form of government but also upon the power of state governments to deprive their citizens of state constitutionally enumerated unalienable rights. This understanding was embodied in state enabling legislation which provided that state constitutions shall be republican in form and "not repugnant to the principles of the Declaration of Independence."[115]

It could be argued that the reference to republican government embodies both the form *and* the object of state government, *i.e.,* the security of state constitutionally enumerated unalienable rights. But this is a streach and not especially persuasive. Nevertheless the argument goes as follows: As every state is admitted "on equal footing with the original States," in all respects whatsoever, their presence in the Union ensures the guarantee of republican government both with respect to its form and its object. Thus, when any state enters the Union, it is forever precluded from legislatively repudiating either the notion that its government should be republican in form or the principle that it was admitted to secure unalienable rights through its respective constitution, statutes, administrative regulations and executive orders. In Constitutional law, this means every state is bound to protect state constitutionally enumerated unalienable rights including those pertaining to unalienable rights.

When the people of a state have not chosen to protect unalienable rights, however, through a constitutional or legal mechanism, a federal court does not have jurisdiction under article IV, section 4 to determine if a state statute contravenes any unenumerated God-given unalienable right. Article IV's guarantee does not extend the United States a power to federalize unalienable rights.[116]

So where the people or their legislative representatives have identified and embodied unalienable rights in their state constitutions, do federal courts have jurisdiction *via* article IV under that state's Congressional admission statute (the enabling Act), to decide whether state legislation alleged to deny or disparage an enumerated unalienable right, contravenes the relevant state constitutional

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115. *See supra* note 39.

116. This approach parallels the United States's obligation with respect to the form of government. When a state enters the Union, it must adopt a republican form of government. The United States then guarantees that form. Likewise as the states participate in the Union and embody unalienable rights in their constitutions, the United States could thereafter be obliged to guarantee the security of those unalienable rights. In both instances under article IV, the power of initiation lies with the people of the states. And in both instances under that same article, the power of enforcement of an enumerated unalienable right within the jurisdiction of the enumerating state may lie with the United States.

provision pertaining to unalienable rights? Probably not.[117]

Federal courts are simply not free to roam among the archives of history or law in order to enforce their own notions of unalienable or natural rights. Moreover, republican principles pertain to adoption of a form of government suitable to secure unalienable rights, but do not define the unalienable rights themselves. Identification and articulation of unalienable rights is the business of the people and the states in our federal system. Whether or not the enumeration of rights therein are *bona fide* unalienable rights in that they are given by God to all human beings is a political question not open to judicial review. But whether or not the rights so enumerated as unalienable are contravened by a state statute is not a political question.[118]

Finally, nothing within the police power of the state can legitimately serve to justify alienation of that which is unalienable. As the police power when rightly exercised must always serve the object of securing unalienable rights and thereunto adopt and enforce measures to protect the public health, safety, morals, and general welfare of the community, such power can never be rational or compelling for the state to abridge, deny, disparage or alienate such rights. Nor is the police power a mechanism for balancing unalienable rights against governmental interests in degrees of alienation.

8. Summary

The preponderance of cases involving the intersection of religion and education are not first amendment cases at all. Most do not involve any Congressional statute and therefore do not trigger the first amendment. In the rare instance where a Congressional statute is present, the case should be argued according to the enumerated powers doctrine, and if sustained on that ground, then examined under the first amendment to determine if it is a law "respecting an establishment of religion, or prohibiting the free exercise thereof" or a permissible civil acknowledgment of God in his Creator capacity.

Litigators should recognize that the Constitution is the Supreme law of the land and not Court decisions such as *Lemon v. Kurtzman* which reject the principles upon which the Constitution and the first amendment are established: namely, that the laws of nature and of nature's God establish

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117. Article IV is not a Constitutional mechanism empowering the United States to append state constitutional provisions to the federal Bill of Rights.

118. The political question and non-justiciable doctrines, precluding judicial review discussed in Luther v. Borden, 7 How. (48 U.S.) 1, 49 (1849) (*but see* Baker v. Carr, 369 U.S. 186, 218-232 (1962)), are based on the proposition that Congress (the legislative branch)--had jurisdiction to declare whether a specific form of government did or did not meet the requirements of a republican government. The evil to be avoided was to prevent an un-elected judiciary from usurping a legislative function.

Luther and its progeny prevent the judiciary under article IV from declaring which rights are unalienable and which are not. But where the state legislature has acted to declare those rights which it deems unalienable, then *Luther* does not preclude judicial review under article IV. Where state constitutional provisions involving unalienable rights have been adopted either by the people or through convention, and state statutes are being tested in their light, then the federal judiciary may enjoy jurisdiction in a challenge to a state admission statute to determine whether the latter conflicts with the former, provided that jurisdiction is limited to enumerated unalienable rights.

the basis upon which the United States was founded, that God gives all persons the unalienable right to the free exercise of religion, and that civil government may acknowledge these "self-evident truths" in its official proceedings without alienating the otherwise religious rights of individuals.

Of course litigators and high profile advocacy organizations which handle these types of cases may continue to ignore the Constitution's enumerated powers doctrine and its non-incorporation design in order to make the cases come out the way they want, but this is no basis for the general public's admiration. Why should the people approve of, or contribute to those who knowingly participate with Congress and the courts in rank usurpation of the Constitution's actual text and meaning? And who will tell the people that the advertised "victory" is premised on conscientious derogation of the unalienable right of government by consent? For the people consented only to a Constitution that kept Congressional power limited through the doctrine of enumerated powers and through the its first amendment limitations. Moreover, the people consented to state governments whose power would be used to secure their enumerated unalienable rights. With liabilities like these attached to court "victories" it is no wonder that so many advocacy group's mass mailings emphasize the expense of litigation rather than its actual cost.

Rather than seeking these tragic victories, litigators should closely scrutinize state constitutional provisions for references to unalienable rights. They should also focus attention on obtaining the security of unalienable rights for parents in the context of education through state legislation or state constitutional amendments to that effect.

B. Equality or Inequality?

Bear in mind that in almost all of the religion cases decided by the Court, its rationale is a function of the test in *Lemon v. Kurtzman*. This test weakly hints of the equality principle when it declares that a law's principle or primary effect may neither advance or inhibit religion, but it does not rise to consider the controlling principle of equality in the sense the Declaration suggests and Thomas Jefferson's *Bill for Religious Liberty* employs, namely: "that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry." This view of equality was subsequently embodied in state constitutional provisions in a variety of forms and is also part and parcel of the free exercise clause of the first amendment.[119]

1. Religious Opinion Neither Expands or Diminishes Civil Rights or Capacities

In addition to education/religion cases, a second type of case is also commonly litigated under the first amendment. This type of case involves fact patterns where an individual's religious opinions are invoked as a justification for expanding or for diminishing that individual's non-religious civil

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119. R. CORD, *supra* note 1 at 250. This Article is not concerned with the piecemeal *Lemon* test which the Court evolved through the process of judicial reverse engineering from the case results desired to the justifying "legal tests." This Article does not examine the cases in the shadow of *Lemon*, but rather in the light of the equality and unalienable rights principles discussed in the previous sections. For discussion of *Lemon*, *see supra* note 91. For an analysis of the equality principle *see Legal Equality*, *supra* note 11 at 139.

rights or capacities. These types of cases almost always involve application of the equality principle and implicate the idea that the law should be no respecter of persons. A court is either called upon to permit the legislature to treat religious individuals the same as non-religious persons, or to permit the legislature to treat them differently by expanding or constricting their civil rights. Different treatment involves either an expansion of rights based on religious belief or a contraction of rights based on religious belief.

Recall that the principle of equality is derived from the laws of nature and of nature's God and that its universal nature binds all governments to the extent that the principle has been articulated or manifested in written law. Several state Declaration of Rights articulate the relationship between religious liberty and the rule of equality.[120] Virginia stated the broadest rule of all, not limiting its application to those who acknowledged God or professed Christianity. It declared that "all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities."[121] In other words, religious opinions should not affect civil capacities, and by necessary implication non-religious opinions should not affect civil capacities either.

The equality principle prevents state and Congressional infringement or adjustment of civil rights on account of one's belief or mode of worship.[122] The principle is part and parcel of both the free exercise clause of the federal Constitution and to the extent the idea is reflected in state constitutions, it constitutes the law of that state as well.[123] In a nutshell the law of equality declares that opinion or belief may in no way diminish, enlarge, or affect civil capacities.[124] Nor does the free exercise of religion conflict with legitimate social and civil obligations.[125] If a conflict does exist, then either the right or the obligation is incorrectly defined or asserted. The equality and free exercise principle should be construed in a harmonious manner and not in a way that balances one against the other.

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120. *See supra* notes 50-58 and accompanying text.

121. R. CORD, *supra* note 1 at 250.

122. *See supra* text accompanying note 58.

123. *See also* U.S. CONST., amend 14.

124. There is no inherent conflict between religious obligations and civil rights. Thomas Jefferson recognized this harmony when he wrote to a Committee of the Danbury Baptist Association on January 1, 1802. He said mankind "has no natural right in opposition to his social duties." *A letter from Thomas Jefferson to a Committee of the Danbury Baptist Association, January 1, 1802* in R. CORD, *supra* note 1 at 114-115.

125. Thomas Jefferson recognized that the conflict between natural rights and social duty could not be the norm or rule since both rights and obligations emanated from a "common father and creator of man." R. CORD, *supra* note 1 at 115.

2. Litigating According to the Equality Principle

a) Equal Access to Public Forums

Several cases in this section consist of a denial of equal treatment and involve discrimination against individuals because of their religion. Such cases include equal access to schools and public places.

For instance in *Widmar v. Vincent*,[126] the Court ruled that a public university must grant equal access to university facilities for student-led Bible studies. The University of Missouri at Kansas City had made its facilities available for the activities of student groups, but denied the use of the facilities to religious student groups. In other words, the University had diminished the civil rights of students based on their religious belief.

In holding for the students the Court assumed the legitimacy of the incorporation doctrine, and turned to the first amendment's free speech clause. The Court indicated that the free speech clause of the first amendment required content-neutrality by the University and thus the University's denial of its facilities was unconstitutional. The equality principle was not vindicated except indirectly through the content neutrality mechanism of the federal free speech clause.

Missouri's courts, however, could have reached the same result on the solid legal footing of its own Constitution, rather than through the Supreme Court under its unconstitutional incorporation of the federal free speech clause. Article 1, Section 2 of the Missouri Constitution states in part that "all persons have a natural right to life, liberty, the pursuit of happiness and the enjoyment of the gains of their own industry; that all persons are created equal and are entitled to equal rights and opportunity under the law; that to give security to these things is the principal office of government, and that when government does not confer this security, it fails in its chief design."

University students are persons entitled to equal rights and opportunity under the law. Missouri's Courts could have made this connection. Article 1, Section 5 states in part that "no person shall, on account of his religious persuasion or belief, be . . . molested in his person or estate" and section 7 observes in part that "no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship." Of course, the University of Missouri at Kansas City had made its facilities available for the activities of student groups, but denied the use of the facilities to religious student groups. Such unequal treatment is "discrimination made against any . . . creed of religion, or any form of religious faith or worship" plain and simple. One should think that Missouri courts could handle this case without the need for incorporation and federalization of all speech claims.

Likewise in *Board of Education v. Mergens*,[127] the Court held that public high schools which make their facilities available to student organizations, must also allow equal access to school facilities

126. 454 U.S. 263 (1981).

127. 496 U.S. 226 (1990).

for student-led Bible studies. The school was prohibited from closing its open forum to religious students. Neither the school's policy or the federal Equal Access Act,[128] which required public schools that opened their facilities to students to open them on an equal basis, violated the establishment clause although the Court was not able to agree upon a common rationale.[129]

Citing a split in circuits, the petitioners in *Lamb's Chapel v. Center Moriches Union Free School District*,[130] asked the Court to reverse a lower court's holding that a New York statute prohibiting religious after-hour use of a public school facility did not violate the free speech or free exercise clause. New York law authorized local school boards to adopt reasonable regulations permitting the after-hours use of school property for 10 specified purposes, not including meetings for religious purposes. Pursuant to this law, the school board issued rules and regulations allowing social, civic, and recreational uses of its schools, but prohibiting use by any group for religious purposes. After the District refused two requests by an evangelical church and its pastor to use school facilities for a religious-oriented film series on family values and child rearing on the ground that the film appeared to be church-related, the Church filed suit claiming that the District's actions violated, among other things, the First Amendment's Freedom of Speech Clause. The lower court reasoned that the school property, as a "limited public forum" open only for designated purposes, remained nonpublic except for the specified purposes, and ruled that the exclusion of the Church's film was reasonable and viewpoint neutral.

The Supreme Court, however, now finding its purported constitutional footing in the free speech clause rather than the free exercise clause, held that such a policy discriminates on the basis of viewpoint by permitting school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject from a religious standpoint. Denial on this basis violates the First Amendment speech clause when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise included subject. The principle that has emerged, not from the constitution but rather “from our cases” noted the Court, is that “the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”[131]

The Court reached the right result, but for substantially the wrong reasons. First, what is the problem with New York’s Constitution? Does it provide no defense of the principle that “forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others?” Perhaps New Yorkers do not understand their fundamental and cherished rights enough

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128. 20 U.S.C. §§ 4071-4074 (1988).

129. The issues raised in the preceding section about the unalienable rights of parents do not apply to the context of higher education since "children" are adults when they attend a university or college and as such may decide for themselves the ideas to which they shall be exposed. Moreover, although *Mergens* does involve a high school setting and would otherwise be suspect under the analysis in the preceding section, it is nevertheless included here because it reflects the equality principle in a clear way and it involves a federal law.

130. 508 U.S. 384 (1993).

131. 508 U.S. at 394, citing, *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)

to place them in their own Constitution? Perhaps it is necessary for the Court to unilaterally extend the first amendment's limits on Congress to the state of New York because the New York courts cannot be trusted to spot an unconstitutional state law under their own Constitution?

Well, as it turns out, Article 1, Section 11 of the New York Bill of Rights states that:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

Apparently, New Yorkers think that no person, including the pastor of the Lamb's Chapel, shall because of his religion, be subjected to any discrimination in his civil rights to participate equally in the benefits of access to the Center Moriches Union Free School buildings by the Center Moriches Union Free School District. Apparently, the Court's purported exigency in extending the first amendment to the states *via Cantwell v. Connecticut*,[132] declaring that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces the liberties guaranteed by the First Amendment" is no exigency at all. Why incorporate when it appears that New Yorkers can state the rule regarding free speech even more clearly than the Court can. At least New Yorkers can point to a Constitutional text, whereas the Court can only point to "our cases" as a basis for support. New York has law, the Court has itself.

Even aside from the phoney incorporation of the first amendment speech clause issue, not much in this case is said about the free exercise of religion, or about how a state financed educational establishment itself violates the unalienable rights of New York residents to support only those educational objects which they would volitionally make their own and not be forced to support any other. The construction and maintenance of the Center Moriches Union Free School *buildings*, paid for as it is from the treasury of the state or its municipal instrumentality, relies upon coercion in the manner of its support. To put it in perspective, if the state forced its citizens to pay for the *Lamb's Chapel educational building*, that would be the constitutionally impermissible equivalent of forcing them to pay for the Center Moriches Union Free School buildings.

Of course, after having touted the republican virtues of New Yorkers and illustrated their insight into securing their equal rights by state constitutional means, it must be observed that with regard to the inalienable right of persons to be free from coercion in supporting state sponsored ideas, in financing the teacher unions and educational buildings that propagate them, the people of New York have miserably failed to acknowledge same. Nevertheless, the *root* principle once again appears to be the principle of equality (not speech), which requires that the state not diminish the equal access rights of its citizens based on their religious belief, speech or association (including religious association).

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132. 310 U.S. 296, 303 (1940).

In *Widmar, Mergens*, and *Lamb's Chapel*, government controlled schools under the cloak of the no-establishment clause, took the position that religious students or organizations were not free to use public and educational facilities like other students or organizations, simply because of their religious belief. The schools argued in effect, that "matters of religion" should diminish the equal civil capacities of their students or organizations seeking to use the government controlled schools after school hours.[133] The Court properly rebuffed state and school district arguments that a religious opinion or message should diminish the equal civil rights or capacities of students or participants--to wit, the right to meet on school campus on an equal basis as enjoyed by non-religious students. It did not, however, clearly vindicate the equality principle in doing so.

Of course in *Widmar* the real issue was not a free speech issue under the federal Constitution, but rather equal rights of religion and speech issue under the Missouri Constitution. The same applies to *Lamb's Chapel* under the New York Constitution. And in *Mergens* the controlling issue was rather whether Congress has the Constitutional power under the enumerated powers doctrine to legislate the Equal Access Act pertaining to educational access in the states. This power is unlikely since Congressional power to interfere with or fund education within the states is historically prohibited.[134]

Equal access to non-educational public places has also been an issue. In *Board of Trustees v. McCreary*,[135] a privately financed nativity scene was displayed in a public park. This arrangement was objected to on grounds of violating the establishment clause even though no federal law, land or punishment was involved. An equally divided Court, however, let stand the second circuit's opinion which upheld expression of religious ideas in a public park. The appeals court found that the creche presented no establishment clause violation. This was not a typical nativity scene case since it involved equal access to public property and the right to express one's religious opinions. Just because the content was religious, the equal civil capacities of the speaker could not be diminished or adversely affected.[136]

The same rule of equality also illuminated the Court's decision in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus*.[137] The Court was faced with an airport wide ban of "all first amendment activity at Los Angeles International Airport." The Court ruled that the ban was facially unconstitutional according to the overbreadth doctrine. The ban was challenged by "Jews for Jesus," an organization which distributed religious tracts–speech banned by the Airport. The Court's

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133. *See also* R. CORD, *supra* note 1 at 250.

134. *See* Morgan, *Federal Jurisdiction*, *supra* note 76. No opinion is given on whether the law can be sustained on other Constitutional grounds.

135. 471 U.S. 83 (1985) (affirmed without opinion by an equally divided Court).

136. The district court had originally found that the creche violated the establishment clause, 575 F. Supp. 1112 (S.D.N.Y. 1983). The second circuit reversed, holding no establishment had occurred and sustained the petitioner's free speech rights, 739 F.2d 716 (2nd Cir. 1984).

137. 482 U.S. 569 (1987).

holding recognized that all speech could not be banned whether it was religious or otherwise. Again, just because the content was religious, the equal civil capacities of the speaker could not be diminished or adversely affected.

The Court in *McCreary* and *Jews for Jesus* showed more confidence, however, with the content neutral free speech argument, which itself is an expression of the equality principle, than it did with any religious theory, or the principle that the first amendment only applies to Congressional and not state provisions, or the principle it should have recognized–that religious expression does not reduce a person's civil capacities.

In *International Society for Krishna Consciousness, Inc. v. Lee*,[138] however, the Court ruled that airports were not traditionally public forums for speech. It stated that restrictions on speech in nonpublic fora are valid only if they are "reasonable" and "not an effort to suppress expression merely because public officials oppose the speaker's view."[139] Since the owner of the airport, the Port Authority, concluded that its interest in monitoring airport activities could be accomplished by limiting solicitation and distribution to the sidewalk areas outside the terminals, the Court found the ban to be less than a complete ban and also a reasonable ban. Since the Authority did not adopt the restrictions in an effort to suppress expression, because it may have opposed the religious speaker's view the court upheld the restrictions.

This case indicates that just because the content of speech is religious, the speaker has no more right to speak than if the content were not religious. This is a correct conclusion based on the principle of equality -- that religious belief neither expands or contracts civil capacities. However, the equally enjoyed civil capacities–the solicitation and distribution on the sidewalk areas outside the terminals-- is not much of a right. But equality is not the whole story.

As far as application of the first amendment is concerned, the Port Authority of New York and New Jersey, which owns and operates the airports in the New York City area and controls certain terminal areas at the airports and which adopted the regulation, is certainly not the Congress and its regulations are clearly not federal statutes. This case should have been brought in State Court and plead under the Constitution of New York. Article 1, Section 3 states that:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

Notice the equality principle embedded in this section–"without discrimination or preference."

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138. 505 U.S. 672 (1992).

139. 505 U.S at 687, citations omitted, O'Connor, J., concurring.

What does it mean to enjoy religious profession without discrimination or preference? It means that religious belief neither expands or contracts civil capacities. It is the same bedrock principle. Or consider Article 1, Section 8. It states that:

> Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.

When the Port Authority of New York and New Jersey, which owns and operates the airports and controls certain terminal areas at the airports, adopted a regulation forbidding, *inter alia*, the repetitive solicitation of money within the terminals, it passed a law. And when the police superintendent of the Port Authority of New York who was charged with enforcing the regulation at issue, did so against the petitioners, he enforced a law. And the law which he enforced was a law which restrained the right of citizens to "freely speak . . . sentiment on all subjects" including the solicitation of money within the terminals. There is no doubt that the regulation at issue violated the Constitution of the State of New York and that the case should not have been decided by the U.S. Court on first amendment grounds, but rather by a New York Court on its own Constitutional terms.

b) Equal Access to Benefits

The Court's tendency to defend the equality principle in the context of content neutral speech or expression found a more muted adaptation in situations where speech is not involved. In *Witters v. Washington Department of Social Services for the Blind*,[140] the petitioner Witters applied for Washington state rehabilitation benefits because of his blindness. He sought to apply the rehabilitation benefits he would receive from the state to pay tuition at a Christian Seminary. The State of Washington, however, denied him the benefits arguing that the use of the money would improperly advance religion in violation of the first amendment.

The Supreme Court disagreed, holding that Witters was entitled to state benefits the same as any other individual who meets the state's standards for vocational rehabilitation benefits. In light of the principle of equality, if the state allowed individuals to obtain benefits[141] because they are legally blind, then Witters could not be singled out simply because he used those benefits to further his religious training. To single him out on that basis would have wrongfully reduced his civil capacities because of his association with a religious seminary.

In *Zobrest v. Catalina Foothill School District*,[142] the Court was petitioned to reverse a lower court's ruling that provision of an Arizona financed sign language interpreter for deaf children who attend a religious school, violated the establishment clause. The school district refused to provide a

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140. 474 U.S. 481 (1986).

141. *See infra* text accompanying note 148-149 for a discussion on the relationship between unalienable rights and the authority of civil government to engage in works of mercy, benevolence and charity.

142. 509 U.S. 1 (1993).

sign-language interpreter to accompany the child to classes. The petitioner alleged that the Individuals with Disabilities Education Act (IDEA) and the Free Exercise Cause of the First Amendment required the school district to provide the interpreter, and that the Establishment Clause did not bar such relief. The Court stated the touchstone for its analysis: "[W]e have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated financial benefit."[143] Consequently, the Court upheld the Arizona statute.

In *Zobrest*, the issue should have been at least considered as to whether any state financed educational venture, such as Arizona's disability act legislation, violates the unalienable rights of parents as defined under Arizona law, to financially support only those educational objects which they would make their own and not be forced to support any other. Here, Arizonians were compelled to pay for educational services rendered to others, irrespective of their consent. Zobrest's parents demanded that their taxpaying neighbors be compelled to support the education of their deaf child because the state compelled them to support the education of their neighbor's children in turn.

Perhaps Article 2, section 33 of Arizona's Constitution is a sufficient declaration of a parent's unalienable right? It states that "[t]he enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people." Or perhaps Article 2, Section 12 would lead to the contrary result? It states in part that"[n]o public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment." Was money applied to religious instruction or just to instruction generally? But if no Arizona Constitutional provision can be fairly said to contemplate or generally support a parents right, then the principle of equality would control as it did.

Under an equality analysis–the rule of which is that religious belief neither expands or contracts one's civil capacities–Zobrest would be entitled to equally participate in a government program that neutrally provide benefits to a broad class of citizens defined without reference to religion. As in *Witters*, the equality principle requires that the state not diminish the equal rights of its citizens based on their religious belief or association. What is troubling is that the Court failed to articulate the root equality principle. Virginia stated the rule. It declared that "No man shall . . . be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities."[144] This meaning was built into the First Amendment, yet the Court invokes a neutrality rationale instead.

Widmar, Mergens, Lamb's Chapel, McCreary, Jews for Jesus, International Society for Krishna Consciousness, Inc. v. Lee, Witters and *Zobrest* were all decided according to various free speech,

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143. 509 U.S. at 8.

144. R. CORD, *supra* note 1 at 250; Virginia Constitution, Art 1, Section 16.

free exercise and establishment clause legal rationales. They could have all been much more clearly decided on the legal principle of civil equality–that opinion or conduct should not diminish equal civil rights or capacities. Many of these cases could have been decided with reference to the state constitutional expression of equality such as in *Widmar* under Missouri law, *International Society for Krishna Consciousness, Inc. v. Lee* under New York law,[145] *Zobrest* under Arizona law, and *Lamb's Chapel* under New York law.

The legal basis for the state constitutional resolution would be far superior to the contrived pretextual basis of incorporation under *Cantwell*. Thus, to the extent the equality principle is embodied in state constitutional provisions, a state is precluded from expanding or contracting the civil rights of its citizens based on their religious belief. But to the extent that a Congressional statute passes muster under the enumerated powers doctrine, then it appears that the first amendment's religion clauses and the content-neutral species of the free speech clause will have to carry water for the equality principle to bar or sustain legislation that expands or diminishes a person's equal civil capacities.[146]

3. Litigating According to the Preferential Rationale

a) Unemployment Compensation and Rejection of the Equality Principle

Several unemployment compensation cases have come to the Court's attention based on a variety of state unemployment compensation schemes. There is no unalienable or federal Constitutional right to obtain unemployment compensation and no state must adopt such a program unless its own state constitution requires that result.[147]

Like government regulation of education, the idea of the *civil government* "compensating" a person during periods of temporary unemployment is a relatively recent phenomenon. The use of the term "compensation" carries along with it the idea of earnings or wages for work performed. Strictly speaking this is a misnomer since the concept of compensation is generally based on contractual obligations and its corresponding legal obligation or duty to pay or compensate.

The relationship between the civil government and the unemployed individual, however, is not one defined by contract related concepts. In actuality that relationship is better characterized as one pertaining to works of mercy, benevolence and charity. The civil government "compensates" the unemployed because it is a charitable thing to do. Historically, works of mercy, benevolence and

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145. Only *Mergens* involved a Congressional statute and is therefore a true first amendment case. The rest of the cases focused on state and local laws and are therefore equal protection and not first amendment concerns. Zobrest did not appeal the federal statute at issue in the lower court.

146. The fourteenth amendment's equal protection clause will also achieve the same effect where a state attempts to deny any person the equal protection of the law.

147. Whether a state may require this result would have to be measured against the requirements of the laws of nature and of nature's God.

charity were not undertaken by the civil government. These undertakings were moral obligations incumbent upon families and ecclesiastical institutions. Though these institutions nevertheless continue to operate in this arena, it is the civil government which now dominates the field.

While it is beyond the scope of this Article to elaborate upon the moral obligation of families and religious institutions to undertake works of mercy, benevolence and charity, it is appropriate to raise two questions for further consideration. The first is whether the unalienable rights given by God to all human beings, includes the right to *freely* give of one's resources to another in the latter's time of need such as a period of temporary unemployment. The second question is whether by the law of nature and of nature's God, the right to freely give, falls *exclusively* under the jurisdiction of families and religious institutions, or whether these matters are also the fit objects of civil government.[148]

If works of charity are not within the jurisdiction of civil government under the laws of nature, then the security of the unalienable right of an individual to freely and voluntarily give to such endeavors is violated when the civil government coerces its citizens to "give" through its tax system. To the extent the people are taxed and to the extent that those monies go to works of charity such as unemployment compensation, that individual is deprived of his or her unalienable right to give *freely* to those persons or charities and *only* those persons or charities that the individual deems are worthy of his or her support. This argument is not anti-tax for it assumes that the civil government has the power to tax. It questions, however, the notion that the civil government has the power to tax and spend to further the jurisdictional objects of private or ecclesiastical beneficence.

It is the obligation of the courts to examine unemployment compensation laws in this light and determine whether the right to freely give is unalienable and if so, whether the right has been identified by the state legislature and only then, determine if the right is contravened by unemployment compensation laws. With these caveats in mind, examination of the following cases in light of the principle of equality bears out some interesting results.

In *Thomas v. Review Board*,[149] the Court was faced with the claim of a Jehovah's witness who was scheduled to work in the production of military equipment after his former assignment was legitimately eliminated by his employer. Thomas refused and applied for unemployment compensation. He claimed that his refusal to work was motivated by his religious beliefs. When he applied for unemployment compensation, he was denied benefits since he quit his job voluntarily. The state of Indiana did not consider voluntary termination a "good cause" that, under the statute would trigger compensation. Benefits were only available to those who could not work, for good cause as defined in the statute. The Court, however, held that "good cause" could include *quitting* the job where motivated by religious belief.

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148. If the objects are fit for civil government then a further question involves consideration of the Constitutional power that animates their implementation. For an excellent discussion of the destructive effect of government "charity" *see* M. OLASKY, THE TRAGEDY OF AMERICAN COMPASSION, 1992.

149. 450 U.S. 707 (1981).

In light of the equality principle, this conclusion presents problems. Setting aside for the time being the problem of a state law being judged by a Constitutional limitation on Congressional power, and ignoring the *a priori* issue of the propriety of the state engaging in works of charity and philanthropy, the question becomes one of whether Thomas was treated the same as others receiving unemployment compensation or whether he was treated differently because of his religious beliefs. If the state statute allowed individuals to obtain benefits because they would not work based on belief, then Thomas would be entitled to benefits because of his beliefs. The state, however, would be required to provide benefits to *all* those who would not work because of their beliefs, irrespective of whether those beliefs were religious or otherwise. The state however, chose not to extend benefits to persons who quit their job on the basis of belief at all.

The Court, however, expanded Thomas' civil capacities based on his religious beliefs. In doing so, the Court ran roughshod over the idea that religious belief ought not expand or diminish a man's civil capacities. Thomas' beliefs entitled him to special treatment not accorded to others who have non-religions beliefs that lead them to quit.

The same rationale would also apply in *Hobbie v. Unemployment Appeals Commission*.[150] In that case, the Court upheld entitlement to unemployment benefits under Florida law where the applicant had become a Seventh Day Adventist. The Adventist religion prohibits work on Friday which they consider the Sabbath. The applicant refused to work on that day and was consequently discharged. After Hobbie was fired, she sought unemployment compensation but was denied benefits because her refusal to work on Fridays was not considered "unemployment through no fault of" her own as required by Florida law. The Supreme Court, however, held that Hobbie was entitled to unemployment benefits and to deny her the same would be an infringement of the free exercise of religion.

Like *Thomas*, the *Hobbie* case allows individuals who elect not to work because of religious belief to obtain unemployment benefits. Any other person, however, who elects not to work on a given day because of any other reason is denied unemployment benefits. These decisions wrongfully expand the civil capacities of some based on their religious belief and consequently contravene the principle that religious belief neither expands or contracts civil capacities. In *Frazee v. Unemployment Compensation Commission*,[151] the Court drew the same conclusion. In *Frazee* an employee whose personal religious convictions forbid working on Sunday, was entitled to unemployment compensation. Other employees who had convictions against working on any given day (or working at all) were not treated the same.

b) Employment Division v. Smith: Equality Revisited

In *Employment Division, Department of Human Resources of Oregon v. Smith*,[152] however, the Court

150. 480 U.S. 136 (1986).

151. 489 U.S. 829 (1989).

152. 494 U.S. 872 (1990).

rejected the unemployment compensation claim of an American Indian who was discharged from employment for the use of drugs. The use of an hallucinogenic herb (peyote) was part of Smith's religious ceremony. The use of peyote was also criminal in Oregon. Smith contested a state law which denied unemployment compensation benefits to an individual discharged for the use of certain controlled substances including hallucinogenic herbs such as peyote. The state denied unemployment compensation benefits to individuals discharged for the illegal use of controlled substances. The Court rejected Smith's plea to, in effect, increase his civil capacities by reason of his religious beliefs and therefore dismissed his free exercise claim.

Again, ignoring the fact that no Congressional statute is involved and therefore the first amendment is irrelevant, and recognizing that the case should have been decided under Oregon's Constitutional provisions pertaining to religion and equality, the *Smith* case from an unemployment compensation and from a free exercise point of view, signals a departure from *Thomas* and *Hobbie* and even *Cantwell* itself. From the standpoint of the power of government to restrict religious practices, however, the decision has a wider effect.

(i) The Historical Test of Constitutionality and *Reynolds v. United States*

Prior to *Smith*, when the government sought to restrict religious practices directly, the Court examined the history and circumstances surrounding the adoption of the free exercise clause. This history has already been examined elsewhere in this Article in much detail. Previously discussed were the critical underpinnings of recognizing God as the Creator, the impact of that recognition on requiring oaths and prohibiting religious tests and as a point of inquiry, regarding a determination of which rights are given by the Creator and are thereby unalienable.[153]

Nevertheless, it is important to now interject some background regarding the Court's: 1) early recognition of these underpinnings in its case decision *of Reynolds v. United States*[154] and its subsequent abandonment of this foundation through; 2) erection of the sincerely held/compelling state interest test announced in *Cantwell v. Connecticut*[155]; and 3) imposition of further limitations on the scope of which sincerely held beliefs will warrant application of the compelling state interest test in *Employment Division, Department of Human Resources of Oregon v. Smith.*[156] The history of the First Amendment and these three cases are watersheds in the development and decline of Constitutional law.

The test was well stated in *Reynolds v. United States* as such:

> The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to

153. See notes 47-62 and accompanying text *supra*.

154. 98 U.S. 145 (1878).

155. 310 U.S. 296 (1940).

156. 494 U.S. 872 (1990).

> ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is what is the religious freedom which has been guaranteed.[157]

Then going back into the history of its adoption, the Court took care to recognize that religion was defined as a duty which is owed to the Creator, not a sincerely held religious belief. It observed that:

> Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. Semple's Virginia Baptists, Appendix. At the next session, the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. 1 Jeff. Works, 45; 2 Howison, Hist. of Va. 298. In the preamble of this act (12 Hening's Stat. 84) religious freedom is defined . . . .[158]

After laying this foundation, defining religion in terms of a duty owed to the Creator (and rejecting Reynold's claim that his religious belief ought to trump the Utah territory's prohibition on polygamy), the Court then zeroed in on the essence of its historical inquiry. It did not balance Reynold's admittedly sincere religious belief against the Utah territory's legislative interest as it would later do in *Cantwell*. It did not ask if the interest was compelling as it would later ask in *Cantwell*. It did not discuss the least restrictive means as it would later demand in *Cantwell*. Nor did it ask if Utah's law imposed a direct or indirect regulation on Reynold's. The *Reynold's* Court actually wanted to understand what the framers and founders meant, rather than fancy itself as the framers and founders itself.

What the Court did do was to quote Virginia's Statute for Religious Liberty written by Thomas Jefferson. It confirmed:

> to suffer the 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 which at once destroys all religious liberty, [but] that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.[159]

"In these two sentences" declares the Court "is found the true distinction between what properly belongs to the church and what to the State."[160] Unfortunately, such sentences, however, would play no meaningful role is *Cantwell* or *Smith.*

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157. 98 U.S. 145, 163 (1878).

158. *Id*. at 163.

159. *Id*.

160. 98 U.S. at 163.

In other words, if Religion is being exercised--if a man is rendering a duty to the Creator--then the government's interest, whatever it may be, is simply irrelevant. The government may only intervene when Religion is not being exercised–when a duty to the Creator is not involved (or when some other inalienable right is not at issue). Then the government's interest, compelling or otherwise is sustained. Thus, Reynold's acts were not regarded as Religion. Polygamy was not so regarded because historically is was not so regarded.[161]

(ii) The Historical Test of Constitutionality and the Defects of History

Now perhaps you are wondering, "What if history is wrong? What if the historical understanding has not kept pace with our enlightened understanding of religion? Then wouldn't use of this Creator/Religion/Historical test produce unjust results?" Well that is a good question and one the framers thought about. The rule of construction and interpretation has already been given:

> The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted.[162]

If indeed the Constitution, its meaning and protections are behind the times, the remedy for this ailment is to amend through Article V the provision which needs updating. Then the Court, when construing the updated provision, may "ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was [amended] or adopted." So if history is wrong, then amend the Constitution through the specific constitutional means provided therein, to establish a clearer understanding of what is right and let the Court construe accordingly.[163]

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161. "At common law, the second marriage was always void (2 Kent, Com. 79), and from the earliest history of England, polygamy has been treated as an offence against society." 98 U.S. at 165.

162. 98 U.S. 145, 163 (1878).

163. Of course in going down that road, any amendment which has the intention or effect of setting aside or impairing any of the principles of the Declaration of Independence–the laws of nature and of Nature's God, equality, unalienable right, government by consent or the right of lawful revolution– would be nothing short of revolution, overthrowing the foundations of our current *Novus Ordo Seclorum*.
Beneath the pyramid on the reverse side of the Great Seal is the Latin phrase "*Novus ordo seclorum.*" Charles Thomson, the Secretary of the Continental Congress from 1774 to 1789, chose this motto. He may have borrowed the phrase itself from Virgil, the famed Roman poet who lived in the first century B.C. Virgil wrote the phrase, *Magnus ab integro seclorum nascitur ordo*, in the fifth line of his classic Eclogue IV. It has been translated in different ways, including:

> A mighty order of ages is born anew.
> The great series of ages begins anew.
> The ages' mighty march begins anew.
> The majestic roll of circling centuries begins anew.

The phrase is part of a prophecy about the fate of the Roman empire:

> Now the last age by Cumae's Sibyl song has come and gone,
> and the majestic roll of circling centuries begins anew . . .
> the Iron age shall cease, the Golden race arise . . .

Of course there will always be a Justice or two (or nine) who argue they are better suited to adjust the historical practices to the living constitution simply because they are Justices. We have no living Constitution in this sense. What we have is a Constitution based on the rule of law. Listen to the dissenters, however, rally around their own wisdom.

> Certainly, our decisions reflect the fact that an awareness of historical practice often can provide a useful guide in interpreting the abstract language of the Establishment Clause. See, e.g., Walz v. Tax Comm'n, 397 U.S. at 676-680; McGowan v. Maryland, 366 U.S. at 431-445; Engel, 370 U.S. at 425-429. But historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action, since, as the Court has rightly observed, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it." Walz, supra, at 678. See also Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. at 792. Attention to the details of history should not blind us to the cardinal purposes of the Establishment Clause, nor limit our central inquiry in these cases -- whether the challenged practices "threaten those consequences which the Framers deeply feared." Abington School Dist. v. Schempp, 374 U.S. at 236 (BRENNAN, J., concurring).[164]

Notice the absence of a thoughtful discussion of the role of the People in changing the Constitution to fit the times. Present is only the self-serving backhanded charge that the clause is "abstract," that rights guaranteed in 1776, 1788 and in 1791 are not "vested,"and that the framers secretly feared that

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and shall free the earth from never-ceasing fear.

Thomson coined the motto: Novus ordo seclorum. The correct translation, according to the U.S. State Department, is: "A new order of the ages." Thomson explained: "The date underneath [the pyramid] is that of the Declaration of Independence and the words under it signify the beginning of the new American Æra, which commences from that date." It is certainly true that the founders were conversant with the Greeks and Romans and that Virgil may be the actual source of the phrase itself. But the founders were also conversant with the Bible and the precepts contained therein. Perhaps they took inspiration and vision from Deuteronomy 4, verses 1-2, 5-8 (NIV) which recognized that Israel was itself to be a new order of the ages in terms of law and civil government under God.

Since the Declaration of Independence had committed the Nation to recognition of God the Creator, the new order thereby created would be truly new, one in which God and his laws would be honored, but no religion or church would claim the legal right to mandate ecclesiastical particulars. After all, the Great Seal also declares "*Annuit coeptis*" which means, "He [God] has favored our undertakings." Judge for your self. Here is Deuteronomy 4, verses 1-2, 5-8 (NIV).

> 1 Hear now, O Israel, the decrees and laws I am about to teach you. Follow them so that you may live and may go in and take possession of the land that the LORD , the God of your fathers, is giving you. 2 Do not add to what I command you and do not subtract from it, but keep the commands of the LORD your God that I give you. . . . 5 See, I have taught you decrees and laws as the LORD my God commanded me, so that you may follow them in the land you are entering to take possession of it. 6 Observe them carefully, for this will show your wisdom and understanding to the nations, who will hear about all these decrees and say, "Surely this great nation is a wise and understanding people." 7 What other nation is so great as to have their gods near them the way the LORD our God is near us whenever we pray to him? 8 And what other nation is so great as to have such righteous decrees and laws as this body of laws I am setting before you today?

164. Lynch v. Donnelly, 465 U.S. 668, 718-719 (1984). Justice Brennan, with whom Justice Marshall, Justice Blackmun, and Justice Stevens join, dissenting.

which they openly embraced. The implementation of such legal assumptions in subsequent case decisions is a textbook example of a Constitutionally impeachable offense committed by the Justices.

(iii) The Historical test of Constitutionality eroded by *Cantwell v. Connecticut*

The historical/unalienable rights test of the Constitution as expressed by *Reynolds* lasted until the Court's decision in *Cantwell v. Connecticut*. *Cantwell* made up a test that required the government to show that restrictions on religion were constitutionally acceptable only where they do not "unduly . . . infringe the protected freedom." The interest of the state was balanced against the religious right of an individual with the scales generally tipping toward the rights of the individual. States have generally had a difficult time in justifying *direct* restrictions on religious practices under this test since part of the state's burden was to show that it was unable to meet its legislative objectives in a way that impose the least restriction on the exercise of religious rights.

However, when *Cantwell* refers to religion, it is not possessed of the same meaning as when the Constitution or *Reynolds* refers to religion. Moreover, when *Cantwell* refers to action being limited, it does so in a different context than when the framers and *Reynolds* refer to conduct. These differences are real and palpable and change the meaning while keeping the words. This is the scam.

As previously examined, *Reynolds* defined religion as the framers defined it: "that religion, or the duty we owe the Creator."[165] *Cantwell* approached religion without reference to a "Creator" or "duties" owed. These terms appear nowhere in the opinion. The *Cantwell* Court stated:

> Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.[166]

For *Cantwell*, religion is freedom to believe and the freedom to act out one's beliefs. For *Reynolds*, religion is freedom to believe and freedom to act out those duties owed to the Creator. The difference is that no Creator is necessary to figure out what duties are owed in the first instance, while a Creator and duties are necessary in the second. When it comes down to it, the free exercise of religion without a Creator is a legal *non-sequiter*. It is simply the practice of practical atheism. The justices are practicing their practical atheism on the American people.

The difference is not over belief versus action. That the state has a limited jurisdiction over certain actions is a given. "Is time enough" wrote Jefferson, "for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[167] This is the same principle as *Cantwell's* recognition that "conduct remains subject to regulation for

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165. 98 U.S. at 163.

166. 310 U.S. at 303-304.

167. 98 U.S. at 163.

the protection of society." The key is rather that the Creator was declared not essential to a legal analysis of religion.

Cantwell also rewrote the First Amendment and applied it to the states through the Fourteenth Amendment.[168] This subject–the incorporation doctrine-- has been dealt with elsewhere.[169]

Finally, *Palko v. Connecticut*[170] decided three years earlier had already eroded the bedrock principle that the free exercise of religion was an unalienable right. Instead, the Court discussed it as a fundamental right or fundamental liberty.

> When we are dealing with the Constitution of the United States, and, more particularly, with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental" -- something without which "a fair and enlightened system of justice would be impossible." Palko v. Connecticut, 302 U.S. 319, 325.

And where did this language "so rooted in the traditions and conscience of our people as to be ranked as fundamental" actually come from? To what did it originally refer? It came from *Snyder v. Massachusetts,* wherein the Court, referring to procedural rules affecting state court trials as posing Fourteenth Amendment due process concerns, stated:

> The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless, in so doing, it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.[171]

The idea of ranking the Bill of Rights guarantees as fundamental was concocted from dicta about state trial procedures. That is the illustrious foundational history of "fundamental rights." The fundamental fairness concept of due process was misapplied to rights–i.e., fundamental rights/fundamental liberties. Thus, when *Cantwell* comes along, it is quite natural for the Court to observe that "the fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment." One thing is clear–gibberish is easier to articulate than the rule of law.

With this background in mind, let us now examine what really happened in *Smith* which was meaningful. Recall the Court's working principles going into *Smith*–the free exercise of religion needs no Creator; history does not control, need not inform and in fact can be set aside by the Court;

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168. 310 U.S. 296, 303 (1940).

169. See text accompanying note 78 to 92 *supra*.

170. 302 U.S. 319 (1937).

171. 291 U.S. 97, 105 (1934).

and with no Creator unalienable rights must fall thus leaving only fundamental judicially balanced rights. Recall how these principles contradicted the Constitution's original intention itself--the free exercise of religion presupposes the Creator; history gives weight to meaning but does not control, but if it is to be set aside it should by the will of the people through the amendment process; and with the Creator unalienable rights exist and trump all suppression thereof by the legislature.

Turning to *Smith*, the case did not change the "compelling state interest" test in situations where the government seeks to restrict religious practices directly. The state must still show a compelling interest that outweighs the religious right being restricted. The *Smith* decision, however, did change the test as it applies to generally applicable laws that *incidentally* forbid or require conduct that is contrary to a religious practice. In effect, the Court lowered the level of justification that a state must demonstrate before it can begin to restrict facially neutral practices which may incidentally affect religious conduct.

Under *Smith*, generally applicable laws are presumed valid if the state can demonstrate a mere rational basis for the legislation. The Court said that when the legislature passes a law which is generally applicable and doesn't single out religion specifically, (though it may impact religious conduct or religiously motivated conduct) then that law will not violate the first amendment free exercise clause if it has a rational basis for its enactment. Such a law can also be enforced if it is otherwise consistent with the federal Constitution and does not transgress the state's constitution. Of course, a state law that survives federal review may still violate a state constitutional guarantee. One effect, therefore, of the Court's *Smith* test is to throw free exercise litigation back into state courts deciding the matter under state law, provided that the Plaintiff's attorney understands he or she must first plead that provision. *Smith* is a backhanded and indirect un-incorporation case, tending to redirect in a primitive sort of way, the flow of indirect religious regulation litigation back to the states.

Some commentators and religious leaders have viewed *Smith* as a dangerous precedent since the Supreme Court lowered the standard of review to a rational basis test when otherwise valid laws are objected to or sought to be exempted from application by virtue of one's religion. Real danger, however, does not come from lowering the standard when the new standard is equality. Equality is the correct standard in situations where generally applicable laws incidently affect religion. It is the correct standard, however, only where such laws are themselves consistent with the laws of nature and of nature's God, and to the extent civil jurisdiction and legislative power are otherwise Constitutional.

There are, however, real dangers which are not recognized. The first is that the Court will continue to apply, and religious leaders will continue to advocate, that the "compelling state interest" test should be invoked and applied to laws which seek to *directly* restrict religious practices. The danger is that the unalienable right to the free exercise of religion will continue to be regarded as merely fundamental. The danger is that a right which is unalienable and therefore *not subject to any balancing whatsoever*, is still treated as if it were alienable when the state's interest is compelling, and thus is regarded as either the weak right of religious toleration or capable of being balanced into oblivion.

Why do religious advocacy organizations such as the Christian Legal Society for instance, continue to insist on *less protection* from state interference than that which an assertion of unalienable rights would provide? Is it lack of understanding, fear of losing or fuzzy bits and pieces thinking? The Court itself can cite to no credible evidence that permits it to engage in balancing of unalienable rights. It is only able to muster the argument that freedom to act cannot be absolute because the Court itself has said so in previous cases where unalienable rights were not at issue.[172]

Another very real danger which exists is that the rule of equality may be applied to laws which violate the unalienable rights of *all* persons, not just persons claiming a religious based right. Where the law is equally onerous to all persons in that everyone's unalienable rights are violated, and the law also has an incidental affect on religious practice or religiously motivated practice, the danger exists that emphasis on the religious practice will overshadow the unalienable rights issue.

For instance, elaborate judicial and legislative arguments may be invoked to protect, what in effect constitutes special preferences or exemptions from otherwise generally applicable laws affecting religious conduct. This is a danger because it will tend to defeat the legitimate though unrefined rule of equality laid down by the Court in *Smith*.

An example of this well intentioned but self-defeating view is found in "The Religious Freedom Restoration Act. (RFRA)"[173] The Act legislatively attempted to "overturn" the *Smith* rationale and codify balancing the state's interest in facially neutral legislation with an incidental or indirect affect on religion, against a petitioner's free exercise of religion claim.[174] The codification of the

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172. 494 U.S. at 894 (O'Connor, J., concurring) *citing, inter alia,* Reynolds v. United States, 98 U.S. 145, 161-167 (1879). The Court misleads itself, however, when it says that it has respected "the First Amendment's express textual mandate" but it then ignores the historical record pertaining to religion as an unalienable right (as discussed in this Article's sections 1-4 *supra*). Moreover, respect for the Constitution's "textual mandate" is not evidenced by the Court's extra-judicial legislative declaration that the free exercise clause of the first amendment "has been made applicable to the states by incorporation into the Fourteenth amendment." The Court also cites to itself for this proposition since the text does not support such a construction. *Id*. at 876-877 *citing* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

173. 42 U.S.C. § 2000bb-1 et seq.

174. The Act's genesis springs from the decisions of lower courts which invoked the *Smith* rationale. Several of these cases involved laws that required the Amish to display orange safety triangles on the back of their buggies when operating on a public highway; that required churches to obey landmark-preservation rules even when those rules interfere with church remodeling plans; that deemed religious objections insufficient to prevent autopsies; and ruled that OSHA hard-hat requirements could not be disregarded based on religious beliefs.

Each of these situations involves a general law (highway, landmark, autopsies, and safety requirements) that incidentally affects religious conduct or belief. Rather than properly seeking to determine if the state's law or regulation violates some God-given unalienable right, the religious litigants only sought to selfishly insulate themselves from the law's effect because they were religious.

The unalienable rights arguments would have considered questions such as:

--With respect to reflective triangles: Does an individual traveling on a state highway have an unalienable right to do so without meeting the safety demands of the owner (the state)? Does that state have jurisdiction to regulate traffic on its own highways and are those regulations reasonable in requiring a reflective safety triangle?

--With respect to church property: Do the owners of real property enjoy the unalienable right to use their property in a non-negligent non-nuisance way, free from governmental regulation? Does the civil government have the

compelling state interest test is perhaps the Act's most misguided feature because support of balancing is a direct denial that God-given unalienable rights are really unalienable. That religious organizations can advocate or support the codification of the denial of unalienable rights says little about their understanding of the overshadowing principles raised in the previous sections of this Article. It also suggests a lack of understanding about the source of law itself codified in the Declaration of Independence.

However, the Supreme Court struck down the Act in *City of Boerne v. Flores*.[175] In *Boerne*, the respondent, the Catholic Archbishop of San Antonio applied for a building permit to enlarge a church in Boerne, Texas. When local zoning authorities denied the permit, relying on an ordinance governing historic preservation in a district which they argued included the church, the Archbishop brought his suit challenging the permit denial under, *inter alia*, the Religious Freedom Restoration Act of 1993. This is a classic case of a claim that religion ought to expand one's civil capacities. This line of cases met with doom in *Smith* and also met its Waterloo in *Boerne*.

In imposing RFRA's requirements on the States, Congress relied on the Fourteenth Amendment, which, *inter alia*, guarantees that no State shall make or enforce any law depriving any person of "life, liberty, or property, without due process of law," or denying any person the "equal protection of the laws," and empowers Congress under section 5 of the Amendment "to enforce" those guarantees by "appropriate legislation." The Court held that although Congress can enact legislation enforcing the constitutional right to the free exercise of religion, its section 5 power "to enforce" the first amendment is only preventive or "remedial." The Court reasoned that the Fourteenth Amendment's design and section 5's text are inconsistent with any suggestion that Congress has the power to decree the substance of the First Amendment's restrictions *on the States*.

The Court wrote that:

> The "provisions of this article," to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause follows from our holding in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), that the "fundamental concept of liberty embodied in [the Fourteenth Amendment's Due Process Clause] embraces

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authority to take private property or reduce its usefulness with or without compensation through landmark preservation rules?

--With respect to autopsies: Do heirs-at-law have an unalienable right to prevent the state from taking control of a deceased person previously related to them by blood or marriage? Does the civil government have jurisdiction over the physical body of the dead?

--With respect to OSHA regulations: Is there an unalienable right to exercise individual judgment about the degree of safety protection one employs when working? Does the government have jurisdiction to demand a minimum level of safety in the private work place or does traditional tort law provide an adequate remedy and incentive for safety?

These types of inquiries, rather than pleas for special treatment and consideration based on religious beliefs should mark the advocacy of individuals offended by a law or regulation which incidentally affects religion. From an unalienable rights perspective, no law, compelling or otherwise ought to contravene the unalienable rights of any person.

175. 521 U.S. 507 (1997).

> the liberties guaranteed by the First Amendment."[176]

As we have seen the Supreme Court's source of authority in *Cantwell* is nothing less than an unsupported assertion that "The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment."[177] What is this "concept of liberty?" Is it the liberty which all persons enjoy in the form of unalienable rights? Is it the liberty which the Creator has extended to all persons? No. Is the Court referring to liberty implicated in a duty owed to the Creator? No. The Court does not discuss the matter with this view in mind. It has no understanding of such concepts or ideas. It states instead its own gospel of belief versus action without the need to discuss duties to one's Creator.

> Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case, the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.[178]

If a right is unalienable, however, it cannot be duly infringed, balanced or reduced to mere toleration, *unduly* or otherwise. No, the Court is not talking about freedom of religion as an unalienable right. It is discussing the "right" as something which may be regulated under certain conditions. And what are those conditions? Are they the conditions which the *Reynold's* Court noted when it said:

> The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is what is the religious freedom which has been guaranteed.[179]

Is the Court saying we must go back to the history of the times when the clause was adopted to determine if the regulation or statute at issue is of a kind that the framers regarded as constitutional or not? No. The Court is simply setting up a balancing test free from the historical context.

Having laid this new foundation, the Court then lectures Congress about why it lacks any such power. The Court postures:

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176. 521 U.S. at 519.

177. 310 U.S. at 303.

178. 310 U.S. at 303-304.

179. 98 U.S. 145, 163 (1878).

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment].[180]

In other words, if Congress can change the scope of a Constitutional right by changing what it means, it would not be enforcing the right or the Fourteenth Amendment as it is written. Now this is quite an accurate statement. Indeed, Congress cannot change the meaning of the First or Fourteenth Amendment by legislation. It cannot change what is written. But what is actually written? Does the Fourteenth Amendment due process clause refer to "the fundamental concept of liberty?" Is that written in the amendment? No. Nor is this concept "embodied in that Amendment." Does the Amendment specifically embrace "the liberties guaranteed by the First Amendment?" Of course not. None of this is specifically written or even implied. The Court's reasoning is good, but its application of that reasoning is myopic–it only extends it to Congress, not to itself. The Court refuses to see that it too is as subject to the text of the Constitution as Congress.

Is "duplicity" the right word to describe what is going on? Or perhaps the Justices simply do not understand what they are doing? It is perhaps likely that being educated in American ABA approved law schools has not helped them to see this point. Or perhaps they now know that they are as subject to the Constitution as Congress because they have been told so, and the real problem is one of their will, not of their knowledge. Let us put the Court's umbrage against Congress in context. Let us rewrite the Court's learned opinion but change the players. If there is a *Constitutional* principle here, it is equally applicable to Congress as the Court. Thus:

> A Judicial Opinion which alters the meaning of the Free Exercise Clause cannot be said to be interpreting the Clause. The Court does not enforce a constitutional right by changing what the right is. It has been given the power "to interprete," not the power to rewrite what constitutes a constitutional violation. Were it not so, what the Court would be interpreting would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."

If Congress cannot can change the scope of a Constitutional right by changing what it means, neither can the Court. Nor can the Court alter the Constitution's meaning by judicial interpretation or construction. It is morally hypocritical, even willfully duplicitous for the Court to claim they are doing otherwise. Constitutionally speaking such an expansive approach to the Constitutional limits on judicial power fails the Article III, section 1 "good behavior" requirement and should trigger appropriate Congressional review and impeachment under article I, section 3, clauses 6 & 7.[181]

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180. 521 U.S. at 519.

181. The first open expression of judicial supremacy over the Constitution was in *Cooper v. Arrons,* 358 U.S. 1 (1958). In *Cooper,* the Supreme Court could not resist advancing its argument to expand the power of judicial review into the

RFRA was an effort by Congress to change the meaning of the First Amendment from one which protected unalienable rights to one which protected only fundamental rights which could be balanced. *Cantwell* was an equally offensive effort by the Court to change the meaning of the First Amendment Religion clause from one which protected unalienable rights to one which protected only fundamental rights of action or conduct which could then be legislatively balanced. In *Boerne*, the pot calls the kettle black.

Congress also unconstitutionally used Article 5 to try and expand its power contrary to the Fourteenth Amendment's actual text limiting Congressional power to "enforce[ment]" authority. The Court, however, is also guilty of the same offense. It used the Amendment's due process clause as a pretext to further expand its power of judicial review into the power of judicial supremacy, contrary to that Amendment's text which says nothing about application of the first amendment to the states or the "fundamental concept of ordered liberty." Both *Cantwell* and RFRA are unconstitutional. *Cantwell* is an unconstitutional judicial decision and RFRA an unconstitutional Congressional statute. Neither branch is above the law of the land.

c) Employment Division v. Smith: Unalienable Rights and Jurisdiction Revisited

When these types of cases go back to the states and the state constitutions, the legislature and the state courts should not miss the opportunity to eyeball them through the lens of unalienable rights and the jurisdiction extended to them under the law of nature. From the standpoint of unalienable rights, there is no right to do wrong. If the use of hallucinogenic drugs is wrong according to the law of nature and of nature's God, and that fact is recognized by the legislature in a statute to that effect, then no unalienable right to use an hallucinogenic herb exists. On the other hand, if the use of hallucinogenic herbs is not wrong according to the law of nature and of nature's God, but that fact is not recognized by the legislature, then an unalienable right to use hallucinogenic herbs may exists and be trampled down by that law.

Clearly there is more here than meets the eye. The use or possession of narcotics or drugs (or alcohol for that matter) is not contrary to the law of nature. No Biblical injunction can be found to condemn such use or possession. The use of alcohol as a recreational drug is simply not condemned, only those who abuse alcohol or strong drink are condemned. The same can be noted for drugs, whether labeled "over the counter," "by prescription" or as "controlled substances." The use of

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power of judicial supremacy. It remarked that Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court and referring to the Constitution as "the fundamental and paramount law of the nation," declared in the case of *Marbury v. Madison*, 1 Cranch 137, that "It is emphatically the province and duty of the judicial department to say what the law is." This is the power of judicial review which, had the Court looked at the Constitution, they would have found in Article III, section 2.
Nevertheless, from this legitimate recognition of the power of judicial review, the *Cooper v. Aarons* Court took a forbidden step further and pronounced that its *own opinion* in *Marbury* "declared the basic principle that the federal judiciary is *supreme* in the exposition of the law of the Constitution." 358 U.S. at 18 (emphasis added). This assertion is both false and deceptive. It is false because *Marbury* itself did not recognize the power of judicial *supremacy,* but rather only the power of judicial *review*. It is deceptive because *Marbury* is only evidence of law and not the Supreme law of the Land itself.

drugs by whatever label is not condemned, only those who abuse drugs are condemned. The best argument that can be put forward to the contrary is when alcohol or drugs are employed to produce a stupor or trance intended to move one to a heightened state of consciousness or even spiritual connection with something transcendent, as Mr. Smith sought with his use of peyote. In such a case said use is contrary to law of nature's prohibition on false worship. It violates the command that one ought not worship any false gods, but only the one true God.[182] But this does not settle the question.

Having discussed the question of drug use from the point of view of right and wrong, the critical question of jurisdiction is not far behind. What authority or jurisdiction does the law of nature extend to any civil government to punish in a criminal court, or treat differently in terms of civil benefits or liabilities, a person such as Smith, who so worships contrary to the law of nature? In fact, in very plain fact, the law of nature extends no such jurisdiction to civil government to criminalize either the possession or use of alcohol (including communion wine) or the possession or use of narcotics. Nor does it empower civil governments with any jurisdiction to treat persons differently in terms of civil benefits or liabilities based on their possession or use of such matters.

This means that state and federal laws, past and present, whether in the days of prohibition and or in modern times dealing with controlled substances, have no basis in the law of nature. Their enactment and enforcement is undertaken contrary thereto. Of course, nothing in this discussion excuses use of alcohol or drugs which injure another. Such injuries ought to be treated like any other tort. They are no different in law than injury produced in any other fashion such as use of a motor vehicle which injures another, either intentionally or negligently.

It should also be noted that while the great mass of modern Constitutional, criminal, civil and regulatory laws surrounding possession and use of alcohol and drugs (excluding taxation on transfers or sales) are contrary to the laws of nature, federal courts do not enjoy a general jurisdiction to articulate and apply the law of nature as a basis to strike them down. Nor do state courts enjoy such a jurisdiction unless a state constitutional provision extends them that scope of review. The remedy for correcting the wrong lies rather with the legislatures of the several states.

Having said all this, the objections must be flowing in the readers' mind. "How can we use the Bible as a guide in understanding the law of nature?" "That is just your interpretation." "Do you want the Supreme Court pronouncing what is orthodox as a matter of First Amendment or Constitutional Law?" "Don't you know that drugs are bad and rot the moral fiber of the user and the Country?"

In answer, all law has to have some source or sources. In the American system, the framers and founders made the decision to base American law on the "laws of nature and of nature's God." Until the Declaration is wiped from the pages of our American history and the law of nature and nature's God is dethroned by the American people acting by their representatives in lawful convention, it remains the steady and sure source of American law. Those who say otherwise, speak and act

182. Exodus 20:3 states that "You shall have no other Gods before me." (NIV, 1978)

against the strong legal presumption that this dually expressed single source of law shall be relied upon by the civil government in all of its branches. He who likes it not, may change it by a lawful revolution, but not by Constitutional interpretative judicial fraud.

The law of nature is expressed in nature itself and in the Bible. Without this dually expressed single source of law, to what other sources would the legislature turn–their own writings called statutes and regulations, the private writings of learned scholars from antiquity, or better yet, the opinion polls of the people? Ought these evolving views be our sources of law and not those which claim a fixed, uniform and universal applicability such as the law of nature? How can we use a source which is no more than our own imaginations and experience written down in a statute book or a treatise which has no other foundation? Are not these "sources" just someone else's interpretation? Do we want the Supreme Court pronouncing what is orthodox as a matter of First Amendment or Constitutional Law, based on such sources, allowing the Court unfettered freedom to roam among these writings and their own opinions as the source of American law? This would make the Court supreme in all matters of law and answerable to none, not to the Declaration and not to the Constitution itself. This approach ought to frighten every free person and send him or her running to the laws of nature and nature's God for a standard by which the civil governments in this land can be restrained, or simply to find a safe haven from arbitrary and lawless governance.

If one is concerned about interpretation, then all sources should be excluded. If one is concerned about the hegemony of orthodoxy, then legislation based on opinion polls should raise greater concerns about the divinity of arbitrary civil law. What is a federal court but a single branch of a national government established pursuant to that law, a branch whose legitimacy and very existence is indebted to a Constitutional Article which came into existence solely by reason of that very basis of American law. Let him who has issue with the legal authority of the Declaration of Independence and its recognition that the laws of nature and nature's God is the source of American law step forward and persuade Americans why other sources of law are more worthy of our national obedience. Let them demonstrate from history the superiority of their sources of law in creating a free civil society. Let them persuade Americans if they can, that the sources of law emanating from their dissenting hand are worthy of American blood, of American life, fortune and sacred honor. But we ought not let them put the law of nature away quietly with J.D. or Ph.D. credentialed smug ignorance.

d) Organizational Claims to Preferential Treatment because of Religious Mission

The Court, however, was more consistent with the principle of equality in several other cases, rebuffing a variety of religious organizations which sought to increase their civil capacities or decrease their civil obligations. Thus in *Heffron v. International Society for Krishna Consciousness, Inc.*,[183] the Court rejected the petitioner's plea to increase its civil capacities because of its religious choices. Petitioners sought an exemption from a Minnesota state rule governing the operation of state fairs which restricted the sale or free distribution of literature, merchandise and books to

183. 452 U.S. 640 (1981).

licensed booths. The rule did not prevent verbal communication of any organization's point of view. Petitioners maintained that because their literature and books were religious, their distribution and selling activities could not be restricted to a booth. The Court disagreed, holding that as long as the rule was applied even handedly to all groups and organizations, it could not be said to contravene the first amendment. The Court properly refused to expand the civil capacities of the petitioner because of its religious content, but continued to wrongly apply the first amendment to state rules and regulations.

Equal application of the law was also at issue in the case of *Larsen v. Valente*,[184] the Court was faced with the question of whether or not the state of Minnesota could require some religious groups and not others to comply with the state's charitable solicitation laws. Petitioners sought to share in the exemption accorded to other religious organizations. The state, however, only exempted religious organizations that received more than one-half of their contributions from members. This requirement excluded the Unification Church which consequently sought to have the requirement declared unconstitutional therefore permitting them to also enjoy the religious exemption. The Supreme Court held that the state could not single out some religious charitable groups for special treatment. It ruled that such treatment set up precisely the type of denominational preference that the first amendment was intended to prohibit.

Ignoring the fact that the first amendment only applies to Congressional statutes, and not state laws, and considering the case from the standpoint of equality, if Minnesota's law requiring registration of charitable organizations is valid on other grounds, then it should apply equally to all charitable organizations, religious or otherwise. Whether the law violates the unalienable right to associate, or whether the state has the legitimate power to prohibit the giving and receiving of gifts is certainly worthy of investigation in light of unalienable rights' principles. The Court should have considered whether the law contravenes one of these unalienable right, provided that the legislature or Minnesota constitution defined them. This should have been the initial inquiry.[185] But assuming *arguendo* the legitimacy of the state's power, the law should not adjust the civil capacities of any non-profit organization because of its religious activities.

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184. 456 U.S. 288 (1982).

185. A serious question exists whether Minnesota's law denies or disparages the unalienable right given by God to all human beings to *freely* give a gift of resources as well as freely receive a gift from another. Minnesota law requires that a charitable organization register with the state prior to giving or receiving any gifts. Among other requirements, the Act will render an organization ineligible to maintain its registration if it spends an "unreasonable amount" for management and fund-raising costs. Anything over 30 percent is deemed unreasonable. Thus the giver's judgment as to the fit objects of his philanthropy is wrongfully restricted by the state. *See* MINN STAT. §§ 309.555, subd. 1a (Supp. 1982). The Act is allegedly established to protect the contributing public and charitable beneficiaries from fraudulent practices in the solicitation of contributions. While protection of the public from fraud is a laudable object, the regulatory means to accomplish that end may not directly impair the unalienable right to receive gifts by preventing an organization from soliciting gifts, without the government first showing the existence of any fraudulent practice. The entire registration scheme also regards the unalienable right to give as a mere privilege to be exercise only at the sufferance of the state.

At issue in *Tony and Susan Alamo Foundation v. Secretary of Labor*,[186] was a Congressional provision that adopted an equality approach to application of wage and hour laws. The Alamo foundation was a non-profit religious organization which derives its income from its commercial business. The Secretary of Labor maintained that the foundation must pay its employees a minimum wage (either in cash or other compensation) as required by the Fair Labor Standards Act.[187] The foundation maintained that it was not a business "enterprise" within the meaning of the Act and therefore the Act did not cover the foundation. The foundation also argued that since it was religious, the free exercise clause warranted an exemption from the requirements of the Act. From the standpoint of the laws of nature and the God-given principle of equality, these were certainly not consistent arguments.

The Court, however, rejected these arguments, holding that Congress was not required under the Constitution to exempt religious corporations from the Act. Congressional refusal to increase the civil capacities of the foundation because of its religious beliefs did not run afoul of the Constitution. Under the wage and hour laws Congress had in mind the goal of outlawing from interstate commerce, goods that fall below minimum standards of decency, (*i.e.*, goods made by employees paid less than the minimum wage--a dubious rationale).[188]

Assuming *arguendo* that wage and hour laws violate no unalienable rights and are also an appropriate "commerce clause" regulation under the enumerated powers doctrine (and that is a very large and exceedingly tenuous assumption), then to that extent such laws should apply to all commercial entities. But if the wage and hour laws contravene the unalienable right to associate, or the unalienable right to enter into non-fraudulent arms length contract where the parties to the contract voluntary define its terms including compensation, then to that extent the wage and hour laws should apply equally to no one.[189]

In *Lyng v. Northwest Indian Cemetery Protective Association*,[190] the Court rejected petitioner Indian organization's contention that the federal government could not build a road on federal property near lands set aside by American Indians for religious rituals. These rituals required silence and privacy which would be interrupted by traffic that a road would bring. In response to a free exercise claim, the Court held that the government *may* accommodate religion if reasonable alternatives are available, but that the federal government was not required to alter its plans to build a road even if that interfered with the exercise of petitioner's religion. The Court, therefore did not expand the civil capacities of Indians based on their religious beliefs and convictions. No unalienable rights are involved with respect to government construction of a road on its own land.

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186. 471 U.S. 290 (1985).

187. 29 U.S.C. § 201 *et seq.* (1988).

188. Generally under employment anti-discrimination law, Congress had in mind to free from significant governmental interference a religious corporation's ability to define and carry out its religious mission.

189. The *Alamo* case presents the opposite Congressional rationale found in *Amos* with respect to accommodation.

190. 485 U.S. 439 (1988).

A case involving a statutory civil privilege was challenged in *Larkin v. Grendel's Den, Inc*.[191] In *Larkin* the state of Massachusetts had given churches and schools a veto power over third party applications for local liquor licenses within a 500 feet radius of that church or school. This practice extended churches and schools a civil capacity which was not possessed by other private entities located within 500 feet of an applicant for a liquor license. The Court found the arrangement Constitutionally defective under the establishment clause. From the standpoint of equality, the Court arrived at the correct conclusion since churches and schools were accorded an increased civil capacity not equally enjoyed by others in the same 500 foot radius. From the standpoint of the first amendment, no Congressional law was involved.

At issue, however, in *Church of Jesus Christ of Latter Day Saints v. Amos*,[192] was a Congressional statute which exempted religious corporations from the religious prohibitions of Title VII. Title VII prohibits an employer from undertaking certain unlawful employment practices based on race, color, sex, national origin, and religion.[193] The law, however, does not apply where the employer is a religious organization. Section 702 indicates that this "subchapter shall not apply . . . to a religious corporation . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation. . . of its activities."[194] This provision was challenged by Amos who was discharged from employment because of his religion. His employer was a non-profit facility operated by the Latter Day Saints.

The Supreme Court upheld the Constitutionality of this amendment under the establishment clause of the first amendment. The Court observed that "Congress acted with a legitimate purpose in expanding the § 702 exemption to cover all activities of religious employers."[195] *Amos* dealt with the scope of the government's discretionary authority to accommodate religious practices with respect to employment discrimination laws. (Recall that in *Alamo*, Congress did not seek to accommodate religion with respect to the wage and hour laws). In *Amos* the Court noted that an exemption for religious corporations was not required by the free exercise clause, nor was it

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191. 459 U.S. 116 (1982).

192. 483 U.S. 327 (1987).

193. Title VII of the Civil Rights Act of 1964, section 703(a) makes it an unlawful employment practice for an employer "(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion . . " 42 U.S.C. § 2000e-2(a). *See also*, Annotation, *Validity, Construction, and Application of Provisions of Title VII of The Civil Rights Act of 1964 and Implementing Regulations, Making Religious Discrimination Unlawful*, 22 A.L.R. FED. 580 (1975 and 1989 Supp.)

194. 42 U.S.C. § 2000e-1. This provision does not exempt a religious employer from discrimination on the basis of race, national origin or sex.

195. 483 U.S. at 339. Justice Brennan and Justice Marshall concurred in the judgment but went on to suggest that the exemption applied only to non-profit religious corporations. Justice Blackmun and Justice O'Connor also concurred separately in the holding but went on to question the continued validity of the standard announced in Lemon v. Kurtzman, 403 U.S. 602 (1971).

prohibited by the establishment clause.[196] The Court's controlling premise was that Congress was free to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious mission.

The principle that has been applied thus far is that religious opinions or beliefs should not affect equal civil capacities. Applying this rule to the present case indicates that Congress increased the civil capacities of religious corporations because they are religious. Religious corporations enjoy increased civil capacities because they are not bound by the prohibition on religious discrimination imposed by Title VII. They are free from significant governmental interference with their ability to define and carry out their religious mission.

The principle of equality requires either that Congress ensure that all corporations be free from governmental interference with their ability to define and carry out their corporate object vis-a-vis religious discrimination, or that none be free. Moreover, overlooking the questionable commerce power jurisdiction upon which Title VII is founded and its negative implications for the enumerated powers doctrine, the non-discrimination principle when effectuated through government coercion under Title VII, invariably must come into irreconcilable and direct conflict with the unalienable right of free association. One or the other must yield.[197]

e) Individual Claims to Preferential Treatment because of Religion

Religious individuals as well as religious organizations have claimed preferential treatment because of their religion. In *Goldman v. Weinberger*,[198] the Court found no violation of the free exercise of religion in ruling that a Jewish rabbi could be prohibited from wearing his religious cap while on military duty. In *Goldman* religion would not be used to expand the civil capacities of the adherent. Religion could not be used to alter a regulation which bound all military personnel on an equal basis. But if wearing of certain garments such as a cap is an unalienable right; a duty owed to one's Creator, then the decision was incorrect. The question turns on whether God has established a universal requirement that military personnel are to wear a specific type of head covering and whether the United States through its legislative or executive arm has recognized that right.

The same type of situation was present in *O'Lone v. Shabbazz*.[199] Shabbazz was a Muslim inmate who sought to engage in group worship on Fridays. In order to accommodate this request, the petitioner would have to be granted an exemption from a New Jersey rule that prohibited inmates who worked outside of the facility during the day, from returning to the facility at any time other

196. *See also* Brief for the United States by Charles Fried, Solicitor General of the United States, Nos. 86-179 and 86-401 in Corporation of the Presiding Bishop v. Amos, page 22.

197. For a discussion on the natural rights and common law difficulties inherent in Title VII *see* H. BELZ, EQUALITY TRANSFORMED: A QUARTER-CENTURY OF AFFIRMATIVE ACTION (1991), and R. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992).

198. 475 U.S. 503 (1986).

199. 482 U.S. 342 (1987).

than at the completion of the work detail. Shabbazz sought a special exception allowing him to return earlier in the day to worship. The Court discussed the nature and limitations of incarceration and ruled that as long as all inmates are accorded a time to worship, then the religious belief of some adherents could not be used to provide a special privilege not otherwise accorded to others equally situated.

Since worship involves the direct exercise of religion, there was really no issue that Shabbazz's belief was being used to expand or reduce his civil capacities. Had Shabbazz not been under confinement, a New Jersey rule that kept him from worshipping at any given time he so desired would have directly impaired his unalienable right to the free exercise of religion. But since he was under confinement and New Jersey had accorded some time to worship, the Court's conclusion was correct on the grounds that his religious beliefs as to the time of worship could not be used to provide him a special privilege to do so where not also accorded to all other inmates under confinement.

And in *Jensen v. Quaring*,[200] an equally divided Court let stand without opinion, a lower court ruling that permitted a Quaker to be exempt from a photograph requirement on a Nebraska driver's license. Thus, the Court permitted a civil capacity to be expanded on account of an individual's religious belief. Religious belief excused meeting the criteria that others who did not so believe were required to meet. The decision is contrary to the equality principle. Nor is any Congressional statute present. Perhaps the Supreme Court was not aware that Nebraskans actually have a Constitution of their own that contains a "'no preference" provision in Article 1, section 4. Perhaps incorporation is simply impractical as well as legally wrong.

But in *Bowen v. Roy*,[201] the Court rejected the claim of an American Indian contesting a federal requirement that he obtain a federal social security number for his children as a prerequisite to receiving child welfare benefits under state law. The Court found that Roy's free exercise claim must yield to the government's interest in maintaining a fraud free welfare and social security system. The Court correctly refused to increase the civil capacities of Roy's daughter based upon his religious belief. Assuming *arguendo* that the social security and welfare system is a valid

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200. 472 U.S. 478 (1985) (affirmed without opinion by an equally divided Court). Article 1, section 4 of the Nebraska Constitution states:

> All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect or support any place of worship against his consent, *and no preference shall be given by law to any religious society*, nor shall any interference with the rights of conscience be permitted. No religious test shall be required as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious beliefs; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of legislature to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode public worship, and to encourage schools and the means of instruction. (Emphasis added).

201. 476 U.S. 693 (1986).

exercise of enumerated powers and does not contravene any unalienable rights,[202] the requirement that participants must use a social security number should apply equally to all those in the system.

Finally, in *Estate of Thornton v. Caldor, Inc.*,[203] the Court struck down a Connecticut law which mandated Sabbatarian rights for employees with no recognition of the employer's rights. The state of Connecticut had passed a law which granted employees an absolute and unqualified right not to work on their chosen Sabbath. This law had the effect of expanding the rights of employees based on their religious belief. Other employees which did not entertain religious beliefs were denied the absolute and unqualified right not to work one day out of the week of their own choosing. The Court found that the law violated the establishment clause. While the equality principle would have reached the same conclusion, it would have done so on the basis that the civil capacities of religious employees were improperly expanded because of their religious belief. Of course, the law at issue was not one adopted by Congress. This case should have been decided under the Constitution of Connecticut, Article 1, section 3 (as well as Article 1, section 20 on equality) which carries with it an equality principle when it allues to "without discrimination." It states:

> The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.

f) Equality, Preferences and The Taxing Power

Several tax related cases also came before the Court in which civil capacities were sought to be expanded in some, and narrowed in others on the basis of religious belief. A tax deduction issues arose in *Mueller v. Allen*.[204] *Mueller* involved a Minnesota law which provided taxpayers an income tax deduction on their state tax return for expenses incurred in providing "tuition, textbooks and transportation" for their children attending elementary or secondary schools. Since the law permitted deductions by all parents, those whose children attended parochial schools were equally entitled to the deduction the same as other parents whose children attended other schools. A group of taxpayers objected to equal application of the law to the parochial school parents arguing that the deduction constituted an establishment of religion in violation of the first amendment. The Court rejected this claim and sustained the law on Constitutional grounds.

From the standpoint of equality, the petitioners sought to constrict the civil capacities of taxpayers who sent their children to parochial schools presumably for religious reasons. The Court, however, recognized at least by way of its conclusion though not its rationale, that religious belief ought not affect civil capacities. From the standpoint of the first amendment, Minnesota's law is not a

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202. The relationship between social security and unalienable rights has not been adequately explored to warrant any conclusions as to its legitimacy.

203. 472 U.S. 703 (1985).

204. 463 U.S. 388 (1983).

Congressional statute that would trigger first amendment review. *Mueller* is a state constitutional case, not a first amendment one. It should be obvious by now that this case should have been decided under Minnesota law. Why is incorporation so critical to hang on to? Perhaps the Court thinks Minnesotans can't figure it out though their Constitution seems on point. Article 1, section 16 states:

> The enumeration of rights in this constitution shall not deny or impair others retained by and inherent in the people. The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies or religious or theological seminaries.

The "no preference" criteria points to the equal nature of how the law should apply without regard to belief.

While the petitioners in *Mueller* sought to decrease the equal civil capacities of religious parents, an attempt to increase civil capacities was present in *Hernandez v. Commissioner of Internal Revenue*.[205] Hernandez and others sought to deduct as a charitable deduction on their federal income tax return, certain contributions made to their church. Congress provided that charitable contributions made to a variety of qualified organizations, religious, educational and otherwise, may be entitled to be deducted. The "contribution," however, sought to be deducted was not considered a contribution by law, but rather a *payment* for services. While contributions are deductible, payments are not deductible. Petitioners argued that since the recipient was religious, that in effect they were entitled to the deduction. The Court, however, properly rejected this claim. The Court, was unwilling to alter the meaning of the statute in order to expand the civil capacities of Hernandez.

The same effort was put forward by the Petitioners in *Davis v. United States*.[206] In *Davis*, the Petitioners were parents of two missionary sons that embarked upon such work on behalf of thier church. The parents donated money directly to their sons' bank account for missionary purposes under the auspices and general direction of the church. The United States IRS denied the parents a tax deduction for these contributions and the parents appealed alleging that 26 U.S.C. § 170 allowed a taxpayer to claim a deduction for a charitable contribution. The Court held a deduction allowable only if the contribution is made "to or for the use of" a qualified organization. Since the gift was not under any control or fiduciary oversight of the church, the Court properly denied the deduction on statutory, rather than constitutional grounds.

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205. 490 U.S. 680 (1989).

206. 495 U.S. 472 (1990).

From an equality point of view the petitioners tried to expand their civil capacities–the option to deduct contributions because of religion, in this case the missionary funding arrangement established by thier petitioners' church. From an unalienable rights point of view, there is no unalienable right to a tax deduction.

The Court also considered application of the equality principle where tax exemption was at issue in the case of *Bob Jones University v. United States*.[207] Bob Jones University applied for and obtained federal tax exempt status under a broad tax exemption law that provided exempt status for an organization operated "for religious purposes." The University had promulgated a policy prohibiting interracial dating which it maintained was necessitated by its religious views. The IRS eventually revoked the University's tax exempt status arguing that the religiously motivated policy of the University was contrary to general principles of charitable trust law. (The University received no federal funds and thus the government invented a historical trust theory).

The Supreme Court held that the IRS could revoke the tax exempt status of the University because the University's racial policy positioned it outside of the historical purpose of a charitable organization. Consequently, its contributors were not entitled to a tax deduction for contributions made to the University. As long as the "historical purpose of a charitable organizations" test is applied equally across the board to all charitable organizations, religious or otherwise, then the civil capacities of the University are not diminished because of its religious belief or religiously motivated policy.

But if the "historical purpose" test was applied selectively to Bob Jones because of its racial dating policy, then the government wrongfully diminished the equal civil capacities of the University based on its religious belief. Given the background of the case, it is more likely than not that the Court closed a blind eye to the government's creation and selective application of the "historical purpose of a charitable organizations" test thereby diminishing the civil capacities of the University. The Court had to stretch far beyond the statutory language to reach its result, something it would not ordinarily do with other tax-exempt organizations.

In *Jimmy Swaggart Ministries v. Board of Equalization of California*,[208] a sales tax was at issue. Jimmy Swaggart Ministries sold religious materials at its crusades in California and to California residents through the mail. California levied a sales tax on the sales of tangible personal property. This category included the Ministries' religious books and materials. California sought to enforce its sales tax law against the Ministry as far as it did business in the state. The Ministry objected arguing that the imposition of a sales tax on religious materials violated the first amendment including the free exercise clause even though California's tax statute is not a Congressional law that would trigger the first amendment but for the Supreme Court's incorporation doctrine.

Jimmy Swaggart Ministries in effect, sought to increase its civil capacities because of its religious

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207. 461 U.S. 574 (1983).

208. 493 U.S. 378 (1990).

disposition. It sought to exempt itself from the sales tax because it was religious. The Court rejected this argument holding that the free exercise clause was not violated and that the Ministry was not singled out to be taxed because of its religious beliefs. Thus, in the final analysis the equality principle controlled.

In *United States v. Lee*,[209] the Court rejected the argument presented by an Amish employer that his religious belief necessitated an exemption from withholding social security taxes. In effect the Court refused to expand the civil capacities of a religious employer because of his religious belief.

Finally in *Texas Monthly, Inc. v. Bullock*,[210] the Court (applying the incorporation doctrine) struck down a Texas law which exempted religious periodicals from a sales tax. The Court held that the law violated the establishment clause and that the exemption was not required by the free exercise clause. Texas had increased the civil capacity of religious publishers because of their religion. This ran contrary to the idea of equality. Since a sales tax violates no unalienable rights, Texas could either exempt all publications or none from its requirements. The Constitution of Texas, Article 1, section 6 would have reached the correct result striking down the law on both no preference and equality principles. It states:

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion, and no preference shall ever be given by law to any religious society or mode of worship. But it shall be the duty of the Legislature to pass such laws as may be necessary to protect equally every religious denomination in the peaceable enjoyment of its own mode of public worship.

4. Summary of Equality and Preference Section

This subsection on equality has considered various decisions of the Supreme Court as they embraced or rejected the rule that religious belief or practice ought not enlarge, diminish or affect the civil rights or capacities or individuals or organizations. According to this point of view or principle, the Court's holdings in *Larsen* (approved on the basis of religious belief, the exemption of a religious organization from a charitable solicitation law), *Thomas*, *Hobbie* and *Frazee* (approved on the basis of religious belief, exemption from an unemployment compensation law which would otherwise deny benefits), *Jensen* (Quaker was exempt from photograph on Nebraska drivers license based on religious belief), *Amos* (Religious corporations afforded civil capacity not extended to nonreligious corporations), and *Bob Jones* (Charitable trust theory selectively applied to diminish equal tax exempt capacities of religious institution) were incorrectly decided. They were incorrect because they sanctioned an increase or decrease in the civil capacities of individuals and organizations on

209. 455 U.S. 252 (1982).

210. 489 U.S. 1 (1989).

the basis of their religious belief.

Each of the other cases analyzed in this section reached the correct result from the standpoint of the equality principle, but often through wrongful reliance on use of the incorporation doctrine. These cases also involved state laws or local regulations and include *Widmar* [Bible study at University of Missouri sustained], *McCreary* [privately financed nativity scene in public park upheld by an equally divided Court], *Jews for Jesus* [Los Angeles Airport ban impermissible], *International Society for Krishna Consciousness, Inc.* [Port Authority limited ban on in-airport solicitation and speech]*; Witters* [Washington rehabilitation benefits available to all on equal basis],*Lamb's Chapel* [use of scool facilities available to religious groups after hours on equal basis], *Zobrest* [Arizona benefits for deaf child]; *Thomas* [Indiana must increase civil capacities of religious pacifist to unemployment compensation], *Hobbie* [Florida must increase civil capacities of religious worker to unemployment compensation], *Frazee* [State must increase civil capacities of religious worker to unemployment compensation], *Smith* [Oregon does not have to increase civil capacities to religious person to unemployment compensation], *City of Boerne* [Struck down RFRA, land use exemption for religious purposes not sustained], *Heffron* [Minnesota state fair regulation sustained], *Larkin* [Massachusetts liquor veto law struck down], *Shabbazz* [New Jersey prison rules on worship affirmed], and *Caldor* [Connecticut exemption for religious workers struck down].

Only *Alamo* [federal wage and hour laws], *Lyng* [federal Land use], *Amos* [Title VII exemption under federal law], *Goldman* [federal military service dress code], *Hernandez* and *Davis* [federal Tax Deduction], *Bob Jones* [federal tax exemption], *Bowen* [use of federal social security number in state welfare program], and *Lee* [federal social security withholding required] dealt with a federal law or controversy and therefore could have presented a first amendment argument provided the statute at issue could be found within Article 1, section 8 or other Constitutional provision and thereby first pass muster under the enumerated powers doctrine.

It should also be observed that many of the cases that were correctly decided do not address the first and controlling issue: whether or not an unalienable right is constitutionally present, and whether or not that right is being violated or encroached upon by the civil government. It does no good to find that the requirements of the equal application of the law are met, when the law is equally violative of the unalienable rights of all. Unemployment compensation, wage and hour cases and laws pertaining to the regulation of association and contract in employment under Title VII are perhaps the most obvious examples of laws that tread upon unalienable rights--rights clearly protected under many state constitutions.

Courts in particular should scrutinize state constitutional and statutory provisions for references to unalienable rights. Where such provisions exist and a state law contradicts unalienable rights, federal courts (in terms of pendent jurisdiction for instance) may construe the state's unalienable rights provision to strike down the offending state law. Federal courts, however, may not act as super state legislatures in divining and defining the unalienable rights of the people. That is a task for the state legislative body and for state judicial review in state courts. Federal courts do not suddenly entertain jurisdiction simply because states have not written the guarantees of unalienable rights into their constitutions or laws. However, if the claimed unalienable right is enumerated in

the federal Constitution or a statute, or the federal courts enjoy jurisdiction by the Constitution's express terms, then federal courts may construe the unalienable right at issue.

C. Governmental Reliance on and Recognition of God the Creator

1. Necessary and Proper Reliance on God

Recall that the examination of article VI revealed that acknowledgment of God was a necessary prerequisite to taking an oath of office with integrity. Only a religious test was prohibited. This distinction--between civil recognition of God and specific religious doctrines--characterizes the third type of case to be examined. Like the principles in article VI, these cases deal with matters related to God and civil government generally, but avoid mixing religion and creeds with civil power. Such cases arise where the recognition of God *by the civil government* is necessary and proper to the civil or constitutional discharge of its power.

Under article 1, section 8, clause 18, Congress has power to "make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or any department or officer thereof." This provision does not give Congress additional subject matter jurisdiction. It merely provides and defines the conditions (both necessary and proper) under which the substantive powers enumerated elsewhere in the Constitution, may be carried into effect. In other words, the clause embraces those legislative means which are necessary and proper to carry out the enumerated powers of the Constitution unless forbidden by the "letter and spirit of the Constitution."[211]

In the instant context, Congress may adopt those legislative means which are necessary and proper to carry out an enumerated Constitutional power unless forbidden by the first amendment religion clauses or the flat Constitutional ban on religious tests in article VI. The exact parameters of this power and its limitations are the subject of another Article. Suffice it to say that for present purposes, Congress may pass laws designed to carry out a Constitutionally enumerated power as long as those laws: 1) do not establish a religious test for a public office or trust; 2) do not establish a national religion, national articles of faith or national mode of worship; 3) do not prevent or interfere with religious belief or worship; 4) do not infringe any equal civil right or capacity on account of one's belief or worship; and 5) do not interfere with the rights of conscience (the reason and conviction used to determine religious belief and mode of worship) in any manner, or on any pretext.[212]

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211. McCulloch v. Maryland, 4 Wheat. (17 U.S.) 316, 405, 407, 411, 421 (1819). Chief Justice John Marshall elucidated the proper scope of this provision in *McCulloch*. Since article VI is part of the Constitution, Congress has the power to "make all laws which shall be necessary and proper for carrying into execution" the terms of that provision.

212. A fine example of the proper exercise of this power which the framers wanted to guarantee by placing it in the Constitution, is the oath of office in article VI. Had the framers not constitutionalized the oath of office as a means unto a Constitutional end (ensuring that the oath is taken with integrity by recognition of God), then Congress most certainly would have been able to adopt the means statutorily. Likewise the framers provided for limitations on the exercise of the Congressional power by elevating to a Constitutional level, a prohibition on the institution of a religious test as a

The general idea is that the Declaration of Independence established controlling precedent. It established the precedent that God is relevant to the establishment of nations such as the United States; that God defined the objects of civil government; that God had laid down the rule of equality and unalienable rights as limits on civil power. To the extent that Congress seeks to adopt legislation based on an enumerated power which acknowledges or furthers these precedents, and a proper Constitutional means empowers it to do so, then such legislation cannot be said to run afoul of the first amendment.

The cases to come before the Supreme Court in the last decade, however, in which the relevance of God's status as Creator or in which the necessity of his blessing was determined to be necessary and proper to the discharge of a civil power, were not argued on the basis of article 1, section 8, clause 18. They were rater considered as establishment clause cases even though they predictably involved no Congressional statute.

One such example is *Marsh v. Chambers.*[213] In *Marsh* the Court was faced with a Nebraska legislative practice of beginning each of its sessions with a prayer offered by a chaplain paid by the state with the legislature's approval. The Supreme Court held that the chaplaincy practice did not violate the establishment clause. The Court relied upon the contemporaneous history of the first Congress adopting the establishment clause and also providing for a Congressional chaplain. The Court correctly acknowledged that to "invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances an 'establishment' of religion."[214] This statement is correct because the written legal consensus embodied in the Declaration recognizes that God guides civil governments as much as individuals. Thus, if the legislature seeks to importune God's direction in the day to day affairs of the nation, it recognizes that no nation can long exist which does not acknowledge that God governs in its affairs.

Had the Congressional chaplaincy provision been at issue it also would have been upheld under article 1, section 8, clause 18 as necessary and proper to carry out any Congressional lawmaking power defined in article 1, section 8. The same factual rationale as discussed in *Marsh*, would apply, "to invoke Divine guidance on a public body entrusted with making the laws is" an acknowledgment

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qualification for public office under the Constitution.

213. 463 U.S. 783 (1983).

214. *Id*. at 792. Had there been no incorporation of the first amendment, this case would have turned on Nebraska's Constitution. For instance, the state constitution declares that:

> All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.

NEB. CONST., ART. I, § 1 (1991). Nebraska certainly could acknowledge that invocation of Divine guidance upon and by those public officials entrusted and charged with securing the unalienable rights of the people is a necessary, proper and reasonable means of effecting that end unto which governments are instituted.

"that we are a religious people whose institutions presuppose a Supreme Being."[215] Or more precisely, "to invoke Divine guidance on a public body entrusted with making the laws is" an acknowledgment that we are a people whose civil institutions are established with an understanding of accountability to God the Creator, but not civilly accountable to religion or religious institutions.

A Congressional chaplain statute can also be sustained under article 1, section 5, clause 2 pertaining to Congressional rules of proceeding. Likewise military chaplains are especially necessary and proper vis-a-vis article I, section 8, clause 12 (raise and support an army), clause 13, (provide for and maintain a Navy), and clause 16 (organize, arm and discipline the Militia) in light of the dangers inherent in military life and conduct. The free exercise clause, however, is not an appropriate vehicle for a civil declaration that God is the Creator or the implication which may flow therefrom precisely because the clause deals with the rights of the individual. It would truly be awkward to argue that an amendment, which by definition is a limitation on the power of Congress, should now become a basis for the exercise of legislative power.

2. Governmental Recognition is Not Unconstitutional Compulsion

In addition to situations where the discharge of a Constitutional power requires the recognition of God, there are also occasions in which the government may observe events associated with God. Among these observances are public holy days. The Constitution itself recognizes Sunday as an official day for certain governmental purposes and therefore creates a powerful precedent for civil observation of one day in the week (in this case Sunday) as a holy day established and set aside by God the Creator.[216]

Government celebration of officially recognized holy days or holidays was at issue in *Lynch v. Donnelly*[217] and *ACLU Greater Pittsburgh Chapter v. County of Allegheny*.[218] Both cases involved state observation of the Christmas holy day and holiday season by inclusion of a nativity scene in their Christmas display. *Lynch* involved a government owned Nativity scene displayed on private property. *ACLU Greater Pittsburgh Chapter* involved a privately owned Christmas creche displayed on public property. The display in *Lynch* was sustained because it was one of many Christmas displays. The creche in *ACLU Greater Pittsburgh Chapter* was held unconstitutional because it was not one of many Christmas displays. The holding in these cases indicate that the Court is merely substituting its judgment for that of local officials as to what constitutes "too much" accommodation or endorsement of religion. There does not appear to be any bright line or any legal standard in the Court's holdings except perhaps the "three plastic reindeer rule" which attorneys have coined to characterize the content based absurdity of the Court's "legal test."

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215. *Id*. quoting Zorach v. Clauson, 343 U.S. 306, 313 (1952).

216. *See* U.S. CONST., art. 1, § 7. This recognition, however, does not permit civil government to forcibly extend the rule to the private sector.

217. 465 U.S. 668 (1984).

218. 492 U.S. 573 (1989).

In part, the holdings are a product of the Court's construction of the establishment clause out of context. The clause prohibits enactment of *laws* respecting an establishment of religion. It does not prohibit government from *observation* of the actual meaning of officially recognized holidays. As previously mentioned, the Constitution itself recognizes a Sunday exception for certain legislative business. Article I, section 7, clause 2 excepts Sunday from the ten day rule applicable to the President when a bill is returned to the legislature. The laws of nature confirm the rule that man is to work six days and rest on the seventh. The Constitution writes that rule into the operation of the federal government and properly limits its effect to the federal government as a self-imposed restriction. The "Sunday exception" provision as well as the article VI oath requirement illustrate that the framers never intended to write recognition of God or of special days out of the Constitution.[219]

The nativity scene observances at issue in *Lynch* and *ACLU Greater Pittsburgh Chapter* do not impose a rule of action prescribing conduct or forbearance which must be obeyed. Disobedience to the "observance" subjects no one to legal sanctions. No conduct is required. No action is prohibited. No penalties are present. Both cases involve a situation where local governments have decided to officially recognize a holiday--Christmas. This decision is no different in kind than the Constitution's article VII recognition that the Constitution was created in the "year of our Lord." Both the official recognition of Christmas and the Constitution's recognition of its date of creation simply mark time. They do not establish religion.

Local governments have elected to celebrate this holiday by calling attention to its purpose and meaning, but they have passed no law requiring anyone to also celebrate the holiday or observe its meaning. They will punish no one for failure to observe the holiday. Were the text construed according to its plain meaning and the prerogative of local and state governments to select the holidays they wish to celebrate, nativity scene cases and cases involving other public observation of religion would be more easily resolved.[220]

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219. Article VII's reference to "the year of Our Lord" is also an interesting provision. The reference is a means of recognizing the year of the reign of the Sovereign during which the Constitution was adopted. Nativity scene cases should note that civil government's recognition of the birth of Jesus Christ as a national holiday can be consistent with the Constitution's recognition that the creation of the United States is dated from his birth date as well. This argument differs from requiring an Oath in the name of Jesus Christ. *See supra* note 33.

220. Article VII states that the Constitution was "done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and eighty seven and of the Independence of the United States of America the Twelfth." Historically the phrase "In the year of" was used to identify the political sovereign of a nation as well as to date the laws of that sovereign's reign. Of course, the English Parliament employed the phrase to recognize a given King or Queen as sovereign since English Statutes were dated from the year his or her reign began. The framers followed this pattern but with a new twist. They referred to the one thousand seven hundred and eighty seventh year of the reign of "our Lord" and then dated the life of the republic in terms of the elapsed years since its independence or birth--"and of the Independence of the United States of America the Twelfth."
The reference to "the year of our Lord" is still used by the federal government in a variety of legal contexts including significant Presidential orders and proclamations. It was used by Congress in many of the statutes admitting states into the Union. To maintain, as the Constitution does, that God, rather than the President, Congress or the Courts, is the political sovereign, is to maintain that we are to be governed by God's laws to the extent its principles are reflected in the Declaration and to the extent that the Constitution articulates and conforms to those principles. Thus, the

3. The Lee v. Weisman Impasse

This Article has previously observed that legislative bodies (and the Court where Constitutionally authorized) have consistently failed to recognize the whole notion of unalienable rights in the context of public school education. In particular, the unalienable right of parents to direct the education of their own children, and the unalienable right of intellectual freedom--the right of an emancipated student to be free from mandatory exposure to a government approved curriculum or idea--have been neglected.

It has also been noted that the Court's record is erratic where faced with a legislative pronouncement that involves governmental observation of religious holidays or requires governmental invocation of Divine guidance on a public body. It was observed that such pronouncements and invocations are both appropriate and Constitutional acknowledgments that we are a created people whose civil institutions are established with an understanding of accountability to God the Creator, but not with accountability to religion or religious institutions. Moreover, for purposes of the establishment clause, governmental recognition of God is not unconstitutional compulsion prohibited by the establishment clause.

a) Background

The case of *Lee v. Weisman*,[221] juxtaposes the notion of unalienable parental rights alongside appropriate and Constitutional acknowledgments that we are a created people whose civil institutions are established with an understanding of accountability to God the Creator.

The facts are straightforward. The principal of a public school in Providence, Rhode Island, invited a clergyman to give an invocation at the school's graduation ceremony. The ceremony was voluntary and attendance was not required by the state. The principal invited a Rabbi and gave him a pamphlet containing guidelines for the composition of public prayers at civic ceremonies. The principal advised, but did not require the Rabbi's prayers be nonsectarian. After the ceremony and prayer, Weisman, the father of one of the school's students, sought a permanent injunction barring the principal from inviting clergy to deliver invocations and benedictions at future graduations. Relying on the incorporation doctrine, the District Court enjoined the school from continuing this practice on the predictable grounds that it violated the establishment clause of the first amendment. The Court of Appeals affirmed. The Supreme Court narrowly affirmed.[222]

In arriving at its conclusion striking down the practice of graduation prayers, the majority staked

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understanding that the United States is a nation of laws and not of men assumes real significance.

221. 505 U.S. 577 (1992).

222. The majority consisted of Justice Kennedy, who delivered the opinion of the Court, in which Justices' Blackmun, Stevens, O'Connor, and Souter joined. Blackmun and Souter also filed concurring opinions, in which Stevens and O'Connor joined. Justice Scalia filed a dissenting opinion, in which Chief Justice Rehnquist and Justices' White and Thomas joined.

their legal claim on their view that the prayer exercise was fraught with coercion. The majority observed that "a government may not coerce anyone to support or participate in religion or its exercise . . . ."[223] The Court found that the principal directed and controlled the prayer's content. It warned that religion in the hands of government "might begin as a tolerant expression of religious views, [but] may end in a policy to indoctrinate and coerce." Searching for additional grounds to support its coercion rationale, the Court observed that the school district's supervision and control of a high school graduation ceremony "places subtle and indirect public and peer pressure on attending students" and that "the State may no more use social pressure to enforce orthodoxy than it may use direct means."

In a concurring opinion, three justices observed that the invocation of God's blessings delivered at a public school "is a solemn avowal of divine faith and supplication for the blessings of the Almighty."[224] This solemn avowal and supplication, when combined with the element of coercion was enough "religion" for the Court to conclude that a violation of the establishment clause was present.

Another concurring opinion equated the universal with the sectarian quite intentionally and clearly:

> the Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be. In barring the State from sponsoring generically Theistic prayers where it could not sponsor sectarian ones, we hold true to a line of precedent from which there is no adequate historical case to depart.[225]

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223. 505 U.S. at 587, *citing* Lynch v. Donnelly, 465 U.S. 668, at 678. The Rabbi offered the following invocation:
> God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it. For the liberty of America, we thank You. May these new graduates grow up to guard it. For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust. For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it. May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.
> Amen.

The benediction offered was as follows:
> O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. Amen.

224. 505 U.S. at 603, *quoting* Engel v. Vitale, 370 U.S. 421, 424 (1962). Justice Blackmun, with whom Justice Stevens and Justice O'Connor join, concurring.

225. 505 U.S. at 610. Justice Souter, with whom Justice Stevens and Justice O'Connor join, concurring.

In order to reach its holding, the Court interpreted the facts so as to support its finding of coercion. It also historically and Constitutionally wrong conclusion that a solemn avowal of divine faith and supplication of God Almighty was simply another sectarian tenet of the Judeo-Christian religion. The Court concluded that inherent differences between the public school system and a session of a state legislature could not be adequately distinguished to bring the case within the Court's prayer ruling in *Marsh v. Chambers.*[226]

The dissent emphasized the same facts but in the light of non-coercion and historical practice. It observed that "the history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."[227] The dissent recounted numerous examples from our Nation's origin, where:

> prayer has been a prominent part of governmental ceremonies and proclamations. The Declaration of Independence, the document marking our birth as a separate people, "appealed to the Supreme Judge of the world for the rectitude of our intentions" and avowed "a firm reliance on the protection of divine Providence." In his first inaugural address, after swearing his oath of office on a Bible, George Washington deliberately made a prayer a part of his first official act as President.[228]

Prayers of former Presidents such as Jefferson and Madison as well as President George Bush Sr. were in accord. Public thanksgiving and prayers which acknowledged "the many and signal favors of Almighty God" were cited as long-established practices of prayer as were prayers to open Congressional sessions and the Court's own sessions. To these general traditions of prayer at public ceremonies, the dissent added "a more specific tradition of invocations and benedictions at public-school graduation exercises" which began in the public-high-school setting as early as July 1868.

The dissent criticized the Court for separating graduation invocations and benedictions from these other instances of public invocations and prayers. The dissent argued that the public school graduation invocations and benedictions involved no coercion and that the Court's coercion thesis was contrary to both fact and law. It was contrary to fact because no attendance was required and contrary to law because no threat of penalty or actual penalty was applicable to those who failed to attend graduation.[229] The dissent concluded that the graduation prayers at issue should be sustained

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226. 463 U.S. 783 (1983).

227. 505 U.S. at 633, (Scalia, J., dissenting) *citing* Lynch v. Donnelly, 465 U.S. at 674-678, Marsh v. Chambers, 463 U.S. at 786-788, Wallace v. Jaffree, 472 U.S. at 100-103 (Rehnquist, J., dissenting), Engel v. Vitale, 370 U.S. 421, 446-450, and n. 3 (1962) (Stewart, J., dissenting).

228. 505 U.S. at 633, (Scalia, J., dissenting).

229. With respect to the Court's invocation of the "peer-pressure = coercion" argument (505 U.S. at 593) based on the writings of psychologists' such as Sigmund Freud, (505 U.S. at 593-94,642 & fn.10, Blackmun, J., concurring) Justice Scalia noted that: "I see no warrant for expanding the concept of coercion beyond acts backed by threat of penalty--a brand of coercion that, happily, is readily discernible to those of us who have made a career of reading the disciples of

on the basis that they conform to "our long-accepted constitutional traditions."

If the arguments are condensed into plain English, the majority believes that to invoke God's blessing in a public school graduation ceremony is coercive and religious, both Constitutionally forbidden. The dissent believes that to invoke God's blessing in a public school graduation ceremony is not coercive and though it is religious, such practices have long been among our accepted constitutional traditions, and are therefore not constitutionally forbidden.

b) Analysis

Now, how do these views square with a regard for unalienable rights, equality and the free exercise of religion? Consider the majority's view first. The immediate context is public education. Does the reader understand that public education is by definition, a coercive institution? The majority is very long on the rhetoric of the dangers of indirect and "peer pressure" coercion. It goes to inordinate lengths to demonstrate how coercive the entire public school context can be when religion is present.

While the Court correctly points out the adverse effects of religion when engendered through a coercive system of public education, it unhappily remains enthusiastically blind to the adverse effect of secularism when engendered through that very same coercive system of public education. The Court failed to recognize or appreciate that public education by definition, whether its focus is on religious or pagan and secular ideas, is undertaken and accomplished through the pitchfork of state coercion. If the majority were attentive to this condition, it would have considered the unalienable right of parents to direct the education of their children and the unalienable right of graduating seniors to be free from government enforced secular orthodoxy which lies at the very heart of the public school curriculum. The unalienable right of a student to intellectual freedom precludes state coerced exposure to content whether it be religious or otherwise.

To the extent that a graduation ceremony is the concluding expression of twelve years of state coercion, the Court vindicated the unalienable right of Deborah Weisman to be free from state enforced coercion in matters of religion. (The Court did not call it an unalienable right, but rather "a dissenter's rights of religious freedom.") It left untouched, however, the power of the state to trample upon the unalienable right of parents to direct the education of their children for their preceding twelve or so years of public education. For shame.

In other words, the Court condoned twelve years of state enforced secularism but could not tolerate thirty seconds of peer pressure “enforced” religious prayers. The Court was wrong on the first count to condone twelve years of state enforced secularism. It was right on the second count, however, not to tolerate thirty seconds of state enforced religious prayers to the extent that the fiction of state coercion is accepted.[230] Even given an incorporated first amendment analysis the Court should have

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Blackstone rather than of Freud." (505 U.S. at 642, Scalia, J., dissenting).

230. The *Jaffree* case is similar. The unalienable right of parents to define the ideas to which their child shall be

at least asserted that the principle of intellectual freedom--that "Almighty God made the mind free, and manifested His will that free it should remain"--is relevant to establishment clause jurisprudence.[231]

But the incorporation doctrine aside, the Court should have considered the unalienable right of a parent to direct the education of his or her own child in light of the Rhode Island constitution article 1, section 3 pertaining to intellectual freedom.[232] Had this right been factored into the equation in a *non-coercion setting*, the objection of Deborah Weisman's father to the prayer would have not been sustained. He, like all other parents had an unalienable right to direct the education of his daughter and that if he desired that she should remain unexposed to appeals to God, then it was his right not to require her attendance. By the same measure, other parents present who wished their child's mind to be exposed to appeals to God, they too enjoy that right in full and *equal* measure and were free to attend as they liked. Both were free to do what they liked.

To the extent that the ceremony was coercive, the students were a captive audience. They were forced to sit and listen to the typical graduation speeches of secular self-exaltation. To this extent those who had reached the age of majority were denied their unalienable right to intellectual freedom. The parents of those who were yet minors, were deprived of their unalienable right to educate their own children.

With respect to the dissent's view and how it squares with a regard for unalienable rights, equality and the free exercise of religion, little more can be added. On the fundamental issues of unalienable rights and equality, the dissent did not distinguish itself from the majority. The dissent would

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exposed was trampled by the state when it declared all children shall be forcibly exposed to a minute of silence. The Court's response was equally brash. It said nothing of six hours (the rest of the school day) of forcible exposure to pre-approved and state sanctioned secular ideas. This was found perfectly acceptable.

231. Thomas Jefferson identified the legal basis for intellectual freedom when he observed that "Almighty God hath created the mind free" and that "all attempts to influence it [the mind] by temporal punishments, or bur[d]ens, 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 . . . ." R. CORD, *supra* note 1 at 249. The Commonwealth of Virginia adopted this language as the basis of its state disestablishment law.

Among the majority, however, only Justice Souter's concurring opinion demonstrates a willingness (by implication) to at least thoughtfully examine the legal basis for intellectual freedom as an historical principle.

232. The Rhode Island Constitution substantially mirrors the Virginia statute for religious freedom. It declares that:

> Whereas Almighty God hath created the mind free; and all attempts to influence by temporal punishments or burdens, or by civil incapacitations, tend to beget habits or hypocrisy and meanness; and whereas a principal object of our venerable ancestors, in their migration to this country and their settlement of this state, was, as they expressed it, to hold forth a lively experiment that a flourishing civil state may stand and be best maintained with liberty in religious concernments; we, therefore, declare that no person shall be compelled to frequent or support any religious worship, place, or ministry whatever, except in fulfilling such person's voluntary contract; nor enforced, restrained, molested or burdened in body or goods; nor disqualified from holding any office; nor otherwise suffer on account of such person's religious belief; and that every person shall be free to worship God according to the dictates of such person's conscience, and to profess and by argument to maintain such person's opinion in matters of religion; and that the same shall in no wise diminish, enlarge or affect the civil capacity of any person.

R.I. CONST., ART. 1, § 3 (1987).

simply draw the Constitutional line on the side of those who want to entertain the prayer.

Happily, however, the dissent properly invoked the right set of principles, though it inadequately attributed them to history and quickly misapplied them to the context of public education. The dissent correctly recognized that governmental reliance on and recognition of God as the Creator is both necessary and proper. Moreover, it understood that governmental recognition of God is not unconstitutional compulsion. So far so good. Rather than attributing these principles, however, to the "laws of nature and of nature's God" or its Constitutional expression in article VI or any other source discussed in the first four sections of this Article, the dissent turns to piling up history and historical examples.

But unlike the dissenters, those who have made a profession of reading the disciples of Blackstone rather than Holmes, can discern that the examples of history standing alone, without an anchor in the law of nature and of its Creator God, cannot tell us whether that history is constitutional or otherwise.

Neglecting our legal heritage in exchange for history, the dissent further stumbles by attempting to place public high school graduation ceremonies on par with those appeals to God that mark and sustain our country. Their clerks no doubt searched high and low for the earliest public high school graduation ceremony accompanied with prayer, and yet could only go back to 1868. The dissent's invocation of graduation ceremonies as historically imbedded in our Constitutional traditions dating from July 1868 wears thin. It is rendered such because it assumes quite mistakenly that public education contravenes no unalienable right. If the subject were examined, it would be recognized that public education as we know it today with all of its coercive dimensions, did not even exist at this Nation's founding. In striving for a good object, the dissent bit off an awfully grand historical assumption which is the major weakness in its analysis and legal rationale.

Credit must be given to the dissent, however, for recognition of the correct legal principle. Its defense of public recognition of the Creator is worthy, especially when compared to the popular legal idolatry of "[n]early half a century of review and refinement of Establishment Clause jurisprudence" relied upon by the majority and self-immortalized by the concurring opinions. But we must have more than the correct legal principle, we must also have the correct foundation and a discerning application of that principle.

This is the legal impasse of *Lee v. Weisman* and every other state education/religion case that dominates first amendment religion litigation. The Court will not move forward with rejection of the incorporation doctrine, recognition of the unalienable right of every student of age to intellectual freedom or of every minor student's parents to the unalienable right to educate their own children, provided that a state constitution or legislature has identified those rights.

This discussion provides some guideposts for non-activist judicial inquiry in future cases. It also encourages religious litigants to closely scrutinize state constitutional provisions for references to unalienable rights as well as admonishes religious litigants to stop trying to redeem public education with grand legislative strategies and judicial arguments that are wrong in principle. Finally, the

discussion should encourage religious organizations and people of good will to focus time, energy and resources into obtaining the security of unalienable rights in the context of education for all people irrespective of their religious beliefs or lack thereof, through state constitutional and legislative efforts to that effect.

4. Future Cases and Considerations

The Court cannot break the *Lee v. Weisman* impasse on principle or continue to rely on *Employment Division v. Smith*, unless it revisits the unalienable rights and equality principles of the Declaration of Independence. It really has no other option but to revisit these principles. Its current jurisprudence is not the poised prototype of a half-century "of review and refinement of Establishment Clause jurisprudence" as the Court make-believes. "Review and refinement" does not well describe a jurisprudence of "rank usurpation."

It should be clear by now, that to the extent equality is made the sole guide, the religious petitioner will be equally free or slave to the same degree as other citizens. If equally free, then not by virtue of any unalienable right to the extent such rights are wrongfully ignored, but simply as a matter of legislative indulgence. And if equally slave, then that status is also as a matter of legislative forbearance.

Equality without unalienable rights is tyranny for all. Unalienable rights without equality is slavery for some or most. But where equality and unalienable rights are regarded, then the result is liberty for all.

CONCLUSION

The American legal system is based on the laws of nature and of nature's God. Its principles are expressed in the Declaration of Independence and are to a varying degree, grafted into the Constitution and the Bill of Rights and the constitutions of the several states. The two foremost rules that animate the American legal system pertain to equality and unalienable rights. Americans have the expectation that the governments we create by our constitutions (both federal and state), will preserve and not quash the free exercise of our unalienable God-given rights. We also expect that government will preserve the free exercise of our unalienable God-given rights on an equal basis showing no favoritism or partiality before the law.

Historically, the American legal system recognized that civil government itself stood accountable to God as the Creator and Preserver of nations. Its officials *qua* officials recognized their obligation to acknowledge God's attribute as Creator and civil government's dependence on and conformity to his laws as embodied in the nation's legal documents which in turn were established according to the collective understanding and assent of the governed. Such civil recognition of Almighty God pertained to the universal laws of nature and was not founded upon some peculiar sectarian religious proposition. Civil recognition of God is not the focus of the no-establishment of religion principle, for to equate the two mistakenly and tragically results in purging of the legal basis of the American regime.

The American legal system recognizes that the free exercise of religion is one of many unalienable rights that governments are created to protect. The founding documents that created our legal system were based on the understanding that freedom of religion was rooted in the recognition that Almighty God created the mind free; that religion involved duties to God the Creator, that these duties were not inconsistent with rights toward other men, and that the discharge of such duties must be voluntary. Our laws also recognized that no man or government could ever lawfully coerce another to perform any religious obligation.

This Article has examined the free exercise of religion as an unalienable right, as a right defined in the context of the laws of nature and its Creator. The unalienable right to the free exercise of religion has no meaning apart from that context. The Constitution has acknowledged and embodied this understanding and approach to religion. Article VI requires an oath and prohibits a religious test. An oath by definition requires that God be invoked. Invoking God serves as a reasonable mechanism for ensuring the oath is taken and performed with integrity. The religious liberty of the deponent is preserved by that article through prohibition of a religious test. While the oath recognizes that the faithful performance of public officials are more likely than not to be preserved by invocation of God, no religion is established because religion involves the discharge of a man's duties to God and the oath compels no such individual duties to God, but rather, is confined to duties to the people. The invocation of God is a civil mechanism designed to secure the performance of the office, better than any such pledge could secure performance. Perhaps the corruption of public officials would not be so common if they were required to take an oath that requires them to understand they stand be fore God when taking it.

The first amendment to the Constitution also followed the pattern of permitting and encouraging civil recognition of God, while precluding civil coercion in the discharge of religious duties to God. The first amendment ingrafted the Declaration's recognition that God gives unalienable rights to men and women. The amendment prohibits a Congressionally established national religion, articles of faith or mode of worship. Congress may not interfere by law with religious belief or worship. Congress may not infringe by law any of the equal civil capacities of its citizens on account of their belief or mode of worship. Congress may not interfere by law with the intellectual formulation of belief, religious or otherwise. These prohibitions are legal and pertain to the use of coercion accompanied by legal penalty. Social pressure, psychological tension or other non-legal means are not contemplated within the prohibition of the amendment.

Broadly speaking, these limitations on Congressional power were condensed into the present day language of the first amendment's free exercise and establishment clauses. The amendment prohibits federal legislation that interferes with the unalienable right to the free exercise of religion. The first amendment was not intended or designed to write God, the laws of nature's God, or the source and nature of equality or unalienable rights out of the Constitution (either state or federal), or laws made in pursuance thereof.

An examination of notable religion cases, however, indicates broad misconstruction of the history and meaning of unalienable rights, the Constitution, Bill of Rights and the free exercise of religion. The most notable departures from this history and meaning are found in the Court's earlier holdings

in *Palko* and *Cantwell*. These decisions gutted the specific relevance of state constitutional bills of rights. *Lemon* soon followed.

While several of the Court's *conclusions* in its religion cases were consistent with the transcendent historical ideas about religion and equality, the same cannot be said with respect to its treatment of unalienable rights in general. Unalienable rights were rarely discussed. The Court is oblivious to the concept of a right which cannot be balanced or subjected to a rational or compelling governmental interest. Conflicts between unalienable rights and federal education laws, wage and hour laws, charitable solicitation laws, and social security laws should have defined the actual case or controversy, but were never considered.

It is true that the Court cannot, with any legal integrity, fabricate unalienable rights from whole cloth. But where legislative and state constitutional provisions exist that recognize unalienable rights, the Court should have at least factored such provisions into the legal equation. Attorneys, however, do not plead and judges or Justices do not inquire into the basic notion of an unalienable right. Thus, unhappily those notions do not find their way into court. Consequently, attorneys plead and courts evaluate religion cases in the nebulous twilight zone of parties seeking to block religious practices (such as the prayers in *Jaffree* and *Weisman*) from interfering with their rights or preferences. This situation leaves the inarticulate and indirectly reasoned equality related decisions, *Witters, Lamb's Chapel, Zobrest,* and the *Smith* case as the only semi-bright light on the horizon of religious liberty litigation in the past twenty years. Their beam, however, is far from blazing.

The *Smith* decision has opened the door to equal application of generally applicable laws. Religious individuals and organizations will no longer be able to protect special legislative preferences and entitlement. They will begin to feel the full weight of the civil government's regulatory and criminal law. Will religious litigants now find themselves the *beneficiaries* of governmental laws and regulations in equal proportion to the non-exempt population? Not at all. No one should be fooled; religious individual and organizations will now feel *in equal measure* with their neighbor, the painful extent to which the civil government has defaulted on its first and foremost promissory note--to preserve and not quash, the free exercise of *each and every* unalienable God-given right on an equal basis irrespective of belief.

It is not the equal enjoyment of unalienable rights that we now face, but their equal abridgement. Will religious leaders, their lobbying organizations and their attorneys will realize that loving their neighbor as themselves, means they must defend the unalienable rights of all? Or will the salt of the earth continue to be trampled under judicial foot because it has lost its jurisprudential savor?

The self-serving litigating and lobbying philosophy of securing preferential treatment for religious clients has brought first amendment jurisprudence to a anesthetized impasse. We must eschew special exemptions from generally applicable laws and learn to examine those laws in the bright light of the laws of nature and of nature's God, the unalienable rights God has given to every human being, and the expression of those rights in state and federal constitutional and legislative provisions.

General laws which have an incidental impact on religious practice or religiously motivated

practices, should not be opposed on grounds that religion is entitled to a special exclusion or benefit. Preferential treatment is contrary to equality. Otherwise, a first amendment claim is nothing more than pleading insulation from the equality principle of the laws of God on the basis of one's devotion to Him. This is absurd.

At the same time, the full defense of religious practices subjected to *direct* regulatory control or impairment are to be vigorously defended, but not with the dead arguments of preferential treatment, compelling state interest or another Religious Freedom Restoration Act. Such laws or policies should be resisted on grounds that they contravene an unalienable right--the free exercise of religion. The unalienable right to the free exercise of religion is entitled to absolute protection by virtue of its Grantor, not by virtue of the subjective belief or sincerity of its adherent.

The challenge for religious individuals and institutions is to first lay the constitutional and legislative foundation for the unalienable rights of parents to direct the education of their own children. Other unalienable rights involving property, contract and association will follow. Unalienable rights must be embraced not simply for the benefit of a religious individual or organization, but because the security of unalienable rights is the only security of anyone's liberty, religious or otherwise. If indeed, it is true that all men and women are created equal, that they are endowed by their Creator with certain unalienable rights, that governments are instituted in order to secure those rights, then no more transcendent a mandate lies ahead than to define and secure those rights for all. Legislative hearings might help define this mandate.

The struggle is between two visions of law, government and rights. The view adopted by the framers of the Declaration, Constitution and Bill of Rights, or the modern primal view. Depending on which view is adopted, unalienable rights can either be regarded as "endowed by [the] Creator" or simply a primal "power, privilege, faculty, or demand, inherent in one person." They can either be viewed as conforming to the "laws of Nature's God" or "grounded in personality."

In consequence thereof, religious liberty can either be understood as unalienable or simply something government should tolerate for the time being. Religion can either be judged best "left to the conviction and conscience of every man," or where a compelling or rational governmental interest exists, every man can be required to "profess or renounce this or that religious opinion." The free exercise of religion can be considered either as a duty owed to the Creator, a basis for unequal treatment, or an excuse for wrongful conduct. But until trained advocates, lawyers and people of good will recognize these differences, the legislative, executive and judicial branches will continue to apply the principles of unequal treatment and conditional rights that characterize a people who perish because they have neither vision nor knowledge.

The struggle is also over whether or not we will honor the Constitution and its design of a government with three equal, independent, coordinate and limited branches with the role of the judicial branch limited to deciding “cases and controversies” in accordance with laws made by elected representatives. Federalist No. 78 vision stands firm on the one hand--that the Judiciary has

> no influence over either the sword or the purse; no direction either of the strength or wealth

> of the society, and can take no active resolution whatever. It may truly be said to have neither force nor will but merely judgement; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgements.

Federalist No. 81 is also part of that vision--that we may expect Congress to punish

> judiciary encroachments on the legislative authority by impeachment and removal of the encroaching judges. There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with [the power of impeachment and removal], while this body was possessed of the means of punishing their presumption, by degrading them from their stations.

Against this vision is a horde of self-dealing judicial opinions, *Peters, Sterling, Cooper,* and *City of Boerne* among them which declare that "the basic principle that the federal judiciary is *supreme* in the exposition of the law of the Constitution;" that absent such a supremacy, "the Nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals" as if the president had to obtain the Court's permission in order to "execute the Office of the president" or "preserve, protect and defend the Constitution."[233] They declare that "every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 "to support this Constitution" and conclude it means every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3 to support this opinions of the Supreme Court. A damnable lie.

Our framers and founders depended on the integrity of judges to restrain themselves from defying their constitutional limitations. They also trusted the integrity of Presidents to refuse to enforce fallacious Supreme Court decisions. Ultimately they built into the Constitution mechanisms regarding impeachment and amendment which in turn depended on the courage and integrity of Congress to remove lawless judges. The Presidents and Congresses, however, have utterly failed to show either.

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233. Article II, Section 1, clause 7.

APPENDIX A

State constitutional provisions referring to unalienable, inalienable, inherent or natural rights include,

ALA. CONST. ART. I, § 1 (1991)(That all men are equally free and independent; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.);

ALASKA CONST. ART. 1, § 1 (This constitution is dedicated to the principles that all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry: that all persons are equal and entitled to equal rights, opportunities, and protection under the law; and that all persons have corresponding obligations to the people and to the state.);

ARK. CONST. ART. 2, § 2 (1992)(All men are created equally free and independent, and have certain inherent and inalienable rights, amongst which are those of enjoying and defending life and liberty; of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness. To secure these rights governments are instituted among men, deriving their just powers from the consent of the governed.);

CAL. CONST. ART. I § 1 (Deering 1992)(All men are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness and privacy.);

COLO. CONST. ART. II, § 3 (1991)(All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness.);

CONN. CONST. ART. 1 § 2 ([The people] have at all times an undeniable and indefeasible right to alter their form of government in such manner as they think expedient.);

FLA. CONST. ART. I, § 2 (1991)(All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion or physical handicap.);

HAW. REV. STAT. CONST. ART. I, § 2 (1991)(All persons are free by nature and are equal in their inherent and inalienable rights. Among these rights are the enjoyment of life, liberty and the pursuit of happiness, and the acquiring and possessing of property. These rights cannot endure unless the people recognize their corresponding obligations and responsibilities.);

IDAHO CONST. ART. I, § 1 (1992)(All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety.);

ILL. CONST. ART. I, § 1 (1991)(All men are by nature free and independent and have certain inherent and inalienable rights among which are life, liberty and the pursuit of happiness. To secure these rights and the protection of property, governments are instituted among men, deriving their just powers from the consent of the governed.);

IND. CONST. ART. 1 § 1 (We declare, That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness . . . .);

IOWA CONST. ART. I § 1 (1991)(All men are, by nature, free and equal, and have certain inalienable rights -- among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.);

KAN. CONST. ART. 1, § 1 (All men are possessed of equal and inalienable natural rights, among which are life, liberty, and the pursuit of happiness.);

KY. CONST. § 1 (Baldwin 1992)(All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned . . . Fifth: The right of acquiring and protecting property.);

LA. CONST. ART. 1, § 1 (The rights enumerated in this Article are inalienable by the state and shall be preserved inviolate by the state.);

ME. REV. STAT. CONST. ART. 1, § 1 (1991)(All people are born equally free and independent, and have certain natural, inherent and unalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.);

MASS. CONST. ANN. PT. 1, ART. 1 § 2 (1990)(All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; *in fine*, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.);

MISS. CONST. ART. 3, § 6 (The people of this state have the inherent, sole, and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they deem it necessary to their safety and happiness.);

MONT. CONST. ART. 2, § 3 (1992)(All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.);

NEB. CONST. ART. I, § 1 (1991)(All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed.);

NEV. CONST. ART. 1, § 1 (1991)(All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness.);

N.H. CONST. ART. 2 (All men have certain natural, inherent and essential rights--among which are, the

enjoying and defending life and liberty, acquiring, possessing and protecting, property, and, in a word, of seeking and obtaining happiness and safety.)(*See also* article 5 pertaining to religion.);

N.J. CONST. ART. 1, par. 1 (1991)(All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.);

N.M. CONST. ART. II, § 4 (1992)(All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.);

N.C. CONST. ART. 1, § 1 (We hold it to be self-evident that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of fruits of their own labor, and the pursuit of happiness.);

N.D. CONST. ART. 1, § 1 (1991)(All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.);

OHIO CONST. I § 1 (Baldwin 1992)(All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.) [NOTES: COMMENTARY Editors Comment: 1990 This section and succeeding § 2 are based on part of Article VIII, §1, 1802 Ohio Constitution, which itself paraphrased the Declaration of Independence. It restates principles accepted before the Revolution: that man has certain inalienable rights under natural law; that the purpose of government is to secure and protect those rights; and that all governmental powers depend on the people's consent. See, e.g., Resolutions of October 14, 1774, I Journals of the Continental Congress 63-73 (Worthington C. Ford ed, 1904); Blackstone's Commentaries 41-53 (J. W. Ehrlich ed, Nourse Publishing Co 1959); Thomas Rutherforth, II Institutes of Natural Law, Ch III (Cambridge, England, 1754-56)];

OKLA. CONST. ART. 2, § 2 (All persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry.);

OR. CONST. ART. 1, § 2 (All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their consciences.);

PA. CONST. ART. 1, § 1 (All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.)(See also section 3 pertaining to the natural and indefeasible right to worship Almighty God.);

S.D. CONST. ART. VI, § 1 (All men are born equally free and independent, and have certain inherent rights, among which are those of enjoying and defending life and liberty, of acquiring and protecting property 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.);

TENN. CONST. ART. 1, § 1 ([The people] have at all times, an unalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper.)(*See also* section 3 pertaining to the natural and indefeasible right to worship Almighty God.);

TEX. CONST. ART. 1, § 2 ([The people] have at all times, an inalienable right to alter, reform or abolish their government in such manner as they may think expedient [subject only to the Republican guarantee.]);

UTAH CONST. ART. I, § 1 (1992)(All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right.);

VT. STAT. ANN. CONST. ART. 1 (1991)(That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness and safety; therefore no person born in this country, or brought from over sea[s], ought to be holden by law, to serve any person as a servant, slave or apprentice, after he arrives to the age of twenty-one years, unless he is bound by his own consent, after he arrives to such age, or bound by law for the payment of debts, damages, fines, costs, or the like.);

VA. CONST. ART. I, § 1 (1992)(That all men are by nature free and independent and have certain inherent rights, of which, when they enter a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.);

W. VA. CONST. ART. III, § 1 (All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: The enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.)(*See also* section 3 pertaining to the indubitable, inalienable and indefeasible right to reform, alter or abolish [their government.]);

WYO. CONST. ART. 1, § 1 ([The people] have at all times an inalienable and indefeasible right to alter, reform or abolish the government in such manner as they may think proper.)(*See also* section 2 pertaining to the equal and inherent right to life, liberty and the pursuit of happiness.)

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