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A Response to Professor Marshall

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I said in my article critiquing *Smith* that the theoretical argument in support of its position is "serious and substantial, even if mistaken."[1] Professor Marshall demonstrates the truth of at least the first of these propositions. Space does not permit a point-by-point rebuttal, but a few areas of disagreement are sufficiently important to warrant mention.

The heart of Marshall's position is that free exercise exemptions are a form of "favoritism for religious belief over other beliefs."[2] He can say this, however, only by ignoring the symmetrical character of the free exercise and establishment principles. Both "single out" religion for special treatment, but sometimes this is an advantage and sometimes a disadvantage. When a Jehovah's Witness refuses to work in an armaments factory, he is constitutionally entitled to unemployment benefits,[3] while a secular antiwar activist in the same position is not.[4] In this context, it may appear that religion is "favored." But if a public school football coach (or even a member of the team) offers a prayer or other religious inspiration before the game, he will be stopped; a girls' tennis coach who offers feminist words of inspiration before the game engages in protected speech. When the Reverend Jerry Falwell's Liberty University applied recently for public bonds, it was turned down because of its religious teaching;[5] no one would consider turning down Antioch College because of its secular ideology. In these contexts, religion seems "disfavored." It is simply not accurate to describe the pre-*Smith* constitutional scheme, *taken as a whole*, as "favoritism" for religion.

It would be possible to accept Marshall's position on free exercise of religion (no "singling out") and still maintain consistency

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[1] Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U Chi L Rev 1109, 1129 (1990).

[2] William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U Chi L Rev 308, 319 (1991).

[3] *Thomas v Review Board*, 450 US 707, 719 (1981).

[4] See Marshall, 58 U Chi L Rev at 319 (cited in note 2).

[5] *Habel v Industrial Development Authority*, 1991 Va LEXIS 5 (S Ct Va).

with the Establishment Clause. This would mean that religion cannot be "singled out" under either clause. If a public school teacher wants to tell his class about the importance of a personal relationship with Jesus Christ, that would be no different from holding forth about the importance of Martin Luther King or of protecting the environment. But that is not Marshall's position. As he says, "the Establishment Clause uniquely singles out government advancement of religion as a matter to be avoided. . . . [T]here is no comparable limitation on other types of belief systems."[6] Having embraced the "singling out" position with reference to establishment, why is Marshall so reluctant to extend it to free exercise?

Marshall's admonitions about the difficulty of defining and identifying religion—about which he says I seem "delightfully unconcerned"[7]—are, of course, no less pertinent under the Establishment Clause than under the Free Exercise Clause. But now it is Marshall who is unconcerned. Apparently, in Marshall's world, religion can be "singled out" only for the purpose of exclusion from government benefits. When government interference is at issue, religion must be accorded protection no greater than that given secular beliefs.[8] This combination—"singling out" under the Establishment Clause, "equal treatment" under the Free Exercise Clause—is a powerful instrument for the secularization of society. It is hard to see anything "neutral" about it.

Marshall suggests at one point that his view of the Establishment Clause might not preclude statutory religious exemptions.[9] But his explanation for why the free exercise exemption "offends Establishment Clause principles"[10] is equally applicable to statutory exemptions: "Special treatment for religion connotes sponsorship and endorsement; providing relative benefits for religion over non-religion may have the impermissible effect of advancing religion."[11] If Marshall is right about free exercise exemptions, he must be wrong about statutory exemptions; "special treatment" is special treatment, whether judicial or statutory. But if he admits that under his reasoning statutory exemptions are unconstitu-

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[6] Marshall, 58 U Chi L Rev at 325 (cited in note 2).

[7] Id at 310.

[8] See id at 319-22.

[9] Id at 323.

[10] Id at 319.

[11] Id (footnotes omitted).

tional, Marshall forfeits any possible support for his position in precedent,[12] history,[13] or a jurisprudence of judicial restraint.[14]

Those who claim that religion may not be "singled out" must grapple with the very text of the First Amendment, which refers specifically to "religion." *Why* religion is distinguished from other forms of belief is open to many interpretations, but that it *was* distinguished seems undeniable.[15] My position is not "that the Constitution prefers religious belief."[16] Rather, I contend that the Constitution treats religious belief *differently*—sometimes better, sometimes worse, depending on whether the context is one of interference or advancement. The unifying principle is that the reli-

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[12] The Supreme Court has unanimously upheld the legitimacy of statutory religious exemptions. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327, 338 (1987). Even Justices Brennan, Marshall, and Stevens, whose views of the Establishment Clause are the strictest on the Court, agree that "legislative exemptions . . . that were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause" are permissible. *Texas Monthly, Inc. v Bullock*, 489 US 1, 18 n 8 (1989) (plurality opinion).

[13] While the historical evidence bearing on whether the Free Exercise Clause was understood or expected to vest the courts with authority to create exceptions from generally applicable laws on account of religious conscience is divided, there is abundant evidence that religious exemptions were deemed legitimate. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1511-12 (1990).

[14] The emerging position among the conservatives on the Court seems to be to take the narrowest plausible view of both religion clauses. This at least has the virtue of consistency. Under this view, religious exemptions are constitutionally permissible and even "desirable" (the Court's word, see *Smith v Employment Division*, 110 S Ct 1595, 1606 (1990)), but they must be made by the political branches, not by the courts. This approach has nothing in common with Marshall's position, because his opposition to free exercise exemptions rests on their supposed inconsistency with constitutional values under the Free Exercise Clause, the Free Speech Clause, the Establishment Clause, and the Equal Protection Clause. Marshall, 58 U Chi L Rev at 310-13, 319-22 (cited in note 2). Advocates of judicial restraint would, presumably, disagree with Marshall on every point.

[15] My statement that "the Free Exercise Clause, understood as Madison understood it, reflected a theological position," McConnell, 57 U Chi L Rev at 1152 (cited in note 1), seems to have misled Marshall—though this is my fault, not his. My statement was unclear. I do not, as Marshall infers, believe that "the Constitution embodies a special commitment to theistic obligation," Marshall, 58 U Chi L Rev at 327 (cited in note 2), in any religious sense. As I said in the article, not all the framers (and perhaps not Madison) accepted the phenomenon of religion as true "as a matter of personal faith." McConnell, 57 U Chi L Rev at 1152 n 184 (cited in note 1). Atheists no less than committed believers can coherently support the principles of the Free Exercise and Establishment Clauses. I meant only that the distinction between religion and other beliefs, to be understood, requires reference to perspectives *internal to religion* (hence "theological"). Viewed from a secular perspective, religion is just another ideology. Only by examining the unique character and claims of religion as they are perceived by believers (and by non-believers who apprehend their power and importance) can we appreciate why the framers of our Constitution were so concerned that the federal government be precluded from meddling in this aspect of human life.

[16] Marshall, 58 U Chi L Rev at 322 (cited in note 2).

gious life of the people should be insulated, to the maximum possible degree, from the effect of governmental action, whether favorable or unfavorable. To extend this principle to all other beliefs and activities would be impossible.