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William C. Porth
Robinson & McElwee

Robert P. George
Princeton University

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TRIMMING THE IVY: A BICENTENNIAL RE-EXAMINATION OF THE ESTABLISHMENT CLAUSE

WILLIAM C. PORTH*

ROBERT P. GEORGE**

INTRODUCTION

A little to the north and east of Charlottesville, in Orange County, Virginia, on the property of a modern winery, stands the remains of a great house. It was designed around 1814 by that American polymath, Thomas Jefferson, for his friend James Barbour, diplomat, United States Senator, Secretary of War, and Governor of the Commonwealth of Virginia.[1] Today the house is a desolate ruin. The imposing bulk of the decayed lower stories and a few clusters of broken columns attest to a grandeur that can now only be imagined. Ivy trails luxuriantly over the wreckage.

James Barbour's mansion is not the only artifact of the early years of the Republic and the genius of its founders, the original fabric of which is covered by an unmanageable growth, as of ivy. A far more important artifact in this class is the foundational instrument of our government, the Constitution of the United States. In one respect, the Constitution is in much better shape than Governor Barbour's house; words can outlast the strongest brick and stone. But, even though the words of the Constitution survive exactly as our forefathers wrote them, they have, over the course of two centuries, become so encrusted with the ivy of judicial interpretation as to have become, in parts, almost wholly obscured.

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* B.A. 1978, Washington & Lee University; J.D. 1981, Harvard University; partner in the firm of Robinson & McElwee, Charleston, West Virginia.

** Assistant Professor of Public Law and Jurisprudence, Department of Politics, Princeton University; B.A. 1977, Swarthmore College; M.T.S. 1981, Harvard University; J.D. 1981, Harvard University; D. Phil. 1986, Oxford University; member of the bars of New Jersey and Pennsylvania.

[1] Labels on bottle No. 1768 of the Barboursville Vineyards 1980 Virginia Pinot Chardonnay in author's collection; 5 NATIONAL CYCLOPAEDIA OF AMERICAN BIOGRAPHY 82 (1907).

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In this, the Constitution's bicentennial year, perhaps the most fitting mark of respect we can pay to the charter which has given our nation its legal and political form is to strip away some of this ivy. We should adopt as the chief object of our attention the words of the Constitution itself, instead of Professor Piffle's commentary on Mr. Justice Snort's landmark opinion interpreting this clause or that.

It is certainly not our intention to derogate either scholarship or the accrued body of judicial wisdom. Scholarship can play a useful role in interpreting and applying constitutional provisions. Precedent is essential to the orderly development and the stability of law in general and constitutional law in particular. But either scholarship or precedent can go awry, and, when either does, it invites correction. In the field of scholarship, this invitation should never be declined; scholarship's sole legitimate devotion is to the discovery and dissemination of the truth. Precedents embodying or built upon faulty interpretations should also be corrected — unless there are powerful countervailing considerations. In rare cases it may be more important that the applied law be settled than that it be correct. But both scholarship and precedent are subsidiary to, and must be respectful of, the words of the Constitution itself. Just as the most radically dissenting Roman Catholic theologian, *qua* theologian, is (or ought to be) constrained by and faithful to the magisterium of the Roman Catholic Church,[2] the most politically active and extreme federal judge or professor of constitutional law, *qua* interpreter of the Constitution, is (or ought to be) constrained by and faithful to the Constitution.

It is our objective in this article to undertake a fresh examination of one constitutional provision, the establishment clause of the first amendment, by focusing on the plain meaning of the clause. We shall first consider the task of constitutional interpretation in general and attempt to identify the method of interpretation which is most faithful to the Constitution. Then we shall review the establishment clause jurisprudence of the past several decades, note where it has

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[2] G. GRISEZ, 1 THE WAY OF THE LORD JESUS (CHRISTIAN MORAL PRINCIPLES) 871-98 (1983). *See also infra* note 10.

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gone astray, and offer a corrective interpretation. We shall then examine a particular establishment clause case which is both recent and controversial, the Mobile County textbooks case,[3] and evaluate the reasoning and outcome of that case in light of both conventional establishment clause jurisprudence and the reading of the clause which we propose. Finally, we shall suggest an alternative mode of analysis based upon a general principle of even-handedness (freely derivable from either the establishment clause or the equal protection clause of the fourteenth amendment) which can be applied to many cases which have customarily been analyzed (and frequently poorly decided) under a faulty reading of the establishment clause.

THE TASK OF CONSTITUTIONAL INTERPRETATION

The Constitution has several basic purposes. It creates the central structures of our national government;[4] it authorizes those structures to perform certain tasks and wield certain powers;[5] it reserves to the people, and the various state governments instituted by them, any powers not expressly conferred upon the federal government;[6] and it recognizes the especial protected status (against infringement by federal and state governments) of certain basic rights, privileges, and immunities of the people.[7] The Constitution does other things as well. For example, it places certain restrictions (unrelated to individual rights) on state governments, both explicitly and implicitly;[8] and it provides a mechanism deliberately slow and cumbersome for its own amendment.[9]

In the degree of specificity which it employs, the Constitution takes a middle course. It is far more detailed than a mere statement of broad ideals such as "the aim of government is to do justice" or "government must not trespass on the rights of the people." On

[3] Smith v. Board of School Commr's, 655 F. Supp. 939 (S.D. Ala. 1987), *rev'd*, 827 F.2d 684 (11th Cir. 1987).

[4] U.S. CONST. arts. I, II, and III.

[5] *Id.*

[6] U.S. CONST. amend. X.

[7] *E.g.*, U.S. CONST. amends. I — IX.

[8] *E.g.*, U.S. CONST. art. I, § 10 and art. IV (explicitly); *E.g.*, U.S. CONST. art. VI, cl. 2 read in conjunction with the enumerated powers conferred upon Congress by art. I (implicitly).

[9] U.S. CONST. art. V.

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the other hand, it is far more general than the statutes and regulations which the federal government has created in effectuation of its various constitutional mandates. It is, as it were, the blueprint of a great engine of government for a sovereign people. It is neither the mere concept for such an engine, nor a plan of the specific work which the engine will perform.

The engine was intended to be enduring. While the work which it will undertake may be expected to change with changes in circumstances and changes in the political will of the people, modifications of the engine itself are rarely needed. It was for this reason that the amendment process was made elaborate. It was also made to require ratification by the people (through either their state legislatures or state constitutional conventions) so that the federal government alone could not alter the very restraints which the people had placed upon it.

For the Constitution to work, two requirements must be fulfilled. First, its operative provisions must be understood; second, they must be obeyed. Only the first requirement is at all problematic. The second is purely a matter of will. Men may genuinely differ about the precise meaning of certain constitutional provisions. If they are loyal to the Constitution, however, they cannot dispute that whatever it mandates must be performed and whatever it forbids must be eschewed. Our governmental officials, for example, are bound so to act by their solemn oaths.[10]

[10] U.S. CONST. art. II, § 1 prescribes the oath of the President, which contains the promise to "preserve, protect and defend the Constitution of the United States." U.S. CONST. art. VI, cl. 3 requires United States senators and representatives, state legislators, and all federal and state executive and judicial officers to be bound by oath "to support this Constitution." Curiously, the oath taken by federal judges is unique among the oaths taken by government officials in containing no express commitment to support or defend the Constitution. The judicial oath of office reads, in pertinent part: "I will administer justice without respect to persons, and do equal right to the poor and to the rich, and . . . I will faithfully and impartially discharge and perform all the duties incumbent upon me . . . according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States." 28 U.S.C. § 453. Of course, even this weaker formulation requires a judge to promise to act in conformity with the Constitution. If anyone were to argue that the form of the judicial oath confers upon judges a special license to manipulate or disregard constitutional provisions, he would merely be making a case for the unconstitutionality of the statute prescribing the oath.

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One might wish to suppose that willful infidelity to the Constitution would be rare, and when it occurred, would be speedily redressed through the process of impeachment.[11] However, the matter is not so simple. The desire to have the Constitution mean what one would *like* it to mean can tempt one to disregard what one *knows* it to mean. More insidiously, it can distort one's actual understanding of what it *does* mean. Finally, beyond these cases of culpable misunderstanding (whether conscious or unconscious), there can be honest, though not always reasonable, disagreement about the meaning of the Constitution and, even more to the point, about the *purpose* of the Constitution. One or another of these phenomena is variously responsible for the changing, and increasingly idiosyncratic, reading of the Constitution engaged in by the federal judiciary.

It is odd that it should be so. Certain forms of literature are intentionally obscure, ambiguous, or rich with multiple meanings. A written constitution, by contrast, is a form of literature which, by its very nature, aims at clear communication. Ambiguity is no more desirable in a constitution than it is in a road sign or a railway timetable. To be useful, the admonition "No passing" to a motorist should be as plain as it can be; so should the admonition "No passing of a Bill of Attainder" to the Congress.[12]

The concept of a written constitution as an effective restraint upon the actions of generation after generation of willful men entrusted with the power of the state requires the initial assumption that ideas can be given clear verbal formulations. It posits the mutual practical efforts of the skillful writer and the intelligent and receptive reader. There may be skeptics who deny the possibility of any such communication. But if it *is* an impossibility, the rest of the apparatus of our constitutional law is a chimera. If the draftsmen of a constitution cannot reasonably aspire to convey a clear message to readers of their own, or a later, generation, how can a lawyer hope to present a rational argument to a judge, and how can a judicial opinion give any meaningful direction to anyone?

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[11] U.S. CONST. art. II, § 4.

[12] U.S. CONST. art. I, § 9, cl. 3.

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Beginning with this fundamental premise about the nature of constitutional communication, and turning to the text of our own Constitution, we discover no textual evidence that the framers deliberately courted ambiguity. An unprejudiced reading of the document conveys the impression that each point was set down as clearly and specifically as its subject matter allowed. What, then, is the source of the ambiguity which has permitted so many judges and theorists to come to so many different conclusions about the meaning of the same words? In some instances, one must admit, a particular subject matter calls for a certain breadth of concept and of phrasing. "Freedom of speech," for example, is a constitutional formulation the precise content of which is neither set forth in the first amendment nor immediately understood as a matter of the common vocabulary shared by speakers of the English tongue. Recourse must be made to some extra-textual source to understand and apply the protection against the abridgment of this freedom. Similarly, the concept of cruelty referred to in the eighth amendment or the understanding of what process is "due" under the fourteenth amendment before a person may be deprived of life, liberty, or property, are matters which require independent ethical reflection and determination on the part of anyone faced with the task of applying those constitutional provisions.

Instances of the use of words and concepts of this character in the Constitution are not infrequent. Yet they remain an occasional, not a pervasive, phenomenon. Often the Constitution addresses a subject, if sometimes only in part, in words that, given their plain and common meaning (considered in the verbal and structural context in which they occur), yield the clearest possible message. Section 1 of the fourteenth amendment is a provision of this composite character. While it contains a number of phrases which must be imbued with content from outside the four corners of the Constitution, it has an obvious symmetrical structure and a basic verbal formulation which conveys, and should be accorded, its plain meaning — and *within which* the content of the more elusive phrases can be sought and then applied in a manner which accords the amendment no less verbal rigor than it actually contains.[13] All too often,

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[13] In the specific case of the fourteenth amendment, the key clauses of section 1 have been

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however, the presence in a constitutional provision of any word or phrase of less than crystalline clarity has been exploited by "interpreters" as justification for treating the entire provision as ambiguous. We object to such obscurantism.

The proper methodological approach of a constitutional interpreter might be analogized roughly to that of a physician confronted

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focused on and developed in isolation, the words taken as merely a starting point for an elaborate jurisprudence which has only the slightest rooting in the text. Here are the actual words of the three key clauses:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

It is not our purpose in this article to advance or defend in any kind of detail our understanding of the plain meaning of the fourteenth amendment. However, for the sake of illustrating our general theory of constitutional interpretation, we will set forth very briefly that understanding. The three clauses above are directed to the *functions* assigned to the three branches of government. The privileges and immunities clause is directed to the substantive content of laws; it prohibits state legislatures from enacting (and state executives from enforcing) laws which infringe upon the various privileges and immunities of individual citizens. The equal protection clause is directed to the enforcement of laws; it requries state executives to enforce laws in a fair, impartial, and even-handed fashion. The due process clause is directed to the proper conduct of adjudicatory proceedings (and, although the tremendous expansion of administrative law in the twentieth century was unquestionably not foreseen by the framers and ratifiers of the fourteenth amendment, the protections of the due process clause are reasonably and necessarily extended to the proper conduct of quasi-adjudicatory proceedings, as well); it requires judges (and members of the quasi-adjudicatory panels of administrative agencies) to afford a person adequate procedural safeguards before he may be required to suffer such sanctions as fine, confiscation, imprisonment, or execution.

An acceptance of this plain meaning clearly leaves much to be decided by a court faced with the task of applying any of three key clauses of section 1 of the fourteenth amendment. Judgments must be made about the substantive content of "privileges and immunities" and "*due* process" and the dividing line between, *inter alia*, prosecutorial discretion and discriminatorily selective application of laws. But the plain meaning approach takes us a helpful distance down the road principled interpretation; unlike conventional readings of the fourteenth amendment, it doesn't leave us directionless at the crossroads, ready, out of either hubris or despair, to conclude that the fourteenth amendment contains some vague and high-sounding phrases and that we should apply our inventiveness to creating appealing standards, of constitutional force, which can be associated with those phrases.

Neither of the authors of this article is, by training or inclination, an historian. We arrived at the plain meaning outlined in this note by a close reading and analysis of the constitutional text, and nothing else. One author first suggested this reading to the other in 1979 or 1980. It has come to our attention that this same reading has been arrived at by Michael Zuckert on the basis of historical research and analysis and advanced in his doctoral dissertation and other unpublished work. Although we are unaware of the nature or persuasiveness of this historical proof, its existence constitutes an example of the way in which the "plain meaning" method of constitutional interpretation can be affirmed in some instances by sound historiography. A description of the Zuckert thesis may be found in Berns, *The Constitution as Bill of Rights*, in HOW DOES THE CONSTITUTION SECURE RIGHTS 50, 67-68 (1985).

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with a patient who has a mysterious ailment. The physician should first perform a physical examination and, if needed, conduct a battery of diagnostic tests. In many cases these efforts will enable him to make a confident diagnosis. However, if his patient's ailment remains mysterious, he may then have to engage in more imaginative or speculative analysis. But he should never ignore the initial and fundamental steps of diagnosis and proceed directly to the recondite stage. Similarly, a constitutional interpreter should never forego a textual analysis of a provision of the Constitution and an effort to discern its plain meaning on the grounds that such efforts will not ultimately resolve *all* conceivable questions about that provision.

It is not our purpose to probe the psychology of constitutional obscurantists. We are willing to suppose that (in all but the queerest cases) their motivation is not ill-will toward the Constitution or any kind of intellectual bad faith, but, in all likelihood, an undiscriminating devotion to furthering what they perceive to be the larger purposes of the document at the expense of its own clear statements. This enterprise, while not ignoble, fundamentally misconceives a basic purpose of the Constitution — prior restraint of government by the governed. It sets up the judiciary as a law unto itself, a branch of government immeasurably superior to the other branches and empowered to impose its own philosophy, and thereby its untempered political will, upon the people.[14]

There is a lively debate over the good and bad effects of allowing courts to create fundamental law in the constitutional context. Our point is simply that, good or bad, such a system is not the system created by our Constitution. Under that system, the Congress makes laws, the Congress and state legislatures (or constitutional conventions) make (by amendment) the Constitution, and the federal courts

[14] The literature arguing against this state of affairs (*i.e.*, government by an activist judiciary) and demonstrating it to be either unwise or anti-constitutional, or both, is vast. One of the most eloquent expressions predates the ratification of the Constitution. THE FEDERALIST No. 78 (A. Hamilton). For a few other notable examples, see R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 283-99 (1977); J. AGRESTO, THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY 163-65 (1984); Berns, *The Least Dangerous Branch but Only If*, in THE JUDICIARY IN A DEMOCRATIC SOCIETY (1979). Not all who make the case against government by judiciary are political conservatives. *E.g.*, Finnis, *A Bill of Rights for Britain? The Moral of Contemporary Jurisprudence*, 71 PROCEEDINGS OF THE BRITISH ACADEMY 303, 328-31 (1985).

interpret both constitutional and statutory provisions and apply them to the facts of the cases or controversies which properly come before them. The courts have also assumed the power to test the acts of all three branches of government against the Constitution and to invalidate them when they are inconsistent with the courts' interpretation of that document.[15]

How should the courts go about their task of interpretation? Surprisingly, and disappointingly, this is more than a rhetorical question. Although one would expect the individuality of human intelligence to produce a certain (but limited) degree of variability in the interpretations arrived at by different interpreters, one could legitimately expect them to share, at least on a fairly basic level, a common conception of the task in which they are engaged. But this is not the case.

The classification of interpretive theories is a favorite pursuit of contemporary constitutional scholarship. So it is that the literature of constitutional studies has evolved such creatures as strict and liberal constructionists,[16] originalists and non-originalists,[17] textualists,[18] textual determinists,[19] structuralists,[20] immanent structural-

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[15] *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). This power is nowhere expressly conferred upon the courts by the Constitution. The points ordinarily advanced in support of the constitutionality of the power itself are (a) the early date of its annunication by the Supreme Court, (b) contemporary theoretical justifications of the concept of judicial review in *The Federalist* and the constitutional debates, and (c) the necessitarian argument that, without it, any branch of government could transgress against the Constitution with impunity and deprive the Constitution of its restraining power — except insofar as each branch is willing to exercise self-restraint. We shall not consider here the purely academic question of the constitutionality of the courts' power to declare unconstitutional the acts of co-equal branches of government. However, it should be noted that the strongest argument in favor of the constitutionality of the power (the necessitarian one) is a two-edged sword: once the courts had assumed this power, the integrity of the Constitution was no longer dependent on the self-restraint of all three branches of government; it became precariously dependent on the self-restraint of the judicial branch alone. Whether or not this is the scheme contemplated by the Constitution (and the very novelty of the scheme supports the argument that, if contemplated, it would have been expressly addressed), it is a sad and obvious fact that our judges have frequently failed to exercise the philosophical modesty needed to make it work. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) and Roe v. Wade, 410 U.S. 113 (1973).

[16] L. TRIBE, GOD SAVE THIS HONORABLE COURT 41-49 (1985).

[17] Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204 (1980).

[18] Grey, *Constitution as Scripture*, 37 STAN. L. REV. 1 (1984).

[19] Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 743 (1982).

[20] Harris, *Bonding Word and Polity*, 76 AM. POL. SCI. REV. 34, 37 (1982).

ists,[21] transcendent structuralists,[22] historicists,[23] intentionalists,[24] supplementers,[25] aspirationalists,[26] positivists,[27] process theorists,[28] aesthetic theorists,[29] distributivists,[30] rejectionists,[31] literalists,[32] court skeptics and rights skeptics,[33] neutral principles theorists,[34] preservatists,[35] activitists and passivists,[36] constructivists,[37] and the list goes on.

Perhaps the most familiar classificatory division is between interpretivists and non-interpretivists.[38] It is probably also the least useful. Interpretivism, as described by John Hart Ely, holds "that judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution."[39] Non-interpretivism, on the other hand, authorizes courts to "go beyond that set of inferences and enforce norms that cannot be discovered within the four corners of that document."[40] Ely further distinguishes between clause-bound and non-clause-bound interpretivists.[41]

Of course, non-interpretive theories are really not theories of constitutional *interpretation* at all. They do share with theories of

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[21] *Id.* at 39.

[22] *Id.* at 41.

[23] R. Dworkin, Law's Empire 359 (1987).

[24] R. Berger, Government by Judiciary: The Transformation of the Fourteenth Amendment 21 (1977).

[25] Grey, *supra* note 18, at 1.

[26] *E.g.*, S. Barber, On What the Constitution Means (1984).

[27] Harris, *supra* note 20, at 37.

[28] *E.g.*, J. Ely, Democracy and Distrust (1980).

[29] *E.g.*, L. Carter, Contemporary Constitutional Lawmaking 165 (1985).

[30] *E.g.*, Parker, *The Past of Constitutional Theory — and Its Future*, 42 Ohio St. L.J. 223 (1981).

[31] Grey, *supra* note 18, at 2.

[32] Bennett, *"Mere" Rationality in Constitutional Law: Judicial Review and Democratic Theory*, 67 Calif. L. Rev. 1049, 1089 (1979).

[33] D. Richards, Toleration and the Constitution 4-6 (1986).

[34] *E.g.*, Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 Harv. L. Rev. 1 (1959).

[35] L. Carter, *supra* note 29, at 41.

[36] R. Dworkin, *supra* note 23, at 369-78.

[37] *Id.*

[38] Grey, *Do We Have an Unwritten Constitution?*, 27 Stan. L. Rev. 705 (1975).

[39] J. Ely, *supra* note 28, at 1.

[40] *Id.*

[41] *Id.*

interpretation a normative concern for judicial practice. They differ, however, in proposing no method for discerning the meanings, or guiding the applications, of constitutional provisions or the constitutional document as a whole. By their own terms, they seek to guide or justify judicial choice and action by reference to something entirely outside the scope of the constitutional document. Non-interpretivists apparently see no point in attempting to guide judicial choice and action by reference to principles set forth in the Constitution. Even if they might concede that the Constitution contains some coherent principles, they fear that these principles are not up to the task of resolving serious constitutional disputes. In giving up on constitutional interpretation, however, non-interpretivists abandon faith in the Constitution as law.

Few constitutional scholars (and seemingly no judges) today wish to be categorized as non-interpretivists.[42] The term has acquired a definite air of opprobrium. Although there are radically different views among constitutional specialists about how the Constitution ought to be interpreted, virtually all claim to have identified the theory which is able to produce authentic interpretations. Hence the long list of interpretive theories set out above. Even those who would go furthest "beyond the document" in their search for meaning claim constitutional authority for their journeys and characterize their quest as a search for *constitutional* meaning.

While we are committed to the "plain meaning" approach to the task of interpretation, we by no means disdain constitutional theory. Indeed, our conclusion that courts should, to the fullest extent possible, give effect to the plain meaning of constitutional provisions is grounded in what seems to us to be the best under-

[42] Even a judge as unfettered by the text of the Constitution as Justice Brennan gainsays in theoretical discourse the implications of his judicial practices: "Justices are not platonic guardians appointed to wield authority according to their personal moral predilections." Speech by Justice William J. Brennan at Georgetown University, *The Constitution of the United States: Contemporary Ratificatin* (Oct. 12, 1985). One of the handful of scholars frank enough to proclaim his adherence to non-interpretivism is Michael Perry. *See* M. PERRY, THE CONSTITUTION: THE COURT AND HUMAN RIGHTS (1982). Ronald Dworkin, with characteristic ingenuity, argues that there is no meaningful distinction between interpretivists and non-interpretivists, but that, to the extent they differ at all, it is the interpretivists who are really non-interpretivist, and vice-versa. R. DWORKIN, A MATTER OF PRINCIPLE 34-37 (1985).

standing of the point of the Constitution — in other words, in a constitutional theory. Moreover, we recognize that the meanings of various elements of the Constitution are not immediately plain and that, with respect to these elements, courts are required to make authoritative choices within more or less circumscribed ranges of possibilities. In these areas, certain constitutional theories usefully guide the choice and action of the constitutional interpreter. They do so, not by replacing the authoritative choices reflected in the Constitution, but by illuminating these choices. For example, structuralist theories frequently help to make plain the meanings of provisions which, when considered in abstraction from the structures and structural relations of the Constitution, could seem thoroughly ambiguous. The fact that the meanings of certain provisions (*e.g.*, as we shall demonstrate, the establishment clause) can be identified without resort to complex structural analysis provides no basis for concluding that there are not other provisions, the meaning of which may be inaccessible without the aid of such analysis.[43] On the other hand, the detection of ambiguity anywhere in the Constitution is no justification for concluding that the document does not provide, at other points, unambiguous directives. Constitutional theories go awry, however, precisely to the extent that they send the interpreter off on an *un*authorized quest for extra-constitutional standards for decision-making.

Of the interpretive theories rooted in a perception that proper constitutional interpretation should be highly attentive to, and respectful, of the text of the Constitution itself, the most prominent currently is the theory of "framers' intent" or "original intent." According to this theory, the fundamental task of a judge confronted with a constitutional question must be to discern the intention of the framers and ratifiers of the constitutional provision at issue. It is *their* intention which will resolve any uncertainty as to correct meaning and which will provide guidance as to the proper application of the Constitution to the factual situation at hand.To all but the most ardent neoterist, "framers' intent" is an appealing

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[43] *See supra* note 13.

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theory. It assures a measure of permanence, consistency, and rootedness in the task of constitutional interpretation. (Indeed, it may succeed too well in this direction and result in a rigid, ossified Constitution.) It clearly serves, however, to protect the Constitution from becoming a mere vessel of words into which each successive generation of federal judges pours the wine of its own philosophical (whether political, moral, or economic) predispositions.

But there is a critical problem with the theory of "original intent" if it is used to authorize a search for that intent beyond the text of the Constitution in the minds of the framers and ratifiers. Such a use misdirects our attention from something unitary, definite, and permanent — the constitutional text — to something diverse, indefinite, and changeable — the minds of (at the very least) hundreds of men. There are several different senses of intent, most of which are indeterminable, misleading, or irrelevant. The legitimate sense of intent as a principled guide to constitutional interpretation is simply "the intended meaning of the text." This "intent," however, is often overshadowed by other notions of "intent" which are incapable of providing principled guidance.

First, there is the *motive* of individual framers and ratifiers in approving the particular formulations contained in the Constitution. It is a virtual certainty that different framers and ratifiers acted out of different motives. What all of those motives may have been would be impossible to discover today due to the incompleteness of the extant historical records — even if one made the questionable assumption that every surviving recorded expression of the views of a framer or ratifier was a complete and accurate reflection of his motivation in casting his vote. Even more to the point, it is supremely irrelevant why someone chose to vote for a particular constitutional provision. One man may have voted to protect his business, another to annoy his rival, a third to be faithful to his conscience. Some votes may have been whole-hearted, some grudging, some the product of compromise. Given the fact of human individuality, if the voting process required not only agreement of result but also agreement of motivation, democracy would be impossible. In the final analysis, it matters only *how* the voters voted, not *why* they voted as they did.

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Second there is the *personal philosophy* of individual framers and ratifiers on the subject matter addressed by particular constitutional provisions which they approved. Such philosophies may comport more or less closely with the content of the Constitution. Obviously, a man may decide to vote for something which falls short of his ideal; most practical politicians are masters of the art of compromise. But a decision to compromise does not necessitate, and perhaps only rarely reflects, a change in personal philosophy on the part of the maker of that decision. Typically, the attitude of a compromiser could accurately be portrayed as "Although I would rather have X, I am willing, under the circumstances, to accept Y." This simple fact of life generates manifold problems for most seekers of original intent. The extra-constitutional materials on which they often rely — such materials as A's diary, B's letter to a friend, C's transcribed or summarized speech — are far more likely to reflect the personal philosophies of such artifacts' authors than their disinterested interpretations of constitutional provisions. Even in cases where the materials expressly purport to be a reading of the Constitution, they may often convey more of the authors' prescriptive beliefs about what the Constitution *should* say than their impartial descriptive assessments of what it *does* say. We see this temptation succumbed to frequently enough by judges, whose sole charge is the task of interpretation; how much more powerful a temptation must it be to men who were themselves creators of the Constitution.

Third, there is an *individual's perception* of the intended meaning of a text — which is not necessarily coincident with its intended meaning. Different people possess intellectual gifts of different kinds and in different degrees; they also may devote different levels of attention and reflection to the projects in which they engage — including the project of drafting and approving the provisions of a constitution. As a result, there may well be, as an objective fact, a variation in the subjective perceptions of individual framers and ratifiers about the intended meaning of the very provisions they have approved. Ronald Dworkin has advanced with some subtlety and precision the argument that there is no such thing as *the* framers' intent (at least in many cases) because of the multifarious psychological states of the individuals involved in the collective acts of

framing and ratifying the constitution.[44] With regard to one aspect of psychological state motivation we find nothing telling in this argument, not because there is likely to be any motivational consensus, but because, as we have discussed above, motivation is irrelevant. With regard to another aspect of psychological state, however — a framer's or ratifier's understanding of the meaning of what he is approving — Dworkin makes a telling point. Just as the collective act of creating a contract requires a meeting of the minds, it would seem that the collective acts of legislators and constitution-makers require some threshold level of shared understanding to make them valid and purposive, instead of accidental and meaningless. In the final analysis, however, this is only a philosopher's quibble, if an intriguing one. As a practical matter, it will never, or almost never, be determinable whether the requisite level of shared understanding has or has not been reached in a particular instance. In the absence of compelling evidence, why adopt Dworkin's pessimistic assumption that the shared understanding is lacking? One would do better to assume that men of at least ordinary intelligence can understand most expressions aimed at clearly communicating ideas. If one is so thoroughly skeptical about human capacities for comprehension and communication that one cannot accept *that* assumption, one might as well crawl into a cave. It would, in any event, be irrational for such a skeptic to write articles, engage in public debate, perform the duties of a professor, or accept appointment as a judge.

The three senses of intent considered above (motive, personal philosophy, and individual perception) are not useful guides to constitutional meaning. To the extent that an interpretive theory focuses upon any of them, it will be unreliable. The intent of the Constitution's framers and ratifiers cannot be meaningfully discerned apart from a study of the only artifact which can be regarded as accurately reflecting that intent — the text of the Constitution itself.[45] And,

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[44] R. DWORKIN, *supra* note 42, at 43-48.

[45] H. Jefferson Powell turns the tables on the "original intent" theorists in an entirely different way by attempting to demonstrate through the same sort of detailed historical analysis in which they engage that the framers' and ratifiers' original understanding of the concept of original intent was something quite different, and more flexible, than the understanding of its modern proponents. The neat paradox of his analysis is only telling, however, against those who believe that this sort of

to the extent that a "framers' intent" theory focuses upon the text, it should be virtually indistinguishable from the "plain meaning" approach.

In our view, textual analysis is the single most important, and most neglected, technique of constitutional interpretation. It strikes us as curious that, in an age when textualism (of one form or another) is the sole respectable method of literary analysis, students of the Constitution should persist in attempting to find the meaning of *their* text in the biographical details and extra-textual literary remains of its authors. (We use the word "authors" here in a very broad sense to include all those who participated in the framing or ratifying of the Constitution and its amendments.) Indeed, there would ironically seem to be far more justification for attempts at extra-textual historical investigation in the case of a work of sole authorship such as a poem or a novel (where it is uniformly eschewed) than in the case of a work of collective authorship such as the Constitution (where it is a respectable, although not the dominant, approach). Keats's letters, for example, can actually give us reliable information about the circumstances of the composition of particular poems, the message or effect for which the poet strove, and his personal literary theories. By contrast, the collected writings of Madison or Jefferson on religious freedom and the relationship between church and state are likely, for the reasons discussed above, to give us little more than some insights (perhaps quite interesting and historically significant in their own right) into the views of *Madison* or *Jefferson* and even those, only at the times at which, and in the various contexts in which, they happened to be writing.

The best approach to constitutional interpretation therefore seems to us to focus initially and primarily on the text, to rely upon the technique of textual analysis, to restrict the role of extra-textual historiography to the use of materials which bear reliably on explication of the text (*e.g.*, the contemporary meaning of certain

historical approach is actually useful in discerning the framers' intent. In fact, Powell's analysis is subject to the very criticisms we have made of the original intent approaches which focus inadequately on the constitutional text. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

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words, the contemporary practices and institutions of society, and the record of collective acts respecting the text — such as the acceptance and rejection of amendments and alternative formulations), and to be devoted in an intellectually humble and respectful spirit to the discernment (wherever possible) of the plain meaning of the Constitution from its text. This is what we mean when we refer to the "plain meaning" approach. This is what has never been applied by the Supreme Court in its establishment clause jurisprudence.

WRONG FROM THE START: A BRIEF REVIEW OF ESTABLISHMENT CLAUSE JURISPRUDENCE

One need not search far for the origins of contemporary establishment clause doctrine. They are to be found in the first Supreme Court case devoted primarily to construing that clause, *Everson v. Board of Education*.[46] The question before the Court in *Everson* was whether public funds could be used to pay for transporting children to and from parochial schools. A bare majority of the justices found in this practice no violation of the establishment clause, as extended to apply to the states by the fourteenth amendment.[47] Curiously, however, Justice Black, writing for the Court, justified this result by arguing that public funding of transportation of schoolchildren to and from parochial school did not constitute "aid" to religion.[48] Were it otherwise, according to Black, there would indeed be an establishment clause violation. In Black's words:

> The 'establishment of religion clause' of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.[49]

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[46] Everson v. Board of Educ., 330 U.S. 1 (1947).

[47] None of the justices disputed in *Everson* Justice Black's conclusion that the fourteenth amendment had incorporated the establishment clause and applied it to the states. It is questionable whether this conclusion has ever received adequate reflective attention from the Supreme Court. As we discuss, *infra*, the plain meaning of the establishment clause provides a strong logical argument against its incorporability.

[48] Perhaps even more curiously, many years later the Supreme Court would prohibit, on establishment clause grounds, the public funding of transportation for non-religious field trips for parochial school students without overruling *Everson*. Wolman v. Walter, 433 U.S. 229, 252-55 (1977).

[49] *Everson*, 330 U.S. at 15-16.

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It is therefore obvious that Black, and the justices joining in his opinion, understood the words "make no law respecting an establishment of religion" to preclude any aid, even non-discriminatory aid, to religions.

Historically, the leading alternative to the "no-aid" (or "strict separationist") interpretation of the establishment clause has been the "no-sect-preference" (or "non-preferentialist") interpretation. No-sect-preference means that governmental aid to religions is permissible under the establishment clause so long as it is even-handed. No religion may be, arbitrarily, singled out for special favors or excluded from governmental aid.

The dissenting justices in *Everson* stressed the respects in which providing children with transportation to and from parochial schools does, in fact, aid the religious mission of such schools. In light of this, they argued, the establishment clause, interpreted as forbidding any such aid, rendered unconstitutional the publicly-funded transportation services at issue in *Everson*.[50] The logic of this argument seems unassailable. It is difficult to understand how the majority squared its no-aid interpretation with its willingness to uphold the challenged state assistance.

On the other hand, the *Everson* majority could clearly have justified its result under a no-sect-preference interpretation. Such an interpretation had been vigorously urged upon the Court in briefs and oral argument.[51] It is therefore interesting to ask why the majority felt compelled to reject such an interpretation, joining instead with the dissenting justices in adopting the no-aid reading. If we take Justice Black's opinion at face value, the answer would seem to be that the justices were persuaded that the *history* of the framing and ratification of the establishment clause provided powerful evidence for the no-aid interpretation.

Black's historical analysis begins with a discussion of the intolerance and religious persecution which settlers in America had imported from Europe.[52] Recognizing the problems of strife and

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[50] *Id.* at 18-63 (dissenting opinions).

[51] G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 135 (1987).

[52] *Everson*, 330 U.S. at 8-10.

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injustice portended by this situation, Black argues, the statesmen of the day decided to ban governmental aid to religion as a matter of constitutional law.[53] According to Black, the prohibition of laws "respecting an establishment of religion" reflects the views of Thomas Jefferson, as embodied, for example, in his Virginia Bill for Religious Liberty.[54] He finds the spirit of the establishment clause to be encapsulated in Jefferson's metaphor of a "wall of separation" between church and state. The intent of the framers and ratifiers, Black contends, was to erect exactly such a "wall."[55]

Writing in dissent, Justice Rutledge echoed Black in stressing the relevance of Jefferson's Virginia Bill. His historical analysis differs from Black's mainly in attributing more influence to (or at least exhibiting a greater deference toward) the opinions of James Madison. According to Rutledge, Madison was the "author" of the establishment clause, and it represents a "compact and exact" precis of his putatively strict-separationist views.[56]

The majority and dissenting justices alike relied upon a straightforward original intent approach in explicating the establishment clause. On the basis of their historical analyses, there was general agreement among all nine justices that the intent of the framers was to prevent any government aid to religion. The only disagreement (among the justices) concerned the question of whether transportation to and from parochial schools amounted to "aid."

The historiography of the *Everson* opinions has, over the years, been the subject of intense scholarly criticism.[57] Even critics who share, to at least some extent, with the *Everson* justices a reliance

[53] *Id.* at 11.

[54] *Id.* at 11-13.

[55] *Id.* at 16. We have previously warned of the dangers of looking to unreliable extra-constitutional sources for guidance in constitutional interpretation. *Everson*'s reliance upon Jefferson's metaphor is a perfect object lesson in that it imports content into the Constitution from the views expressed in an 1802 letter by a man who was neither a framer nor a ratifier of the Constitution.

[56] *Id.* at 34-41.

[57] An especially interesting re-evaluation of the origin and historical context of the establishment clause stresses the failure of contemporary jurisprudence to attend to the rootedness of late 18th-century American antiestablishmentarianism and beliefs in religious liberty in explicitly theological ideas. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777 (1986).

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upon historical analysis, maintain that the historical record reveals that an overwhelming majority among the framers and ratifiers of the first amendment were in favor of non-discriminatory aid to religions.[58] These critics make a compelling case. Even if we emphasize those writings and actions of, say, Jefferson and Madison which make them appear most sternly opposed to any governmental aid to religion, such strict-separationist views would have placed them in a tiny minority.[59] Moreover, modern scholarship is sharply divided over Madison's role in the drafting of the establishment clause.[60] On a considerably more important point, recently published historical research reveals an overwhelming agreement among participants in the debates surrounding the adoption of the religion clauses that aid to religion, if even-handed, is not only appropriate but often desirable.[61] If we follow the *Everson* Court in making the beliefs of the framers about the relationship of church and state dispositive of the dispute between the no-aid and no-sect-preference interpretations, we must conclude that all nine justices in *Everson* came down on the wrong side.

Still, the historiography and reasoning of *Everson* has never been repudiated by the Court. Thus, the no-aid principle functions as a foundational premise of establishment clause doctrine. Very frequently — as in *Everson* itself — this leaves before the courts the question of what is to count as "aid." Perhaps nowhere in its constitutional jurisprudence has the Supreme Court been less able to produce consistent and defensible results. In the forty years since *Everson*, the justices have thrashed about in search of a set of principles capable of generating a coherent body of case law. Now the

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[58] *E.g.*, G. BRADLEY, *supra* note 51, at 1-18 & 121-34; R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 2-15 (1982); M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT (1978); W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976); McClellan, *The Making and Unmaking of the Establishment Clause*, in A BLUEPRINT FOR JUDICIAL REFORM (1981).

[59] Just how "strict" the "separationism" of Madison and Jefferson may have been is itself a disputed matter. *Compare, e.g.*, Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, *with* R. Cord, *supra* note 58, at 17-47.

[60] G. BRADLEY, *supra* note 51, at 87, 105 n.24.

[61] Especially compelling is the historiography contained in G. BRADLEY, *supra* note 51, at 19-68.

Court (in the persons of four of its eight sitting justices) appears to be on the verge of abandoning its most recent candidate for the job, the so-called "tripartite test" first announced in the 1971 case, *Lemon v. Kurtzman*.[62]

In order to survive attack as a violation of the establishment clause under the *Lemon* test, a challenged statute, or other governmental act, must (1) have a secular purpose, (2) in its principal or primary effect neither advance nor inhibit religion, and (3) not foster excessive government entanglement with religion.[63] The chief objection to these criteria is their lack of any basis in the words of the establishment clause. Nothing in the text requires the government to act always for secular purposes; nothing forecloses the government from advancing or inhibiting religion in general, or one or more religions in particular, either as a primary or subsidiary effect; and nothing speaks to the possibility of government and religion becoming entangled in constitutionally unacceptable ways.

In addition to being stitched together out of whole cloth, the *Lemon* test has proven to be ludicrous in application. Justice Rehnquist is undoubtedly correct in his judgment that, as a mechanism for making the no-aid interpretation yield principled results, this test has failed miserably. Even restricting one's focus to a single category of establishment clause cases, the so-called school services cases, one finds the outcomes of challenges to the provision of goods and services to parochial school children under the *Lemon* criteria to be filled with inconsistencies which appear to be both arbitrary and absurd:

> For example, a State may lend to parochial schoolchildren geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial schoolchildren write, thus rendering them nonreuseable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A state may pay for diagnostic services conducted in the parochial school but therapeutic services must

[62] Lemon v. Kurtzman, 403 U.S. 602 (1971), *aff'd*, 411 U.S. 192 (1973).

[63] *Id.* at 612-13.

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> be given in a different building; speech and hearing 'services' conducted by the State inside the sectarian school are forbidden, Meek v. Pittenger, 421 U.S. 349, 367, 371, 44 L.Ed.2d 217, 95 S.Ct. 1753 (1975), but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Wolman, 433 U.S. at 241, 53 L.Ed.2d 714, 97 S.Ct. 2593, 5 Ohio Ops.3d. 197. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. *Id.* at 245, 53 L.Ed.2d 714, 97 S.Ct. 2593, 5 Ohio Ops.3d 197. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[64]

We believe that the unsatisfactory results of the *Lemon* test are directly traceable to flaws inherent in the test. The heart of *Lemon*, and its most reasonable element, is the "effect" prong. The "purpose" prong either adds nothing to the test or it authorizes a fundamentally unsound and unworkable investigation into legislative motives. In *Wallace v. Jaffree*[65] and *Edwards v.Aguillard*,[66] a moment-of-silence statute and a balanced-curriculum statute, which would evidently have been neutral in effect, were struck down under the first prong of *Lemon* on the ground that each was the product of an unconstitutional legislative intent. Indeed, the laws were invalidated on no stronger basis than the contention that *certain individual legislators* (as evidenced by their public utterances) had unacceptable religious *motives* for introducing or voting for the challenged statutes. The implications of such a technique of judicial review are alarming. Under the reasoning of *Jaffree* and *Aguillard*, any of the civil rights acts of the nineteeth century or the 1960s would be unconstitutional if it could be demonstrated that certain congressmen supported them out of a religiously-based belief in the brotherhood of man or the equality of the races. (This would, in turn, raise the question of whether the judicial invalidation of such laws on establishment clause grounds would itself amount to a vi-

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[64] Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (dissenting opinion). For an interesting attempt to identify a "norm" unifying the disparate results in these cases in the judicial aversion to the symbolic union of church and state, *see* Marshall, *"We Know It When We See It": The Supreme Court and Establishment* 59 S. CAL. L. REV. 495 (1986).

[65] *Wallace*, 472 U.S. 38.

[66] Edwards v. Aguillard, 107 S. Ct. 2573 (1987).

olation of the constitutional rights of those congressmen under the free exercise clause.) And, of course, the principle need not be restricted to the religion clauses. Perhaps the Supreme Court could strike down a welfare statute because some legislators who voted for it did so out of racial animus, believing that it would weaken the structure of the black nuclear family. Let us take the approach of *Jaffree* and *Aguillard* yet a step further. If it can be applied to do away with laws *approved* for improper reasons, why should it not also be applied to justify the judicial resuscitation of bills which failed to become laws if enough legislators had unacceptable motives in voting against them?

In applying the *Lemon* test, the Supreme Court has attempted to make the "purpose" prong meaningful by collapsing statutory purpose into legislative motive, indeed, into individual legislators' motives. In our view, an inquiry into motivation (in any legal context, not merely an establishment clause review) can ordinarily be justified only in two ways, the first of which is obviously not applicable here — (a) in an effort to demonstrate criminal intent in connection with an attempted action which, through fortuity, miscarried or never reached culmination, or (b) in an effort to seek extenuation of an action which produced bad, unfortunate, or improper results. We may well choose in some cases, to exonerate a man whose actions have produced an undesirable effect on the ground that he did not intend such an effect. In the absence of negligence, or worse, a good heart and a clear conscience will usually be held to excuse a negative outcome. But we will have arrived at the extremes of overexacting scrutiny and rigorism when we begin invalidating actions with beneficial or wholly innocent outcomes on the ground that we don't approve of the motivation of one or more of a collectivity of actors. As Don Marquis once wrote, an idea is not responsible for the people who believe in it. Similarly, a law (or other state action) with an acceptable outcome is not responsible for, and should not be rejected because of, the fact that some people supported it for unsavory or foolish reasons.

The "entanglements" prong of *Lemon* is also a source of difficulty. It is so open-ended that it has virtually no prescriptive content. A judge can give his subjective impulses free rein under the

guise of applying this third prong. Even if the challenged law is impeccably neutral in purpose and effect, he can, if he has any inclination to strike it down, rule that the nexus between church and state is just a wee bit too close and therefore gives rise to excessive entanglements. Indeed, the whole notion of entanglements seems to be derived from an identifiable extra-constitutional source, the Jeffersonian "wall of separation" metaphor, and to have a basis in neither logic nor the Constitution. Its unworkability is best demonstrated by the cases in which it has served as an insurmountable "catch 22": the ensurance of neutrality under the second prong of *Lemon* requires monitoring (or other mechanisms) which would constitute excessive entanglements under the third prong; but the absence of the objectionable entanglements would leave no adequate means of guaranteeing neutrality.[67] The interpretation of any provision of the Constitution as a "catch 22" is inherently suspect.

According to Rehnquist, we should not be surprised by the failure of the *Lemon* test to make the basic doctrinal premise set forth in *Everson* workable. The problem, he says, is that this premise "has no basis in the history of the amendment it seeks to interpret."[68] Without such a basis, no theory can be expected to guide our interpretation of the establishment clause in consistent and defensible ways. All we can expect, in Rehnquist's words, is "consistent unpredictability" in constitutional adjudication.[69] In Rehnquist's view, the abandonment of not only the *Lemon* test, but also the strict-separationist constitutional jurisprudence in which it is rooted, is long overdue.

Recently, Justice Scalia implicitly indicated his agreement with Rehnquist's "pessimistic evaluation" of establishment clause doctrine.[70] Scalia singles out for special (and especially devastating) criticism the "secular purpose requirement" of the *Lemon* test. He argues that scrutinizing legislation or other state action to ensure against a religious intent is so cumbersome and uncertain that it

[67] *E.g.*, Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).
[68] *Wallace*, 472 U.S. at 112.
[69] *Id.*
[70] *Edwards*, 107 S. Ct. at 2591, 2605 (Scalia, J., dissenting).

should be done by the courts only if demanded by the text of the establishment clause. But such a reading of the clause, he claims, is an "unnatural" one.[71] Scalia persuasively advocates the abandonment of the "purpose" prong of the *Lemon* test as a "good place to start" the task of rectifying the Supreme Court's "embarrassing establishment clause jurisprudence."[72]

In a brief dissent in *Wallace v. Jaffree*, Justice White has indicated that he, too, is dissatisfied with the prevailing establishment clause jurisprudence. He states that, in view of the history of the religion clauses (as set out at length in Rehnquist's dissent in that case), "it would be quite understandable if we undertook to reassess our cases dealing with the establishment clause"; he then proceeds to endorse explicitly "a basic reconsideration of our precedents."[73]

In her concurrence in *Jaffree*, Justice O'Connor demurred that she "was not ready to abandon all aspects of the *Lemon* test."[74] Recalling her concurrence in *Lynch v. Donnelly*,[75] O'Connor proposed what she deems both a "clarification"[76] and a "refinement"[77] of that test.

According to O'Connor, the establishment and free exercise clauses have a common point or purpose, "to secure religious liberty."[78] The particular role of the establishment clause, in her view, is to forbid "government from making adherence to a religion relevant in any way to a person's standing in the political community."[79] Apparently she understands this prohibition to be rooted in a concern for religious liberty. She identifies "two principal ways" in which legislation or other government action can go wrong in respect of it:

> One is excessive entanglement with religious institutions, which may interfere with the independence of the institutions, give the institutions access to government

[71] *Id.* at 2607.
[72] *Id.*
[73] *Wallace*, 472 U.S. at 91.
[74] *Id.* at 68 (O'Conner, J., concurring).
[75] Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Conner, J., concurring).
[76] *Wallace*, 472 U.S. at 68.
[77] *Id.* at 69.
[78] *Id.* at 68.
[79] *Lynch*, 465 U.S. at 687.

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> or governmental powers not fully shared by non-adherents of the religion, and foster the creation of political constituencies defined along religious lines. . . . The second and more direct infringement is government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message.[80]

What O'Connor supposes one gets from all this is a coherent picture of how the three parts of the *Lemon* test "relate to the principles enshrined in the establishment clause."[81] But, we must ask, what are these principles? Are they "no-aid" principles, "no-sect-preference" principles, or something else again? And how are these principles promoted by three criteria which, in application, yield such unprincipled results?

The current group of justices who, to a greater or lesser extent, dissent from prevailing establishment clause doctrine appear to share with those justices who wrought that doctrine in *Everson* a basic methodological assumption — that "the principles enshrined in the establishment clause" can be identified by an extra-constitutional ascertainment of the substantive views of the framers and ratifiers about the proper relationship between church and state. Ironically, contemporary defenders of the prevailing doctrine tend to soft-pedal the *Everson* Court's methodological reliance upon this sort of inquiry. They express incredulity about the prospect of recovering the concrete beliefs of the framers and ratifiers, and, in any event, they argue that those beliefs should not control the application of constitutional provisions to contemporary problems. They attempt to justify the strict separationism established in *Everson* not by appeal to history, but, rather, by appeal to philosophy.[82] Thus, they argue that "no-aid" is sound constitutional doctrine insofar as it constitutes sound moral and political philosophy — even if it turns out that the *Everson* justices were dead wrong as a matter of historiography in depicting the framers and ratifiers as strict separationists.

So the contemporary situation is by and large, one in which those who support the methodology of *Everson* oppose its conclusions,

[80] *Id.* at 687-88.

[81] *Id.* at 689.

[82] *E.g.*, M. Perry, *supra* note 42, at 36.

while those who support its conclusions oppose its methodology. In our view, however, *Everson* is incorrect in terms of *both* its methodology and its conclusions. We hold that interpreters of the establishment clause need not resolve disputed questions of philosophy *or* history in order to ascertain the meaning of the words, "Congress shall make no law respecting an establishment of religion. . . ." No inquiry need be made into either the philosophical question of the ideal relationship of church and state or the historical question of the dominant opinions among the framers and ratifiers regarding the ideal relationship of church and state. Inquiry of either sort is irrelevant in view of the fact that the words speak for themselves. The proper interpretive methodology is, therefore, neither historiographical nor philosophical, but rather textual — a matter of giving effect to plain meaning.

At this juncture, readers may find their credulity badly strained. If the meaning of the establishment clause is plain, why has every Supreme Court justice since 1947 — whether liberal or conservative, strict separationist or non-preferentialist — felt it necessary to look beyond the words themselves? Why, indeed, did disputes about the meaning of the words arise in the first place? Surely *some* ambiguity exists. And to resolve interpretive questions in the face of ambiguity one must look to something beyond the words.

Now, it is true that most modern interpreters have considered the establishment clause to contain a certain ambiguity. The source of this supposed ambiguity is the locution "respecting an." These words allegedly broaden the meaning of the words "establishment of religion" to include various aids or preferences which admittedly fall far short of establishing a religion.[83] Were these words not present, most interpreters would presumably find the meaning of the establishment clause to be clear: it would simply prevent the creation and maintenance of a state religion along the lines of the national

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[83] "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment." *Lemon*, 403 U.S. at 612. This is certainly an odd "sense" to give to the word "respecting," which, in its plain meaning, is synonymous with "concerning" and "about," not "approaching" or "tending toward."

churches of Britain and other European nations. But, most maintain, the establishment clause must forbid more than this or there would be no need for the words "respecting an." Just what else it forbids is, of course, a disputed matter. Strict separationists claim that it forbids any aid to religion; non-preferentialists maintain that it forbids sect-preferences.[84]

But it is simply a mistake to think that "respecting an" broadens the meaning of "establishment of religion," and thereby creates ambiguity. These words do forbid the federal government from doing something beyond establishing a religion, but they do so without broadening the concept of "establishment." Rather, the inclusion of the words "respecting an" clearly and concisely forbids the federal government, not only from establishing an official national church, but also from attempting to disestablish, or otherwise interfere with, official churches in the states.

No one denies that several state establishments existed at the time of the framing and ratification of the first amendment.[85] Indeed, the consent of some states with established churches to the ratification of the Bill of Rights was necessary to make it legally operative.[86] One must understand this historical context to appreciate the prohibition which the establishment clause placed upon the federal government.

The obvious meaning of "respecting an" establishment of religion, then as now, is "regarding," or "having to do with," or "in reference to" such an establishment. And these words are broad enough to cover both a possible national establishment and actual (and potential) state establishments. They call particular attention to the constitutional disentitlement of the federal government to make

[84] Leonard Levy takes the extreme position of emphasizing the word "respecting" (though giving it its plain meaning of "concerning") while reading out the word "establishment" altogether as superfluous verbiage. L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 96-97 (1986). Thus, he arrives at the conclusion that the federal and state governments cannot have anything to do with religion, indeed cannot even make reference to it in their laws. The violence that this "interpretation" does to the text of the Constitution is obvious. It creates, not a Jeffersonian wall, but a Berlin Wall of separation between church and state.

[85] *See* G. BRADLEY, *supra* note 51, at 20, for a review of various historical assessments of these establishments.

[86] *Id.*

any law setting up an established church at the federal level or interfering with established churches (and the right of the people to opt to establish churches) at the state level.[87]

This meaning is clear, simple, and offers a satisfying account of each word of the establishment clause in the historical context in which it was formulated. Moreover, detailed historical research of a kind which delves far deeper than the modest historical verities relied upon under the "plain meaning" method reaches precisely the same conclusion.[88]

One test of this "plain meaning" is to engage in the imaginative exercise of constructing clear and simple verbal formulations to convey competing meanings and see how close they come to the constitutional formulation. For example, if one wished to prohibit government from having *anything* to do with religion, as Leonard Levy contends the establishment clause does,[89] one would prohibit the making of laws "respecting religion." If one wanted to do nothing more than prohibit the federal government from creating a national church, one would enjoin it from making laws "establishing" any religion (or church). If one wanted to enforce a "no-aid" principle, one would forbid the government from making any laws "aiding" or "advancing" or "promoting" a church or a religion (or religion in general). Finally, if one wanted to mandate the "no-sect- preference" principle, one would prohibit the government from treating different churches or religions unequally or from preferring or discriminating against any church or religion. These (or some thing quite like them) are the obvious, clear verbal formulations that would occur to a writer (individually or as part of a collectivity) who wanted to convey in an unambiguous fashion any of the principal competing meanings that interpreters have ascribed to the es-

[87] Although we arrived at this interpretation by an application of the "plain meaning" textual method, we are certainly not the first to reach this conclusion. Moreover, for those who subscribe to the full-blown historiographical method, or who are willing (as we are) to use historical research to verify a purely textual conclusion, recent historiography of vastly greater depth and detail than the casual efforts of the *Everson* justices supports this interpretation. *E.g.*, G. BRADLEY, *supra* note 51, at 95; G. MILLER, RELIGIOUS LIBERTY IN AMERICA 75 (1976).

[88] *Id.*

[89] L. LEVY, *supra* note 84.

tablishment clause. Whether one starts with the words of the clause, to try to determine its meaning, or with the possible meanings, to see how they would likely be expressed, one is left with the inescapable conclusion that there is no correlation between the establishment clause and any meaning except the "plain meaning" that we have proposed.

We are not impressed by the argument that the fact that some (or even many) people do not find the meaning of the words of the establishment clause "plain" requires the conclusion that their meaning is *not* plain. To say that meaning is plain is not to suggest that anyone, much less everyone, grasps it. There can be unwarranted doubt about a perfectly evident meaning, just as there can be unwarranted certainty about a seriously ambiguous meaning. To assert that the meaning of a proposition is plain is not necessarily to imply anything about the actual intellectual achievements or mental states of individual human subjects; it is necessarily to make a strong statement about the immediate intelligibility of the proposition in question considered as an object of the inquiring human intellect. All sorts of distortions can prevent one from understanding evident (or even self-evident) truths. A failure to attend to an historical context which includes the significant fact of established churches in many of the ratifying states (which is nothing like an inquiry into the beliefs, or other mental states, of individual framers and ratifiers) can render the meaning of the words "respecting an" opaque. Still more insidious are the distortions introduced by zeal for an ideology or cause, whether "no-aid," "no-sect- preference," or anything else. And, of course, doctrine itself, when wrong from the start, can obscure even the most obvious meaning in far less time than it takes ivy to enshroud a building.

While our interpretation is unlikely to shock historians, it is quite likely to scandalize strict separationists and non-preferentialists alike. The upshot of our argument is that nothing in the first or fourteenth amendments prohibits the states from establishing religions. The *Everson* court unanimously concluded that the Constitution had been amended to incorporate the establishment clause against the states. We maintain that, in logic, such a principle is incapable of incorporation. Unlike the speech, press, assembly, petition, and free ex-

ercise clauses of the first amendment, the establishment clause not only restricts the power of the federal government, it specifically protects a popular prerogative in the states. It is logically impossible to turn such a protection on its head and make it a prohibition. As Bradley points out, "it would be like trying to apply the Tenth Amendment to the states."[90] One need not reject the incorporation doctrine in principle (and we do not reject it) to see that it cannot apply to the establishment clause once the plain meaning of that provision has been grasped.[91]

But to conclude that the establishment clause does not forbid religious establishments in the states leaves open the question of what it forbids the federal government from doing in the field of religion (apart from interfering with state establishments). Everyone would agree that it may not, as Black put it, "set up a church."[92] But some would argue that it may not do certain other things which fall short of constituting full-blown establishments. Here again the debate between strict separationists and non-preferentialists could break out. Again, however, we would consider the debate misplaced. The authoritative choice, with respect to the federal government's powers, embodied in the establishment clause is a choice to forbid an establishment of religion (i.e., a state church). It is not a choice to prevent federal aid to religions or even to require that such aid be even-handed. Of course, the federal government could run afoul of this prohibition without "formally" or "literally" establishing a religion. An establishment in all but name is nonetheless an establishment. The federal government could violate the establishment clause by affording a particular sect or view about religion such aid and/or recognition in preference to others that it becomes, in effect, the national religion. Such a possibility could be ruled out in principle only by adopting formalistic or literalistic approaches which

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[90] G. BRADLEY, *supra* note 51, at 95.

[91] This point — which is the *real* incorporation problem involved in state establishment clause cases — was overlooked both by Judge Hand, who rejected incorporation in Jaffree v. Board of School Comm'rs, and by M. K. Curtis, who criticised him soundly for doing so. Curtis, *Judge Hand's History: An Analysis of History and Method in Jaffree v. Board of School Commissioners of Mobile County*, 86 W. VA. L. REV. 109 (1983).

[92] *Everson*, 330 U.S. at 15.

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are properly rejected by contemporary legal scholars. The plain meaning methodology need not rely upon, and should certainly not be confused with, formalism or literalism.

Since we reject the methodology proposed by non-preferentialists, we do not credit their claim that the establishment clause forbids the federal government from preferring any sect(s) over any others. They are quite likely correct in claiming that a great many framers and ratifiers were committed intellectually and/or politically to some form of non-preferentialism. But insofar as the plain meaning of the establishment clause does not embody an authoritative choice to require the federal government to adhere to non-preferentialism, we see no warrant for reading that position into the first amendment. Had they wished to do so, the framers and ratifiers could have opted for a provision embodying non-preferentialist principles. The plain fact is that they did not do so. *Why* they did not is a very interesting historical question — one worthy of the careful labors of historians who devote themselves to such difficult (and perhaps insoluble) questions. But it is a question which is, from the point of view of the constitutional interpreter, simply not relevant. As authoritative choosers, the framers and ratifiers made whatever choices they made. Many generations later, we are bound by their choices, although only to the extent that we choose not to replace them with new authoritative choices. The American people are certainly authorized under the Constitution to revoke by constitutional amendment the choices of the framers and ratifiers. No interpreter, however, is authorized to substitute what he regards as a better choice for one of their evident choices, by adopting an alternative interpretive methodology which disregards, contradicts, or nullifies the plain meaning of the provisions they framed and ratified. To paraphrase Herbert W. Vaughan, if this is strict constructionism, we bless it.

SMITH V. BOARD OF SCHOOL COMMISSIONERS

A. *The District Court Decision*

The next step which we will undertake in explanation and justification of our reading of the establishment clause is to apply it to the facts of a real case. The particular case we have chosen is

Smith v. Board of School Comm'rs.[93] We selected *Smith* for several reasons — the notoriety of the trial court opinion, the full factual record accessible through that opinion, and the timeliness and political sensitivity of the issues involved in the case.

On March 4, 1987, Brevard Hand, Chief Judge for the Southern District of Alabama, granted an injunction sought by a group of Christian parents and teachers prohibiting the further use in Mobile County public schools of a large number of textbooks alleged to contain secular humanist teachings. In a lengthy opinion, Hand held that the challenged books represented an establishment of religion in violation of the first amendment as incorporated and applied to the states through the fourteenth amendment. The defendant-intervenors appealed to the Eleventh Circuit and, on August 26, 1987, secured a unanimous reversal.[94]

The matter began on May 28, 1982, when Ishmael Jaffree, an atheist, acting on behalf of himself and his three school-aged children, brought an action against the Mobile County Board of School Commissioners seeking a declaratory judgment and an injunction prohibiting regular religious observances in the public schools. A little more than a month later, Jaffree amended his complaint to add as defendants Governor George Wallace and other state officials, including the Attorney General, the individual members of the State Board of Education, and the Superintendent of Schools, and to request an injunction against the implementation of state legislation mandating moments of silence for prayer or meditation in the schools. Jaffree's claim was that the activities he sought to have enjoined constituted an establishment of religion in violation of the United States Constitution.

On July 30, 1982, Douglas T. Smith, a Christian and a public school teacher, together with other Christian teachers and parents, filed a motion to intervene as defendants in the case, claiming that a decision granting the injunctions sought by Jaffree would violate their federal constitutional rights to the "free exercise" of their re-

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[93] Smith v. Board of School Comm'rs, 655 F. Supp 939 (S.D. Ala. 1987).

[94] Smith v. Board of School Comm'rs, 827 F.2d 684 (11th Cir. 1987).

ligion, as well as certain statutory and state constitutional rights. After this intervention was permitted, the defendant-intervenors filed a pleading requesting that, if the court decided to grant Jaffree's injunctions, they be "expanded to include the religions of secularism, humanism, evolution, materialism, agnosticism, atheism, and others."[95] Their claim was that religious activity on behalf of these "religions" was taking place in the public schools and being fostered by the State Board of Education.

Jaffree objected to the intervention, maintaining that the plaintiffs were capable of representing a class which would include the intervenors. In view of the obvious differences of viewpoint between Jaffree and the intervenors, however, the court rejected this argument and no class was established.

In November of 1982, the matter was heard, and on January 4, 1983, the court delivered its opinion.[96] Therein, Hand ruled that the court had no jurisdiction to hear Jaffree's complaint because the first amendment applied only to the federal government and not to the states. According to Hand, "the constitution had not been amended to incorporate the first amendment to the states."[97]

Anticipating reversal for his egregious disregard of Supreme Court precedent, Judge Hand noted in his opinion that the Court reserved the right to re-examine the record and consider the claims of the defendants and defendant-intervenors in the event that his ruling on the incorporation of the first amendment was overturned on appeal.[98] Predictably, the United States Court of Appeals for the Eleventh Circuit, citing unambiguous Supreme Court authority on the subject, rejected Hand's position on incorporation and remanded the case to the district court.[99] The remand order included a direction to issue and enforce an order enjoining *inter alia* the implementation of the statutes challenged by Jaffree on the ground that they were unconstitutional in light of the establishment clause of the first

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[95] Smith v. Board of School Comm'rs, 655 F. Supp at 942.

[96] Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1983).

[97] Smith v. Board of School Comm'rs, 655 F. Supp at 943.

[98] Jaffree v. Board of School Comm'rs, 554 F. Supp. at 1129.

[99] Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983).

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amendment. The Eleventh Circuit's ruling was upheld on appeal to the Supreme Court of the United States in a widely-publicized five-to-four decision.[100]

Having reserved jurisdiction, Hand, on remand, reconsolidated the cases and realigned Smith and the other defendant-intervenors as parties plaintiff in light of their requests for relief. Jaffree, having prevailed on his requested relief, withdrew from the case. The former defendant-intervenors, now plaintiffs, filed a new brief, and the state defendants moved for a scheduling conference. At that point, a new set of parties, consisting of several parents and teachers who objected to the plaintiffs' claims that secular humanism was being unconstitutionally advanced in the public schools, intervened as defendants. Subsequently, certain of the state defendants (*i.e.*, the Governor of Alabama and the Mobile County School Commissioners), filed consent judgments confessing the plaintiffs' claims.

The initial move of the new defendant-intervenors was procedural: they filed a pre-trial instrument challenging the jurisdiction of the Court to realign the parties and resolve the reserved issues. Their argument was that the remand order in *Jaffree v. Wallace* effectively ended the litigation inasmuch as it contemplated no further proceedings beyond the issuance of the injunction ordered therein. Observing that the granting of such a claim would merely result in a refiling by the plaintiffs, Hand refused. "Our procedures are not this wooden. This Court has jurisdiction."[101]

In view of their large number (more than 600) and the suitability of their claims for class action adjudication, Hand ordered that the plaintiffs proceed as a class. Thus, the stage was set for a decision on the allegedly unconstitutional textbooks.

The plaintiffs proposed to demonstrate that the content of a large number of home economics, history, and social studies textbooks being used in Mobile County public schools both constituted an establishment of the religion of secular humanism and violated the free exercise rights of parents who wished to rear their children in

[100] Wallace v. Jaffree, 472 U.S. 38 (1985).

[101] Smith v. Board of School Comm'rs, 655 F. Supp at 944.

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religious faiths other than humanistic ones. The plaintiffs claimed that humanism was a "religion" within the meaning of the establishment clause, and should therefore be excluded from the public schools to the extent that Christianity or any other religion must be excluded. They also claimed that, in promoting humanism, the textbooks inhibited Christianity, Judaism, and other religions. This sort of inhibition happens, they argued, when textbooks contain statements contrary to the tenets of other religions; it also happens when the books omit discussion of the roles played by the religions of Christianity and Judaism in the history of the United States.

The plaintiffs contended that they did not seek to have the tenets of Christianity taught in place of those of secular humanism. Rather, they merely sought equal treatment for Christianity and other religions. They further maintained that a distinction should be drawn between the teaching of facts about a faith and the teaching of the tenets of that faith. The former teaching, they argued, is perfectly appropriate in public institutions devoted to education; the latter, however, is unconstitutional.

The state defendants, apart from the Governor and the Mobile County School Commissioners, answered by asserting the following: (1) in approving textbooks for use in the public schools, the state had not adopted an approach antagonistic to religion; (2) nothing compels the plaintiffs or their children to believe the material contained in the textbooks; (3) it would be impossible to construct a reasonable and substantial curriculum while trying to accommodate every religious interest by excluding ideas that may be contrary to someone else's religious beliefs; and (4) secular humanism either is not a religion or, if it is a religion, is a religion *established by the Constitution itself*. At the same time, these defendants admitted that the curriculum of the schools was defective in its lack of reference to the contributions of religion to American life and the importance of religion in American history. But, while agreeing that the state superintendent should take steps to remedy this situation, they denied that it created a basis for granting the plaintiffs relief of any kind. In their view, it neither established a religion nor impeded anyone's free exercise thereof.

The defendant-intervenors joined the state defendants in denying that secular humanism is a religion. They took the position that "secular humanism" is simply a label for views that do not comport with religious world views. While admitting that the challenged textbooks do contain certain statements consistent with the beliefs of some secular humanists, they argued that the books also contain certain statements consistent with the beliefs of some Christians. In any event, they maintained, exposure to the books inhibited no one's free exercise of religion. They also joined the state defendants in claiming that poor curriculum content, such as the exclusion of meaningful reference to the role of religion in the historical development of the United States, while regrettable, is not unconstitutional.

In their consent decree stipulations, the Governor and the Mobile County School Commissioners agreed that secular humanism is a religion both for free exercise and establishment clause purposes, and that the promotion of secular humanism in public school textbooks constitutes an unconstitutional inhibition of religion insofar as it reflects apparent governmental disapproval of theistic religions.

Testimony in the case was taken from numerous parties as well as from expert witnesses on both sides of the dispute. This testimony is summarized at length in Judge Hand's opinion.

Various plaintiffs, attacking the textbooks, testified that their children were being taught a secularist ideology which conflicts in important ways with their own Christian morality. Many were careful to say that they did not propose to have Christianity taught in the schools, but sought only to ensure the equal treatment of Christianity and other belief systems. Smith and other teachers testified that they were forbidden to provide their students with views in conflict with those espoused by humanism on subjects such as evolution and moral subjectivism, and that, as a result, students were not being allowed to consider alternatives to the humanist point of view.[102]

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[102] *Id.* at 944-46.

Several state defendants testified, including Wayne Teague, the State Superintendent of Schools, John Gyson, the Vice-President of the State School Board, and William Huestes, apparently a member of the Board. Most of this testimony concerned the relationship between the state bureaucracy and local school authorities. Huestes described the procedures under which local school boards may select textbooks from a state-approved list. He also described the procedures under which this list is drawn up and the opportunities for review and comment by members of the public. In reply to a question about whether the authorized textbooks had been examined to determine whether they contain secular humanist content, Tyson stated that this had not been undertaken because he does not know what "secular humanism" means.[103]

Two defendant-intervenors testified in support of the books, Patricia Chandler Jones, a public school home economics teacher, and Corrine Jane Howell, a public school teacher and a parent of public school children. Both denied that the challenged books espoused secular humanism or unconstitutionally inhibited Christian belief. Thus, they attempted to parry both the "establishment" and "free exercise" claims of the plaintiffs. Mrs. Howell testified that, while she was a Christian and had reared her children in the Christian faith, she nevertheless opposed the teaching of the tenets of Christianity in the public schools. This, she apparently feared, was the veiled purpose of the plaintiffs' action.[104] Miss Jones, also a Christian, expressed concern that the attack on the textbooks was really an assault on "critical thinking."[105]

The expert testimony was rich and colorful. Among those testifying were such nationally known figures as Robert Coles, Russell Kirk, Paul Kurtz, Richard Baer, William Coulson, James Hitchcock, and Glennelle Halpin. The plaintiffs sought to demonstrate the "religious" nature of secular humanism by exhibiting the ways in which secular humanism criticizes the tenets of various religions (e.g., God as the ultimate source of values) and advances alternative tenets

[103] *Id.* at 950-51.
[104] *Id.* at 949.
[105] *Id.* at 949-50.

of its own (e.g., man as the only source of values). The defendants and defendant-intervenors sought to show that secular humanism is not a "religion," at least for establishment clause purposes, inasmuch as it relies exclusively on reason (and is thus "scientific") and makes no appeal to any spiritual or transcendent authority.

A key element of the plaintiffs' strategy was to establish the profound influence of the avowed humanist John Dewey on the mainstream of contemporary education in America. As the conservative thinker Russell Kirk observed in his testimony, Dewey repeatedly declared that humanism *was* a religion and was destined to supplant the outmoded, childish faiths which had prevailed among human beings before its ascendancy. Dewey also plainly saw the public schools as institutions capable of inculcating humanist thought in rising generations of American youngsters. According to Kirk's testimony, as summarized in the Hand opinion, "John Dewey's school of thought may now be adjudged as dominant in educational circles."[106]

The secular humanist philosopher Paul Kurtz attempted to counter the plaintiffs' strategy by arguing that Dewey's most influential followers (e.g., Sidney Hook, Ernst Nagel, and Corliss Lamont) as well as many leading humanists among his contemporaries (e.g., Bertrand Russell and Jean-Paul Sartre) did not believe humanism to be "religious."[107] Therefore, he argued, Dewey's views ought not be taken as indicative of humanist thinking. Kurtz went on to deny that secular humanism is a creed or faith. Rather, he argued, it is a scientific viewpoint that investigates any matter of human concern without religious preconceptions. It is ethical, but includes no spiritual, transcendent, or other-worldly dimensions. Unlike religions, it has no piety, cultic practices, or liturgies.[108]

Under cross-examination, Kurtz admitted that some contemporary humanists do share Dewey's views that humanism is a religion and should be spread through the vehicle of the public schools.[109]

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[106] *Id.* at 956.
[107] *Id.* at 965.
[108] *Id.* at 969.
[109] *Id.*

He denied, however, that this was a majority view or a view he himself shared. At the same time, he was forced to admit that the American Humanist Association, of which he is a member, has sought and achieved constitutional immunities and protections as a "religion" under the free exercise clause. He admitted further that the Association certifies counselors who enjoy the same legal status as priests, pastors, and rabbis.[110] Perhaps most damagingly, he was confronted with pieces of his own writing over many years which appeared to contradict his testimony that humanism is not a religion. In response, he declared that certain passages contained in these writings were being taken out of context,[111] and that, in any event, his views had changed in various ways over time.[112]

There was general agreement among experts on both sides that the educational quality of the challenged textbooks was, in most cases, quite poor. Indeed, it is noteworthy that the deposition of Harvard psychiatrist and social critic Robert Coles, testifying for the defendant-intervenors, was sympathetic toward the plaintiff parents and their struggles because he shared their view that the books contained a quantity of "social and cultural rot."[113]

Judge Hand's opinion summarizes much of the expert testimony under the headings "Quality of Education," "Secular Humanism," "Religion Defined," "Does Secular Humanism Fit the Description of Religion?," and "The Textbooks."[114] Under the last heading, testimony quoting specific textbook passages alleged to contain humanist religious (or irreligious) content is summarized. In addition, Appendix N of the opinion provides extensive direct quotation of such passages under the headings "Examples of Anti-Theistic Teaching" (Attachment A), "Subjective and Personal Values Without an External Standard of Right or Wrong" (Attachment B), "Hedonistic, Pleasure, Need-Satisfaction Motivation" (Attachment C), and "Anti-Parental, Anti-Family Values" (Attachment D).[115]

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[110] *Id.* at 970.
[111] *Id.* at 965.
[112] *Id.* at 970.
[113] *Id.* at 960.
[114] *Id.* at 959-74.
[115] *Id.* at 999-1013.

While it is debatable whether certain passages are appropriately catalogued under these headings, the quoted material reveals that, at least so far as the textbooks were concerned, the Mobile County Schools were certainly not providing "morally neutral" or "value-free" education. Clearly, the texts proposed that certain views about the nature of moral life were more reasonable, up-to-date, and suitable than others. Just as clearly, the texts sought to promote the formation of individuals with a particular, and controversial, self-understanding. The view and self-understanding preferred in the books may legitimately be said to be in harmony with the tenets of secularist and humanist philosophies and in conflict with the teachings of the Judaeo-Christian tradition.

Attempts by defendants' witnesses to deny this all involved the claim that the texts do not favor any particular moral or religious views, but merely attempt to assist the student in choosing for himself the views he will adopt. Implicit in this, however, is a position about the nature of moral life which is itself highly controversial as a matter of moral philosophy and theology. From a secularist or humanist viewpoint, propositions such as "[s]tandards are a personal decision and will vary with each person" or "[m]orals are rules made by people" — to quote from *Today's Teen*, one of the challenged textbooks — provide the foundation for truly "critical thinking."[116] But from alternative religious and philosophical viewpoints, they merely represent the secular humanist ideology of subjectivism.

Hand concluded as a matter of law that the viewpoint adopted by the books qualifies as "religion" under the establishment clause. In the course of reviewing Supreme Court precedents on the definition of "religion" for constitutional purposes, he argued that the "religious" nature of belief systems is indicated ultimately by the questions they address. He cited four areas in which "religious" belief systems address questions and make assumptions: (1) the existence of supernatural and/or transcendent reality; (2) the nature of man; (3) the ultimate end, goal, or purpose of man's individual and collective existence; and (4) the purpose and nature of the uni-

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[116] *Id.* at 1003.

verse.[117] The viewpoint adopted by the textbooks, whether labeled "secular humanist" or not, at least implicitly addresses issues and makes assumptions in all of these areas. He therefore found the viewpoint to be "religious" and, insofar as it corresponded to the secular humanist viewpoint, to represent the "religion" of secular humanism.

While remarking that he retained his view that the first amendment does not apply to the states, Hand acknowledged that his court was bound by the contrary judgments of higher courts. The question then became one of whether the state could, without violating the establishment clause, favor the religious viewpoint of secular humanism over alternatives in its schools. He ruled that it could not. Accordingly, he enjoined further use of the offending textbooks in the public schools of Alabama.

The notoriety of Hand's decision must be understood in light of contemporary politics as well as constitutional jurisprudence. Over many years, organizations promoting a liberal social agenda have successfully employed strategies involving constitutional litigation in the federal courts to eradicate what they perceived to be an officially sanctioned Christian, or theistic, or religious bias in the public schools — especially in certain southern states. The thrust of establishment clause jurisprudence as it emerged from this litigation has been in the direction of a strict separationist view of religion and public education. While the language of "neutrality" has frequently been employed in establishment clause cases, it is clear from these cases that the state must be "neutral" not only among religious sects, but also between religion and competing non-religious viewpoints. From the liberal point of view, the ensuing secularization of, *inter alia*, public education was a welcome development. It was considered not only fair, but enlightened and progressive.

It is hardly surprising, then, that the Hand decision strikes many liberals as a perverse maneuver by a reactionary southern judge seeking to impose (some might say *re*impose) Christianity in the public schools. "Secular humanism," they are inclined to believe, is a mere

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[117] *Id.* at 979.

right-wing bogey. They view it as simply a convenient catch phrase meant to color as "religious" (and therefore subject to antiestablishmentarian constitutional principles) an educational philosophy aimed at teaching students to think for themselves (or "think critically"). They perceive it as being used, still more sinisterly, by fundamentalist zealots as an excuse to attempt to unravel the tradition of modern constitutional jurisprudence that now stands in the way of their supposed goal of re-Christianizing American public education.

Our principal concern, however, is not the political palatability of the result reached by Judge Hand, but the constitutionality of his opinion, *i.e.*, its consistency (or inconsistency) with the establishment clause. Obviously, it is inconsistent with what we maintain to be the plain meaning of the clause. At the most fundamental level, the case involved no justiciable controversy under the establishment clause since the clause is not applicable to the states.[118] Even if one accepts the incorporation of the clause, however, occasional statements in a public school textbook favoring religion in general, or one religion over others, clearly do not amount to an actual *establishment* of religion. Once incorporation is deemed to have occurred, one of the two parallel purposes of the establishment clause (*i.e.*, no federal interference with a state establishment) disappears. This merely limits the scope of the phrase "respecting an establishment of religion." It does not confer upon the words a radically different meaning. Thus, after incorporation, both the federal and state governments are prohibited from one thing and one thing only — establishing a religion. And the plain meaning of an *establishment* of religion is government adoption of *one* religion as *the official state religion* — or a pattern of preference for one religion so comprehensive and thoroughgoing that it constitutes an establishment in everything but name.

Of course, the plain meaning of the establishment clause, as we read it, is not the accepted meaning — and might never be so. We propose, therefore, to examine Judge Hand's analysis in the light of conventional establishment clause jurisprudence.

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[118] *See supra* text accompanying notes 90-91.

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The stated ground for Judge Hand's decision to enjoin the use of the challenged textbooks in the Mobile County schools was that the use of the books violated the establishment clause insofar as their content promoted the religion of secular humanism. Under the prevailing doctrine, it is undoubtedly possible for officials responsible for the selection of textbooks in public schools to violate the establishment clause by their choices. For example, a history text that taught as a matter of fact that Jesus Christ rose from the dead three days after his crucifixion and appeared in the flesh to his disciples would certainly violate the second prong of the *Lemon* test in that it would clearly advance the Christian religion. A less dramatic, but nonetheless clear, example would be a text that taught that moral rules are given by God.[119] Such a text, while perhaps promoting no particular religion, would promote a view common to theistic religions over contrary religious and secularist views.[120]

Is it in principle possible for officials to violate the establishment clause under the prevailing doctrine by selecting textbooks that promote secular humanism? Those who deny this possibility argue that secular humanism is not a religion. They claim that it is, rather, a scientific or philosophical viewpoint. As such, it may be promoted in school textbooks without running afoul of the establishment clause. But this reasoning is fallacious.

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[119] It is arguable that the objectionable content found in words or actions when they are viewed in isolation can sometimes be diluted or neutralized by their context or setting. This concept has been applied to religious paintings in a museum and a creche used as part of a municipality's holiday decorations. See the discussion in Justice O'Connor's concurring opinion in *Lynch*, 465 U.S. at 692-93. We cannot, however, conceive of the concept being applied by a federal court to countenance the inclusion of even an isolated proposition of religious faith in a textbook.

[120] There are two distinct ways in which the plaintiffs claimed, and Judge Hand ruled, that the challenged textbooks violated the establishment clause — by containing statements which promoted or disparaged particular religions (or religion in general) and by neglecting to give adequate emphasis to the historical roles played by religion, religious leaders, and "believers" in general. The latter claim is problematical. We are not prepared to conclude in principle that there could be no neglect of religious matters in a particular textbook so egregious that it could not give rise to a valid claim under conventional establishment clause doctrine. However, any such claim would be so dependent on the precise wording of the challenged textbook *in its entirety* that it could not be properly assessed on the basis of extracts and summaries of the sort contained in Judge Hand's opinion, for all its factual detail. We have not undertaken to read any of the forty social studies and history texts which Judge Hand found to be unconstitutionally neglectful of religion. Consequently, in analyzing the opinions of both the trial and appellate courts, we shall confine ourselves to an evaluation of the treatment accorded the "improper inclusion" claims and pass over entirely the "improper neglect" claims. All of our comments should be read in the context of this implicit limitation.

Whether one categorizes secular humanism as a "religion" or not is irrelevant for purposes of prevailing establishment clause doctrinal analysis. One significant fact is that secular humanism constitutes, and is presented by its proponents as constituting, an alternative to (other) religion(s). On any reasonable understanding of the core values protected by the establishment clause, as it is understood under the prevailing doctrine, it would be irrational to permit the establishment of such a view in preference to (other) religious views. These core values (e.g., fairness, personal authenticity, liberty of conscience) would be no less jeopardized by the governmental promotion of secular humanism (whether considered as an alternative to religion or as a religion itself) than by the establishment of Christianity, Judaism, Islam, Buddhism, Taoism, or Voodoo.

Moreover, at the level of particulars, secular humanism embraces certain positions on questions which have, or can have, an obvious and important religious dimension. Such positions frequently contradict the tenets of theistic religions in general, or certain theistic religions in particular. The neutrality required under the *Lemon* test therefore prohibits state promotion of such positions.[121] Take, for example, the following spectrum of statements:

3 All of the teachings of the Catholic Church are true.
2 The teaching of the Catholic Church concerning the Assumption of the Virgin Mary is true.
1 The Virgin Mary did not die and suffer decay and corruption, but was assumed bodily into Heaven.
0 The Catholic Church teaches that the Virgin Mary was assumed bodily into Heaven.
1' The Virgin Mary died and suffered decay and corruption, and was not bodily assumed into Heaven.
2' The teaching of the Catholic Church concerning the Assumption of the Virgin Mary is false.
3' All of the teachings of the Catholic Church are false.

Statement 0 is a simple descriptive statement of what the Catholic Church believes. It is theologically neutral in that it takes no position

[121] For statements of the neutrality requirement, *see Wallace*, 472 U.S. at 60, and the pre-*Lemon* case, Abington School District v. Schempp, 374 U.S. 203, 214-15 (1963). Ironically, the Eleventh Circuit cited the requirement and these very cases in the course of reversing Judge Hand. Smith v. Board of Comm'rs, 827 F.2d 689.

on the truth or falsity of the Catholic belief. Presumably there could be no serious objection, even under conventional establishment clause thinking, to a statement of this kind being included in a public school textbook dealing with an academic discipline where a descriptive study of a particular religious belief was pertinent. (To explain the qualifications in the preceding sentence, we should note that the only serious objections which occur to us are (a) if the subject area of the textbook is one in which a consideration of religious beliefs is gratuitous or irrelevant, or (b) if the religious belief of only the Catholic Church is considered in a context in which such selectivity is arbitrary. A few obvious instances in which a descriptive statement of one or more Catholic beliefs could be included in a textbook without incurring objection (a) or (b) would be a science book which reviewed the life of Galileo, a history book which treated Martin Luther's role in the Protestant Reformation, and a philosophy book which analyzed the thinking of Thomas Aquinas.)

Statements 1, 2, and 3 and 1', 2', and 3' contain various propositions affirming the truth or falsity of the teaching which is merely described in Statement 0. Each numbered statement and its prime are symmetrical. Statements 3 and 3' are the most comprehensive; they affirm the truth and falsity, respectively, of all Catholic teachings and, thus, of any particular teaching, including that described in Statement 0. Statements 2 and 2' and 1 and 1' are propositions about the truth or falsity of only the teaching described in Statement 0, but they make reference to that teaching in different ways. Statements 2 and 2' expressly identify the teaching as the teaching of the Catholic Church but do not contain any precis of it. Statements 1 and 1' contain a precis of the teaching but make no express identification of it as the teaching of the Catholic Church. One final point which must be emphasized is that Statements 1, 2, and 3 contain propositions that are a part of the official and authoritative system of beliefs of (at least one) religion. The primes of those statements contain propositions which could be part of the belief system of a (competing) religion, but which could also be adopted by institutions, or included in systems of belief, which are not primarily religious in character.

We would contend that, under conventional establishment clause jurisprudence, none of the seven statements given above, except Statement O, could constitutionally be asserted through state action (e.g., by being included in a public school textbook). Statement 3 or 3' would put the state in the position of endorsing or denying in its entirety the corpus of beliefs of a particular religion. By making Statement 2 or 2' the state would endorse or deny one specific belief of a particular religion, expressly identified by the state as a belief of that religion. Statement 1 or 1' would likewise involve the state in endorsing or denying one specific belief of a particular religion, although without expressly indentifying the religion whose adherents hold the belief.

We think that there is nothing controversial about our contention in the preceding paragraph and, therefore, we will not deter the progress of the analysis with a detailed discussion of why those statements would be regarded as unconstitutional. We trust that the gradations on the spectrum from Statements 3 to 1 and 3' to 1' adequately demonstrate that nothing turns on the difference between an endorsement (or denial) of *all* of the beliefs of a religion and some subset thereof, or on the difference between mentioning and not mentioning the particular religion associated with a specific religious belief.

The very lack of controversy about the six objectionable statements given above, however, may convey the impression that our spectrum is not a useful method of analysis. Those particular statements are not only obviously unconstitutional under the second prong ("primary effect") of the *Lemon* test, as that prong has been applied; they are also statements which it is difficult to conceive of ever encountering in a modern American textbook. But other formulations of such statements can be constructed which are both plausible and objectionable — plausible, in that they *sound* fairly neutral and can easily be imagined as figuring in even the most up-to-date textbook, but objectionable, in that they are, as a matter of logic, a clear deviation from the ground of neutrality in which true Level O statements may be found.

Take, for example, the following statement, which can readily be imagined as occurring in a modern textbook dealing with,

inter alia, such subjects as biology, chemistry, or ecology:

> 1'' [A] *Modern science teaches that,* [B] *in the natural course of things,* all human beings die and their bodies (unless they are subjected to artificial or natural preservative processes) readily deteriorate and break down into the simple chemical building blocks of which all material things are composed.

This would be a Level O statement. First of all, with the inclusion of the italicized phrase [A], it is merely descriptive of what "modern science" teaches. Second, with the inclusion of the italicized phrase [B], it is not inconsistent with either a belief that the Assumption of the Virgin Mary actually occurred or a belief that it did not. If the Assumption occurred, it was certainly a miracle and perforce a departure from the natural course of things. Statement 1'' merely sets forth an account of that natural course and expresses no view on whether departures from that course (*i.e.*, miracles) are possible or whether any such departures have ever occurred.

We would even be prepared to concede that, in the proper context, Statement 1'' could constitutionally be included in a public school textbook *minus both* italicized phrases. In a discussion of science, for example, it is a reasonable implication of any unqualified expression of scientific "fact" that the expression reflects the generally prevailing view among contemporary men of science. If the view is an antique, controversial, or minority view, one would expect an expression of it to be suitably qualified. It is also a reasonable implication of an expression of a "fact" of science that it is intended to be a commentary upon the natural material order. It is that order, after all, with which science deals and about which it is capable of making meaningful observations, experimentation, and conclusions. So, if the quoted statement were encountered in a plainly scientific context, and even if it simply began "All human beings. . .," one could legitimately infer the unexpressed qualifications contained in the absent phrases [A] and [B] and regard the statement as, effectively, a Level O statement.

Make a slight change, however, to come up with the following statement, and the implications and effect are entirely different:

> 1''' All human beings who ever lived (apart from those living in the world today) have died and their bodies (unless they were subjected to artificial or natural preservative processes) have deteriorated and broken down into the simple

> chemical building blocks of which all material things are composed — or, at least, have begun that process of deterioration.

Here you have not a scientific "fact" but a putatively historical "fact" derived, in all likelihood (if faultily derived, as a matter of logic), from a generally accepted scientific "fact." Statement 1''' does not entail any particular view on the possibility of a miraculous departure from the relevant natural process *in the future*; it is, however, inconsistent with the belief that such a miraculous departure may have already occurred. Logically, it is a denial not only of the Assumption of the Virgin Mary, but also of the Resurrection and Ascension of Jesus Christ.

The conclusion which we draw from our spectrum analysis is that the second prong of *Lemon* requires "symmetry of exclusion" and "symmetry of inclusion" in order to achieve its stated goal of neither advancing nor inhibiting religion. In other words, if any statements which deviate in one direction from Level O are permitted, statements which deviate to the same degree in the opposite direction must not only be allowed but must be affirmatively supplied in order to preserve even-handed treatment. And if statements which deviate in one direction are excluded, statements which deviate to the same degree in the opposite direction must also be excluded. Thus, if Statement 1''' is included in a textbook, Statement 1 must also be included; and if Statement 1 is excluded, Statement 1''' must be excluded, as well.

We believe that such exacting and consistent even-handedness is constitutionally required under the *Lemon* test. We also believe that, by and large, it has not generally been accorded. In public school textbooks, deviation from the ground of neutrality in the direction of various prime statements (*i.e.*, anti-religious statements) has been permitted, when adequately disguised. Even the slightest deviation in the opposite direction has been thoroughly suppressed. *Smith v. Board of School Comm'rs* itself provides the perfect illustration: Judge Hand insisted on an even-handed application of conventional establishment clause analysis; the Eleventh Circuit reversed him and endorsed the asymmetrical bias against religious points of view which is a familiar characterstic of most modern establishment clause decisions.

Let us focus on one of the objectionable statements in one of the challenged textbooks in *Smith. Today's Teen* states that "morals are rules made by people."[122] This claim, if Judge Hand was correct in according it the contextual meaning which he did, is obviously highly controversial. It amounts to an espousal of moral relativism and moral positivism; it both denies the existence of a permanent objective moral order and teaches that human beings can determine, rather than discover, what is morally right and wrong. Most religions deny these propositions; secular humanism affirms them. Clearly, the teaching embodied in the statement confers an advantage upon secular humanist views and a disadvantage upon the religious alternatives. It assists parents who wish to inculcate securalist beliefs in their children and burdens parents who wish to pass on their religious faith. If one considers secular humanism as a religion, the constitutional violation under prevailing establishment clause doctrine is immediately evident. If, however, one considers secular humanism not as a religion itself, but as an alternative to religions, the constitutional violation is no less apparent. Under our spectrum analysis, the statement "morals are rules made by people" is as much a deviation from the ground of neutrality as the statement "morals are rules made by God." If either statement is constitutionally impermissible, both statements are impermissible.

It is a curious phenomenon that many liberal onlookers, because they believe (rightly or wrongly) that Judge Hand's motivation in ruling as he did arose from a sympathy with fundamentalist Christian views, have judged the result of the case instinctively rather than analytically. It is unthinkable to such liberals that Hand's decision could be correct. But a clear-headed review of the case in light of the prevailing doctrine reveals that, to the extent that that doctrine is faithful (or is authoritatively decreed to be faithful) to the establishment clause, Hand's decision is substantially correct. It simply follows the recipe provided by the Supreme Court in *Everson* and *Lemon* in applying to the gander the sauce savored by so many liberals when applied to the goose.

[122] Smith v. Board of School Comm'rs, 655 F. Supp. at 1003.

B. The Court of Appeals Reversal

To the surprise of virtually no one, Judge Hand's decision was reversed on appeal. On August 26, 1987, the Eleventh Circuit, on the basis of its rejection of Hand's findings of fact and application of law to facts, ruled that none of the challenged textbooks violated the establishment clause. However, the Eleventh Circuit's opinion, while coinciding exactly with liberal political sympathies, is far less faithful to the principles espoused in the conventional establishment clause jurisprudence than the opinion it overturned.

As we have already pointed out, the question of whether or not secular humanism is a religion need not be resolved in order to assess the plaintiffs' claims. The Eleventh Circuit also saw no need to address this question, but was willing to assume, for the sake of argument, that secular humanism *is* a religion.[123] Quoting from a variety of precedents, the court framed the dispositive question to be whether the state of Alabama "pursue[d] a course of complete neutrality toward religion," i.e., that it "protect[ed] all, . . . prefer[red] none, and . . . disparage[d] none."[124]

In analyzing this question, the court, of course, applied the *Lemon* test. It passed over with little comment the first ("secular purpose") and third ("no excessive entanglements") prongs of that test on the ground that no party had alleged their violation. The court focused exclusively on the second ("primary effect") prong. The full statement of that prong in *Lemon* is that the "principal or primary effect [of a challenged state action] must be one that neither advances nor inhibits religion." This was not, in fact, the test applied by the Eleventh Circuit. It first posited its own reformulation of the second prong of *Lemon* on the strength of comments by Justice O'Connor in her concurring opinions in *Jaffree* and *Lynch*. The Eleventh Circuit's version (via Justice O'Connor) of the "second prong of *Lemon*" is that the challenged state action "conveys [no] message of endorsement or disapproval" of religion.[125]

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[123] Smith v. Board of School Comm'rs, 827 F.2d at 689.
[124] *Id. See supra* note 121.
[125] *Id.* at 690.

This, obviously, is an entirely different requirement. It scrutinizes not the primary effect of a state action, but a judge's perception of the message which that action conveys. Two additional layers of subjectivity have thereby neatly been inserted into what was intended to be a straightforward inquiry into consequences. Under the Eleventh Circuit's approach, one looks not at consequences, or even at some supposed message which either the action or its consequences have actually conveyed to the public, but instead at a judge's speculative impression of what message could or would be conveyed.

If the court had focused on *effect*, it would have had to conclude that at least certain statements in at least some of the textbooks advanced, as propositions of fact, views contrary to tenets of at least some theistic religions.[126] Whatever the primary purpose of the textbooks, taken as a whole, might be, the primary effect of such statements is the inhibition of religion. (It is also the advancement of a religion if one regards secular humanism as a religion.) Under an even-handed application of the conventional establishment clause jurisprudence, the focus must be upon the consequences of the challenged statements *alone*, if, as we believe, that would be the focus in the case of a challenged statement of theistic belief.[127] The factual assertion that morality is subjective can no more be saved from violating (the conventional understanding of) the establishment clause by being inserted in the midst of two hundred pages of sewing tips and recipes for French toast than can the factual assertion that Jesus Christ rose from the dead be saved by being inserted in two hundred pages of uncontroversial facts about world history.

If the court had focused on public perceptions of the effect of the challenged statements, it would have been forced to recognize that at least a substantial number of persons perceived the state's message to be one of disapproval of theistic religious beliefs. This is apparent from the testimony of teachers and parents on which Judge Hand relied and which is summarized in detail in his opinion. It must be granted, of course, that this perception was not shared by all members of the public. But under the ordinary standard of

[126] *E.g.*, the statements from *Today's Teen* which we have focused upon.

[127] *See supra* note 119.

appellate review, there was an ample basis in the record of the case for a trial judge to conclude that the challenged state action conveyed an unconstitutional message.[128]

It was only by divorcing itself completely from the record and speculating abstractly on the message conveyed, not by the challenged statements themselves but by the challenged textbooks as a whole, that the court was able to find that they passed muster under the second prong of the *Lemon* test. The court gave three statements of the message it believed was conveyed by the books. One does nothing more than embrace certain of the values of secular humanism expressed axiomatically in the books and portray those values, not as controversial claims about profound questions of morality and religion, but as uncontroversial human and civic virtues: "[T]he message conveyed is one of a governmental attempt to instill in Alabama public school children such values as independent thought, tolerance of diverse views, self-respect, maturity, self-reliance and logical decision-making."[129] This is not even an impartial determination of what the message is, but a value judgment that the message is a desirable one.

The court's second statement of the message, like its first, reflects its own agreement with the disputed ethical propositions found in the challenged home economics books, and a sorry incapacity for understanding that these propositions are both disputable and disputed:

> The message conveyed by these textbooks with regard to theistic religion is one of neutrality: the textbooks neither endorse theistic religion as a system of belief, nor discredit it. Indeed, many of the books specifically acknowledge that religion is one source of moral values and none preclude that possibility.[130]

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[128] The Eleventh Circuit did not apply the ordinary standard that a lower court's decision should not be disturbed unless it is clearly erroneous. Instead, it engaged in a *de novo* review of Judge Hand's findings of fact and his application of law to facts, citing as its only authority for such a practice two concurring opinions of Justice O'Connor — neither of which, incidentally, addresses standards of appellate review. Smith v. Board of School Comm'rs, 827 F.2d at 690 n.4. Although the Court gratuitously noted that it could have reached the same conclusion under the "clearly erroneous" standard of review, it obviously could not have done so had the focus of its inquiry been the message *actually perceived* by a substantial segment of the public.

[129] Smith v. Board of School Comm'rs, 827 F.2d at 692.

[130] *Id.*

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For some reason, the court supposes that the view that morality is grounded in subjective choice and that one possible subjective choice is to seek guidance from religion is not antithetical to the view (of theistic religions) that morality is objective. Such thinking is unconscionably sloppy and, viewed most charitably, betrays the depth and unconsciousness of the court's own acceptance of the secular humanist belief on this point.

The court's third statement of the message conveyed has reference to the message of the challenged history and social studies textbooks. Although, as we have already indicated, we do not attempt to evaluate either the lower court's or the appellate court's conclusions with respect to *these* books, the following supposed "message" which the Eleventh Circuit found them to convey must be quoted in demonstration of the emptiness of the method of analysis which that court employed:

> We do not believe that an objective observer could conclude from the mere omission of certain historical facts regarding religion or the absence of a more thorough discussion of its place in modern American society that the State of Alabama was conveying a message of approval of the religion of secular humanism. Indeed, the message that reasonably would be conveyed to students and others is that the education officials, in the exercise of their discretion over school curriculum, chose to use these particular textbooks because they deemed them more relevant to the curriculum, or better written, or for some other nonreligious reason found them to be best suited to their needs.[131]

This is not, in any sense, a "message" which could conceivably be conveyed by any textbook. It is simply speculation about the motives of those who approve textbook use. It fails even to consider the *content* of the books themselves. One might as well suppose, regardless of the content of a textbook, that, because public officials *ought* not to approve textbooks which promote particular religious views, the officials who approved a particular book had no such motive, and — at the absurd end of this chain of illogic — that the textbook does not engage in such promotion.

The Eleventh Circuit's opinion, in short, is intellectually shoddy. It distorts the very test (the second prong of *Lemon*) which it pur-

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131. *Id.* at 693-94.

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ports to apply. Then, in performing the application, it falls miserably short of the principled neutrality which it earnestly invokes. For those who find satisfaction in speculating on the philosphical motives that inspire result-oriented judges (and who, rightly or wrongly, attribute such motives to Judge Hand), the opinion of the Eleventh Circuit should be a fertile object of study. Whatever criticism may justly be leveled at Judge Hand, his analysis must at least be conceded to be even-handed.

One charge which we have *not* seen leveled at Judge Hand is that he wrote his opinion in *Smith v. Board of School Comm'rs* in the role of (what we call) *judge as satirist*. We mean by that phrase a lower court judge bound by precedent, or any judge holding a minority view, who conveys his criticism of a disagreeable rule of decision by deliberately forcing it to, not a *reductio ad absurdum*, but its logical end point. Functionally, the technique employs stark logical rigor in circumstances in which prudence or mercy might ordinarily recommend a bit of intellectual sleight of hand. Such a judge may hope, through the imposition of a disturbing result, to draw attention to the inadequacies of the rule of decision which he (in the case of a lower judge bound by precedent) is not empowered to criticize openly or (in the case of a judge holding a minority view) is not able to discredit in the eyes of his brethren through persuasion alone.

There is much to be said in favor of a judge acting as satirist upon occasion. It serves something of the function of a highly-energized dissent, yet it can be used far more widely — even, for example, by a district court judge who wishes to correct the errors of his circuit judges or the justices of the Supreme Court, but who has no more seemly means of doing so at his disposal. In short, it increases the field of effect of judicial wisdom at whatever level of the hierarchy it may be found. But the technique has serious drawbacks as well. Any satire which produces its effect principally through practical results rather than words claims real human victims. Someone will have his only case decided less justly for the sake of a hoped-for improvement in the decision of a class of cases in the future. Although there should be a profound contempt reserved for the judge who habitually sacrifices the rule of law to his personal

conception of justice in the individual case, one cannot unreservedly commend a judge who embraces the opposite extreme.

In any event, it strikes us that there might be some surface plausibility in classifying the trial court's opinion in *Smith v. Board of School Comm'rs* as the work of the judge as satirist. Judge Hand took conventional establishment clause doctrine and applied it against irreligion precisely as it is customarily applied against religion. The howls of pain which reverberated throughout the legal, academic, and media establishments were a reminder of just how offensive equal treatment can be to the privileged. Ultimately, however, we reach the conclusion that Judge Hand was not exercising his satirical gifts. At bottom, the effect of his opinion was not to make a bad problem worse for the sake of drawing attention to it, but to import a measure of fundamental fairness into a chaotic and unbalanced area of law. This may not be the work of a judicial Swift or Aristophanes, but it is the work of someone at least as valuable, a conscientious and even-handed judge.

CONCLUSION: A PROPOSAL FOR A NON-INTERPRETIVE CONSTITUTIONAL STANDARD OF EVEN-HANDEDNESS

It would be our inclination, if we were redrafting the Constitution, to forbid religious establishments, not only at the federal level but also in the states. We would, moreover, impose upon the federal and state governments a constitutional duty to treat religious activities, groups, viewpoints, etc. even-handedly. We would be guided in our draftsmanship by principles of political morality which specify a due regard for liberty, fairness, tolerance, and, above all, personal authenticity in matters of religion. These principles are drawn, not from any positive law (indeed, they are the guides of human choice and action in the positing of law including the law of the Constitution), but from the objective order of justice which is a part of the natural (*i.e.*, moral) law.

Obviously, we have no warrant to redraft the Constitution. In interpreting the Constitution as it is written, other principles of political morality (*i.e.*, the principles of the rule of law) themselves forbid us from ignoring the plain meaning of constitutional provisions for the sake of producing more desirable outcomes. Thus,

while we would favor a constitutional amendment to prohibit all governmental establishments of religion and require even-handedness in governmental treatment of religions, we oppose efforts to effect such an amendment by what Justice White has aptly called the "exercise of raw judicial power."[132] To the extent that those responsible for the authoritative interpretation of the Constitution disrespect the distinction between interpretation and amendment, the people they serve no longer live under the protections of a written constitution.

Still, we are not so naive as to suppose that the plain meaning of the establishment clause will be given effect by the Supreme Court. Established doctrines, even when erroneous, are hard to dislodge. Moreover, as the 1987 confirmation hearings on Robert Bork have demonstrated, some outcomes are so highly valued that no demonstration of their lack of fidelity to, or even direct inconsistency with, the Constitution will shake the commitment of judges and of political actors involved in the selection and advancement of judges, to their political insulation and perpetuation.

The outcomes produced by prevailing establishment clause doctrine, however, are sufficiently undesirable to warrant pragmatic challenges to that doctrine. While outcomes under our plain meaning approach would likewise be undesirable as a matter of abstract political morality (although required as a matter of sound constitutional interpretation), outcomes superior to both those commanded by the Constitution *and* those produced under the conventional misinterpretation of the establishment clause are possible. An endeavor to produce such superior outcomes would not be good constitutional interpretation (which plain meaning alone can provide with respect to the establishment clause), but at least it would produce some genuine practical benefits. In short, if one cannot bring about fidelity to the Constitution, one should at least embrace a form of infidelity which yields (judged from the standpoint of political morality) sound, fair, workable, and reasonably consistent results. The prevailing infidelity certainly cannot claim to do this.

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[132] Roe v. Wade, 410 U.S. 113, 222 (1973).

What we would propose is a reading of either the establishment clause or the equal protection clause of the fourteenth amendment so as to require even-handedness in all governmental action toward religious activities, groups, viewpoints, etc.[133] Such a reading would implicitly forbid religious establishments inasmuch as a decision to elevate one sect above others would be, in principle, discriminatory among religions. It would not, however, demand the sort of strict separationism which creates the danger of discrimination against religious viewpoints and in favor of non-religious alternatives to religion. Finally, it would help to limit undesirable judicial intervention into such areas as school curriculum decisions, insofar as it placed the burden on a complainant to establish that a challenged state action not only injected a particular view about religion into a text or lecture at a certain point, but that the school's educational enterprise, judged as a whole, was discriminatory. This burden was in effect imposed on the fundamentalist plaintiffs in *Smith* by the Eleventh Circuit. A fair (if non-constitutional) doctrine of even-handedness in matters of religion would impose it equally on those complaining of religious and anti-religious elements in school teaching, curricula, and materials.[134]

Perhaps the soundest passage in the Eleventh Circuit's undistinguished opinion in *Smith v. Board of School Comm'rs* was its comments on the "special context" of public elementary and secondary schools:

> This special context is one which requires a sensitivity on the part of the court to both the broad discretion given school boards in choosing the public school curriculum, which mandates that courts not intervene in the resolution of conflicts arising in the daily operation of school systems unless basic constitutional values

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[133] The principle of even-handedness is embodied in the no-sect-preference reading of the establishment clause, which, despite its inadequacy as the "plain meaning" of the clause, is eminently sound as a principle of political morality.

[134] We stated in our introduction that a principle of even-handedness was "freely derivable" from either the establishment or equal protection clauses. We meant by that simply that a modern judge could derive such a principle from the values protected by those clauses with no greater infidelity to the constitutional text than is customary in contemporary constitutional jurisprudence. Our use of the word "freely" in this context is as an antonym of "strictly." Such free derivation would be claimed by many, we presume, to be a valid method of constitutional interpretation; we believe it to be essentially non-interpretive in character.

> are 'directly and sharply implicate[d],' and the pervasive influence exercised by the public schools over the children who attend them, which makes scrupulous compliance with the establishment clause in the public schools particularly vital.[135]

Few things would serve our state systems of public education less well than the transformation of them into battlefields in the wars of indoctrination into religion and irreligion. Judge Hand's ruling deserves sharp criticism on this score, although the brunt of the criticism must be directed at the precedents which he followed. Had Judge Hand's ruling become prevailing law, it would probably have ushered in an era of opposing waves of litigation by religious parents and secular humanist parents over every last sentence in a textbook and comment in a teacher's lecture. Ultimately we might well have seen washed away much of the remaining *content* of public education — which has become a pretty thin gruel in recent years in response to the conflicting sensitivities of various participants in the public education process. The only result that could be expected from such a process would be the apotheosis of whatever is bland and unobjectionable. The Eleventh Circuit deserves no praise, however, for the analysis which it substituted for Judge Hand's. That analysis merely perpetuated an unconscionable double standard under which the secular humanist is licensed to pick every last speck of religion out of the system of public education while no attention is paid to the essentially anti-religious structure and content of much of that system. This outcome does not keep the courts from interfering in the educational process; it merely ensures that the interference will be completely one-sided.

Under a standard of even-handedness, public schools could pass muster either by excluding all controversial material in the realm of religion/irreligion or by providing a reasonably balanced presentation of opposing viewpoints. We do not suggest that the balance would have to be a precise one; it would merely have to ensure that significant viewpoints were not wholly excluded and that no particular position was unduly emphasized as the sole correct viewpoint. Instead of having a perpetual Garritization of public education, the decision-making with respect to public schools would be returned

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[135] Smith v. Board of School Comm'rs, 827 F.2d at 689-90.

to democratic political processes at the state and local level — with the power of the judiciary held in reserve to remedy serious violations of the even-handedness principle.

Several specific lines of cases could be resolved with remarkable ease under a standard of even-handedness. The school aid cases, for example, would not even present a serious controversy so long as the government offered comparable aid to any religious school, irrespective of the identity of the religion which sponsored it. The moment-of-silence cases would be even simpler. A statute which provides for (and, in application, is used to provide) a moment in which students may engage in any quiet, contemplative activity of their choice is of the essence of even-handedness. (Indeed, as we discussed, *supra*, such a statute should not pose any constitutional problem even under the *Lemon* test, provided a judge was not guilty of conflating legislative purpose with the motives of individual legislators.) Cases involving equal access to school facilities by student groups (including religious groups) would have an equally obvious resolution.

One area which would remain thorny, although not for strictly constitutional reasons, would be cases of non-compulsory school prayer. Compulsory school prayer is clearly a violation of the free exercise clause. While it is no violation of a person's free exercise rights to be exposed to (even uncongenial) religious views, it is a violation to be compelled to participate in any religious exercises, congenial or not. Even non-compulsory school prayer, however, has practical implications which are absent from cases involving the content of textbooks, teacher lectures, and the like. The latter cases involve educative activities; school prayer, by contrast, is a reverential activity.

There is a great gulf between those two classes of activity which highlights the questionable wisdom of instituting officially-sponsored school prayers, even when students are not compelled to participate in them. The function of the public schools is educative, not reverential. The educative function is served by teaching children about the beliefs and practices of different religions (and other belief systems). The educative function is neither advanced nor retarded by allowing individual or collective reverential activities to be engaged

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in by students on their own initiative — *e.g.*, an individual student saying grace before a cafeteria lunch or a group of students meeting in a classroom (under the same restrictions to which other student organizations are subject) to study the Koran, partake of a seder dinner, or participate in a mass. But the official sponsorship of a reverential activity takes a school beyond its educative function into an area where it has no expertise and places it in the awkward position of either genuinely engaging in a form of worship or else falsifying the very activity which it is promoting.

The qualms which arise about such employment of school authority are more likely to have their origin in prudential than constitutional concerns. We would concede that a program of officially sponsored non-compulsory school prayer need not *in principle* violate either the free exercise clause or a standard of even-handedness with respect to religion. However, *in practice*, it seems probable that many such programs would. And if prayers used in the program had any very distinctive religious content (*e.g.*, an invocation of Jesus), the principle of even-handedness would require, at the very least, official sponsorship of other prayers, or some equally distinctive reverential activities, for the benefit of students whose religions do not accept the divinity of Christ. On the whole, where *real* prayer is at issue (as distinguished from pious civic platitudes cast in a form of petition or thanksgiving), public schools would be well-advised to eschew any form of official sponsorship.

Although we have focused our attention principally on establishment clause controversies which arise in the field of public education, the principle of even-handedness in religious matters is obviously susceptible of much broader application. We would assert that, in *any* area of application, it should produce fairer and more consistent results than conventional establishment clause doctrine. And its lack of rootedness in the Constitution is no more pronounced or scandalous than the lack of rootedness of the conventional doctrine. Indeed, those who adhere to the plain meaning of the establishment clause but who are willing to accept the prevailing understanding of the equal protection clause can root the principle of even-handedness in the fourteenth amendment with a perfectly clear conscience. If, therefore, we are not prepared as a political

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society to be bound by our written Constitution, let us at least insist upon the exercise of moral and political wisdom by those who, for better or worse, have the institutional power to shape the accepted meaning of the Constitution. Let us insist upon the elevation to effective constitutional status of this principle of even-handedness in matters of religion.