Establish No Religion: Brevard Hand's Civil-Libertarian Turn

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An important dimension of American conservatism is its moral-cultural character. That character often manifests itself as a celebration of nonurban "real Americans" and resentment toward educated, (post)modernist liberals and the minority groups whose interests those liberals defend. Conservatism since World War II, considered in moral-cultural terms, has essentially been a majoritarian impulse, even when cloaked in civil-libertarian terms. Although conservatives have sometimes understood themselves as political outsiders, they have consistently claimed the status of true, essential Americans whose political dominance could, through new strategies, somehow be restored. Although this majoritarian impulse can be studied in regard to anticommunism and desegregation, this essay traces its impact on religion in public education. In response to the minority rights activism of the left and rulings by the Supreme Court, conservatives have again and again reiterated William Jennings Bryan's insistence that plainspoken taxpayers had the right to fashion whatever public educational policies they wished. Traditionally religious Americans—recently, evangelicals joined by Catholics—have portrayed themselves as genuine, faith-driven Americans entitled to manage local schools as they chose, as long as their chosen policies did not violate the explicit prohibitions of the Constitution. Conservative intellectuals have defended this right by lauding representative

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democracy, especially at the local level, while bemoaning Alexander Bickel's counter majoritarian problem.[1]

Conservatives sounded those majoritarian themes after the Court's decisions in *Engel* and *Schempp,* which tightly circumscribed the space available for religious content in public schools. Not only did Christian conservatives rail against the Court's rulings; so, too, did conservative politicos such as Barry Goldwater and Strom Thurmond. Their language, and the language of conservatives in and out of government through the early 1980s, registered complaints that ordinary, God-fearing citizens had been deprived of their right to encode their moral preferences into law. From the early 1960s through the mid-1980s, an antijudicial animus seized American conservatism. Figures as diverse as William Buckley, George Wallace, and Phyllis Schlafly castigated the Court for supposedly prioritizing the rights of atheists and religious radicals over the moral sensibilities of Middle America. Each of those prominent conservatives warned that the moral orthodoxy sustaining American culture and law had been bludgeoned when the Court banned organized, out-loud religious exercises from the public schools.[2]

1. The moral-cultural worldview of American conservatism was explored in James Davison Hunter, *Culture Wars: The Struggle to Define America* (New York: BasicBooks, 1991), and George Lakoff, *Moral Politics: How Liberals and Conservatives Think* (Chicago: University of Chicago Press, 2001). Alasdair MacIntyre describes the impasse in worldviews as possessing an "interminable character," emblematic of a culture in which "there seems to be no rational way of securing moral agreement" in his *After Virtue* (Notre Dame: Notre Dame University Press, 1984), 6. Bryan's relevance to conservative majoritarianism is discussed in David Farber, *The Rise and Fall of Modern American Conservatism: A Short History* (Princeton: Princeton University Press, 2010), 46–47. The "countermajoritarian problem" is famously posited in Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962; New Haven: Yale University Press, 1986) 14–17. Although several historians have noted the centrality of majoritarianism to conservatism throughout this period, the connection is made most explicitly in David Sehat, *The Myth of American Religious Freedom* (New York: Oxford University Press, 2011).

2. *Abington v. Schempp,* 374 U.S. 203 (1963). Strom Thurmond and Barry Goldwater, "Address on the Supreme Court Decision on Prayer in the Public Schools" (1962), in *America in the Sixties, Right, Left, and Center: A Documentary History,* ed. Peter B. Levy (Westport, CT: Praeger, 1998), 127–31. In constitutional terms, the prerogative of "God-fearing" citizens to craft laws based on moral preferences was explored in Robert H. Bork, *Tradition and Morality in Constitutional Law* (Washington, D.C.: American Enterprise Institute for Public Policy, 1984). On *Schempp*'s catalyzing of an interdenominational antisecular movement, see Sarah Barringer Gordon, *The Spirit of the Law: Religious Voices and the Constitution in Modern America* (Cambridge, MA: Harvard University Press, 2010), 89–95. On conservative antijudicialism, see Sehat, *Myth of American Religious Freedom,* 267–78; and George H. Nash, *The Conservative Intellectual Movement in America since 1945* (Wilmington, DE: ISI, 1996), 199–203.

This essay looks at a critical moment in conservative majoritarianism. The early 1980s would signal the high-water mark for the majoritarian constitutional strategy of religious conservatives. It was at this time that William Rehnquist would abandon his well-honed arguments that the First Amendment's guarantees should not apply to the individual states. By 1984, Jesse Helms and his Senate allies would cease their longtime efforts to deprive the federal courts of jurisdiction over laws regarding school prayer and abortion. A crucial development had taken place: so-called moral majoritarians recognized that minority rights protections had become enshrined in federal law and made relatively invulnerable to attacks by state legislatures. Moral majoritarians' longtime fight had come to seem a lost cause.[3]

Those changes prompted Christian conservatives to shift their arguments. More and more, instead of clamoring for the right of ordinary "real Americans" to craft laws based on their moral preferences, many on the right reimagined themselves as a religious minority. As such, they claimed, they were as entitled to First Amendment protections as any other religious group. Increasingly, they relied on the free speech clause to make their case. The 1981 *Widmar v. Vincent* case helped turn the tide by declaring that universities lacked the compelling interest required to deny religious student organizations the same right to use campus facilities as was granted to all other student organizations. At stake, according to the Court, were the free speech rights of the religious students. Congress would then use *Widmar* as the basis for its 1984 Equal Access Act, which extended those same protections to high school students. In their arguments for the 1984 law, Christian conservatives employed a new strategy: posing as a minority group exercising its First Amendment rights. That strategy would net Christian conservatives a number of victories in the upcoming years and would prove more effective than the old majoritarian arguments.[4]

3. On Rehnquist's rejection of the incorporation doctrine, see *Buckley v. Valeo,* 424 U.S. 1 (1976) at 291 (Rehnquist, J., dissenting); *Carter v. Kentucky,* 450 U.S. 288 (1981) at 309–10 (Rehnquist, J., dissenting); and *Snead v. Stringer,* 454 U.S. 988 (1981) at 988–90, esp. 989. On Helms's efforts, see Edward Keynes with Randall K. Miller, *The Court v. Congress: Prayer, Busing, and Abortion* (Durham: Duke University Press, 1989), 195–200.

4. Steven P. Brown, *Trumping Religion: The New Christian Right, the Free Speech Clause, and the Courts* (Tuscaloosa: University of Alabama Press, 2002); and *Widmar v. Vincent* 454 U.S. 263 (1981). United States Senate, Committee on the Judiciary, report on S. 1059, the Equal Access Act, Feb. 22, 1984 (Washington, D.C.: U.S. Government Printing Office, 1984). The success of conservatives in general, beginning in the late 1970s, at building sophisticated networks that influenced legal education and judicial decision making is explored in Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*

The shift in constitutional argument is illustrated by a fascinating turn of events in Mobile, Alabama, from 1982 to 1987. Amid a community battle over religious content in public schools, federal judge Brevard Hand issued two rulings that registered the change in conservative strategies. The fate of his ruling in *Jaffree v. Board* convinced Hand to issue an audacious ruling in *Smith v. Board* that purported to carry the Court's Establishment Clause doctrine to its logical conclusion. Much maligned, *Smith* demonstrates how frustrated religious majorities co-opted case law to advance their claims. Although Hand's opinion in *Smith* did not spawn a new line of jurisprudence, it did demonstrate conservatives' increasing willingness to use rather than fight the federal courts—to accept and utilize the judiciary's commitment to protecting First Amendment rights.

Ishmael Jaffree was an atheist with three children attending Mobile public schools. In the winter of 1981, Jaffree grew dismayed on learning that each of the three children was regularly being exposed to prayers recited aloud by his schoolteachers. After the teachers and the Mobile school board repeatedly ignored his complaints, Jaffree filed suit in federal court in July 1982. In response, an incensed Alabama legislature quickly passed a law sanctioning school prayer as an expression of Americans' deep moral conviction. Governor Fob James saw Jaffree's suit as an opportunity to challenge existing Establishment Clause doctrine. Indeed, James looked to instigate a thoroughgoing reinterpretation of the Constitution: "It's time to address the '62 decision [*Engel*], not by trying to find a loophole, but by contesting the grounds" on which the ruling rested. The governor prepared to demonstrate beyond question that "our founding fathers never intended that you couldn't acknowledge God in a public institution."[5]

Jaffree's case was heard by Hand, whose rulings against minority rights were well known throughout the state. Hand was a strong proponent of instilling Judeo-Christian morality into children; he

(Princeton: Princeton University Press, 2008). Nonetheless, the continued periodic effectiveness of conservative majoritarianism against First Amendment claims is evinced in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990).

5. "Jaffree: Anti-Prayer Suit Aimed at Choice," *Birmingham News*, September 5, 1982, 1–2; "A Former Child Evangelist Wins a Supreme Court Fight against Prayer in Public Schools," *People Magazine*, June 24, 1985, 36–38; "Panel Oks Pension Bill," *Montgomery Advertiser*, June 24, 1982, 2; "Governor Signs Prayer Bill into Law," *Montgomery Advertiser*, July 13, 1982, 1; "Prayer in Schools Bill Is Now Law," *Mobile Register*, July 13, 1982, 1; "Panel Oks Pension Bill," *Montgomery Advertiser*, June 24, 1982, 2; "Governor Signs Prayer Bill into Law," *Montgomery Advertiser*, July 13, 1982, 1; "Prayer in Schools Bill Is Now Law," *Mobile Register*, July 13, 1982, 1.

defended the rights of families and communities to live in accordance with customs and values of their choice; he saw a strong federal government as a threat to the right of states to determine their own laws; and he considered himself a strict constructionist and practitioner of "judicial restraint." Above all, he advocated a republican ideology that defended the rights of "the people" over the prerogatives of the behemoth government in Washington. Hand was unlikely to share Ishmael Jaffree's concerns. Hand declared publicly that good government and good laws could rest only on "our religious heritage," America's "fundamental morality." If our laws were to "represent the true meaning of freedom as conceived by our Founding Fathers," he insisted, Americans needed to demand that those laws be informed by "a profound belief in God and the teachings of our Judeo-Christian heritage." Religious tolerance notwithstanding, society needed to embrace and strengthen its religious core.[6]

Not surprisingly, Hand found in favor of the Mobile schools and the state of Alabama. Hand's ruling in *Jaffree* was startling. It declared that, contrary to well-settled Supreme Court doctrine, the First Amendment's Establishment Clause did not prohibit a state government from establishing a religion if it so chose. Hand's opinion derived almost entirely from the testimony of the school board's expert witness, James McClellan, a constitutional scholar who exerted much influence in New Right legal circles. McClellan was committed to launching "a conservative constitutional revolution" that would strike down the incorporation doctrine and deny the federal courts any purview over religious establishment. McClellan was blunt about his majoritarianism. In his trial testimony, he denounced judicial review over religious matters, insisting that it illegitimately obstructed democratic rule. The Court's prohibition against religious expression in public schools was "undemocratic," he maintained, because it allowed "a small, select minority" to "impose their view on the people." Democracy required the right of the people to "encourage morality," and the courts had no business standing in the way.[7]

6. W. Brevard Hand, "The Religious Foundation of Good Government," speech delivered at the Government Street Methodist Church, Mobile, Alabama, June 27, 1976, Speech file 1, W. Brevard Hand Papers (United States District Courthouse, Southern District of Alabama, Mobile, Ala.), 1–2; W. Brevard Hand, speech delivered at Mobile Rotary Club, Mobile, Alabama, April 25, 1974, Speech file 1, W. Brevard Hand Papers (United States District Courthouse, Southern District of Alabama, Mobile, Ala.), 4. Evidence of Hand's judicial, political, and religious philosophies can be found throughout his speeches and writings, gleaned from his decisions, and gathered in abundance from the five interviews that I conducted with him.

7. *Jaffree v. Board of School Commissioners of Mobile County,* 554 F.Supp. 1104 (1983). Ibid., 1113–14. Testimony of James McClellan at *Ishmael Jaffree*

In his testimony, McClellan urged Hand to rebuke his judicial superiors. He encouraged Hand to refute the twentieth-century doctrine of church-state separation. Hand complied. His *Jaffree v. Board* ruling confronted the American legal establishment with a brazen set of claims about the nature of American government and the way the Constitution ought to be understood. No narrow opinion, *Jaffree* was a broadside for numerous causes central to the New Right: the need to read the Constitution's text strictly, to place it in the "primary" historical context of its authors' intentions, to protect public expressions of religion, to defend states' rights, to assure popular majorities of their right to determine the fundamental laws by which they lived, and to resist the Supreme Court's alleged dissolution of the Constitution's republican principles.[8]

Hand's opinion quoted McClellan's essay "The Making and Unmaking of the Establishment Clause," arguing that the Establishment Clause was intended, not to forbid government advancement of Christianity, but, rather, "to exclude all rivalry among *Christian* sects and to prevent any *national* ecclesiastical establishment." Hand used the same essay to assert that the Founders never intended to apply the Establishment Clause to the states. Paraphrasing McClellan's trial testimony, he concluded that "the first amendment in large part was a guarantee to the states which insured that the states would be able to continue whatever church-state relations existed in 1791." Hand's ruling declared as well that the authors of the First Amendment sought only to prohibit the creation of a national religion.

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et al. v. Board of School Commissioners of Mobile County et al., Civil case no. 82–0554-H, box no. 1, accession no. 021–93–0423, location no. C0681974 SAN (Federal Records Center, East Point, Ga.), November 15, 1982, 599, 598–600. James McClellan, "A Lawyer Looks at Rex Lee," *Benchmark* 1 (March-April 1984): 5. James McClellan, "The Making and Unmaking of the Establishment Clause," in *A Blueprint for Judicial Reform,* ed. by Patrick B. McGuigan and Randall R. Rader (Washington, D.C.: Free Congress Research and Education Foundation, 1981), 295; McClellan, "Lawyer Looks at Rex Lee," 10. Testimony of McClellan at *Jaffree v. Board,* 530, 525–26, 529–30.

McClellan had served as a longtime aid to North Carolina senators Jesse Helms and John East and helped them craft their bills to restrict Supreme Court jurisdiction over school prayer and abortion. James McClellan interview by Robert Daniel Rubin, October 14, 2004, transcript (interview conducted by telephone), 1–3, 19–20. McClellan asserted his support for the legislation in James McClellan, "Congressional Retraction of Federal Court Jurisdiction to Protect the Reserved Powers of the States: The Helms Prayer Bill and Return to First Principles," *Villanova Law Review* 27 (May 1982): 1019–29.

8. Testimony of McClellan at *Jaffree v. Board*, 566, 603. In a letter to the *Washington Times,* McClellan explicitly tied the *Jaffree* ruling to Senate conservatives' jurisdictional measures. James McClellan, letter to the editor, *Washington Times,* December 21, 1982.

Those men, he insisted, "never intended the Establishment Clause to erect an absolute wall of separation between the federal government and religion." Informed by various constitutional majoritarians, Hand condemned recent Establishment Clause jurisprudence as inadequately informed by history. "From the beginning of our country, the high and impregnable wall which Mr. Justice Black referred to in *Everson* . . . was not as high and impregnable as Justice Black's revisionary literary flourish would lead one to believe." History demonstrated conclusively for Hand that neither Jefferson nor the other Founders literally intended to cordon off religion from government. "Enough is enough." Now was the time to resuscitate the accurate historical record.[9]

Hand's advocacy of states' rights, judicial restraint, and public expressions of religious faith reinforced his majoritarian convictions, which convinced him that religious minorities needed to endure the indignities and inconveniences that went along with being different from the majority. The Jaffree children's suffering of ostracism did not entitle them to legal redress. "Since the states were historically free to establish a religion," he reasoned, "some irritation by non-believers or those in the religious minority was a necessary consequence of establishment." It could not be prevented. Being in the minority might be tough, but assuaging hurt feelings was not government's proper function. "Psychological pressure naturally flows anytime a state takes an official position on an issue. It does not make an establishment unconstitutional."[10] Wherever the majority determined laws, Hand wrote, minorities must endure constraint and even coercion. "The Constitution . . . does not protect people from feeling uncomfortable. A member of a religious minority will have to develop a thicker skin if a state establishment offends him."[11] And "tender years are no exception," he added, with the plaintiff's children in mind.[12]

Hand's majoritarianism spoke to his republicanism. By protecting the majority's right to legislate, Hand claimed, the courts preserve the people's sovereignty. The Constitution belongs to the people. If we "have faith in the rightness of our charter . . . then all will have

9. *Jaffree v. Board,* 1114, quoting from McClellan, "Making and Unmaking of the Establishment Clause," 295, emphasis added by Hand. *Jaffree v. Board*, 1115. Ibid., 1115–18. See Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth, 1982); and Raoul Berger, *The Fourteenth Amendment and the Bill of Rights* (Norman: University of Oklahoma Press, 1989).
10. *Jaffree v. Board of School Commissioners of Mobile County*, 554 F.Supp. 1104 (1983).
11. Ibid., 1128–29.
12. *Jaffree v. Board,* 1118, n. 24; Ibid., 1126; Ibid., 1128–29.

input into change and not just a few" jurists. For Hand, it was the Constitution's republican nature that Justice Black and his brethren had most egregiously contravened. In its haste to do good, the Court had usurped the people's most fundamental right and responsibility: to choose its laws freely and wisely. "The judiciary has, in fact, amended the Constitution to the consternation of the republic," Hand warned. No matter how pure their motives, liberal judicial activists were baldly "denying to the people their right to express themselves. It is not what we, the judiciary, want," he maintained, "it is what the people want translated into law pursuant to the plan established in the Constitution as the Framers intended. This is the bedrock and genius of our republic." Hand insisted that "the mantle of office give us no power to fix the moral direction that this nation will take. When we undertake such course we trample upon the law." When judges legislate, they destroy the republican fabric from which America was made. Hand refused to be a party to such treachery.[13]

An incensed appellate court summarily reversed Hand. Nor did he fare any better with the Supreme Court, whose 6-3 ruling in *Wallace v. Jaffree* charged the judge with violating "the established principle that the government must pursue a course of complete neutrality toward religion." Not only did John Paul Stevens's majority opinion rebuke the attempt, by McClellan and other opponents of the "living Constitution," to convince the Court to renounce its own jurisdiction over state laws regulating school prayer. Stevens also reinforced the successful recent efforts of Senate liberals who had repudiated the moral majoritarianism that had so unabashedly clamored to reassign religious dissenters to society's margins. The ruling spoke plainly. "The District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion" now compelled the Court "to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States." For Stevens the incorporation doctrine was part of the Court's inviolable commitment to protecting the equal treatment of minorities and their right to full standing within society. The Court would not allow an individual state to dictate moral or political orthodoxy to its citizens. "Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the

13. Ibid., 1126, 1128–29.

counterpart of his right to refrain from accepting the creed established by the majority."[14]

The Court's *Jaffree* ruling reaffirmed doctrine on church-state separation. But it was notable as well for something else: a final, bald attempt by conservatives to reject that doctrine head-on. Among the three dissenting justices was Rehnquist, whose opinion issued a conservative clarion call for overhauling church-state jurisprudence. Like McClellan and Hand, Rehnquist complained that his brethren had recklessly disregarded the Constitution. The justices' notion that a "wall of separation" separated church from state, he declared, was nothing more than "a metaphor based on bad history, a metaphor which has proved useless as a guide to judging" and should "be frankly and explicitly abandoned." As many times before, Rehnquist excoriated his colleagues for substituting their own religious values for those of the popular majority.[15]

Rehnquist's vast, ambitious, twenty-five-page dissent read more like a law-review article than a judicial opinion. Pent-up frustration appeared to pour out into his opinion—frustration toward his liberal colleagues, their predecessors, and the edifice of civil libertarianism that they had constructed. Rehnquist's tone was stern and even caustic. He conveyed exasperation toward a legal-political establishment that either did not understand or did not care about good government. Rehnquist used the *Jaffree* case as an opportunity to correct what he considered decades of faulty thinking and faulty adjudicating. Remarkably, the facts surrounding the *Jaffree* case played almost no role in his opinion, which mentioned the case itself only once—in two sentences within the penultimate paragraph. His mind seemed to be focused, not on prayer or Alabama classrooms, but on American jurisprudence since the 1940s. Rehnquist took the opportunity to signal that the New Right and its attempt at counterrevolution remained alive and well.[16]

14. *Wallace v. Jaffree,* 472 U.S. 38 (1985) at 39, 48-49, 52.
15. Ibid. at 107 (Rehnquist, J., dissenting). In his brief to the Supreme Court, McClellan urged the justices to overturn their entire religion-clause jurisprudence. Brief for the Center for Judicial Studies as *amicus curiae* supporting petitioners, July 3, 1984, pp. 2-4, in *Wallace v. Jaffree.* On the Court's alleged disregard for the Constitution, see William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (May 1976): 693-706. Rehnquist had earlier asserted his religious majoritarianism in *Thomas v. Review Board,* 450 U.S. 707 (1982), at 722-27 (Rehnquist, J., dissenting); *Goldman v. Weinberger,* 475 U.S. 503 (1986), (Rehnquist, J., dissenting); *Hobbie v. Unemployment Appeals Commission of Florida,* 480 U.S. 136 (1987), (Rehnquist, J., dissenting); *Mueller v. Allen,* 463 U.S. 388 (1983); and *Stone v. Graham,* 101 S. Ct. 192, 449 U.S. 39 (1980), at 45 (Rehnquist, J., dissenting).
16. *Wallace v. Jaffree*, 472 U.S. at 91–114 (Rehnquist, J., dissenting).

Reagan-era majoritarians would prove unable to return prayer to public school classrooms, nor could they circumscribe the federal courts' authority over the matter. For the time being, there would remain constitutional limits to a majority's ability to use public education to disseminate its religious views. Federal judges, rather than playing a reduced role, would retain the final word. Hand may have declared himself and other federal judges powerless to impose the Establishment Clause on state and local government, but his superiors decreed otherwise. The Supreme Court informed him that Alabama and its public educators may establish no religion. Hand was ordered on remand to do what he had heretofore resisted: enjoin Alabama's prayer law and prohibit devotional practices in Mobile schools.

In the two and a half years since Hand's *Jaffree* ruling, the church-state landscape had changed somewhat. Justice Sandra Day O'Connor had nudged the Court away from its all-but-automatic reliance on the secular standard for adjudicating Establishment Clause claims, suggesting instead that governmental neutrality required evenhanded treatment of religion and nonreligion. Congress had passed the Equal Access Act of 1984. During the Supreme Court phase of *Jaffree,* prominent evangelical litigators had submitted *amicus* briefs utilizing the idiom of civil rights to advocate for viewpoint pluralism. The case was returning to Hand just as the Christian Right was recognizing the practical value of adopting elements of the 1960s rights revolution.[17]

This posed a challenge for Hand, who was now being directed to constrain the legislature of his state and the public schools in his town—institutions whose right to home rule he strongly supported. The wide majority of Alabamians wished for their public schools to conduct devotional exercises, and it fell now to Hand to inform them that the federal judiciary—that he—would silence any organized, out-loud religious devotion that might fill the classroom. Against his will, he was now obligated to strike down the policies of local schools whenever they lacked secular purpose or secular consequence.

17. *Lynch v. Donnelly,* 465 U.S. 668 (1984), at 688; Noah Feldman, *Divided by God: America's Church-State Problem—and What We Should Do about It* (New York: Farrar, Straus, and Giroux, 2005), 201-206. *Congressional Quarterly Almanac* 40 (98th Cong., 2nd Session, 1984): 491. Brief for the Moral Majority as *amicus curiae* supporting petitioners, July 3, 1984, at *Wallace et al. v. Jaffree et al.*, before the Supreme Court of the United States, on appeal from the United States Court of Appeal for the Eleventh Circuit; Brief for the Christian Legal Society and National Association of Evangelicals as *amici curiae* supporting petitioners, July 3, 1984, at *Wallace v. Jaffree*; Brief for the Freedom Council and the Rutherford Institute as Amici Curiae supporting petitioners, July 5, 1984, at *Wallace v. Jaffree.*

Hand saw that conservative goals might be accomplished through liberal means. He returned his attention to the *Jaffree* trial, where a group of local evangelicals had intervened in the case. Those intervenors had leveled arguments that, in key respects, mirrored the arguments of Ishmael Jaffree. Posing as a religious minority, they purported that they, and not Jaffree, were actually the aggrieved party. Although their argument had played no role in Hand's final ruling, it remained on the record, an instructive example of religious conservatives turning the tables on agnostics and dissenters. Moreover, his own single-handed attempt to reverse the Supreme Court had been an audacious act of judicial activism, signaling that conservatives such as he would defend their values by any legal means necessary.

The three attorneys for the *Jaffree* intervenors numbered among the growing number of Christian conservative "cause-lawyers" committed specifically to Christian causes. Two were affiliated with the Rutherford Institute, whose founder and director, John W. Whitehead, called on Christians to "go on the offensive like Jesus Christ"—not only to defend their rights, but also to sue for them. Christian Right leaders such Francis A. Schaeffer, Whitehead, and his mentor Rousas John Rushdoony had declared that traditional, "biblical" Christians, on the basis of their worldview, nowadays stood outside mainstream American society and comprised a minority group. If other minority groups could succeed at identity politics, then so could they. And if others could use the federal courts in their quest, then so could religious conservatives.[18]

Hand did not consider himself a religious activist. His love was the law. He did, nonetheless, feel distressed by what he thought to be a nation "slouching towards Gomorrah," and he would gladly use his authority to allow state schools to acknowledge and honor Christian morality. Since his involvement with the presidential campaign of Barry Goldwater, through his rulings limiting court-ordered desegregation and affirmative action, Hand had bristled indignantly at political liberalism run amok. He remained a political creature, willing and able to enforce a view of the Constitution whose primary function was to enforce his particular beliefs about government. Faced with implementing a Supreme Court order to enjoin local schools from engaging in what he considered legitimate activities, Hand remained as resourceful as his situation was challenging.[19]

18. Francis Wilkinson, "Judge Hand's Holy War," *American Lawyer* 9 (May 1987): 112. "Lawyer: Christians Must Mount the Offensive," *Birmingham News,* April 4, 1986.

19. Robert H. Bork, *Slouching towards Gomorrah: Modern Liberalism and American Decline* (New York: HarperCollins, 1996). W. Brevard Hand interview by Robert Daniel Rubin, December 5, 2000, Mobile, Alabama, 2-3; "Hand Doesn't

During the *Jaffree* trial, Hand had endorsed the intervenors' central claim: that an antireligious worldview, "secular humanism," had permeated Alabama schools so exclusively as to constitute a religious establishment. He had warned that "if the appellate courts disagree with this Court in its . . . conclusion of constitutional interpretation," then "this Court will look again at the record in this case and reach conclusions which it is not now forced to reach." And what might those conclusions be? Hand was clear. If the schools needed to be insulated from Christian influences, then he would "also purge from the classroom those things that serve to teach that salvation is through one's self rather than through a deity." If a religious establishment by the state was unconstitutional, then he would try to ensure that no religion at all was established.[20]

Hand saw in the intervenors' argument a vehicle for establishing that federal court control over state schools was untenable and unwise. The justices insisted on micromanaging the nation's classrooms; perhaps he could demonstrate the unmanageability of their task. Perhaps he could show that religion, of one variety or another, necessarily girds and structures all teaching, that education could be purged of religion no more than it could be purged of language. Hand looked to make the removal of faith from the classroom as distasteful to liberals as to conservatives. The intervenors' complaint that the Alabama public schools had violated their First Amendment rights had gone unaddressed. Hand now sought to resolve those outstanding issues as well as deliver a badly needed lesson to his judicial superiors.[21]

On August 15, 1985, Hand directed the *Jaffree* parties to submit memoranda indicating their positions on reopening the case and on the intervenors' argument. He then realigned the parties, designating the erstwhile intervenors as plaintiffs. The new plaintiffs assumed the name of the individual whose name had appeared first on the group's petition to intervene in *Jaffree,* Douglas A. Smith. At long last, these conservative evangelicals were given the opportunity to challenge what they considered the anti-Christian bias pervading the textbooks used in Alabama public schools. In their new brief, the *Smith* plaintiffs reaffirmed that "the curriculum used in the

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Think He's Controversial," *Montgomery Advertiser and Alabama Journal,* November 26, 1987, A2; "A Good Ol' Boy Sitting on the Federal Bench," *Los Angeles Times,* March 29, 1987, sec. 5, p. 3.

20. *Jaffree by and through* Jaffree v. James, 544 F.Supp. 727 (1982), 732 n2. *Jaffree v. Board,* at 1129. Ibid., 1129, n41.

21. Hand interview, October 10, 2002, pp. 12-13; Hand interview, April 12, 2000, pp. 14-15; *Smith v. Board of School Commissioners of Mobile County,* 827 F.2d 684 (1987), at 687-88.

Mobile County School System unconstitutionally advances the religion of Humanism." Among the original defendants, only the state board of education chose to defend itself against this charge. It fell to the state to show that its curricular materials advanced no religion at all. And so Hand initiated a new phase of the case, *Smith v. Board.*[22]

The 1986 *Smith* trial and ruling signaled the Christian Right's most daring civil-libertarian turn, away from its majoritarian battle against the incorporation doctrine, and toward full, if awkward, membership in the civil rights revolution of the 1960s and 1970s. More comprehensively and straightforwardly than ever before, Christian conservatives called on the federal courts to protect *their* rights as a minority. The *Smith* plaintiffs in no way played the role of the *Jaffree* defendants. Nowhere to be found were expert witnesses asserting that the Bill of Rights did not apply to the individual states or that an advancement of religion in the classroom did not violate the Establishment Clause. None of the witnesses explored the Framers' original intentions or the Supreme Court's later interpretations. As fully as Ishmael Jaffree, they embraced existing Establishment Clause case law. Rather than asserting that individual states retained the constitutional right to establish a religion, their witnesses called for an even more robust enforcement of the First Amendment's ban against establishment of any religion—including the religion of secular humanism. One after another academic scholar testified that a number of social studies, United States history, and home economics textbooks approved for use in Alabama schools were promoting the humanist religion. The textbooks purportedly accomplished this by ignoring and thus demeaning Christianity's and Judaism's role in American life, as well as by disseminating anti-theistic values. By emphasizing the paramount importance of freethinking, of human beings, the books discomfited students whose parents taught that God's will, and not human intelligence, demanded their primary compliance. The parade of scholars called by the plaintiffs contended that, even in Alabama, the humanist majority had mistreated the Christians in its midst.[23]

22. *Smith v. Board of School Commissioners of Mobile County,* 827 F.2d 684 (1987), at 688. Memorandum on position of plaintiffs Smith, September 15, 1985, *Jaffree v. Board*, at 1. "Tyson Says Textbook Publishers Should Appear at Humanism Trial," *Mobile Press Register,* March 15, 1986. Minutes of the official session of the Alabama State Board of Education, Montgomery, Alabama, March 13, 1986, 13. Plaintiff's memorandum of law, October 10, 1985, at *Douglas T. Smith et al. v. Board of School Commissioners of Mobile County et al.*, consolidated with *Douglas T. Smith et al. v. George Wallace,* 1983-1987: Wallace File, 1-2.

23. Transcript, *Douglas T. Smith et al. v. Board of School Commissioners of Mobile County et al.*, Civil case no. 82-0554-H, box no. 2, accession no. 021-93-0423, location no. C0681974 SAN (Federal Records Center, East Point, Ga.), October 6-26, 1986.

Judge Hand's March 1987 ruling in *Smith* found in favor of the plaintiffs. Hand entered judgments against the defendant board of education, whom he "hereby permanently restrained and enjoined from using any of" the many home economics, history, and social studies textbooks examined during the trial. Each of the banned books, in Hand's estimation, had advanced the religion of secular humanism, in violation of the Establishment Clause of the First Amendment to the United States Constitution. "With these books," he wrote, "the State of Alabama has overstepped its mark." The state would now need to "withdraw" in order "to perform its proper nonreligious function" and nothing more.[24]

Hand emphasized, beyond all else, the civil-libertarian character of the plaintiffs' argument. He denied that they wished to impose their own worldview. Hardly were they "narrow-minded or fanatical proreligionists" attempting "to force a public school system to teach only those opinions and facts they find digestible" or "censor materials deemed undesirable, improper or immoral." The *Smith* plaintiffs had sought "objective education, not partisan indoctrination." It was not they who wished to proselytize. The plaintiffs wanted religious neutrality in the classroom. They desired only that their children might be spared the suffering that came with prejudice and marginalization. At bottom, "what this case *is* about," Hand wrote, was the "improper promotion of certain religious beliefs, thus violating the constitutional prohibitions against the establishment of religion, applicable to the states through the Fourteenth Amendment." Enforcing the Establishment Clause against an individual state was his charge, Hand pointed out. He did not seek out that charge, but he had now assumed it. And he would execute his responsibility however he saw fit.[25]

Hand seemed to relish the irony of enforcing the Court's mandate in a manner that the liberal justices would find wholly improper. As if to throw *Jaffree* back at the Court, he used the Establishment Clause to constrain the very religious dissenters and agnostics who had historically benefited from its application. "It is this Court's solemn duty and obligation under the first and fourteenth amendments as interpreted by the Supreme Court in *Jaffree* to protect the rights of these plaintiffs," Hand reminded his readers. He would see to it that all Alabama schoolchildren enjoyed an education "unimpaired by an officially sponsored version of history that ignores the facts" about religion. The Court required that public schools conform to religious neutrality. Well, he would impose religious neutrality on the state, but

24. *Smith v. Board of School Commissioners of Mobile County,* 655 F.Supp. 939 (1987), at 988.
25. Ibid., 974; Ibid., 975; Ibid., 974, emphasis in original.

the justices might not like what they saw. He would ensure that Alabama established no religion whatsoever.[26]

Conservatives did not support Hand's *Smith* decision as they had *Jaffree. Smith* drew little popular local support. Instead, the ruling attracted resistance and resentment, even among school prayer advocates. The plaintiffs and their sympathetic judge—and not their opponents—were accused of censoring the curriculum and strong-arming the system. The Eleventh Circuit reversed Hand's judgment, scoffing that his "conclusions were in error" and "reflect[ed] a misconception of the relationship between church and state mandated by the establishment clause." After Justice O'Connor refused the plaintiffs' request to stay the appellate court's decision, the plaintiffs and their backers, including Pat Robertson's National Legal Foundation, concluded that ultimate victory did not await them and so chose not to appeal. Federal judges would remain unreceptive to subsequent cases like *Smith.* Even as the rights of religious conservatives were gaining recognition via the Free Speech Clause, it strained the courts to interpret the Establishment Clause as requiring equal treatment between God-centered and secular worldviews. *Smith* would no more impact Court doctrine than had *Jaffree.* Thus ended the odyssey of the evangelical "civil libertarians" from Alabama.[27]

Yet, despite *Smith*'s failure to take root directly, its larger legacy would endure. In shifting away from his position in *Jaffree,* Hand registered the

26. Ibid., 985.

27. Wilkinson, "Judge Hand's Holy War," 114; "Textbook Case Undeserving of Court Time," *Mobile Press Register*, October 25, 1986; "State Board Acts Correctly to Appeal," *Mobile Press Register*, March 14, 1987; Bob Sherling interview by Robert Daniel Rubin, November 14, 2000, transcript, pp. 19–20 (in Robert Daniel Rubin's possession); "Textbook Case Emergency Appeal Nixed," *Mobile Press,* October 22, 1987. "Plans to Appeal Textbook Ruling Are Abandoned," *Mobile Register,* November 26, 1987. On the involvement of the National Legal Foundation in *Smith,* see "Prayer Case Didn't Die after Court Ruling," *Birmingham News,* January 19, 1986, 12A. "Fundamentalists Say Book Issue Still Alive," *Mobile Press Register,* December 2, 1987; Kirsten Goldberg, "Alabama Group Closes Its 'Secular Humanism' Suit," *Education Week,* December 9, 1987, 8; Joseph W. Newman, "Organized Prayer and Secular Humanism in Mobile, Alabama's, Public Schools," in *Curriculum as Social Psychoanalysis: The Significance of Place,* ed. Joe L. Kincheloe and William F. Pinar (Albany: SUNY Press, 1991), 72. *Smith v. Board of School Commissioners of Mobile County,* 827 F.2d 684 (1987), esp. 690.

Several federal cases, in the years following *Smith,* featured plaintiffs arguing unsuccessfully that public schools had established a religion of secular humanism. These included *Roberts v. Madigan,* 702 F.Supp. 1510 (1989); *Doe v. Human,* 725 F.Supp. 1503 (1989); *Seidman v. Paradise Valley Unified School District No. 69,* 327 F.Supp.2d 1098 (2004); and *Harper v. Poway Unified School District,* 445 F.3d 1166 (2006). See Rosemary C. Salomone, *Visions of Schooling: Conscience, Community, and Common Education* (New Haven: Yale University Press, 2000), 117-20.

new constitutional reality of the era. The insight behind his *Smith* opinion would become the Christian Right's greatest insight: that, under the banner of equal rights, the judiciary could and would sometimes compel government to accommodate Christianity. Religious conservative scholars, lawyers, and activists would increasingly appeal to the belief, popularized during the rights revolution of the 1950s through the 1970s, that minority groups deserved influence in American public life, and that, when the "political" branches would not afford minorities the influence they deserved, the courts should intervene.

The civil-libertarian turn represented a compromise by the Christian Right, which recognized how firmly entrenched was the role of the federal courts as defenders of minority rights. More generally, Christian conservatives comprehended the law's growing tendency to reflect society's ever-increasing diversity. Failing to undo *Engel, Epperson,* and *Roe,* many Christian Right lawyers and activists became willing to play by the rules of mainstream society, to accept an invitation simply to participate in the political-legal game. Thus did Christian constitutionalist Stephen Carter call on government to accommodate "epistemic diversity" along with "diversity of other kinds" so that citizens with a God-centered worldview might cease to be marginalized and disrespected by what Carter saw as the dominant secular culture.[28]

Its benefits aside, the civil-libertarian turn incurred costs with the long-term potential to disadvantage religious conservatives as badly as had the Court's secularism standard. Byron White, the lone dissenter in *Widmar* and a conservative, had worried about the impact on religion from the Court's reliance on the Free Speech Clause to protect religious expression. His brethren, he had said, were "plainly wrong" in asserting that "religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle," for, if they were correct, then "the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech." At that early moment in the civil-libertarian turn, White had recognized what most religious conservatives would not: that if religious expression deserved the same protection as every other public utterance, then religious expression would cease to signify sacredness. The power of religion lay in its ultimate difference from all else, its unassimilability into the mundane. Government's evenhanded treatment of all viewpoints and utterances threatened to rob religion of its essential difference. The same constitutional provision invoked by religious student groups might someday be used by gay rights organizations; the very clause protecting religious speech might also protect the rights of pornographers. Perhaps, over

28. Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Anchor, 1994), 15, 229-30.

time, churches would lose their tax exemptions and other privileges that came with being essentially different from all other institutions. Whatever its advantages, reliance on the "equal treatment" principle carried hazards for all religious citizens.[29]

Christian Right leaders embraced the civil-libertarian turn, not because they failed to recognize its hazards, but because it offered them a "foot in the door." The opportunity to challenge the *Lemon* test's secular basis for adjudicating church-state relations moved Judge Hand, in *Smith,* to embrace the equal treatment principle. Hand had no desire to debase religious ideas or religious citizens; he did not want public schools to present Christian values in the same manner as they presented socialism, feminism, devil worship, and personal selfishness. The equal-treatment principle merely provided Judge Hand with a strategy for making judges realize how untenable it would be to apply the First Amendment to the states if judges were forced to apply it in a fair, evenhanded manner. For most Christian Right leaders, as for Judge Hand, the goal remained incrementally to achieve familiarity and to win acceptance for religious conservatives' voices in government and throughout the public sphere. Playing the "pluralism card" is not the same as genuinely welcoming nontheistic worldviews into public discourse. As prominent figures such as James Dobson, Michael Farris, Pat Robertson, and Tim LaHaye have long made clear, the Christian Right is happy to fight the culture wars, but their intention is to win those wars through whatever strategic means lay at hand. Asking the courts to guarantee equal treatment makes sense to them only paradoxically, as a means to a contrary end: the Christianization of the public sphere. "By definition, they are missionaries," in the words of education theorist Eugene Provenzo, "whose purpose in life is to convert those who have not yet discovered Absolute Truth." If they accept the pluralistic model, it is for strategic purposes only.[30]

29. *Widmar v. Vincent,* 454 U.S. at 282. On the hazards to traditional religion brought on by adoption of the equal treatment principle, see Aaron Louis Haberman, "Civil Rights on the Right: The Modern Christian Right and the Crusade for School Prayer, 1962-1996″ (Ph.D. diss., University of South Carolina, 2006), 185-86, 207; Winnifred Fallers Sullivan, "The Difference Religion Makes: Reflections on *Rosenberger,*" *Christian Century,* March 13, 1996, 292-95; Gregg Ivers, "American Jews and the Equal Treatment Principle," in *Equal Treatment of Religion in a Pluralistic Society,* ed. Stephen V. Monsma and J. Christopher Soper (Grand Rapids: Eerdmans, 1998), 177; and Brown, *Trumping Religion,* 10, 60, 139-45.

30. Hand interview, April 12, 2000, 12-15; Hand interview, December 5, 2000, 16-17. The seeming inconsistency between evolving constitutional philosophy and enduring moral principle is explored in Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (Cambridge, Mass.: Harvard University Press, 1996), 1-38. James C. Dobson, "The Second Great Civil War," in *Children at Risk:*

In fact, the Court's civil-libertarian turn augured, not a new respect for religious pluralism, but an enhancement of the power of local majorities to turn their religious preferences into public policy. In a roundabout way, the conservative justices made Hand's *Jaffree* opinion more relevant over the subsequent fifteen years than at the time of its issuing. Their majority rulings in *Rosenberger* and *Good News,* concurrence in *Zelman,* and dissent in *Santa Fe* completely spun around the Court's earlier rationale for judicial review. Whereas *Engel, Schempp,* and *Epperson* had protected religious minorities against marginalization by state legislatures and the religious majorities whose interests they served, these later rulings protected majorities of students, teachers, and legislators from being restrained by the judiciary and the interests of religious minorities. The Court would become less concerned with tyranny of the majority and more concerned with its own tyrannical capacity. Writing for the Court in *Rosenberger,* Anthony Kennedy refused to tolerate "governmental censorship" intended "to ensure that all student writings and publications meet some baseline standard of secular orthodoxy," as any such monitoring would "imperil the very sources of free speech and expression." In concurrence, Justice Thomas defended not only students' religious expression, but also their prerogative as "religious adherents" fully to participate in "government programs." Five years later, Thomas's majority opinion in *Good News* flatly denied "that any risk that small children would perceive endorsement" of Christianity required an evangelical organization's prohibition from meeting

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What You Need to Know to Protect Your Family, ed. James Dobson and Gary L. Bauer (Thomas Nelson, 1994), 21-44; Michael Farris, *The Joshua Generation: Restoring the Heritage of Christian Leadership* (Nashville: Broadman and Holman, 2005); Tim LaHaye, *The Battle for the Mind* (Old Tappan, N.J.: Revell, 1980); Tim LaHaye, *The Battle for the Public Schools* (Old Tappan, N.J.: Revell, 1983).

On the continuing effort to Christianize the public sphere, see John S. Detweiler, "The Religious Right's Battle Plan in the 'Civil War' of Values," *Public Relations Review* 18 (Fall 1992): 247-55; Rob Boston, *The Most Dangerous Man in America? Pat Robertson and the Rise of the Christian Coalition* (Amherst, N.Y.: Prometheus, 1996); Justin Watson, *The Christian Coalition: Dreams of Restoration, Demands for Recognition* (New York: St. Martin's, 1997); Chip Berlet and Matthew N. Lyons, *Right-Wing Populism in America: Too Close for Comfort* (New York: Guilford, 2000), 255-64; Rob Boston, *Close Encounters with the Religious Right: Journeys into the Twilight Zone of Religion and Politics* (Amherst, N.Y.: Prometheus, 2000); Michelle Goldberg, *Kingdom Coming: The Rise of Christian Nationalism* (New York: Norton, 2006); Chris Hedges, *American Fascists: The Christian Right and the War on America* (New York: Free Press, 2006); and Dan Gilgoff, *The Jesus Machine: How James Dobson, Focus on the Family, and Evangelical America Are Winning the Culture War* (New York: St. Martin's, 2008). Eugene F. Provenzo, *Religious Fundamentalism and American Education: The Battle for the Public Schools* (Albany: State University of New York Press, 1990), 91.

on school premises. To the contrary, disallowing the group from meeting would publicly demonstrate governmental disapproval of religion, allowing "any bystander" to "suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement." With the new century, the justices embraced a position that the *Schempp* Court never could have imagined. If the majority of a community favors the performance of a religious activity in public space, then the Court will not interfere simply to pacify a handful of malcontents. As Judge Hand had declared in *Jaffree,* "A member of a religious minority will have to develop a thicker skin if a state establishment offends him." And "tender years are no exception."[31]

31. *Rosenberger v. Rector and Visitors of University of Virginia,* 515 U.S. 819 (1995), at 844-45. Ibid., at 862. *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), at 120. Ibid., at 118. *Zelman v. Simmons- Harris,* 536 U.S. 639, at 676–86 (Thomas, J., dissenting). See also Rehnquist's dissent in *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), at 318-26. *Jaffree v. Board,* 554 F. Supp. 1104 (1983), at 1118 n24. See Ivers, "American Jews and the Equal Treatment Principle," 167-77; Brown, *Trumping Religion,* 67-68, 76-77; Sullivan, "Difference Religion Makes"; and Matthew A. Peterson, "The Supreme Court's Coercion Test: Insufficient Constitutional Protection for America's Religious Minorities," *Cornell Journal of Law and Public Policy* 11 (Fall 2001): 261-63.