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## EVERSON V. BROWN: HERMENEUTICS, FRAMERS' INTENT, AND THE ESTABLISHMENT CLAUSE

JOHN T. VALAURI\*

This essay examines the establishment clause framers' intent debate. But I do not take sides in this longtime dispute. Instead I question some important unstated assumptions made by participants of both stripes in order to undermine them. One assumption is that there are, at least in principle, specific, historically discoverable matters of fact about the 1789 intent of the framers of the first amendment and the 1868 framers of the fourteenth amendment.<sup>1</sup> A second assumption is that these facts clearly and directly determine outcomes in controversial contemporary establishment clause cases.<sup>2</sup> Both assumptions achieve doctrinal certainty at the cost of historical incompleteness and interpretive oversimplification. They employ a historical history, static meaning, and mechanical interpretation. They do have one main allure: they provide easy answers for hard cases.

But this is a false allure. In opposition to this received approach, I want to focus on issues of historical difference and development which might accord some overlooked, complex problems more extended, serious attention. There are two complaints I have against the standard views. The lesser complaint is that the historical record on framers' intent is less clear than either side lets on. Both achieve clarity through selectivity in sources and readings.

My second and major complaint is that there is a missing step in the argument. Even if all the historical assertions made by separationists or nonpreferentialists about the minds of the framers are accepted, that still will not determine case results today. Too much has changed in the interim conceptually, institutionally, and historically.

Now you may feel you can safely ignore the views of an obscure midwestern law professor and perhaps even the approach suggested by an obscure continental philosophy. The apparent risk is small. For this reason and others, I will

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1. See *infra* notes 31 and 32 and accompanying text.

2. See *infra* notes 33 and 34 and accompanying text.

strive to cast my argument in terms of considerations not so easily dismissed. My hermeneutic arguments have cognates in American legal and constitutional history and doctrine. The hermeneutic approach has deep affinities with the American legal and philosophical pragmatic tradition personified by Justice Oliver Wendell Holmes, Jr.<sup>3</sup> More important yet, the approach to historical issues and constitutional interpretation I argue for here is employed in the paradigmatic case for modern constitutional jurisprudence, *Brown v. Board of Education*.<sup>4</sup>

I want, then, to get the religion clauses disputants to pay more than lip service to Holmes and *Brown*. I want to inject into this debate some of the richness found in the overall constitutional framers' intent dispute, richness largely absent here.<sup>5</sup> The religion clauses debate is innocent of the philosophical interpretive issues of the other debate.<sup>6</sup> Both sides are mainly content with their common historical approach because each gets, they believe, sufficient historical ammunition to fight their fight. Interpretive advances occurred in *Brown* because proponents of desegregation had weak historical arguments concerning the specific intent of the framers.<sup>7</sup> Perhaps *Brown* made a virtue of necessity, but as Holmes reminds us, the role played by historical continuity in constitutional interpretation is only a necessary, not an obligatory one.<sup>8</sup>

The conceptual, institutional, and historical changes since the 1780s and 1860s have recast the constitutional terrain. The older facts of the matter concerning intent, if they are facts, do not directly answer modern questions. The Virginia General Assessment Bill of 1784 would doubtless be unconstitutional today upon most theories of the religion clauses.<sup>9</sup> Only someone who denied incorporation might assert the contrary. In

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3. On the relevance of pragmatism to the hermeneutic tradition see K. APEL, C. S. PEIRCE: FROM PRAGMATISM TO PRAGMATICISM (J. Krois trans. 1981). On the relation of Holmes to American pragmatism see Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U.L. REV. 541 (1988).

4. 347 U.S. 483 (1954).

5. I have elsewhere tried to give a taxonomy of this larger debate. See Valauri, *The Varieties of Constitutional Theory: A Comment on Perry and Hoy*, 15 N. KY. L. REV. 499 (1988).

6. For a notable exception see Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1118 (1988).

7. See R. KLUGER, *SIMPLE JUSTICE* 617-56 (1976). See also R. BERGER, *GOVERNMENT BY JUDICIARY* 117-33 (1977).

8. "[H]istorical continuity with the past is not a duty, it is only a necessity." O. HOLMES, *COLLECTED LEGAL PAPERS* 191 (1920).

9. See *infra* note 69 and accompanying text.

any event, it is not our current problem. On the other hand, Justice Black's quandary in *Everson v. Board of Education*<sup>10</sup> of wanting to maintain the wall of separation between church and state while not denying religious citizens otherwise generally available governmental benefits is a modern problem unforeseen by even the most clairvoyant of the framers.

In what follows, I sketch what some of these new problems are and how they impact contemporary establishment clause doctrine. First, I briefly present some hermeneutic tools to employ in bridging historical gaps. Then, after making some Holmes/*Brown* analogies, I apply them to the problem of effectuating establishment clause meaning in the modern context of the nonpreferentialism debate and suggest a rewriting of *Everson*.

### I. *EVERSON* AND THE RECEIVED VIEW

The best source for the received view of the role of framers' intent in shaping the meaning of the establishment clause for nonpreferentialism today is Justice Black's opinion in *Everson*.<sup>11</sup> Not only does it inaugurate the modern era of establishment clause jurisprudence by applying that clause to the states through incorporation in the due process clause of the fourteenth amendment,<sup>12</sup> but it also sets the list of sources and parameters for the framers' intent debate over establishment clause meaning. Both the *Everson* dissenters and most separationists and nonpreferentialists today proceed from Black's historical matrix in *Everson*.<sup>13</sup> They differ mainly in their evaluations of what the historical materials mean.

Recall, then, Justice Black's historical narrative. It is the model for all that follows. After an initial statement of how different the 1947 religious/constitutional situation is from that of the framers' era, Black nevertheless immediately plunges into a discussion of that self-same history.<sup>14</sup> From this discus-

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10. 330 U.S. 1 (1947).

11. *Id.* at 3-18.

12. *Id.* at 8.

13. See *id.* at 33-58 (Rutledge, J., dissenting); see also L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986) (a separationist view); see also R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982) (a nonpreferentialist view).

14. Black first says, "[T]he expression 'law respecting an establishment of religion,' probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights." Two sentences later he continues, "[I]t is not inappropriate briefly to review the background and environment of the

sion, he reaches the general, apparently timeless conclusion that "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any and all religions, or to interfere with the beliefs of any religious individual or group."<sup>15</sup>

He next finds the climax of preconstitutional establishment clause history in the Virginia debate over its General Assessment Bill of 1784.<sup>16</sup> He highlights the role of James Madison in the fight against this Bill, focusing on Madison's Memorial and Remonstrance. He also emphasizes the role of Thomas Jefferson as the author of the Virginia Bill for Religious Liberty, which prevailed over the General Assessment Bill. He canonizes the role of both framers here saying,

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.<sup>17</sup>

Black then traces the historical path to dominance in establishment clause meaning of the Jefferson/Madison view of establishment.<sup>18</sup> He presents the import of the clause as broad, general, and timeless. He next fleshes this principle out in his famous list of prohibited establishments of religion.<sup>19</sup>

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period in which that constitutional language was fashioned and adopted." *Everson*, 330 U.S. at 8.

15. *Id.* at 11.

16. *Id.* at 11-14.

17. *Id.* at 13.

18. *Id.* at 13-15.

19. 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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

*Id.* at 15-16 (citation omitted).

Having set out the majestic sweep of history and principle concerning the establishment clause, Justice Black notoriously derails it with the nonhistorical assertion that the state cannot bar "members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."<sup>20</sup> Finally, he uses this general benefit theory to uphold the challenged school busing statute against establishment clause attack.<sup>21</sup>

The *Everson* dissenters fully accept Justice Black's establishment clause history; they deride only his general benefit theory and the specific result he reaches through it. Justice Jackson in dissent, for example, complains that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support of their commingling in educational matters."<sup>22</sup>

Justice Rutledge's dissent gives the longest historical discussion. It fully follows in form and content the outline I have presented of Justice Black's discussion. Once again, Rutledge speaks of the broad purpose of the amendment "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion."<sup>23</sup> Similarly, he emphasizes the importance of the framing history. He gives supreme importance to the roles played by Madison and Jefferson in the Virginia religion debates of the 1780s. He uses the Virginia history to fill in the sparser, more ambiguous debates in the first Congress.<sup>24</sup> *Everson's* history has remained the Court's (and most academics') received view of framer's intent since 1947.

## II. THE JAFFREE DISSENT

The main challenge to the prevailing establishment clause orthodoxy is found in Justice Rehnquist's dissent in *Wallace v. Jaffree*.<sup>25</sup> But even here the exception proves the rule, for Rehnquist chooses to fight his historical battle largely on his

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20. *Id.* at 16 (emphasis in original).

21. *Id.* at 17-18.

22. *Id.* at 19.

23. *Id.* at 31-32.

24. *Id.* at 33-41. He follows this presentation with the remark that, "By contrast with the Virginia history, the congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled." *Id.* at 42.

25. 472 U.S. 38, 91-114 (1985).

opponents' terrain. For, although he downplays Jefferson's framer's role and wall of separation between church and state metaphor, he does admit the preeminent role Madison played in establishment clause framing.<sup>26</sup> Likewise, he admits the role *Everson* asserts Jefferson and Madison played in the enactment of the Virginia Statute of Religious Liberty.<sup>27</sup> But he denies the relevance of that struggle to Madison's role in proposing the amendment in the House of Representatives.<sup>28</sup> Finally, he parses the House debate and related history to conclude that the establishment clause bars only preferential aid to religion.<sup>29</sup>

### III. SOME UNEXAMINED ASSUMPTIONS

I belabor the received view of framers' intent in Justice Black's *Everson* opinion and the dissenting view in Chief Justice Rehnquist's *Jaffree* dissent for two reasons. First, these two opinions crystallize and canonize the arguments and sources of the separationist and nonpreferentialist positions respectively in the current academic debate. But, more important for my purposes, they help to show that both sides, despite diametrically opposed historical conclusions, start from basically similar views of what the relevant historical materials are, how they are to be approached, and how they are relevant today. It is just these common, unstated assumptions that I go on now to challenge.

Now let me summarize some assumptions made by both the received and dissenting views of framers' intent here, so that I can proceed to undermine them.

1. Framers' intent is a specific matter of historically discoverable fact.<sup>30</sup>

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26. *Id.* at 92-94.

27. *Id.* at 92.

28. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contribution thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

*Id.*

29. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another; but it was definitely not concerned about whether Government might aid all religions evenhandedly.

*Id.*; see *id.* at 92-106.

30. They reject what Professors Corwin and Monaghan call the two-clause theory of the Constitution. See Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 361-67 (1981).

2. These facts can be determined from the writings, statements, and actions of particular historical actors.<sup>31</sup>

3. Somehow these specific statements and acts give rise to general, sweeping constitutional principles which underlie the more ambiguous constitutional text.<sup>32</sup>

4. These sweeping constitutional principles are applicable to all future times and cases in a direct, unexceptional manner.<sup>33</sup>

My general reply to these assumptions is that matters are significantly more complicated and less clear than these views assume. Let me introduce one hermeneutic distinction to give some order to my critique. In attempting to discover author's intent and textual meaning, hermeneuts often distinguish two dimensions of the problem. One is sometimes called the horizontal dimension. It involves the problems in assembling an intent or meaning out of the individual intents and other factors present in the synchronic time slice of the text's creation.<sup>34</sup> This is an important issue especially where, as with the Constitution, a text has many authors or framers. A complementary problem exists along the vertical dimension. This involves meaning change through time and the application of a text or an intent to situations and cases not foreseen at the original writing.<sup>35</sup> Let me deal with the horizontal problems first since they are more conventional and more briefly stated.

#### IV. THE HORIZONTAL CRITIQUE

The hermeneut must face the possibility that there will just be no fact of the matter about the common intent of a group of authors or framers of a document, especially where the historical net is widely and sensitively cast. The idea is to avoid a false clarity gained through selective use of sources and partial readings even of the ones selected.

In this context, the main horizontal problem is the emphasis on the roles of Jefferson and Madison and the events leading to the enactment of the Virginia Statute of Religious Liberty of 1786 in determining the original meaning of the

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31. The debate on both sides is long on documentation, but short on methodology. See *supra* notes 15-18 and accompanying text for *Everson's* historical argument.

32. See *supra* note 19 for *Everson's* paradigmatic list of prohibitions.

33. In *Everson* and elsewhere this is typically a consequence of their categorical cast.

34. See J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 158 (J. Shapiro trans. 1971).

35. See *id.*



establishment clause. Even an ardent separationist must make some factual concessions here. For example, Jefferson, at least technically, was not a framer, since he was ambassador to France at the time. Second, the statements made by Madison during the congressional debate were not those of his Memorial and Remonstrance or other efforts several years earlier in Virginia. Certainly, as the text of the first amendment demonstrates, the relations between Church and State the framers permitted differed for the federal government on the one hand and the states on the other.

The difficulties in treating later documents by Madison and Jefferson as demonstrative of framers' intent is even more severe. Yet judges and academics have relied on sources like Jefferson's "wall of separation" image from his letter to the Danbury Baptist Association<sup>36</sup> and Madison's late views stated in his Detached Memoranda<sup>37</sup> as demonstrative of the original intent and meaning of the establishment clause. Yet, neither was composed until the following century.

There are serious problems even with the congressional debate of the amendment. Lloyd's notes of the debate in the House are incomplete and inaccurate.<sup>38</sup> There are no notes of the Senate debate, which was held in secret.<sup>39</sup> Beyond the accuracy of our historical records, there is the problem of the importance the framers themselves attached to their debate and the psychological intent it might have expressed. H. Jefferson Powell has argued persuasively that the Constitution's framers did not see their psychological intent as important in determining the meaning of constitutional provisions. Instead, they held an objective rather than a psychological view of intent. For them intent was to be found on the face of a document rather than in the mind of its framers.<sup>40</sup>

Add to this the problem that at least the federalist proponents of the Constitution did not feel that the amendments suggested were necessary since the federal government was one of delegated powers. Madison and others held the amendments to be unnecessary because Congress lacked power to

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36. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1878); *Everson*, 330 U.S. at 16; L. LEVY, *supra* note 13 at 181-83; but see *Jaffree*, 472 U.S. at 91-92 (Rehnquist, J., dissenting).

37. See, e.g., *Marsh v. Chambers*, 463 U.S. 783, 807-08 (1983) (Brennan, J., dissenting); L. LEVY, *supra* note 13, at 98.

38. See L. LEVY, *supra* note 13, at 187-89.

39. See *id.* at 187.

40. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 901-13, 935-44 (1985).

legislate in the areas of the proffered prohibitions in the first place.<sup>41</sup> The amendments for them at best constituted harmless reassurances. This situation also complicates the usual relation between proponents and opponents of measures in determining legislative intent. For if the intent of proponents is normally more relevant to meaning than that of opponents, which roles do the federalists and anti-federalists fill here? The federalists in convention proposed the Constitution, but did not see fit to provide a Bill of Rights. Anti-federalist opposition to the Constitution in large measure generated the push for amendments.<sup>42</sup> Although many states proffered amendments, when the time for congressional consideration came, the draft bill came from the federalist Madison. And even his text was modified and remodified through both federalist and anti-federalist suggestions.

The framers are arguably not even the most important source of the meaning of the provision. This position may well go to the ratifiers in the state conventions, for whom we possess yet less clear and less compelling evidence of intent. The Constitution is unlike normal legislation in this respect. The framers are not the adopters; they are not even of the same deliberative body as the adopters. The actual adopters of the Constitution met in separate session on a state-by-state basis. The ratifiers had the text of the amendments, but they could not have been as familiar with the framers' debates as a legislative body would normally be with the action of one of its committees sending legislation to the floor for approval.

Nonpreferentialists also point to legislative acts by the first Congress and others apparently inconsistent with the received view of framers' intent. These acts include the request that President Washington issue a Thanksgiving day proclamation, existence of a legislative chaplain, and support of religious education in the Northwest Ordinance and various Indian treaties.<sup>43</sup>

Nonpreferentialists use these sorts of horizontal arguments to show weaknesses in the received view of framers'

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41. See, e.g., L. LEVY, *supra* note 13, at 115; Laycock, "Nonpreferential" Aid to Religion: A False Claim about Original Intent, 27 WM. & MARY L. REV. 875, 907 (1986).

42. See, e.g., Laycock, *supra* note 41, at 908; Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 850 (1986).

43. See, e.g., *Jaffree*, 472 U.S. at 100-04 (Rehnquist, J., dissenting); *Marsh*, 463 U.S. at 788; R. CORD, *supra* note 13, at 27-29, 38-41, 53-63.

intent and the establishment clause.<sup>44</sup> With this I can agree. We part company, however, over their further assertion that these arguments demonstrate their positive thesis that the framers supported the constitutionality of nonpreferential aid to religion. Instead, what I think these problems show is that we make a mistake in assuming the framers had our problems and situation in mind just because they used some of the same words and concepts we do today or because the first amendment has not itself been amended since 1789. On the contrary, the meaning of these words, concepts, and provisions has changed in crucial ways in two centuries because the background context against which these things show up has changed. This is the vertical problem of hermeneutic interpretation I mentioned earlier. This is the positive, more important aspect of my critique of the nonpreferentialism debate. Let me now turn to it.

## V. THE VERTICAL CRITIQUE

The horizontal critique of the nonpreferentialism debate argues that there just may be no fact of the matter about the original understanding of the establishment clause. The vertical critique is separate and independent, applying even if the horizontal critique is flawed. It holds that, even if the received view and the dissenting view are correct in assuming that there is discoverable truth about what the framers meant and that this may be found in their statements and actions, this is still not sufficient to determine current case results. The vertical critique puts into question, then, the third and fourth assumptions the received and dissenting views make—that the original intent gives rise to general, sweeping constitutional principles and that these principles are directly and mechanically applicable to all future situations and cases.<sup>45</sup>

The debate participants and I agree with Holmes on the necessity of historical continuity; we differ on its nature. The received and dissenting views make continuity trivial because they overlook historical differences and development. True, both judges and scholars sometimes make passing remarks on the complexity of the historical record or the difference between the framers' and modern situations.<sup>46</sup> Yet, like Justice Black in *Everson*, they then proceed to employ broad, timeless,

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44. Their view is conveyed in the subtitle of Cord's book — historical fact and current fiction. See R. CORD, *supra* note 13.

45. See *supra* notes 32 and 33 and accompanying text.

46. See, e.g., *Everson*, 330 U.S. at 8; L. LEVY, *supra* note 13, at 175-76.

and exceptionless principles of establishment clause meaning.<sup>47</sup> The separationists employ *Everson's* received view that all aids to religion are impermissible, while the nonpreferentialists champion the dissenting view that nonpreferential aids are permitted (or even required).

## VI. HERMENEUTICS AND PRAGMATISM

Several hermeneutic notions will aid in the exposition of my alternative view, so I will introduce them now. Hermeneutics recognize that we and the framers live in different worlds. One way of capturing this insight is to say that we live and function within one historical horizon or form of life and that they lived within another.<sup>48</sup> Despite important continuities between the two, there are also significant differences arising out of different historical, political, cultural, and social contexts. Doubtless there is historical continuity between the two, but as Holmes elsewhere said this continuity is organic and experiential. He charges us that,

[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.<sup>49</sup>

Holmes' charge also implicates two other hermeneutic notions. The first is the notion of an effective history. The idea here is that the current meaning of word or concept is deter-

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47. See *Everson*, 330 U.S. at 8-15; L. LEVY, *supra* note 13, at 1-119. In fairness, there are some notable exceptions to this move. Mark Tushnet, for example, suggests that, "The growth of pluralism . . . transformed the problem of establishment." He finds that, "The framers' generation had not developed a conceptual scheme to express its understanding of the proper relation between religion and government." Tushnet, *The Origins of the Establishment Clause* (Book Review), 75 GEO. L.J. 1509, 1513 (1987). See also Laycock, *supra* note 41, at 913-14, 919-20.

48. The notion of the historical interpreter confronting two different historical horizons is basic to contemporary philosophical hermeneutics. See H. GADAMER, *TRUTH AND METHOD* 269-73 (G. Barden and J. Cumming trans. 1975).

49. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

mined by the history of its use from its inception through its controversial and noncontroversial applications to the situation which confronts us today.<sup>50</sup> The second notion is that of crucial importance of application in meaning and interpretation.<sup>51</sup> Meaning is not, to use another Holmesian phrase, some "brooding omnipresence in the sky." Both of these hermeneutic notions should be familiar and congenial to lawyers operating in a common law system. But they are both contrary to the accounts of framers' intent in the received and dissenting views we have examined.

Holmes' pragmatic view of the historical and organic development of constitutional provisions and concepts applies as well to institutions. *Brown v. Board of Education* brings this idea out in a paradigmatic way. Compare, for example, *Brown's* historiography with that of *Everson*.

## VII. THE BROWN PARADIGM

Framers' intent is a crucial issue in *Brown*. In fact, "[r]eargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868."<sup>52</sup> Yet, *Brown* lacks *Everson's* extensive historical narrative. Speaking of the historical sources, Chief Justice Warren writes that, "At best, they are inconclusive."<sup>53</sup> This result stands in marked contrast to the result in *Everson*. The difference arises out of *Brown's* pragmatic approach to historiography, rather than a physical inferiority of the historical record. If anything, the historical record concerning the fourteenth amendment in *Brown* is superior to that of the first amendment in *Everson*. The record of the congressional framing proceedings is more accurate and more complete. So, too, the state ratification proceedings. Far less time had passed since the amendment's adoption than in *Everson*. Moreover, the history of only one amendment needs examination. In *Everson*, because of the incorporation issue, both the first amendment and fourteenth amendment are arguably relevant.

A clue to the answer is provided in Chief Justice Warren's remark that, "An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time."<sup>54</sup> He

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50. See H. GADAMER, *supra* note 48, at 267-74.

51. See *id.* at 274-78.

52. *Brown v. Board of Educ.*, 347 U.S. at 483, 489 (1954).

53. *Id.*

54. *Id.*

notes the rudimentary, undeveloped nature of free public education in both the North and the South in the 1860s. He brings his historical discussion to a close with an organic, almost Holmesian, summation. "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation."<sup>55</sup> Warren then continues the contrast saying, "Today, education is perhaps the most important function of state and local governments."<sup>56</sup> He goes on to base the result in *Brown* and the departure from *Plessy* in large part on the changed status of education in modern-day America.

My concern here is neither with the substantive result in *Brown* nor with substantive questions of equal protection doctrine, but rather with the Court's historiography and use of framers' intent. Note first that Warren denies all four historiographic assumptions made by both the received and dissenting views in the establishment clause area.<sup>57</sup> There is no simple discoverable historical matter of fact about the framers' intent concerning the fourteenth amendment for him. The statements, writings, and actions of the framers are simply inconclusive. So he derives from them no general sweeping principles applicable to equal protection cases in all times and contexts. He recites no litany of constitutional prohibitions as Justice Black does in *Everson*.

In fact, Warren's opinion in *Brown* allows for constitutional change in a way that both contemporary establishment clause views implicitly deny. Both the received and dissenting views assume that the 1789 meaning of the establishment clause is the same as the 1989 meaning. But *Brown* stands for the view that that meaning can change. Public school segregation might have been constitutional in 1868, but unconstitutional in 1954. Do I overread the historical record in this? *Brown* only says that the historical materials are inconclusive; it does not in so many words say that the framers thought that public school segregation was unconstitutional.

Fortunately, Alexander Bickel has already answered this objection in his work on the original understanding and the

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55. *Id.* at 492-93.

56. *Id.* at 493.

57. See *supra* notes 30-33 and accompanying text.

desegregation decision.<sup>58</sup> He contrasts a static view of the meaning of the fourteenth amendment much like the view of the establishment clause I have criticized with "an awareness on the part of these framers that it was a *constitution* they were writing, which led to a choice of language capable of growth."<sup>59</sup> If the Court had taken the first, crabbed view, "[i]t could have deemed itself bound by the legislative history showing the immediate objectives to which section 1 of the fourteenth amendment was addressed, and rather clearly demonstrating that it was not expected in 1866 to apply to segregation."<sup>60</sup>

This evaluation of the specific and immediate intent of the framers of the fourteenth amendment is also found in critics of the *Brown* decision, such as Raoul Berger.<sup>61</sup> But because they typically have the static view of history which limits framers' intent to specific and immediate intent, they are torn between accepting a *Plessy*-like decision they find imprudent and unpalatable and repudiation of their view of framers' intent.<sup>62</sup> But their dilemma is avoidable. *Brown* and Bickel point the way toward a more flexible third alternative. Like Holmes' approach, it allows for the possibility of historical growth and evolution without amendment. It allows us to remove our historical blinders.

### VIII. CONCEPTS AND CONCEPTIONS

One caution here. The pragmatic and evolutionary approach to framers' intent and constitutional interpretation I am here defending against its less flexible opponents is not the same as the account of constitutional interpretation based on a distinction between concepts and conceptions expounded by Ronald Dworkin and applied to the establishment clause area by David Richards. That distinction, as originally set out by Dworkin, is between a general umbrella category, the concept, and its numerous individual varieties, the conceptions.<sup>63</sup> Under this approach, a "vague" constitutional provision, say the eighth amendment, employs certain general concepts (in

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58. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955).

59. *Id.* at 63 (emphasis in original).

60. *Id.* at 64.

61. See R. BERGER, *GOVERNMENT BY JUDICIARY* 117-33 (1977).

62. Berger concludes that it would be "utterly unrealistic and probably impossible to undo the past in the face of the expectations that the segregation decisions . . . have aroused in our black citizenry." *Id.* at 412-13.

63. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1977). The death penalty example is one given by Dworkin.

this case the concept of the cruel and unusual). The Court as interpreter of this constitutional provision in a capital punishment case, rather than being bound by what the framers of the eighth amendment thought about the constitutionality of the death penalty, is free to reach a different determination if it finds that another conception of the cruel and the unusual which bars the death penalty is superior to the framers' conception. How superior? The standard Dworkin and Richards employ is philosophical rather than historical.<sup>64</sup> So the Court would not be bound by the specific intent of the framers in this approach if there is a philosophically preferable alternative available.

Mark Tushnet criticizes Richards' application of this approach to the religion clauses context, saying in part that it just is not a theory of framers' intent, but of something else.<sup>65</sup> He could have added that it is not a theory of *constitutional* interpretation either, but of something else, say philosophical interpretation or perhaps the interpretation of the "unwritten constitution." The shortcomings of the Dworkin/Richards approach here are in fact not all that different from the shortcomings of the received and dissenting establishment clause views I critique. Both assume the existence of right answers based on discoverable matters of fact (be they philosophical or historical).<sup>66</sup> They also develop from these facts broad, general, sweeping principles which are independent of time, context, and development and which are applicable in a straightforward way to a wide range of cases.<sup>67</sup>

One can summarize these similarities by saying that both stand for neutral principles as that notion has evolved out of Herbert Wechsler's criticism of *Brown*.<sup>68</sup> An acceptance of my account of *Brown* or of the pragmatic/hermeneutic approach it exemplifies is a rejection of the neutral principles critique of *Brown* as being part of the historiographic problem *Brown* itself attempts to overcome.

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64. Dworkin goes on to call for "a fusion of constitutional law and moral theory." *Id.* at 149.

65. Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 *LOY. L. REV.* 221, 232-35 (1987) (discussing D. RICHARDS, *TOLERATION AND THE CONSTITUTION*, 58-59, 208 (1986)).

66. *See, e.g.*, R. DWORKIN, *A MATTER OF PRINCIPLE* 119-45 (1985).

67. At base they all derive from a right to equal concern and respect. *See* R. DWORKIN, *supra* note 63, at 180-83, 272-78.

68. *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).



Let me finish with a Brownian critique and rewriting of *Everson*. Since my approach does not, in fact, compel me to opt for either separationism or nonpreferentialism, let me emphasize that it need not bring about reversal in *Everson*'s decision, only a change in its methodology.

### IX. REWRITING *EVERSON*

A rewrite of *Everson* in light of *Brown* would render Justice Black's *Everson* dilemma more intelligible, if not more readily resolvable. It would do this by pointing to the changing historical context and parameters from 1789 to 1947. There is only space here to sketch the sorts of factors it might consider. Many of these have already individually been recognized by commentators, but not presented in a systematic and purposeful way. This is not to say that there is a clear result or right answer here, as I believe there is in *Brown*. One thing the hermeneutic/pragmatic approach does not guarantee is easy answers to hard cases.

Turning to the new *Everson* itself, the historical account given would clearly be more tentative. The "definitive" history presented by Justice Black, or for that matter by Justice Rutledge in his *Everson* dissent, might be replaced by a shorter admission of the inconclusive nature of the historical record. But it would be inconclusive in the way that Bickel explains that term. Cribbing again, the opinion might say that just as one cannot turn the clock back to 1868, neither can one turn it back to 1789. This is because the concepts and institutions involved have shifted, even if the terms and text involved deceptively remained the same.

No one today, except for the rare nonincorporationist, argues that the Virginia General Assessment Bill of 1784 would be constitutional if enacted by a contemporary state legislature. It would violate all three prongs of the *Lemon* test,<sup>69</sup> having a religious purpose and effect and entangling church and state both politically and administratively. But even contemporary opponents of *Lemon* who champion such recent decisions as *Marsh v. Chambers*, would void the Bill on historical grounds. But, in an important way, this is beside the point.<sup>70</sup> For the sort of nonpreferential aid found in the Virginia General Assessment Bill is quite different from that championed by nonpreferentialists today. The aid to religion in that Bill was

69. See *Lemon v. Kurtzman*, 403 U.S. 602, 615 (1971) (examining the purpose of, effect of, and entanglement caused by governmental action).

70. 463 U.S. 783 (1983).

both direct and exclusive in ways current aid programs typically are not. For example, the New Jersey statute in *Everson*, at least as interpreted by the Court, made school busing generally available to both public and private nonprofit school children.<sup>71</sup> Likewise, the federal statute in question in *Aguilar v. Felton* made secular remedial educational aid generally available to students in private and public, religious and secular schools.<sup>72</sup>

The more relevant question, then, is whether the *Everson* or *Aguilar* problems are of a type foreseen by the framers. Contemporary separationists and nonpreferentialists can only answer yes in a general sense because they infer sweeping bans or permissions from the specific acts and statements of the framers. But there is no specific evidence that they can point to in the historical record that would show the framers' opposition or attachment to these legislative schemes because these sorts of programs simply did not exist at that time. Nor are they significantly similar to programs and institutions which did then exist. Let me canvass just a few areas of significant change in the intervening two centuries to illustrate this proposition.

Certainly, institutions and theories of federalism have changed markedly since the framing of the first amendment. Then important doctrines of states' rights, limited and delegated federal powers, and concurrent sovereignty have long since faded away. The fairly uniform opposition to federal religious power in the Convention and the Congress clearly did not reflect a parallel uniform opposition to state power to legislate in the area of religion. Then existing state establishments are just the clearest evidence of this fact. Moreover, doctrines of federal power melded with attitudes towards religion to form combinations no longer found on the contemporary scene. So, for example, a nonpreferentialist anti-federalist like Patrick Henry opposed on state's rights grounds federal power to legislate with respect to religion while he supported the same sort of power on behalf of the states.<sup>73</sup>

Just as the adoption of the fourteenth amendment changed the federalism landscape markedly, *Everson's* incorporation of the establishment clause through the due process clause of the fourteenth amendment changed the constitutional standards

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71. See *Everson*, 330 U.S. at 3 & n.1, 18. But see *id.* at 19-21 (Jackson, J., dissenting) (arguing that in this case the only nonpublic schools involved are Catholic schools).

72. 473 U.S. 402, 404-06 (1985).

73. See L. LEVY, *supra* note 13, at 109-10.

applicable to the states and the relation between federal and state standards. In the pre-Civil War era it was an uncontroversial given that the constitutional requirements to respect individual rights to which the states and federal government were held were quite different.<sup>74</sup> In the main, the states were limited, if at all, by their own constitutions. Nowadays, as cases like *Bolling v. Sharpe*<sup>75</sup> indicate, the assumption that the standards should be identical is so strong that a matching standard will be found even if the textual basis for it is weak. In addition, in the context of the framers' intent debate, the incorporation of the establishment clause creates the irony that a standard is now applicable to the states which neither the framers' of the first nor the fourteenth amendments apparently specifically intended to apply to the states.

The rise of the welfare state and the creation and implementation of governmental welfare powers has caused changes parallel to the shift in conceptions of federalism. The view of most framers on the welfare duties and competencies of government, especially federal government, would today have placed them on the libertarian end of the political spectrum.<sup>76</sup> A dominant federal and state role in education, health care, and all other forms of public welfare is not so much something the framers opposed as it is something they did not even conceive of. We have entered an era in which it is reasonable, although not yet accepted, to argue that these governmental welfare functions are not merely permissible, but constitutionally mandatory.<sup>77</sup>

Finally, concepts and institutions of religion and education have shifted markedly. *Brown's* contrast of the states of public education in 1868 and 1954 could readily be expanded and strengthened to compare public education in 1947 with the rudimentary, if not nonexistent, public education in 1789. The Virginia General Assessment Bill of 1784 stands as an example of just how intimately education and religion were intertwined

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74. Primarily because the federal Bill of Rights did not apply to the states. See, e.g., *Barron v. Baltimore*, 7 Pet. 243 (1833).

75. 347 U.S. 497 (1954) (ending racial segregation in the District of Columbia public schools through the equal protection component of the due process clause of the fifth amendment).

76. Hamilton may have been an exception. See, e.g., Laycock, *supra* note 41, at 907.

77. See, e.g., Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659; Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

in the framers' era.<sup>78</sup> This connection is all but reversed for the members of the *Everson* Court and many others today.<sup>79</sup>

Moreover, religious nonpreferentialism in the 1780s applied at best to all Christians, and perhaps only to all Protestants. Tolerance for and civic acceptance of Catholics, non-Christians, and atheists was not part of the 1780s view of nonpreferentialism.<sup>80</sup> In the 1780s nonpreferentialism meant something closer to multiple establishment. But this is not its modern meaning.

This example points up the dangers of misunderstanding which occur when seemingly similar terms are taken out of their distinctive historical contexts. There is a very strong tendency to (mis)interpret deceptively familiar concepts taken from another context in terms of one's own context and practices. Confusion or misunderstanding is usually the result. A classic example occurs in the philosophy of science where Thomas Kuhn ponders apparently bizarre statements in Aristotle's *Physics*.<sup>81</sup> Aristotle's term *kinesis* is generally translated in English as motion. But when this is done, Aristotle is made to say things which are patently not true about motion. It was Kuhn's insight that Aristotle's term imported something more general, applying to qualitative as well as quantitative changes of physical objects. This larger understanding made Aristotle's seemingly strange statements more intelligible.

A similar sort of problem presents itself in the nonpreferentialism debate, too. Thomas Curry, for example, argues that despite the fact they use something like our terms, the framers

78. The Bill's preamble states that

Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers, who may be thereby enabled to devote their time and attention to the duty of instructing such citizens, as from their circumstances and want of education, cannot otherwise attain such knowledge; and it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies or communities of Christians.

*Everson*, 330 U.S. at 72 (Rutledge, J., dissenting).

79. Justice Jackson contends, for example, that, "Our public school . . . is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion." *Id.* at 23-24 (Jackson, J., dissenting).

80. See, e.g., Laycock, *supra* note 41, at 918-19.

81. T. KUHN, *THE ESSENTIAL TENSION* xi-xii (1977).

did not really understand the distinction between preferential and nonpreferential aid to religion.<sup>82</sup> Douglas Laycock, on the other hand, argues that they understood the distinction, but rejected nonpreferentialism.<sup>83</sup>

I would argue that the framers understood this distinction, but that they understood it differently than we do. Curry would be right to say that the framers did not understand or foresee the distinction, for example, as it presented itself in Justice Black's dilemma in *Everson*. Laycock is probably also right that the framers rejected nonpreferential aid, at least by the federal government. We reject some nonpreferential aid today, but not necessarily the same aid. We are not today so concerned with preserving state prerogatives or state establishments from federal encroachment. A federal government of limited, delegated powers may still be a constitutional platitude, but it is not a constitutional priority or reality. On the other hand, the establishment clause chafes far more today than it did in the 1780s because it bumps up against broad governmental powers the framers clearly did not specifically contemplate.

#### CONCLUSION

The most tentative and difficult part of this revised opinion is the ending because, having criticized several clear, definitive endings, I have none of my own. Once again let me try to make a virtue of necessity by saying this. Unlike *Brown*, the constitutional conflict in the *Everson* nonpreferentialism situation is far more balanced. There is no clearly correct historical outcome. But then the hermeneutic/pragmatic approach does not guarantee clear right answers in all cases. Some questions will remain unavoidably unresolved on the merits. When historical argument substitutes for historical assertion, there will be cases where there is no clear winner or knock-down argument.

In these situations, substantive considerations must be supplemented with procedural decision methods. These include *stare decisis*, burden of proof schemes, and commitment of the problem to resolution through the political process. The use of precedent to supplement framers' intent has been suggested by Henry Monaghan.<sup>84</sup> A burden of proof approach, using the model provided by Justice Roberts, has been suggested by William van Alstyne.<sup>85</sup> The political commitment

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82. T. CURRY, *THE FIRST FREEDOMS* 207-15 (1986).

83. Laycock, *supra* note 41, at 902-03.

84. See Monaghan, *supra* note 30, at 383-91.

85. See van Alstyne, *Interpreting This Constitution: The Unhelpful*

approach would simply open up some constitutional elbow room, creating a range of constitutionally permissible alternatives between the bounds of the constitutionally mandatory and the constitutionally prohibited. In equal protection terms, one might call this a reduced scrutiny proposal. Once again, the law is chagrined to find that philosophy has promised more answers, but instead provided only more questions.

