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THREE CRITERIA FOR CONSTITUTIONAL INTERPRETATION: PREDICTABILITY, FLEXIBILITY AND INTELLIGIBILITY

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My assigned task is to comment on the papers of Professors Smith and Esbeck. My response is only partial, for there is much in these two very different papers that could be applauded or criticized and too little space to do it; but this response also takes broader aim at some fundamental problems found in most efforts to interpret the clause in the first amendment forbidding Congress from passing a "law respecting the establishment of religion . . . ." I propose three criteria for evaluation of such efforts: predictability, flexibility and intelligibility. The Court's own effort fails on all three criteria, as does most of the commentary from the legal profession.

Predictability and flexibility have long ago won secure positions in the literature and case law as ultimate goals for judicial decisions. Predictability, generally secured by adherence to precedent, is "required for the ordering of human affairs over the course of time and a basis of 'public faith in the judiciary as a source of impersonal and reasoned judgments.'" But, as Justice Frankfurter warned, in an oft-quoted passage: "Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

Predictability means following the plain meaning of a provision; taking pains to construe it as it was intended by the drafters; and following the rules of precedent. Flexibility does not mean corruption of the meaning of the original text, however; it means avoidance of overly rigid adherence to precedent where it will work a manifestly unjust or an unmanageable

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result. The conflict between the two can be harmonized by placing on the courts responsibility strictly to adhere to its own precedent, except where a legislature or a jury has appropriately logged in on the opposite side of the issue. That is, courts appropriately achieve flexibility by deferring to more democratically constituted bodies.

Intelligibility does not receive much attention in case law or law reviews. Its defense rests upon the rather simple idea that the Constitution belongs to everyone, not just lawyers and judges. Principles of democratic participation fundamental to the Constitution argue against a narrow specialty of "constitutio nal law" that is off-limits to the interested member of the public because of the vast scholarship required to deal with it. It is achieved, in part, by attention to universal values and broadly applicable rules. For example, if the Court must ascertain the intent of a written enactment, the same rules ought to apply — if they make any sense at all — regardless of whether it is the intent of the drafters of the first amendment, the intent of Congress in passing a law, the hidden intent to racially discriminate, or the intent courts search for when determining whether a law violates the establishment clause. Finally, intelligibility may also be a matter of good manners — eschewing jargon, and considering the layman's position.

Presumably in an effort to enhance predictability, and perhaps intelligibility, the Court has formulated a test that a statute must pass in order to pass constitutional muster. Such a test is supposed to guide the Court and others when deciding how constitutional values are to apply to a given set of facts. To serve this end, the test itself should be rooted in the language of the provision being interpreted and, only where the language is ambiguous, in legislative history. Of course, the application of the test should follow the rules of precedent. The Supreme Court's test for violations of the establishment clause fails each criterion in this test for principled adjudication.

To begin, the very development of the test was a break with precedent. At one time, the Court decided these cases on the basis of a general principle of neutrality: "[The first amendment] requires the state to be . . . neutral in its relations

with groups of religious believers and nonbelievers... State power is no more to be used so as to handicap religions than it is to favor them.'\textsuperscript{5} Purpose was important; the general rule did not cover laws "whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."\textsuperscript{6} Abington School District v. Schempp began the construction of a more elaborate test, taking up the language about what was not covered to articulate a positive, two-pronged test of intent and impact: "to withstand the strictures of the Establishment Clause[,] there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."\textsuperscript{7} Schempp then became authority for the school aid cases.\textsuperscript{8}

The idea of entanglement was introduced in Walz v. Tax Commission, upholding property tax exemptions for churches.\textsuperscript{9} The entanglement language first appeared to explain what was not covered by the test: the Court ruled that a failure to extend tax exemptions to churches could violate the principle of neutrality.\textsuperscript{10} Once again, however, the explanation of what was not covered was transformed into a part of the test, and the Court voided certain aid programs to private schools because of entangling provisions in the administration of the program.\textsuperscript{11} It is difficult to explain the entanglement criterion in the original terms of neutrality except where the interaction of church and state is so intimate that the government is forced to abandon its neutral position. But in such cases, the entanglement prong is unnecessary. Entanglement has come to imply any close cooperation, however careful the state is to maintain neutrality.

After a number of years of experience with the three-part test, a large number of commentators have noted that it fails as a device for permitting easy prediction of cases.\textsuperscript{12} The Court itself has freely admitted the problem:

\begin{itemize}
\item 5. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
\item 7. 374 U.S. 203, 222 (1963) (striking down prayers and Bible reading in public school). Note that the more complex test was unnecessary in this case, as the Court could easily find prayer and bible reading less than neutral.
\item 10. \textit{Id.} at 674.
What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States — the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth — produces a single, more encompassing construction of the Establishment Clause.\footnote{Worse Confounded, 1978 S. Ct. Rev. 171, 190; Note, Public Aid to Private Schools: Committee for Public Education & Religious Liberty v. Regan, 34 Sw. L.J. 1261, 1271 (1981).}

This admission has drawn deserved criticism. Professor Choper has called it the Court's "euphemism . . . for expressly admitting the absence of any principled rational for its precedent."\footnote{Choper, supra note 12, at 681.} Justice Scalia finds it "embarrassing" enough that he would abandon the test.\footnote{Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J., dissenting). See also Wallace v. Jaffree, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting, citing the same passage from Regan).}

Assuming that flexibility is a goal, it should not be used to enhance some subjective goal of the Court, or to excuse it from its duty of principled adjudication, but to defer in some consistent way to democratic institutions. While the above passage is from a case in which the criterion is properly invoked — the Court upheld a state law allowing private schools cash reimbursement for costs of meeting mandated state testing requirements — there are a large number of other cases where the Court has refused to be flexible.\footnote{The Court's claim to flexibility fails when one considers the two recent cases forbidding use of public school teachers on private school premises. See generally Lines, The Entanglement Prong of the Establishment Clause and the Needy Child in the Private School: Is Distributive Justice Possible?, 17 J.L. & Educ. 1 (1988).} In short, the Court has invoked the criterion of flexibility to avoid dealing with the incongruities of its own precedent.

With neither predictability nor flexibility served, the test fails. The failure is exacerbated by the failure of the Court on the third criteria proposed here: intelligibility. A serious problem arises when persons untrained in constitutional law attempt to understand the test. The Court has so utterly failed


\footnote{14. See supra note 12, at 681.}

to explain itself that it is constantly misunderstood and miscon-strued, encouraging widespread abuse of its principles. The distorted application of the Court’s test provides convincing evidence that it is unintelligible to average citizens. To take some examples:

- Publishers of public school texts routinely censor religious references from classic works.17
- A school book editor deleted the words “God,” “Bible,” “Jews,” “Sukkos,” and “Tabernacle” and a key topic sentence, “The Pilgrims got the idea for Thanksgiving from Jews like Molly and her mama,” from Barbara Cohen’s prizewinning story “Molly’s Pilgrim” gutting the heart of the story. Cohen fought back, but the final version was not much improved.18
- An Alabama high school has for years offered a social studies class on comparative religion. Midway into the year the course was abruptly cancelled.19
- Public school libraries have refused donated books that have religious content, or that, in some cases, simply take a position that is sometimes associated with a religious point of view.20
- Student distribution of Bibles has been prohibited in some public schools; so has distribution of pro-life literature, despite constitutional principles that uphold the rights of students in school to distribute literature subject to reasonable rules as to time and place.21

17. For example, a story by Nobel laureate Isaac Bashevis Singer, “Zlateh the Goat,” tells of a boy, lost in a blizzard, who prays “to God” for himself and his goat, lost with him. In an edited version appearing in the Macmillan Grade 6 reader, CATCH THE WIND, the boy prays, but the phrase “to God” is deleted. When the boy is rescued, Singer’s sentence, “Thank God that in the hay it was not cold,” is changed to “Thank Goodness . . . .”
19. Letter from Charlene Jones (the teacher of the course) to Dr. Nicholas Piediscalzi, President of the NCRPE (Apr. 22, 1987).
21. In Florida, a girl who gave a book report on the New Testament and distributed copies to friends was hauled off to the principal’s office. All copies of the New Testament were confiscated, including her personal copy. She was told that she could not quote the Bible in her book report. In other districts, students have been in big trouble for giving friends copies of the Bible as Christmas presents. Telephone interview with Tom Parker (Dec. 1, 1987).
Individuals who would include attention to religion clauses in the first amendment in teacher workshops or other seminars are often told to avoid such material.\textsuperscript{22}

A child in Oklahoma, caught bowing his head to pray before taking the math section of a standardized test was taken to the principal's office and ordered to write "I will not pray in class" 500 times.\textsuperscript{23}

Empirical research has demonstrated that these anecdotal cases are the rule, not the exception. Comprehensive reviews of public school texts reveal a strong tendency to avoid even a mention of contemporary religious thought or activity, leaving a message that the good society is profoundly secular. In the most well-known of these studies, New York University professor Paul Vitz examined 60 elementary school social studies texts and 22 basal readers.\textsuperscript{24} He found that none of the approximately 15,000 pages in 60 books examined had even one written reference to primary religious activity in contemporary American life. Secondary religious references (e.g., a picture of a church or a map that includes the site of a church) to contemporary American life were also rare.\textsuperscript{25}

Some scholars\textsuperscript{26} were prepared to dismiss these findings based upon a presumption that the ideological bias of the


\textsuperscript{23} Telephone interview with B.F. O'Neal, attorney for the child, in Shreveport, La. (Mar. 10, 1987).

\textsuperscript{24} Vitz examined all social studies texts adopted by the two major powers in textbook selections, Texas and California, with all those adopted in Georgia and Florida thrown in for good measure. Vitz estimated that these books represented an estimated 70 to 75\% of all such texts used in public schools throughout the country, based upon an examination of the frequency with which they were selected by all 22 states having a statewide adoption process for texts. The 22 basal readers for grades 3 and 6 represented all the basal readers approved in California and Texas.


researchers tainted the work, but this became impossible following two additional studies by organizations with the opposite ideological bias. Americans United Research Foundation examined United States history, government, and civics textbooks, and found that "religious freedom" and "church-state separation" were topics that were largely ignored. While the general bias of Americans United would lead it to stress the constitutional treatment of religion, and not religion itself, the study also acknowledged the failure to present anything on the positive role of the Judaeo-Christian heritage: "there is little or nothing about . . . the significant religious 'awakenings,' the struggles of minority faiths, the religious motivation of immigrants, and other related themes central to a proper understanding of American history."27 People for the American Way (PAW) has also very generously and appropriately acknowledged the problem. The organization was near completion of a review of major United States history textbooks undertaken for other purposes. Recognizing the importance of the Vitz findings, PAW reviewed the books to see how they treated religion. In the preface to its report, Anthony Podesta, PAW's executive director, reports:

Religion is simply not treated as a significant element in American life — it is not portrayed as an integrated part of the American value system or as something that is important to individual Americans. The two themes which have been in tension since the earliest colonial times — religious intolerance and religious idealism — are not recognized as essential to an understanding of the American character.28

It seems the public needs more intelligible guidance from the Court, and if not the Court, from academic apologists for the Court. The two papers offered here do not really resolve the problem. Professor Esbeck reviews the chaos in current establishment clause jurisprudence but ends by lamely defending it. Professor Smith proposes a new standard, although he declines to call it such; and we do not really know how it will apply in the myriad situations where the establishment clause may be relevant.

Professor Esbeck's defense makes an already complicated matter more complicated. For example, when discussing the

27. C. Haynes, supra note 22, at 57.
Court's test for intent, he confuses the individual purpose, or motive, of individual legislators with the official purpose of the enactment — the collective purpose motivating the legislature as a whole.\(^{29}\) Second, he appears to consider the Court's deference to legislative bodies a unique aspect of adjudication under the establishment clause.\(^{30}\) As already noted, this is a normal way of achieving flexibility in adjudication. There are other good reasons for doing so as well, mostly relating to the Court's proper concept of its own function and principles relating to a separation of powers in government. Professor Esbeck's apparent discomfort over what he calls "highly deferential inquiry" is the Court's normal rule, not an exception developed for the purpose of the establishment clause. Esbeck adds to the general confusion in asserting that the Supreme Court once had used "political divisiveness" as part of its test for establishment;\(^{31}\) it was never really clear that a majority of the Court adopted this language as a part of its test.\(^{32}\) Finally,

\(^{29}\) Esbeck asserts that the Court is "not abandoning motive-analysis altogether" in decisions under the establishment clause. Esbeck, *The Lemon Test: Should It Be Retained, Reformulated or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'y 513, 517 (1990). He fails, however, to offer any real support for the view that a majority is engaging in motive analysis at all. In fact, much later in his article, he correctly notes that the search for purpose is a search for "objective purpose." Id. at 536.

Esbeck also suggests that the Court avoids "motive analysis" when adjudicating other provisions of the Constitution. This needs clarifying. In Palmer v. Thompson, 403 U.S. 217 (1971), the Court made it clear that it would not inquire into individual motivation when the official purpose of an enactment is unambiguous. The Court upheld the closing of a swimming pool, refusing to consider off the record evidence that avoidance of an integration order motivated the decision, despite a challenge under the equal protection clause. Official purpose nonetheless remains the test in such cases. *See* Washington v. Davis, 426 U.S. 229 (1976) (purpose and not disproportionate impact determines validity of employment test). *See also* Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (refusal to rezone upheld, despite disproportionate exclusion of lower income residents and minorities). The same distinctions apply to adjudication under the establishment clause.

Justice Scalia also may be confusing individual motive and legislative purpose, when he engages in a diatribe on the vagaries of judging a statute by legislative motive. *See* Edwards v. Aguillard, 482 U.S. 578, 636-39 (1987) (Scalia, J., dissenting). It is possible, however, that Scalia is only accusing the majority of deciding that case on the basis of "subjective motivation" rather than official purpose. Scalia freely admits that it is possible to discern the "objective 'purpose' of a statute." Id. at 636.

\(^{30}\) Esbeck, *supra* note 29, at 516.

\(^{31}\) Id. at 528.

\(^{32}\) In Lemon v. Kurtzman, 403 U.S. 602, 622 (1971), the Court said "political division along religious lines was one of the principal evils against
Esbeck's discussion of the role of "inherently religious" institutions, laws, and other items is needlessly confusing. The term is a term of art only when applied to institutions, but Esbeck seems to make it a term of art applicable to laws and policies as well.

On the other hand, Professor Esbeck does a very nice job of exposing the inconsistencies in the Court's application of its test for impermissible effects when it is dealing with parochial schools, compared to all other occasions. After such a devastating demonstration of the foibles of the Court's approach, it is all the more puzzling that he concludes by defending the status quo.

Professor Smith's analysis argues for more flexibility for the Court, rather than for legislators, in dealing with the establishment clause, but he bases this argument on the intent of the framers of the first amendment to keep the language flexible. This analysis retains respect for the wording of the amendment — the first point of inquiry in determining the intent of an enactment. However, even if the history he cites may convince one that the drafters intended a flexible meaning, he must still make a case that they intended the Court to wield its power without deference to legislatures. Moreover, as I think Professor Smith would agree, the language still restrains interpretation: one cannot, for example, construe "establishment" to mean "accommodation," without violating some very basic rules of interpretation. In general, I find Smith's analysis helpful, although what he calls a principle of nonpreferentialism, I prefer to call a principle of neutrality, for this is the language that the Court itself at one time endorsed.

Somewhat troublesome is the vagueness with which Professor Smith presents his "liberty maximizing" principle. In particular, this principle fails to resolve the case where the liberty of two opposing groups of citizens are pitted against each other — an often unavoidable situation where public schools

which the first amendment was intended to protect." In Committee for Pub. Educ. and Religious Liberty v. Nyquist, 415 U.S. 756, 797-98 (1973) it said that "the prospect... of divisiveness may not alone warrant the invalidation of state laws," and called it a "warning signal." See also Meek v. Pittenger, 421 U.S. 349, 365 n.15 (1975). Reviewing this meandering line, Professor Choper has concluded that it was unclear whether political divisiveness was an independent test, a warning signal or merely supportive rhetoric. Choper, supra note 12, at 683.

33. Esbeck, supra note 29, at 521, 528.

34. It also avoids the creation of new "isms," needlessly adding to the jargon of constitutional law.
present, as they must, value-laden curricular material. I refer to material that is not religious, but which many groups address with strong religious referents. In such cases, public officials must choose sides, that is, they must prefer one or the other, or abandon the value-laden curriculum. The question, then, is: Whose liberty is to be maximized? It is not enough to assume, as Professor Smith seems to assume, that legislation is always oppressive and therefore judicial invalidation of it is always a step toward maximizing liberty. Indeed, to take another example, legislatures may intend to secure liberty and equal opportunity for the disadvantaged, by allowing them the same freedom as those who can afford to choose their education or other services from the institution they prefer.

Second, I quite frankly do not see how Professor Smith’s liberty-maximizing principle can explain the Court’s stringent approach in the school aid cases, where children who cannot afford anything else are forced to attend secular, public schools. Aptly-named compulsory education laws supply the coercion. State and federal efforts to remedy the impact of the coercion are neutral to religion. Yet, most of them fail the Court’s test. Professor Smith’s analysis simply does not even speak to cases of this sort, let alone guide us toward a better way to predict their outcome.

While it is of course true that broad general principles underlie the first amendment, widely varying, specific cases must nonetheless be decided. A general principle of neutrality toward religion — including sincere conscientious beliefs in the definition of religion — is closer to the broad and general phrasing of the religion clauses than is the Court’s intricate three-pronged test. But its vagueness led the Court to search for a more specific set of rules. The task remains, however, of shaping these rules in an intelligible manner.