Science, Freedom of Conscience and the Establishment Clause

Kyron Huigens*

I. INTRODUCTION

In 1976, despairing over recent decisions which seemed to "tilt the Constitution against religion," David Louisell was driven to ask:

Of course we all know and acknowledge that the first amendment precludes, and rightly so, preference for any religious denomination. But is there not a core of common religious understanding at the heart of American institutions—are we not in fact, as once proclaimed, "[a] religious people whose institutions presuppose a Supreme Being?" Is there not something of a common denominator that sometimes is identified as America's civil religion?1

The answer is no. Justice Douglas's dictum is simply wrong. The Constitution presupposes no Supreme Being, institutes no particular truth and contemplates a legal order that is similarly open. The establishment clause2 maintains constitutional democracy on those terms by invalidating any encroachment on freedom of conscience which religion wielding the power of the state can devise.

This Article is an extended defense of that strong conception of the establishment clause. It is in part a reply to those, like Louisell, who have argued that strict construction theories of the clause "establish" something called "The Religion of Secular Humanism."3 It is in part an attack on the idea that

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3. See infra notes 153, 201-203 and accompanying text. See McGarry, The Unconstitutionality of Exclusive Governmental Support of Entirely Secularistic Education, 28 CATH. LAW. 1 (1983); Toscano, A Dubious Neutrality: The Establishment
the establishment clause mandates accommodations of religion beyond what the free exercise clause requires. It is in part an attempt to dispel the confusion in the cases on which both of those arguments rely. Above all, however, this article is an attempt to give a definitive account of the liberal conception of the Constitution and the clause which apologists of religion have decried for decades, but which has never played the role


4. See infra text accompanying notes 264-90.

5. See infra text accompanying notes 89-111 and 315-49.

6. It is worth a few lines to defend this contentious idea. The Critical Legal Studies [hereinafter CLS] movement has produced a large body of literature purporting to have demolished the liberal conception of law. That body of work presents a fundamental challenge to the analysis presented here. See M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); THE POLITICS OF LAW (D. Kairys ed. 1982); R. UNGER, KNOWLEDGE AND POLITICS 29-144 (1975).

Only one point of the CLS critique bearing directly on my analysis is addressed in the body of this article. The very notion of freedom of conscience rests on a liberal conception of the individual as an autonomous being. The concept of the individual is a favorite target of CLS scholars, as it has always been for anti-liberal theorists of the left and right. See, e.g., R. UNGER, supra, at 228-29; Heller, Structuralism and Critique, 36 STAN. L. REV. 127, 163-7 (1984). Notes 224, 225, 229, 230, and 231, infra, form a more or less continuous essay responding to a leading criticism along these lines advanced by Michael Sandel.


In any event, this article, while liberal in orientation, by no means relies on a naive epistemology. My thesis rests in part on the work of the philosopher Karl Popper, who mounted an influential attack on logical positivism while Wittgenstein was still a true believer. See infra notes 14, 151, 152 and accompanying text. Furthermore, one of the clearest manifestations of liberalism's roots in pragmatism is the role of coherence theories of truth in its leading formulations. Stick, supra at 363. See R. WALKER, THE COHERENCE THEORY OF TRUTH (1989). The foremost example is John Rawls's method of seeking considered opinion in reflective equilibrium. See infra note 224. This article relies heavily on Rawls and shares his epistemological premises. See infra text accompanying notes 219-31.
in the cases which those apologists, in their anxiety, ascribe to it.

Despite the fact that this article advances a strict construction of the establishment clause, I begin with a premise my religious opponents share. In construing the establishment clause, there is no refuge in the notion of neutrality. If science is taught in public schools and religion is not, then the secular has been preferred over religion. If one contends, as I do, that the Constitution mandates that preference, then the preference must be justified.

On the assumption that we can take science as a paradigm of the secular, I will argue that there is a deep congruence between the scientific method and core constitutional values which justifies granting secular ways of understanding preferential treatment over religious beliefs. Building on that congruence, this article will propose and defend a test of validity under the establishment clause which is derived from an influential theory in the philosophy of science. The test is grounded in the Constitution by its attention to a constitutional value which has been slighted in the establishment clause cases: freedom of conscience. The proposed test provides that: Legislation or executive action is invalid under the establishment clause when it has the effect of advancing belief not falsifiable in principle.

There is no harm in admitting at the outset that my account of the establishment clause bears little resemblance to the current state of the law. The current state of the law under the clause is chaos; something widely recognized.\(^7\) Accordingly, part II of this Article presents a diagnosis of Lemon v. Kurtzman,\(^8\) the case which framed the Court's cur-

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rent, inadequate, three part test. While dispelling some of the confusion arising from *Lemon* might be good in itself, my main purpose is to show how the flaws of *Lemon*, and the resulting confusion, have been exploited by those Justices determined to accommodate religion. I then identify a countervailing line of cases which has been completely dominated by the accommodationist tradition. From that countervailing line of cases, I derive my alternative test of validity under the establishment clause.

Part III examines the case of *Edwards v. Aguillard*, in which the Court overturned Louisiana's statute requiring the teaching of creationism. Issues of evidence, belief, faith and science dominated *Aguillard*, and that case is the best means of identifying that quality of religious belief which differentiates it from other systems, like science, which do not offend the establishment clause. I focus on Sir Karl Popper's definition of science and his notion of falsifiability in principle.

Part IV lays out the fundamental conception of the Constitution on which the test of falsifiability rests. As I have indicated, it is a liberal Constitution. I recast the procedural

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9. See infra text accompanying notes 22-88.
10. See infra text accompanying notes 89-99.
11. See infra text accompanying notes 100-12.
14. See infra text accompanying notes 139-52. Karl Popper was born in Vienna in 1902, the son of an accomplished lawyer. He received his doctorate in psychology, but abandoned that field soon after in favor of philosophy. He left Austria in the late 1930s, settling first in New Zealand and, after the war, in London. He taught at the London School of Economics until 1969. He was knighted in 1965. The best critical introduction to Popper is A. O’HEAR, KARL POPPER (1980).

Long before Wittgenstein did so, Popper rejected logical positivism and its dream of "a system of absolutely certain, irrevocably true statements as the end and purpose of science." K. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 37 (1959) [hereinafter K. POPPER, LOGIC]; K. POPPER, LOGIK DER FORSCHUNG (1935). In this respect, Popper's notion of falsifiability has a natural affinity with the deontological liberalism of John Rawls. See J. Rawls, *Kantian Constructivism in Moral theory: The Dewey Lectures 1980*, 77 J. PHIL. 515 (1980). Drawing out that affinity is one of the objects of this article.

A comprehensive reformulation of liberalism on Popperian premises would be a useful exercise, but it is not my purpose here. I intend only to adapt an isolated element of Popper's thought—the notion of falsifiability in principle—to the problems presented by the establishment clause. See infra notes 144-45 and accompanying text and Part V. Popper himself drew largely the same connections between falsifiability, the nature of political authority and pluralism. K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES (5th ed. 1966); K. POPPER, THE POVERTY OF HISTORICISM (2d ed. 1960). See A. Ryan, *Popper and Liberalism* in POPPER AND THE HUMAN SCIENCES (Currie ed. 1985).

15. See infra text accompanying notes 166-216.
Constitution described by John Hart Ely in *Democracy and Distrust* as the deontological Constitution, arguing that the Constitution rests on premises similar to those underlying John Rawls's theory of justice.\(^\text{16}\)

In Part V, I draw together the notions of the deontological Constitution and falsifiability in principle, establishing the fundamental connection between the establishment clause and freedom of conscience.\(^\text{17}\)

Part VI applies the test of falsifiability to the cases, a process which subjects it to a useful strain and provides an opportunity to explicate its various elements.\(^\text{18}\) I then address two outstanding issues in establishment clause theory in light of the test: Justice O'Connor's "no endorsement" test\(^\text{19}\) and the validity of accommodations of religion not required by the free exercise clause.\(^\text{20}\) Finally, I show how the test would treat the major conflicts in the case law.\(^\text{21}\)

**II. A Diagnosis of Lemon v. Kurtzman**

In *Lemon v. Kurtzman*, Chief Justice Burger presented the now familiar three-part test as a distillation of prior case law.

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive governmental entanglement with religion."\(^\text{22}\)

Given that the cases were already marked by inconsistencies and flawed premises, the erratic results produced by the *Lemon* test should have surprised no one. Nevertheless, the criticism has been sharp. In practice, it has been said, the test "means everything and nothing."\(^\text{23}\) Professor Kurland has

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16. See infra text accompanying notes 166 & 190-99.
18. See infra text accompanying notes 240-65.
20. See infra text accompanying notes 287-90.
21. See infra text accompanying notes 292-349.
called it nothing but "words, words, words."\textsuperscript{24} Professor Mansfield expanded on that sentiment by writing:

The principal fault with the Court's decisions under the religion clauses is their failure to come to grips with the fundamental philosophical questions that these clauses inescapably present. More often than not the necessity of confronting these questions is obscured by the incantation of verbal formulae devoid of explanatory value. . . . That legislation must not have as its "purpose" or "primary effect" the aiding or inhibiting of religion, we have learned very well, but by repeating these slogans we come no closer to understanding what is really at stake. The Court stultifies itself by repeated use of these phrases.\textsuperscript{25}

While largely accurate and motivated by an understandable frustration, these comments mislead in suggesting that the Lemon test is a purely arbitrary formula. The test is plainly flawed, but its flaws have causes. The test was derived from cases with their own history and logic, and it is there one must look in order to understand the test's weaknesses.

\textit{A. Everson and the Inversion of Purpose and Effect}

The three prongs of Lemon are not of equal importance; the effects prong is logically prior to both purpose and entanglements. Legislative purpose would be an irrelevant abstraction but for the fact that a legislature has the means to put its intent into effect. Most invalidating entanglements are created in vain attempts to avoid invalidating effects, a Catch-22 that frequently has been commented on.\textsuperscript{26} This being the case, the central defect of the Lemon test is not hard to discover. It is that the Court has no clear idea what beneficial effect on religion it wishes to condemn or why.

Historically, the purpose and effect tests of Lemon are an outgrowth of the "incidental benefits" theory promulgated in \textit{Everson v. Board of Education)—the first modern establishment clause case.\textsuperscript{27} In Everson, the Court upheld a resolution of a New Jersey school board which reimbursed parents of

\textsuperscript{24} Kurland, \textit{supra} note 7, at 15.

\textsuperscript{25} Mansfield, \textit{supra} note 7, at 848.

\textsuperscript{26} Lemon, 403 U.S. at 688 (White, J., concurring and dissenting); L. Levy, \textit{supra} note 7, at 131.

\textsuperscript{27} Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947). \textit{Everson} was the first case to apply the establishment clause to the states via the fourteenth amendment. \textit{Id.} at 15. Beyond that, several commentators have argued that it signalled the Court's
Catholic school children for the cost of their children's travel to and from Catholic schools on public busses. Justice Black argued for the majority that the challenged resolution merely provided a general benefit to all its citizens which incidentally benefitted Catholic school children. He compared the transportation reimbursement to fire and police protection and access to public utilities and concluded that the resolution was valid because the establishment clause does not require the exclusion of parochial schools from general government benefits.  

While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs.

The important thing to note in the Everson opinion is that the Court's brief inquiry into effects was undertaken only for the light it shed on legislative purposes. After determining that the legislation's aiding religion was incidental to the legislature's main purpose, the Court never returned to the issue of effects on religion per se. Effects were considered only insofar as they indicated a legitimate purpose.

McGowan v. Maryland, decided fourteen years later, upheld Maryland's Sunday closing laws, or "blue laws," on the same incidental benefit theory. The opinion followed Everson's method: to discover a legitimizing legislative intent behind the Sunday laws. The Court reasoned that, regardless of their origin in Christianity, the laws currently were intended to operate as health regulations, ensuring a day of

abandoning a preference for traditional theism in religion clause analysis. Comment, supra note 3, at 342-43; Louisell, supra note 1, at 24.

29. Id. at 16.
30. Justice Jackson pointed out in dissent that the school board's resolution explicitly included students attending Catholic schools and pointedly excluded those attending other private and parochial schools. That pattern of conscious inclusion and exclusion belied the notion that the benefit to the Catholic schools was merely incidental. Id. at 20 (Jackson, J., dissenting). The critical point however is that both Black and Jackson address only the question of legislative purpose, Jackson using statutory construction and Black an evaluation of legislative purposes and the legislative process.
32. Id. at 443-45.
rest for the labor force. The Court noted the laws’ substantial benefit to religion only to argue that it was incidental to that purpose and therefore supported the conclusion that the legislature had not acted with an illegitimate purpose.

We do not hold that Sunday legislation may not be a violation of the “Establishment” Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the state’s coercive power to aid religion.

The flaws in both Everson and McGowan are the Court’s exclusive concern with legislative purpose and its subordinating the distinct, and prior, question of effect to that inquiry. Under any plausible theory of judicial review, the Court is entitled to strike down legislation not because the legislature has an illegitimate intent—as if it were culpable and ought to be punished by the frustration of its will—but because the legislation adversely affects interests protected by the Constitution and should therefore not be allowed to operate. As noted above, legislative intent is relevant only because the legislature presumably has the means to carry its intent into execution. Effect, not purpose, is the key factor.

In Everson and McGowan, the Court betrays no recognition of this. The opinions treat the subject laws’ effects on religion only as indicators of legislative intent, without returning to the question of what adverse effects are likely to follow from that intent once it is put into execution. Consequently, the opinions shed no light at all on why certain effects are unacceptable under the establishment clause. By the time effects on religion was designated as a distinct inquiry, in Abington v. Schempp, the Court was well on its way to chaos. Relying on Everson and McGowan, the most one can say about

33. Id. at 445-49. The Court examined the statutory language and history extensively. Despite references to the “Lord’s day” and to “profan[ing] the Lord’s day,” the laws had been reenacted a number of times, with an accretion of exceptions. By 1960, the Sunday laws permitted the sale of tobacco and alcohol, the operation of bathing beaches and amusement parks and the playing of pinball machines, slot machines and bingo. These exceptions supported the inference that the legislature had a legitimate secular purpose: rest for the labor force.

34. Id. at 431-34.

35. Id. at 453 (emphasis added).

36. In McGowan, the inversion is explicit. Id.

any given effect is that it does or does not indicate an improper legislative purpose—limited guidance, to say the least.

This flaw is especially clear in *Board of Education v. Allen*, probably the most troublesome of all establishment clause cases.\(^38\) New York's Education Law, as amended in 1965, required local public school administrators to lend textbooks to all school children, including those in private, parochial schools.\(^39\) In *Allen*, the Court upheld the law against an establishment clause challenge.\(^40\) It reasoned that, since parochial schools had a recognized role in providing secular education,\(^41\) the legislature had a legitimate purpose in lending textbooks on secular subjects.\(^42\) The Court recognized that, as a practical matter, this resulted in a benefit to the parochial schools, but judged this a permissible incidental benefit.

Books are furnished at the request of the pupil and ownership remains, at least technically, in the state. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.\(^43\)

Once again, the Court treated the effects inquiry as a purely secondary, subordinate means of exposing illegitimate legislative purposes.

The express purpose of § 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. *Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose.* The law merely makes available to all children the benefits of a general program to lend school books free of charge.\(^44\)

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\(^{39}\) N.Y. EDUC. LAW § 701 (McKinney 1967 Supp.).

\(^{40}\) 392 U.S. at 248.


\(^{42}\) 392 U.S. at 247-48.

\(^{43}\) *Id.* at 243-44.

\(^{44}\) *Id.* at 243 (emphasis added).
Thus, when Justice White concluded that the incidental benefit to parochial schools did not "demonstrate an unconstitutional degree of support for a religious institution," he meant that it was not so extreme or predominant as to indicate that the legislature's stated purpose was a sham. He did not consider whether the effect, in and of itself, was so extreme as to constitute an establishment.\textsuperscript{45} Relying on \textit{Everson} and \textit{McGowan}, he treated the legislation's effect only as an indicator of fatal illegitimate intent.\textsuperscript{46}

The consequences of all this should be obvious. Because \textit{Everson} misconstrued the relation of purpose to effect, treating effect merely as an indicator of purpose, it gave no content to the critical notion of impermissible effects on religion. Even more disastrously, its "incidental benefits" theory provided no framework within which that analytical content could or would ever develop. In addition, since legislative purpose can be defined only by reference to actual effects, the purpose inquiry too has remained empty, despite the fact that \textit{Everson} and progeny treated legislative purpose, rather than effect, as the determining factor in establishment clause analysis. The result is that Lemon's purpose and effects tests are perfectly circular and perfectly empty.\textsuperscript{47}

\textsuperscript{45} Justice White explicitly disavowed considering the actual effects of the statute in practice, citing an inadequate record. \textit{Id.} at 248.

\textsuperscript{46} This sort of reasoning persisted even after \textit{Abington} and then Lemon explicitly stated the effects test as an inquiry distinct from legislative purpose. In \textit{Committee for Public Education v. Nyquist}, for example, the Court invalidated cash grants and tax credits to parochial school parents despite New York's argument that the benefit to the school was indirect. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973). The Court reasoned that the benefit's being indirect was not sufficient to rebut the (unsupported) assumption that the legislature's purpose was to advance the schools' mission.

Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the state seeks to relieve their financial burdens sufficiently to assure that they continue to send their children to religion-oriented schools.\textit{Id.} at 783. As in \textit{Everson}, \textit{McGowan}, and \textit{Allen}, the Court's decision turned on bad legislative intent: the beneficial effect on religion was treated merely as an indicator of that intent.

\textsuperscript{47} I will not concentrate on the weaknesses of Lemon's entanglement prong, since they are peripheral to my argument. The difficulties have been well described elsewhere. Choper, \textit{supra} note 7, at 681-85. I will only note that Choper discredits only two types of entanglement: administrative entanglements and the threat of political divisiveness. Those two theories were advanced in Lemon at 403 U.S. 619-22 & 622-24, respectively. Lemon, however, advanced a third theory of entanglement which Choper does not address: the threat of religious indoctrination by the state, or with
Thus, much of the confusion commonly attributed to *Lemon* is ultimately attributable to *Everson*. For example, the most notorious of the many conflicts under the establishment clause is that between *Allen* and *Meek v. Pittenger*. Allen held, as noted above, that the state may lend books on secular subjects to parochial schools. In *Meek*, however, the Court determined that instructional equipment—globes, projectors, and so on—could not be loaned on the same basis. The result is arrant nonsense, as described by Justice Rehnquist in his dissent in *Wallace v. Jaffree*:

For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the state may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.

No one has yet seen a way to reconcile *Allen* and *Meek*, least of all the Court itself. It frankly admitted as much in *Wolman v. Walter*, pledging not to extend the "unique presumption" of *Allen*. Allen, however, is a straightforward application of *Everson*’s "incidental benefits" theory: the ultimate, and indefensible, root of the conflict.

*Everson* is also clearly to blame for the conflict between *Committee for Public Education and Religious Liberty v. Nyquist* and *Mueller v. Allen*. In both cases, a state reimbursed parochial school parents for tuition and expenses by way of tax benefits. *Nyquist* invalidated the New York legislation, expressly rejecting the argument that the parents’ intervening decisions concerning the use of the money negated the benefit to religion. In *Mueller*, however, Justice Rehnquist
expressly relied on that ground in upholding the challenged benefits.\textsuperscript{56} Rehnquist distinguished \textit{Mueller} from \textit{Nyquist} by contending that the Minnesota tax scheme provided benefits to all private schools, not just parochial schools.\textsuperscript{57} Unlike the New York scheme, the benefit to religion in Minnesota was incidental, and therefore legitimate.

As we have seen, however, \textit{Everson}'s "incidental benefits" theory is a non-sequitur. The premise is that the benefit is incidental; the conclusion is that the legislation is valid under the clause. All that follows from the premise, however, is that the legislature has some legitimate purpose; that some intended effects of the legislation are secular effects. The legislation might have still other effects which infringe on interests or values protected by the clause. If so, the benefit to religion violates the clause, incidental or not.

\textbf{B. Zorach, the Established Church and Questions of Uncalibrated Degree}

While \textit{Everson} failed to frame the question of invalidating effects adequately, it did identify one such effect: the creation of an established church.\textsuperscript{58} Furthermore, the Court made it clear in \textit{Everson} and in subsequent cases that the clause prohibits more than an actual state church.

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 \textit{vice versa}.\textsuperscript{59}

\textsuperscript{56} 463 U.S. at 399.
\textsuperscript{57} \textit{Id.} at 398.
\textsuperscript{58} 330 U.S. 1, 15 (1947).
\textsuperscript{59} \textit{Id.} at 15-16.
The theory implicit in Everson's oft-cited list is that each of the forbidden practices is a substantial step toward full establishment. What has been missing from Everson and subsequent cases, however, is a reliable scale on which to judge these steps toward that illegitimate goal.

One year after Everson, in Illinois ex rel McCollum v. Board of Education, the Court held that religious classes conducted on school premises during the school day, albeit by non-public employees, violated the establishment clause. Justice Black wrote the opinion in bold strokes:

The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.

In 1951, however, the Court backed away from McCollum's broad formulation. The program at issue in Zorach v. Clauson was slightly distinguishable from that in McCollum. Students whose parents so desired were released from classes to receive religious instruction, as in McCollum, but the classes were conducted off school premises. The Court found this distinction dispositive and upheld the program. As the dissenters pointed out, this contradicted McCollum, since the compulsory attendance laws of New York were used to provide pupils for religious instruction, just as those of Illinois had been. Justice Douglas argued for the majority, however, that what McCollum had treated as a yes or no issue—Is there a benefit to religion?—was a question of degree.

60. Lemon v. Kurtzman, 403 U.S. 602, 612 (1970) ("A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.").
62. Id. at 209-10.
63. 343 U.S. 306 (1952).
64. Id. at 315.
65. Id. at 316-17 (Black, J., dissenting).
66. Id. at 314. Amazingly, Justice Douglas cites McCollum for this proposition. While the Court in McCollum declined to consider released time programs not before the Court, it did so apparently on the ground that to do so would violate the "case or controversy" limitation on the Court's jurisdiction. U.S. CONST. art. III, § 2. Far from
This theory grants a generous license for aid to religion, as was amply demonstrated in *Walz v. Tax Commissioner*. The Court upheld New York's real estate taxation exemption for properties used for religious worship—obviously an enormous governmental benefit to religion. The opinion quotes Zorach to the effect that "we are a religious people whose institutions suppose a Supreme Being," and that "[w]hen the state encourages religious instruction... it follows the best of our traditions. For it then respects the religious nature of our people...." The opinion then proceeds to analyze the issue on Zorach's premise: the legislation is invalid only to the extent it threatens an actual establishment. There was no impermissible religious purpose, because "[w]e cannot read New York's statute as attempting to establish religion." There was no impermissible beneficial effect because: "There is no genuine nexus between tax exemption and establishment of religion." The heart of the *Walz* opinion is the contention that if the tax exemption were likely to lead to full establishment, it would have done so already, given the long history of such exemptions: "Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion...."

What the Zorach analysis ignores, however, is the fact that full establishment is an extremely remote eventuality, even

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saying that establishment clause questions are questions of degree, the *McCollum* opinion states, at the very page cited by Douglas:

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and state speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the state is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

333 U.S. at 231.
68. *Id.* at 672 (quoting Zorach v. Clauson, 343 U.S. at 313).
69. *Id.* at 672 (quoting Zorach v. Clauson, 343 U.S. at 313-14 (emphasis omitted)).
70. *Id.* at 673.
71. *Id.* at 673.
72. *Id.* at 675.
73. *Id.* at 678.
with aid on the order of property tax exemptions.\textsuperscript{74} Given that full establishment is so unlikely, taking it as our ultimate standard leaves us with no standard at all. The consequences are twofold. First, the lack of a realistic, workable standard means that, in practice, anything can be legitimized. There is no better illustration of this than \textit{Walz}. Second, making judgments of degree with no scale is an exercise in drawing arbitrary lines. One legacy of \textit{Zorach} has been repeated and chaotic attempts to gauge questions of uncalibrated degree, based on the extremely remote eventuality of an established state church.

\textit{Lemon} itself institutionalized the \textit{Zorach} approach, stating that the central inquiry of establishment clause analysis is the degree to which the challenged legislation makes eventual establishment of a church more likely.

A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always identifiable as one violative of the Clause. A given law might not \textit{establish} a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.\textsuperscript{75}

In the space of a few pages, however, the Court demonstrated the incoherence of the \textit{Zorach} approach. \textit{Lemon} struck down salary subsidies to parochial school teachers and reimbursements to parochial schools of the cost of secular instruction.\textsuperscript{76} The Court distinguished \textit{Walz} by concluding that, while property tax exemptions had not led to an established church, cash payments to parochial schools and their teachers might do so.

\textit{[M]odern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set

\textsuperscript{74} \textit{See} Everson v. Board of Educ., 330 U.S. 1, 8 (1947).
\textsuperscript{75} 403 U.S. at 612 (emphasis added).
\textsuperscript{76} \textit{Id.} at 607.
in motion but difficult to retard or stop. ... The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies.\textsuperscript{77}

This undermined Zorach's "question of degree" theory in several ways. First, the idea that salary subsidies for school teachers might lead to an established church where property tax exemptions for churches had not is implausible on its face. The argument certainly does nothing to enhance Zorach's intuitive appeal. Second, it is difficult to see why Lemon's reasoning on this point could not apply to the tax exemptions of Walz. Granted that the tax exemptions had been in existence for some time, their validation by the Court certainly gave impetus to efforts to validate other aid to religion. Third, the passage is a tacit admission that one cannot gauge the degree to which any particular legislation advances the day a state church is established. Part of the reason for this is the impact of the Court's own decisions on the issue, but this is only an exacerbating factor in an inherently vague situation. We do not know "where the 'verge' of the precipice lies" because our ultimate invalidating effect—full establishment—is too remote to provide any realistic guidance in particular cases.

For example, in Tilton v. Richardson the Court validated a federal statute which granted money to sectarian colleges and universities for the construction of buildings limited to secular uses.\textsuperscript{78} The Court found no invalidating effect, despite the fact that the federal money obviously allowed the religious institutions to shift their own resources to sectarian uses. By creating that ability, Congress extended a substantial benefit to religion. The plurality denied that the benefit was of sufficient magnitude to violate the establishment clause, but offered no coherent explanation why.\textsuperscript{79}

Zorach, Walz and Lemon would frame the issue in Tilton this way: Is enabling a church-affiliated college to shift funds

\textsuperscript{77} Id. at 624.
\textsuperscript{78} 403 U.S. 672 (1971).
\textsuperscript{79} The only explanation offered relied on Everson's "incidental benefits" theory. Construction grants surely aid these institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. Everson v. Board of Educ., 330 U.S. 1 (1947); Board of Educ. v. Allen, 392 U.S. 236 (1968); Walz v. Tax Comm'n, supra.

\textsuperscript{Id. at 679.}
to sectarian uses as likely as, or any more likely than, the salary subsidies of \textit{Lemon} to lead to the establishment of a state church? The honest answer is: Who can tell? \textit{Lemon}'s discussion of that effect in slippery-slope terms would imply that the answer is yes, and that therefore the construction aid was invalid. \textit{Walz} strongly suggests that the answer is no, which would validate the legislation. Ultimately, however, no one can possibly say whether the benefit to religion at issue in \textit{Tilton} might lead to an established church. The ultimate invalidating effect posited by \textit{Zorach}, full establishment, is simply too remote to serve as a guide.

To return to the example of \textit{Meek} and \textit{Allen}, Justice Stewart prefaces \textit{Meek}'s bald contradiction of \textit{Allen} with an appeal to \textit{Zorach}, as if its "question of degree" approach were an excuse for, not the cause of, the inconsistency.\textsuperscript{80} If \textit{Meek} and \textit{Allen} can be reconciled as a matter of degree, however, the difference in the respective benefits to religion provided by books and instructional materials is too fine for most to discern.

Similarly, Professor Choper's objection that \textit{Meek} and \textit{Wolman} are inconsistent can be traced primarily to the incoherence of \textit{Zorach}. The Court in \textit{Meek} held that Pennsylvania could not provide "auxiliary services"—defined as remedial and accelerated instruction, guidance counseling and speech and hearing services—on parochial school premises, regardless of the fact that the persons providing the services were employees of the state.\textsuperscript{81} In \textit{Wolman}, the Court approved similar Ohio programs on the ground that, with the exception of speech and hearing diagnosis, the services were provided off parochial school premises.\textsuperscript{82} Professor Choper finds the on/off premises distinction trivial, given that the services approved in \textit{Wolman} were provided in a mobile unit adjacent to the parochial school.\textsuperscript{83}

According to Justice Blackmun, writing for the majority in \textit{Wolman}, services provided on school premises were more likely to advance the religious message of the school.

The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in \textit{Meek}. The influence on a thera-

\textsuperscript{80} \textit{Meek}, 421 U.S. at 359.
\textsuperscript{81} \textit{Id.} at 367-72.
\textsuperscript{83} Choper, \textit{supra} note 7, at 681.
pist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. The dangers perceived in Meek arose from the nature of the institution not from the nature of the pupils.  

Choper's objection stems from his refusal to accept this rationale at face value, and on one level this is understandable. While Justice Blackmun's distinction seems perfectly clear in isolation, what is not clear is how it fits with the establishment clause doctrine dominated by Zorach. Does the reduced danger of indoctrination in Wolman as opposed to Meek indicate that Ohio's program was less likely to lead to an established church than Pennsylvania's? Why? The answer would evidently require an excursion into mass psychology that the Court has never been prepared to make.

On another level, however, Choper's objection (if I have read it properly) is disingenuous. What real force is there in objecting that Blackmun's distinction is not well founded in the cases? The method of Zorach, institutionalized in Lemon, is insupportable on its own terms. It casts establishment clause analysis as a question of degree without providing any scale on which to make a judgment other than the extremely remote eventuality of an established church. If Justice Blackmun's distinction in Wolman is implausible because it does not fit well with Zorach, it is certainly worth considering whether Zorach is not the source of the difficulty.

The contradictions between Walz and Nyquist, Tilton and Nyquist and McGowan and Estate of Thornton v. Caldor, Inc. make that idea all the more credible. In each set, the

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84. Wolman, 433 U.S. at 247-48.
85. Professor Paulson has argued that Walz cannot be reconciled with Nyquist. Paulson, supra note 7, at 316. In Nyquist, the Court overturned a system of tax credits and tuition grants to low income residents designed to relieve the financial burden of parents whose children attended non-public schools. 413 U.S. at 798. It makes no sense to conclude that small credits and grants to individuals have too great a religious "effect" while permitting much larger tax benefits to go directly to churches.
86. Tilton and Nyquist are strikingly inconsistent. The latter struck down a program to assist in the maintenance and repair of parochial schools, while the former upheld a construction program for sectarian colleges. Tilton v. Richardson, 403 U.S. 672, 689 (1971); Nyquist, 413 U.S. at 779.
87. In McGowan, the Court approved Maryland laws requiring all businesses to close on Sunday, 366 U.S. at 452, and in Thornton the Court overturned a law permitting each worker to choose his own Sabbath. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). The Thornton Court condemns the Connecticut law particularly on the ground that: "the statute provides for no special consideration if a
Court has approved the greater benefit to religion and con-
demned the lesser.\textsuperscript{88} The reason, of course, is that \textit{Zorach}
requires the Court to treat establishment clause questions as
questions of uncalibrated degree—an approach ensuring
inconsistency.

\textbf{C. The Exploitation of Everson and Zorach}

Not surprisingly, the incorporation of \textit{Everson} and \textit{Zorach}
in the \textit{Lemon} test led to chaos. Much of the criticism of
\textit{Lemon} concentrates exclusively on these conflicting results.\textsuperscript{89}
If one stops short of examining \textit{Lemon}'s roots in \textit{Everson} and
\textit{Zorach} however, it is easy to misjudge the true depth of the
conflict in the cases. While the analytical poverty of \textit{Everson}
and \textit{Zorach} would have led inevitably to some incoherence, the
establishment clause has been damaged far more by their
active exploitation by those Justices disposed to aid religion.

For example, \textit{Zorach} was the dominant force in Justice
Burger's opinion in \textit{Lynch v. Donnelly}.\textsuperscript{90} In \textit{Lynch}, the Court
validated Pawtucket, Rhode Island's practice of maintaining a
creche during the Christmas season. From the outset, Justice
Burger portrayed the establishment clause as affirmatively
mandating the accommodation of religion, on the ground that
Americans are, as Justice Douglas alleged, "a religious peo-
ple."\textsuperscript{91} The influence of \textit{Zorach} extends well beyond this dicta,

\textsuperscript{88} Less egregious, but still incompatible are the results in \textit{Lemon}, \textit{Mueller}, and
\textit{Allen}.

\textsuperscript{89} \textit{See supra} note 7.

\textsuperscript{90} 455 U.S. 668 (1984).

\textsuperscript{91} \textit{Id.} at 675 (quoting \textit{Zorach} v. Clauson, 343 U.S. 306, 313 (1952)). Justice Burger
also writes, having noted Congressional and executive proclamations concerning
religion:

\begin{quote}
One cannot look at even this brief resume without finding that our history is
pervaded by expressions of religious beliefs such as are found in \textit{Zorach}.
Equally pervasive is the evidence of accommodation of all faiths and all forms
of religious expression, and hostility toward none. Through this
however. A critical premise of *Lynch* is Zorach's notion that legislation is invalid only if it sufficiently increases the likelihood of actual establishment.

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to do so.92 (citations omitted)

Justice Burger's own sarcastic dismissal of the very idea that an establishment was threatened in *Lynch* betrays the emptiness of Zorach's standard:

The Court has acknowledged that the "fears and political problems" that gave rise to the Religion Clauses in the 18th Century are of far less concern today. We are unable to perceive the Archbishop of Canterbury, the Bishop of Rome, or other powerful religious leaders behind every public acknowledgment of the religious heritage long officially recognized by the three constitutional branches of government. Any notion that these symbols pose a real danger of establishment of a state church is farfetched indeed.93

At the same time, the result in the case vividly demonstrates the utility of Zorach in extending aid to religion.

Justice Rehnquist, like Justice Burger, has recognized the

accommodation, as Justice Douglas observed, governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people." 343 U.S. at 314.

*Id.* at 677-78.

92. *Id.* at 678 (citation omitted).

93. *Id.* at 686 (citation omitted). In the second creche case, County of Allegheny v. A.C.L.U., 109 S.Ct. 3086 (1989), the Court disregarded the Burger opinion in favor of a "no endorsement" analysis based on Justice O'Connor's concurrence in *Lynch*. *Id.* at 3101-3105; *id.* at 3124-25 (O'Connor, J., concurring); *id.* at 3126 (Brennan, J., concurring in part and dissenting in part). Justice Kennedy, in dissent, objected to that abandonment. *Id.* at 3141 (Kennedy, J., dissenting). His application of *Lynch* shows the reason: the boundless promise of the Zorach approach in accommodating religion.

Crucial to the Court's conclusion [in *Lynch*] was not the number, prominence, or type of secular items contained in the holiday display but the simple fact that, when displayed by government during the Christmas season, a creche presents no realistic danger of moving government down the forbidden road toward an establishment of religion. Whether the creche be surrounded by poinsettias, talking wishing wells, or carolers, the conclusion remains the same, for the relevant context is not the items in the display itself but the season as a whole.

*Id.* at 3140.
possibilities inherent in Zorach's logic. By combining Zorach with Everson's "incidental benefits" theory, Justice Rehnquist gave a virtuoso performance in the art of accommodating religion in his majority opinion in Mueller v. Allen.94 The Court upheld a Minnesota program of tax credits to parents of parochial school children. First, Justice Rehnquist accepted the state's asserted secular purpose of ensuring a proper education for its citizens.95 Having validated the purpose, he then inquired into effects only so far as it might indicate a sham purpose. He concluded that the Minnesota legislature's purpose—unlike New York's in Nyquist—was not a sham because the benefit to the parochial schools was only incidental to Minnesota's broad-based program of deductions for charitable donations.96 The utility of Everson for one disposed to favor religious aid had never been so amply demonstrated.

Justice Rehnquist then demonstrated conclusively that the threat of an established church provides no scale whatever upon which permissible and impermissible effects might be gauged. Fully exploiting Zorach, he confined the effects inquiry to the likelihood of the tax credit's leading to the actual establishment of a state church.97 Not surprisingly, he found that danger remote. "The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."98 Justice Rehnquist then determined that the possible entanglements were not greater than those permitted in Allen and declared the Minnesota tax credits valid.99

The exploitation of Everson and Zorach in the service of government aid to religion is deplorable in itself, but even more troublesome is the deep rupture Mueller, Lynch, and Marsh v. Chambers100 opened in establishment clause doctrine.

95. Id. at 394-95.
96. Id. at 398-99.
97. Id. at 399-400.
98. Id. at 400.
99. Id. at 403-04.
100. 463 U.S. 783 (1983). In Marsh, the Court upheld the practice of opening daily sessions of the Nebraska legislature with a prayer. While Chief Justice Burger pointedly refused to apply the Lemon test in Marsh, it was no great loss. The Mueller opinion surely could have served as the model for an accommodating application of Lemon. Given the analytical emptiness of the purpose and effect tests, Lemon posed
Consider *Engel v. Vitale*\(^\text{101}\) and *Abington v. Schempp*,\(^\text{102}\) which invalidated Bible reading and prayer in schools respectively. The cases embody a condemnation of religious indoctrination which even the accommodationist members of the Court have accepted and asserted.\(^\text{103}\) When reexamined in light of *Everson, Zorach, Mueller, Marsh* and *Lynch*, however, *Engel* and *Abington* seem more isolated and oddly reasoned than unquestionably correct.

In *Engel*, the Court overturned a New York school board regulation requiring the recital of the "Regents' Prayer" before each school day.\(^\text{104}\) The Court began by noting the important role of the Book of Common Prayer in the established Church of England. That very establishment played a leading role in forming a strong movement to disestablishment in the states, sentiment that Jefferson crystallized in the "Virginia Bill for Religious Freedom" and Madison in his "Memorial and Remonstrance."\(^\text{105}\) The danger of religious persecution following on the establishment of a state church was, above all, the motivating force behind the establishment clause.\(^\text{106}\) Even a slight step toward an establishment, the Court argued, was sufficient to violate the clause:

> To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the first amendment: "[I]t is proper to take alarm at the first experiment on our liberties."\(^\text{107}\)

One year later, the Court made the same argument in *Abington*, in which it struck down programs of classroom Bible reading.\(^\text{108}\) *Abington* too recited the history of English and early American establishments and cited the resulting evil of persecution as the danger justifying the establishment clause.\(^\text{109}\)

\(^{101}\) 370 U.S. 421 (1962).
\(^{104}\) 370 U.S. at 436.
\(^{105}\) Id. at 425-30.
\(^{106}\) Id. at 429-30.
\(^{107}\) Id. at 436.
\(^{109}\) Id. at 212-14.
Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."\(^{110}\)

Reading *Engel* and *Abington*, it is easy to feel persuaded that any benefit to religion is unacceptable as a "first experiment on our liberties." It is impossible to deny, however, that that strict rule was unfounded at the time and was never fully implemented afterward. Not only has the Court always been content to allow substantial state benefits to religious institutions, the *Zorach* approach—treating the matter of effects as a question of uncalibrated degree—has had a far greater influence than the strict "first experiment" theory. *Everson*'s incidental benefit theory is, of course, flatly inconsistent with the "first experiment" approach, but it too has overshadowed *Engel* and *Abington*.

In sum, *Everson* and *Zorach*—the roots of *Lemon*—pose two difficulties. First, they have led to confusion in the cases directly through their own incoherence. Second, they have led to an even deeper rift in establishment clause doctrine by providing a vehicle for validating virtually any aid to religion. In this role, they have run up against the countervailing tradition of *Engel* and *Abington*. The inconsistency between *Meek* and *Wolman* cited by Professor Choper is one example of this.\(^{111}\) Justice Blackmun's distinction between the danger of religious indoctrination on and off parochial school premises does not fit *Zorach*'s mold because it was formed by *Engel* and *Abington*.\(^{112}\)

In order to formulate an adequate alternative to *Lemon*, clearly it is first necessary to escape *Everson* and *Zorach*. The most promising route should be obvious: via *Engel* and *Abington*.

**D. Freedom of Conscience and Invalidating Effects on Religion**

The hidden strength of *Engel* and *Abington* is closer to the surface in a third case which shares their "first experiment" premises. In *Epperson v. Arkansas*, the court overturned a law

\(^{110}\) *Id.* at 225.

\(^{111}\) See *supra* text accompanying notes 81-83.

\(^{112}\) See *infra* text accompanying notes 329-33.
prohibiting the teaching of the theory of evolution. Justice Fortas's opinion for the majority cites *Everson* and *McCollum, Engel* and *Abington* and concludes that: "These precedents inevitably determine the result in the present case." So they do. Except for *Everson*, which is cited only for its broad statement of principles, the cases Fortas cites embody the strict separation approach: they recite the dangers of persecution which accompany an established church and then condemn the subject legislation as a "first experiment upon our liberties."

It should not be surprising, then, to note that Fortas supplements his argument. He alludes to other effects of legislation not usually drawn into establishment clause analysis. First, Justice Fortas quotes *Watson v. Jones* to this effect: "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." Next, discussing the propriety of reviewing school curricula, he quotes *Keyishian v. Board of Regents* for the rule that the first amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." Finally, before addressing the establishment clause squarely, Fortas notes *Meyer v. Nebraska*, in which the court overturned a criminal prohibition on teaching in languages other than English using substantive due process analysis.

While Fortas disavows the "broad premise" of *Meyer*’s substantive due process approach, and while none of the cases he cites belongs to the body of establishment clause precedent, his raising those cases is neither an oversight nor a pointless excursion. Consider this passage from *Meyer*:

In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the

113. 393 U.S. 97 (1968).
114. Id. at 107.
115. Id. at 104 (quoting Watson v. Jones, 13 Wall. 679, 728 (1871)). In *Watson*, the Court declined to decide which of two factions were the lawful elders and trustees of the Walnut Street Presbyterian Church.
118. Id. at 105-06.
relation between individuals and the state were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a state without doing violence to both letter and spirit of the Constitution.  

By citing and quoting Watson, Keyishian and Meyer, Fortas suggests an invalidating effect on religion other than the tendency toward full establishment. He suggests that orthodoxy, indoctrination and conformity—in themselves, and not merely as features of an established church—are effects of government action which it is the function of the establishment clause to prevent.

This is no more than a suggestion in the opinion, and Epperson is almost unique among establishment clause cases in making it. There are some obvious reasons why this is so. Given the historical origins of the establishment clause as a response to established churches, one seems to be on firmer ground in treating orthodoxy, indoctrination and conformity as secondary effects of establishment, and establishment itself as the evil to be prevented. Furthermore, protecting free inquiry is ordinarily thought of as a function of the free speech clause. Indeed, the trial court in Epperson invalidated the

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119. 262 U.S. at 402. Justice McReynolds also quotes Plato to make his point: For the welfare of his Ideal commonwealth, Plato suggested a law which should provide: "That the wives of our guardians are to be common, and no parent is to know his own child nor any child his parent . . . . The proper officers will take the offspring of the good parents to the pen or fold, and there they will deposit them with certain nurses who dwell in a separate quarter; but the offspring of the inferior, or of the better when they chance to be deformed, will be put away in some mysterious, unknown place, as they should be."

Id. at 401-02.

120. An exception is Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985), in which Justice Brennan noted that:

[Religious] indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the state.

Id. at 385. However, Ball has proven no more influential on this point than Epperson. Furthermore, Brennan cites Zorach in support of this argument. Zorach's concern with freedom of conscience lapses where the legislation ceases to threaten an established church. Despite the firmness of Brennan's pronouncement, Zorach undermines it, just as it has undermined the role of freedom of conscience in establishment clause analysis generally.

121. See West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943) (Jehovah's Witnesses may not be compelled to salute the flag); Wooley v. Maynard, 430 U.S. 705 (1975) (Jehovah's Witness may not be compelled to carry the message "Live Free or Die" on his automobile license plate).
Arkansas law on free speech grounds.\(^{122}\) Giving the establishment clause a role in guarding against incursions on free inquiry may seem superfluous.

Still, it remains true that religious conviction has produced threats to free inquiry which are distinctive, and that those threats are often far removed from the actual establishment of a state church. The Court’s unequivocal reaction to remote threats of full establishment in *Engel, Abington* and *Epperson*—and later in *Stone v. Graham*\(^{123}\)—is in itself an indication that this is so. In addition, the doctrinal isolation of those cases suggests that they carry out an establishment clause function which is distinct from countering the threat of a state church, the focus of Zorach.

That distinct function of the clause is this: to protect freedom of conscience. The establishment clause serves to bar government’s advancing dogmatic belief, not because dogma is the product of an established church or because it might lead to persecution, but for reasons having to do with dogma itself. *Epperson* suggests the following definition of an invalidating effect under the clause: *Legislation or executive action is invalid under the establishment clause if it has the effect of advancing dogmatic belief.*

One objection to this test has to do with the term “dogma”.\(^{124}\) It is both too imprecise and too weighted with derision to serve a useful purpose in constitutional analysis. It conveys nothing concerning the underlying justification for invalidation under the establishment clause. If we are to get at the meaning of *Engel* and *Abington*—to define an invalidating effect on religion based on something other than the remote likelihood of a state church—we must find a precise, descriptive definition of the invalidating effect. Supplying that gap is the purpose of the next part of this Article.

### III. Dogma and Science in *Edwards v. Aguillard*

*Edwards v. Aguillard* presented the Court with an establishment clause challenge to the “Balanced Treatment for Cre-

\(^{122}\) Epperson v. Arkansas, 393 U.S. 97, 100 & n.4 (1968).

\(^{123}\) 449 U.S. 39 (1980).

\(^{124}\) Other objections also suggest themselves, and are dealt with in later pages. Regarding my use of the term “advance,” see text accompanying notes 254-65. Regarding my use of the term “belief,” see note 247. Regarding the possibility the test requires hostility to religion, see text accompanying notes 273-90.
ation-Science and Evolution Science in Public School Instruction” Act (the Creationism Act or the Act.)¹²⁵ The Court concluded that Louisiana’s stated secular purpose was a sham, and invalidated the Act.¹²⁶ In order to develop the adequate substitution for dogma which my proposed definition of invalidating effects on religion requires, I propose to examine the case as a philosopher of science might.

A. The Failings of Everson in the Aguillard Opinion

The Act required that the teaching of the theory of evolution in Louisiana schools be balanced by the teaching of “creation science.” If either were taught, the Act required that both be taught.¹²⁷ “Creation Science” was defined in the Act as “the scientific evidences for [creation] and inferences from those scientific evidences.”¹²⁸ The stated purpose of the Act was to enhance academic freedom.¹²⁹ As the title of the Act indicated, this goal was to be served by providing “balanced treatment” for creationism in the science curriculum. The legislative history showed, ultimately to the Act’s downfall, that the Act arose out of a perception on the part of its supporters that the teaching of science in the public schools filtered out evidence challenging the prevailing evolutionary view of the origins of life.¹³⁰ It was to prohibit this censorship and to counteract the bias of the scientific establishment that the Act required Louisiana schools to “balance” the teaching of evolution with the teaching of “creation-science.”¹³¹

Aguillard presented a singular challenge to the Court. The Creationism Act’s supporters, by design or intuition, drafted the Act and crafted its legislative history in a way which played to the weaknesses of existing establishment clause case law. The text of the Act rigorously avoids any overt identification of creation science with religion, and plausibly presents it as concerning only science and education. The legislature also succeeded, for the most part, in confining the debate on the Act to the merits of creationism as a scientific theory and the propriety of legislating in matters of science

¹²⁵. LA. REV. STAT. ANN. §§ 17:286.1—17:286.7 (West 1982).
¹²⁷. LA. REV. STAT. ANN. § 17:286.4A (West 1982).
¹²⁸. LA. REV. STAT. ANN. §§ 17:286.3(2) & .3(3) (West 1982).
¹²⁹. LA. REV. STAT. ANN. § 17:286.2 (West 1982).
¹³⁰. 482 U.S. at 593.
and science education.\textsuperscript{132} By framing the Act in this way, Louisiana made the doctrine of Genesis incidental to science instruction, the better to take advantage of the opening provided by \textit{Everson}.

In writing for the majority, Justice Brennan all but walked into the trap. The \textit{Aguillard} opinion is, on its surface, a straightforward application of the \textit{Lemon v. Kurtzman} test.\textsuperscript{133} The Creationism Act clearly grew out of a long, intractable debate between the proponents of creationism and the proponents of evolution.\textsuperscript{134} That debate, which the Court could not ignore, strongly indicated that the teachings the legislature sought to bring into competition were not two scientific theories, but, simply, science and religion.

These same historic and contemporaneous antagonisms between the teaching of certain religious denominations and the teaching of evolution are present in this case. The preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act. Senator Keith's leading expert on creation science, Edward Boudreaux, testified at the legislative hearings that the theory of creation science included belief in the existence of a supernatural creator.\textsuperscript{135}

In short, the Court concluded that the Act lacked a secular purpose because its stated purpose was a sham.

The \textit{Aguillard} opinion's sham theory is a variation on the incidental benefits theory of \textit{Everson}. A legislature's purpose is not a sham if the effect of promoting religion is truly incidental, and vice versa. The effect of teaching creationism was not truly incidental, so the Act's stated purpose was a sham. In \textit{Aguillard}, \textit{Everson} reached its logical nadir: in striking down the Act, Justice Brennan framed the issue as one of sham secu-

\textsuperscript{132} \textsc{La. Rev. Stat. Ann.} § 17.286.2, 17.286.3 & 17.286.4 (West 1982). Some witnesses did express religious sentiments in the course of testifying in favor of the bill. Nick Kalivoda, for example, argued that science educators favored a theory of evolution, "because we do not have to think about a creator and what our responsibility is to Him." 1 Joint Appendix, at E82-83. However, the reason given for supporting the Act was, in virtually all cases, a desire to present "scientific" evidence.\textsuperscript{133} 482 U.S. at 584-86.\textsuperscript{134} \textit{Id.} at 589-90.\textsuperscript{135} \textit{Id.} at 591.
lar purpose without seriously considering what a legitimate secular purpose is to begin with.

In other words, *Aguillard* demonstrates how *Everson*’s failure to address the question of effects directly ensured that the purpose prong too would remain empty. Justice Scalia exploits the emptiness of the purpose prong in his dissent, but he, too, fails to reach the real issue. Perhaps, Justice Scalia argues, if a trial court were to find that there is no genuine scientific evidence to support creationism, the Court would be justified in concluding that “creation-science” is a cloak for the Biblical tale of creation. On the record before the Court, however, the majority’s reasoning simply assumes that there is no such evidence.

However, Justice Scalia does not fully articulate the problem. If the case had been remanded, what standard would the trial court have used to distinguish genuine scientific evidence from sham scientific evidence? How and why would that distinguish a genuine secular purpose from a sham secular purpose? Why would a sham secular purpose violate the establishment clause? Answering those questions calls for a clear idea of what beneficial effects on religion are impermissible under the establishment clause, and why. Even if Louisiana had engaged in a sham, the Act was unconstitutional, if at all, because if put into operation it would have had effects prohibited by the Constitution. Legislative purpose is relevant only because the legislature has the means to put its will into effect. The question is, what was the illegitimate effect of the Creationism Act?

While sham secular purpose analysis is unable to answer, or even properly raise, that question, Justice Brennan’s approach does contain a kernel of insight. There is something about the secular that ensures consistency with the Constitution. A better idea of what that something is, and why it was lacking in the Creationism Act, may help the effort to define invalidating illegitimate effects. In seeking the special quality of the truly secular, it is only natural to begin by examining the paradigm of the secular: science. A better understanding of what makes science science will enable us to abandon completely the notion of a sham secular purpose and to escape the flawed incidental benefits theory from which it grew.

136. See *supra* text accompanying note 47.
137. 482 U.S. at 619-26 (Scalia, J., dissenting).
B. Popper and Falsifiability in Principle

The creationists thought of scientific knowledge as a set of results, called facts. They asserted a set of facts, different from the scientific establishment's, which they claimed could be supported by scientific means. Since their facts were therefore "just as good as evolution's," they demanded and won, briefly, the right to have their facts taught in the public schools.\(^{138}\)

One of the reasons Justice Brennan's argument fails is that he shares the creationists' premise that science is a set of facts. Throughout his opinion, he treats religion and science as mutually exclusive sets of beliefs, and assumes that individual beliefs can be identified as religious or scientific. It is just this content-based conception of science which led Justice Brennan to perpetuate Everson's flawed approach. It gave him a convenient device for separating true from sham science, and, he assumed, true from sham secular purposes.

Ironically, the flaw in Justice Brennan's argument is the same as that in the creationist's arguments in favor of the Act: science is not a collection of facts. The distinguishing mark of science as an intellectual system is its method, not its results. This can best be explained by reference to the work of Sir Karl Popper, who for many years was primarily concerned with drawing the line between science and psuedo-science.\(^{139}\)

Even after one abandons the notion that science is a set of facts, the nature of its method is easily misunderstood. Science is empirical and inductive, and it is ordinarily thought that the scientist begins with observations, in which he discovers patterns. The scientist then generalizes from these observations in order to formulate a hypothesis which he then tests and confirms.\(^{140}\)

Popper challenged this picture of the scientific method on two counts, denying that science proceeds by induction and denying that scientific proof consists of verification.\(^{141}\) First, inductive reasoning itself poses a logical problem which has dogged science from its beginning. Hume stated the "problem of induction" in these terms:

\[\text{[T]here is nothing in any object, considered in itself, which}\]

\(^{138}\) See infra text accompanying notes 153-64.


\(^{140}\) Id.

\(^{141}\) Id. at 36.
can afford us a reason for drawing a conclusion beyond it; ... even after the observation of the frequent or constant con-
junction of object, we have no reason to draw any inference
concerning any object beyond those of which we have had
experience.142

In logical terms, it is possible to negate a universal statement
by a singular statement; this is the modus tollens of formal
logic.143 For example, "A black swan exists" negates the uni-
versal statement: "All swans are white." However, it is not
possible to turn this argument around and infer the universal
from the singular statement. Saying "A white swan exists" in
no way implies "All swans are white." Logically, this remains
the case no matter how many white swans one observes; it is
always possible that the next swan to come down the stream
will be black. Yet, despite this logical problem, the form of
any inductive inference is from singular to universal.

Popper's solution to the problem of induction grew out of
his thinking on the other defect he perceived in the usual
account of the scientific method. Successful tests conducted by
the scientist, it was supposed, verify his theory. However, ver-
ification by testing is nothing more than an inductive infer-
ence, never completely valid in strict logical terms.
Furthermore, Popper noted that verification by experience is
overinclusive. Virtually any statement about the world is sup-
portable by reference to some event consistent with it. This is
as true of astrology as of physics.144

142. D. HUME, A TREATISE OF HUMAN NATURE 139 (Selby-Bigge & Nidditch eds.
1978). Hume made the psychological argument that the repetition of singular
instances inevitably leads us to infer a pattern which, generalized, is the universal. Id.
at 86-94. He acknowledged, however, that what human beings do is distinct from what
is logically justified. Id. at 88.
143. I. COPI, INTRODUCTION TO LOGIC 251-52 (5th ed. 1978).
144. With regard to the reigning psychological theories of his native Vienna,
Popper noted that neither Freud nor Adler would have any difficulty accounting for
the behavior of a man who would drown a child or one who would save it.
According to Freud the first man suffered from repression (say, of some
component of his Oedipus complex), while the second man had achieved
sublimation. According to Adler the first man suffered from feelings of
inferiority (producing perhaps the need to prove to himself that he dared to
commit some crime), and so did the second man (whose need was to prove to
himself that he dared to rescue the child). I could not think of any human
behaviour which could not be interpreted in terms of either theory. It was
precisely this fact—that they always fitted, that they were always confirmed—
which in the eyes of their admirers constituted the strongest argument in
favour of these theories. It began to dawn on me that this apparent strength
was in fact their weakness ....
Popper's key insight was to notice that scientific experiments are persuasive, not when they verify hypotheses, but when there is a substantial risk that they will have the opposite effect: falsification. For example, Einstein theorized that light was subject to gravitation, which implied, among other things, that the sun would affect the light of stars, making them shift position in the sky. Sir Arthur Eddington designed an experiment, carried out in 1919, which compared the position of stars as they normally appeared with their position during an eclipse taking place in their immediate vicinity. The results confirmed Einstein's hypothesis; the stars appeared to move away from the sun.

Now the impressive thing about this case is the risk involved in a prediction of this kind. If observation shows that the predicted effect is definitely absent, the theory is simply refuted. The theory is incompatible with certain possible results of observation—in fact with results which everybody before Einstein would have expected. This is quite different from the situation I have previously described, when it turned out that the theories in question were compatible with the most divergent human behaviour, so that it was practically impossible to describe any human behaviour that might not be claimed to be a verification of these theories.

What this showed, concluded Popper, was that "the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability." This definition of true science differs from the picture of the scientific method sketched above, in which scientific theories are verified by experimentation.

In other words: I shall not require of a scientific system that it shall be capable of being singled out, once and for all, in a positive sense; but I shall require that its logical form shall be such that it can be singled out, by means of empirical tests, in a negative sense: it might be possible for an empirical scientific system to be refuted by experience.

K. Popper, supra note 139, at 35. The weakness, of course, was that, in their ease of verification, the theories were indistinguishable from any pseudo-science or religion. But see A. Grunbaum, Is Freudian Psycho-Analytic Theory Pseudo-Scientific by Karl Popper's Criterion of Demarcation?, 16 AM. PHIL. Q. 131 (1979).

145. K. Popper, supra note 139 at 36-37.
146. Id. at 35-36.
147. Id. at 36.
148. Id. at 37.
According to my proposal, what characterizes the empirical method is its manner of exposing to falsification, in every conceivable way, the system to be tested. Its aim is not to save the lives of untenable systems but, on the contrary, to select the one which is by comparison the fittest, by exposing them all to the fiercest struggle for survival.  

Exchanging falsification for verification solves the problem of induction, at least so far as science is concerned. If a scientific theory is accepted as true because it has survived all attempts at falsification, rather than because repeated experiments verify it, the logical defect of induction—the invalidity of inferring a universal from a particular—ceases to be an issue. Instead of induction, science relies solely on the impeccably logical modus tollens, the negation of a universal by a particular.

Naturally, Popper's reconfiguration of the scientific method has profound implications for the status of scientific proof. The problem of induction was the hard core of the contradiction inherent in the logical positivists' claim that inferences from observation could yield immutable truth. Popper's solution was to surrender the claim to immutability and to rest satisfied with the limited, tentative conclusions to be drawn from experience.

The empirical basis of objective science has thus nothing 'absolute' about it. Science does not rest upon rock-bottom. The bold structure of its theories rises, as it were, above a swamp. It is like a building erected on piles. The piles are driven down from above into the swamp, but not down to any natural or 'given' base; and when we cease our attempts to drive our piles into a deeper layer, it is not because we have reached firm ground. We simply stop when we are satisfied that they are firm enough to carry the structure, at least for the time being.

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149. K. Popper, Logic, supra note 14, at 40-41.
150. Id. at 41.
151. Id. at 36.
152. Id. at 111. Another metaphor used by Popper is helpful in distinguishing his approach from instrumentalism or what is usually called relativism:
I see our scientific theories as human inventions—nets designed by us to catch the world. To be sure, these differ from the inventions of the poets, and even from the inventions of the technicians. Theories are not only instruments. What we aim at is truth: we test our theories in the hope of eliminating those which are not true. In this way we may succeed in improving our theories—
C. Verification, Falsification and the Debate in Louisiana

The issues that troubled Popper were prominent in the debate over the Creationism Act in the Louisiana legislature. The debate over the Act was, however, Popper's worst nightmare come true. By stressing science's supposed reliance on induction and verification, the creationists fully exploited the weakness inherent in that version of the scientific method: in ease of verification, pseudo-science and religion are indistinguishable from science.

Scientists and philosophers of science have coped with the problem of induction in a number of ways, but none has yet concocted the strange mix of relativism and positivism put forward by the defenders of the Act in Louisiana. Science, the creationists argued, verifies immutable facts. However, evolution (and, inexplicably, evolution alone) suffers from the problem of induction; it falls short of producing immutable truth. Since creation science verifies facts, it is at least as "scientific" as evolution, if not more so. It therefore ought to be taught in Louisiana schools.\(^{153}\)

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\(^{153}\) A variation of this argument appears in a number of the articles arguing that strict construction of the establishment clause "establishes" a "religion of secular humanism." Rather than contending that creationism verifies facts and is therefore scientific, the argument is that evolution is incapable of being verified "scientifically" and is therefore a religion.

The relevant factor in the conflict of beliefs in origin is that neither theory of origin, creationism or evolutionism, is capable of scientific proof. ... Both theories of origins suffer from the inability scientifically to prove their hypotheses, and both require an element of "faith." Therefore, the evolutionary theory, an undergirding tenet of Secular Humanism, is religious because of its dependents [sic] on "belief."

Whitehead & Conlan, supra note 3, at 53-54. Another example:

Despite intense argument to the contrary, evolution is inherently based on speculative supposition and therefore constitutes a religious belief. Though it
For example, Tom Ward, one of the Act’s supporters, argued that:

If you go beyond observations and if you go beyond experimentations, then you are beyond the realm of science. Scientific knowledge can only go so far as the things you can observe and things you can experiment with. This is why it is difficult for me to teach the theory of evolution because origins such as the origin of man, the origin of matter, the origin of energy, the origin of the earth, the origin of the universe, any origin is beyond the realm of science.  

This argument refers to the problem of induction, but, far from resolving it, merely exploits it in a manner typical of the creationists’ arguments before the legislature. The argument rests on contradictory insistences that the theory of natural selection is not logically impeccable and that science at large somehow is.

Senator Keith, the main sponsor of the Act, argued along lines similar to Ward’s. He insisted on evolution’s inability to deduce its universal rule from singular instances—a “defect” which evolution shares with all natural sciences, and which is

claims to be a science, it cannot be verified on the basis of the scientific method. Since there is presently no way to ‘test’ the validity of the theory, believing the theory to be true thus requires elements of faith.

Comment, supra note 3, at 352.

Another variation is the claim that science in general is fundamentally indistinguishable from religion:

Secular ideas, it is contended, are premised on objective, verifiable, demonstrable data, while theistic notions are based on no data at all; or at best, that that is subjective, mystical, and nondemonstrable. Those who make this argument fail to see that mysticism, subjectivism, and faith undergird even the most objective of our knowledge and data, as well as our information-gathering methods. In the first place, all data must be interpreted: the bones, the numbers, the photos, the reading taken on delicate scientific equipment—all of the quantifiable and verifiable pieces take on meaning only when they are arranged within the meaning-giving framework of some hypothesis. Hypothesizing is, itself, a subjective, even mystical process. Theories do not provide verification; they are that which must be verified. And they can be verified only in terms of techniques which themselves are predicated on even more fundamental hypotheses and theories.

Toscano, supra note 3, at 201-202.

From this putative philosophical equivalence, the apologists of religion infer an equivalence under the Constitution. Toscano, for example, concludes that religion ought to be taught in public schools as a matter of “fairness” and “balance.” Id. at 203-09.

However, not only are religion and science philosophically distinct, as explained above, the distinction is determinative of their treatment under the Constitution. See infra text accompanying notes 232-39 & notes 311-14.

154. 1 Joint Appendix E85.
no defect at all—and from that concluded that the scientific status of the theory of natural selection was somehow suspect.

It has been repeatedly said during this meeting that I noticed some said that evolution could be absolutely proven. There were other speakers which said it could not be proven. I think that this notes a serious disagreement over the subject of evolution even in the scientific community.\footnote{155}

While the creationists hammered away at the problem of induction as it arises in evolution, they simultaneously held to an assumption that scientific proof is absolute. The creationists insisted repeatedly that evolution is not "proven fact." Representative Jenkins, a supporter of the Act, asked one witness, a science teacher:

What I'm trying to find out is this: Number one, what is this theory of evolution that's so scientific that it's the only thing that should be taught in the schools on this subject? What is it? Is it a theory, or is it proven fact, and does the theory conform with reality in the most basic fundamental sense of do we know whether it's possible that life can be created from non-living material?\footnote{156}

From the fact that evolution could not meet their demand for immutable truth, the creationists inferred a radical relativism. Nick Kalivoda, a witness in support of the Act, testified:

My experience in trying to teach the theory of evolution is that it is a series of postulates that must be accepted on blind faith. You cannot observe them and you cannot experiment with them, therefore, they are beyond the realm of scientific fact. This is a description of a myth, not a theory.\footnote{157}

Another witness in favor of the Act, Byron Young, summed up this line of the creationists' argument by testifying: "Since neither of these theories have been proven absolutely, their acceptance is strictly a personal choice."\footnote{158}

From this radical relativism, the creationists derived a license for the teaching of their beliefs under the flag of "academic freedom." Dr. Boudreaux argued:

In fact, what the bill is actually supporting in my opinion is academic freedom. Freedom to teach science objectively in

\footnote{155. Id. at E273.}  
\footnote{156. 2 Joint Appendix E543-44, Edwards v. Aguillard, 482 U.S. 578 (1987).}  
\footnote{157. 1 Joint Appendix E92-93.}  
\footnote{158. Id. at E23.}
The way that it should be taught and not biasedly. The problem is that evolution is [a] highly biased aspect of supposedly supported scientific evidence. We're saying that creation science which teaches objectively as science the way it really is and whether you were to believe that it's evolutionary or creation, you're not going to prove either one with science. That is going to be an element of faith.\(^\text{159}\)

The creationists' embrace of these contradictory assumptions—that the theory of natural selection suffers from the problem of induction while science at large produces immutable truth—was probably an unconscious error. With consistent inconsistency, the creationists sought the title of science precisely for science's reputed capacity to provide absolute proof of the truth of its assertions. In the hearings, Senator Keith argued: "My intent is that we have the truth. I believe that you want that as well and I believe that is your responsibility to try and determine what is the truth and go from there."\(^\text{160}\)

Professor Boudreaux testified:

> The point is how can we teach in the school system a one sided argument that is not even the truth. I can only say that we are guilty of a lot of brainwashing. I have been guilty of it and now I know that it is different and I know quite clearly that we must put science in its objective (sic). We must. We have a duty to educate at all levels from gradeschool on through the college level what is the truth . . . .\(^\text{161}\)

And yet, the legislators knew or should have known that scientific understanding is tentative and provisional. Witness Paul Beizenherz explained that the hallmark of a genuinely scientific explanation is its being open to falsification and revision, and that creationism, as presented by its supporters, did not meet this description.

> One of the main characteristics of the scientific theory is that it can never be proven absolutely but it can be falsified. . . . A set of ideas that cannot be falsified is not science. . . . Mr. Keith said that we would present a body of scientific evidence in support of creation theory. Dr. Boudreaux and others did not, nor did they in the Senate hearings, present such a body of scientific evidence. . . . One does not become a

\(^{159}\) Id. at E429.

\(^{160}\) Id. at E41.

\(^{161}\) Id. at E60-61.
scientist by the simple act of trying to falsify another scientific system. One has to present an alternative system that too must be falsifiable in principle. That I would submit they have not done.162

Another witness explained the difference between science and religion in Popperian terms:

I think everyone knows that the scientist gets data and then says from these "I conclude. I may be wrong; I may change tomorrow, but I conclude, and this is my present concept of the matter." The religious man says I have listened to the still small voice that is spoken within me. I think it's the voice of God, and I have faith that what I believe that I cannot prove is true because that still small voice within me tells me it's true, and that's the difference. Therefore, the scientist says, "I conclude." The religious man says, "I believe."163

The Act's supporters, however, could not or would not recognize the difference between the tentative, provisional truths of science and the absolute truths asserted by religion. In questioning a science teacher testifying against the Act, Representative Jenkins, a supporter of the Act, asked:

I am a little bit confused about some of the things you've said. For example, you said that science does not and will not ever concern itself with God or the concept of God. I don't really understand that. If there is a God, and he exists, that will be a fact, will it not, a scientific fact? If he does not, that would seem to be a scientific fact as well. That would seem to me, would it not to you [to be] of some interest to scientists.164

The reason science does not concern itself with the existence of God is that any scientific account of His existence would be tentative and provisional—and wholly unacceptable to the

162. 2 Joint Appendix E570-72.
163. Id. at E609 (Kent).
164. Id. at E561-62.

Representative Jenkins made his point more directly in another exchange: I want to ask you a question, please sir. I don't truly understand the distinction you draw between science and religion. It seems to me that a statement is either true or false. It's a fact or it's falsehood, or, in some cases it might be partially true or partially false. I don't understand how you draw this distinction between—you label certain things science, other things religion. If we're talking about one, we shouldn't concern ourselves with the other.

Id. at E608.
faithful on that ground. If there is a God and He exists, in Representative Jenkins’ terms, that is not something that could be disproven. To claim that God’s existence could be established as a scientific fact is to assume that science can establish truth beyond disproof. And that is surely to misappropriate science.

It is tempting at this point to revert to the notion of a sham; to say that creationism is sham science and to conclude with Justice Brennan that the Act was therefore motivated by a sham secular purpose. This is especially tempting given that the Louisiana legislature did hear clarifying testimony on the scientific method. As we have seen however, sham analysis, a descendant of Everson’s “incidental benefits” theory, is insupportable on its own terms. It focuses exclusively on legislative intent, without examining what effects on religion render the legislation invalid or why. Asserting that Louisiana had sanctioned sham science says nothing about why that is impermissible under the clause.

The proper way to analyze the Act under the establishment clause is to stress not just that creationism is not true science, but that it is not falsifiable in principle. What renders the Act unconstitutional is its operating to inculcate immutable truth. This approach would relieve us not only of sham analysis based on Everson, but also of any need under Zorach to rely on the Act’s very remote tendency to establish a state church. The Act was no more likely than the tax breaks in Mueller to lead to a state church. It was, however, very likely to succeed in advancing belief not falsifiable in principle.

In other words, Aguillard is best analyzed by use of the definition of invalidating effects suggested by Epperson: Legislation or executive action is invalid under the establishment clause when it has the effect of advancing dogma. The last term can now be replaced with a more precise term, rendering a definition of invalidating effects which I will call the “test of falsifiability”: Legislation or executive action is invalid under the establishment clause when it has the effect of advancing belief not falsifiable in principle.

The question remains, of course, why such an effect is unconstitutional.
IV. THE DEONTOLOGICAL CONSTITUTION AND THE ESTABLISHMENT CLAUSE

My argument for the test of falsifiability is, from one angle, an excursion into the obvious. It rests on the notion that the establishment clause protects freedom of conscience.\(^\text{165}\) It should be clear from my diagnosis of Lemon, however, why that idea needs explication. Freedom of conscience has played a negligible role in establishment clause doctrine. The hollow roots of Lemon in Everson and Zorach suggest that a close examination of the roots of the test of falsifiability may be the best way of making a case for it. If the test can be founded in the structure of the Constitution itself and in deeply held values like freedom of conscience, the contrast with Everson and Zorach is itself an argument for replacing Lemon with the definition of invalidating effects proposed here.

A necessary first step in that argument is to state a theory of the Constitution itself; one that gives freedom of conscience a central role. A brief sketch would do, but the underlying theory outlined here will be somewhat more elaborate for two reasons. First, a central premise of accommodationist accounts of the establishment clause is that, in unvarnished terms, the Constitution organizes a Christian nation. The account of the Constitution that follows is designed to rebut that notion implicitly, to deny that the Constitution supposes or supports religious principles of any kind. Second, in arguing for the test of falsifiability, I want to stress that it does not embody an ideal of neutrality between religion and non-religion. On the contrary, the Constitution positively favors the secular, within the limits imposed by the free exercise clause, for positive moral reasons. In order to make that argument, it is necessary to dissociate the conception of the Constitution I rely on here from one which is an easy target for critics of liberalism: the purportedly value-neutral procedural Constitution.

A. The Procedural Constitution

The test of falsifiability is premised on the idea that the

Constitution embodies a deontological theory of justice. The deontological Constitution is familiar to most readers, though the term may not be. John Hart Ely's *Democracy and Distrust* relies on such a conception of the Constitution, without, however, providing an adequate defense of the idea. One way to present the notion of the deontological Constitution, therefore, is to give Ely's barebones version of it and then to elaborate that version.

The argument of *Democracy and Distrust* is that the Supreme Court's striking down legislation passed by the elected branches is justifiable to the extent the Court is engaged in policing the process of representation. The Court's function is that of the referee: not to ensure a particular outcome of the political process, but simply to ensure that the process works fairly. The Court's role is to enhance the representative and consensual nature of American government—and hence its legitimacy—by clearing the channels of political activity.

Naturally, this supposes a particular understanding of the Constitution. The most telling negative formulation of Ely's thesis is this: The Court's function is not to enforce fundamental values embodied in the Constitution because the Constitu-

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166. See *infra* text accompanying notes 190-231. The term deontological means, generally, having to do with ethics or duty. *Webster's New World Dictionary* 378 (2d college ed. 1976). As explained more fully below, it has come to refer to any social theory which operates independently of a theory of the good; that is, without reference to supposed proper ends or purposes of human life. See *infra* text accompanying notes 181-85.


168. The connection between Ely and deontological liberalism has been noted in Regan, *Community and Justice in Constitutional Theory*, 1985 Wis. L. Rev. 1073. Regan notes the connection between Ely and John Rawls so that he may extrapolate a critique of Ely based on Michael Sandel's critique of Rawls. *See supra* note 166. Given that Sandel misreads Rawls, it is not surprising that Regan misconstrues the connection between Rawls and Ely. *See infra* text accompanying notes 201-216.


170. *Id.* at 103.

171. *Id.* at 103-34.
tion is not primarily a repository of fundamental values. The Constitution is, rather, a set of specifications for the conduct of government; it is a procedural superstructure designed to accomplish the necessary business of society. Judicial intervention is appropriate only when the process is malfunctioning. Moreover, the Constitution can be said to be malfunctioning only "when the process is undeserving of trust."

Our government cannot fairly be said to be "malfunctioning" simply because it sometimes generates outcomes with which we disagree, however strongly (and claims that it is reaching results with which "the people" really disagree—or would "if they understood"—are likely to be little more than self-deluding projections).

Ely's picture of the Constitution as a procedural superstructure is but one argument in defense of his theory of judicial review. It has proven to be a contentious and vulnerable point, however.

Ely's argument is descriptive: the Constitution is, unarguably, mostly procedure. The parts that make substantive choices or enshrine fundamental values are, in comparison, few and far between. The simple response to Ely's

172. Id. at 43-72 & 92.
173. I set aside the question, what is the necessary business of society? Classical Liberalism is associated with the minimal, "night-watchman" state and the protection of private property. For a more sophisticated account of a liberal program, see R. Dworkin, A Matter of Principle 181-204 (1985).
175. Id. at 103.
176. Id. at 87-88.
178. J. Ely, supra note 167, at 90.
179. Id. at 92. Ely argues that two notable attempts to enshrine substantive values have suffered an ill fate: slavery and prohibition. Id. at 99-100. Of the clearly substantive guarantees, many are open to alternative readings and can be seen to address the structure of the political system. For example, the fourth amendment surely protects privacy, but it also serves political equality.

That rationale [privacy] intertwines with another . . . namely a fear of official
argument is that his description of the Constitution is distorted and idiosyncratic. While the Constitution's text may be mostly procedural, many would argue that those portions which uphold substantive values are its most important provisions.\(^\text{180}\) One particular sentence is striking in this regard. Of the substantive provisions he cannot reinterpret, Ely writes: "But they're an odd assortment, the understandable products of particular historical circumstances—guns, religion, contract, and so on—and in any event are few and far between."\(^\text{181}\) Only in the pre-Reagan era could anyone dismiss the values of "guns, religion, contract and so on" as an "odd assortment." Whatever its wisdom, the conservative movement of the 1980's was extraordinarily successful and was predicated on precisely discretion. In deciding whose lives to disrupt in the ways the amendment indicates—that is, whom to search or arrest or whose goods to seize—law enforcement officials will necessarily have a good deal of low visibility discretion. In addition they are likely in such situations to be sensitive to social station and other factors that should not bear on the decision. The amendment thus requires not simply a certain quantum of probability but also when possible, via the warrant requirement, the judgment of a "neutral and detached magistrate." From this perspective, which obviously is only one of several, the fourth amendment can be seen as another harbinger of the equal protection clause, concerned with avoiding indefensible inequalities in treatment.  

\textit{Id.} at 96-97. 

\(180\). In the fifth amendment, for example, due process prior to takings is prescribed, not as part of the political process, but as a means to keep private property in private hands; to preserve the institution of private property. Tribe, \textit{supra} note 177, at 1065-67 & n.12; Regan, \textit{supra} note 168, at 1110. Regarding the first amendment, Ely himself concedes that the best explanation for the Free Exercise Clause is that: "[F]or the framers religion was an important substantive value they wanted to put significantly beyond the reach of at least the federal legislature." J. ELY, \textit{supra} note 167, at 94.

Similarly, he argues that the prohibition on self-incrimination preserves the reliability of criminal prosecutions, but concedes that it is also based on the notion that "there is simply something immoral . . . about the state's asking somebody whether he committed a crime and expecting him to answer." \textit{Id.} Several commentators have pointed out that the same logic applies to the sixth amendment's guarantee of counsel. Regan, \textit{supra} note 168, at 1111 (citing Grano, \textit{supra} note 177, at 176).

Ely argues that the eighth amendment outlaws cruel and unusual punishment in open-ended terms because, broadly speaking, it addresses unequal treatment. J. ELY, \textit{supra} note 167, at 97. But this explanation is far less compelling than the simple notion that it was written so as to bar whatever forms of torture the future may devise. Regan, \textit{supra} note 168, at 1111. Finally, there is no way around the fact that the Constitution is just as concerned with the substance of slavery in abolishing it as in guaranteeing it. \textit{See} U.S. CONST. art. I, § 9 & amend. XIII.

Interestingly, Ely concedes the establishment clause to the opposition, declining to make the argument that I propose here: that the clause is best understood as serving the Constitution's deontological premises.

\(181\). J. ELY, \textit{supra} note 167, at 101 (footnotes omitted).
those values.182

A second, stronger objection to the procedural Constitution is that it seems to aspire to a neutrality as between citizens that just cannot be achieved:

The process theme's claim of value neutrality might imply either that the choice of process has no value implications or that the proper process does not itself favor some values over others. But the theorist obviously cannot assert that the process is or should be value neutral in the sense of having no value implications. Such a claim would be absurd. Processes obviously make a difference: clearly there are value differences between democratic and authoritarian regimes, and different processes clearly result in the selection of different ends. Moreover, if the process has no value implications, it seems odd that the neutrality theorist is so concerned with it.183

In the context of the establishment clause, the objection would be that a Constitution which does not ensure virtuous, moral or Godly outcomes on some level is not neutral as to those values. Given that virtue, morality and Godliness need and deserve support, the procedural Constitution's non-support amounts to animosity, not neutrality.184

Despite these objections, however, Ely's basic point seems valid. "The American Constitution has thus by and large remained a constitution, properly so called, concerned with constitutive questions. What has distinguished it, and indeed the United States itself, has been a process of government, not a governing ideology."185 As David Lyons has pointed out, it is the terminology of substance and procedure that leaves Ely vulnerable.186 Certainly the Constitution preserves substantive values: liberty, equality, privacy. To the extent it preserves those values, it is not neutral. What Ely means to say, according to Lyons, is that the Constitution does not mandate partic-


183. Baker, Neutrality, supra note 177, at 1040. Baker's full critique, it should be noted, is considerably more complex. See id. at 1042.


ular outcomes. 187

This clarification is helpful, but it leaves several questions unanswered. Lyons notes first of all that, even if the description as refined is more precise, it may or may not be more accurate. The underlying question of what sort of political community the Constitution organizes remains unanswered. 188 In addition, it seems there is a simple explanation for the Constitution’s not specifying outcomes. Detailed policy choices just cannot be made at a government’s birth. There is a practical, functional distinction between a Constitution and legislation. To say the Constitution does not specify outcomes is to say very little.

However, Lyons’s substituting “outcomes” for “substance” is a good beginning in recasting Ely’s procedural Constitution into something more defensible and more servicable for my purposes here. Ely himself suggests a fruitful approach:

Don’t get me wrong: our Constitution has always been substantially concerned with preserving liberty. . . . The question that is relevant to our inquiry is how that concern has been pursued. The principal answers to that, we have seen, are by a quite extensive set of procedural protections, and by a still more elaborate scheme designed to ensure that in the making of substantive choices the decision process will be open to all on something approaching an equal basis, with the decision-makers held to a duty to take into account the interests of all those their decisions affect. 189

The key to redeeming the procedural Constitution is to draw this out, to clarify the connection between the features of the Constitution Ely emphasizes and the ideal of liberty. His descriptive argument alone is unpersuasive. Ely demonstrates that the Constitution is amenable to his reading, but not that that reading is definitive. Furthermore, given that the procedural Constitution cannot pretend to neutrality, how can it justify the preferences it does show? The issue is, does the interpretation of the Constitution as procedural superstructure describe a Constitution we are willing to accept as just? To answer that question, we need to see the Constitution’s not dictating particular policy outcomes as part of a broader political philosophy.

187. Id.
188. Id. at 753.
189. J. Ely, supra note 167, at 100.
B. The Constitution and Deontological Justice

As a first step, consider a basic distinction between the notions of "the good" and "the right."\(^\text{190}\) The good has to do with the proper ends, or supposed proper ends, of life. It is what properly constituted reason will choose, simply because to do so is proper according to an overarching conception of human purpose. The right, in contrast, describes relations between persons along the way, so to speak, without reference to their chosen ends or the propriety of those ends. A social theory addressing the question of the right is likely to stress notions of fairness, equality and liberty; a theory turning on a conception of the good will rely more on notions of virtue, duty and propriety.

Two meanings of the term justice can be distinguished, which differ in whether the good is given priority over the right or vice versa. Justice conceived with reference to the good describes treatment appropriate to the particular ends of human existence which one's theory of the good posits. For example:

Governance, for Aquinas, was not the strictly remedial or punitive reality it was for Augustine; governance could be an expression of that human nature which has God for its origin. . . . [H]is conviction that human reason can know with conviction the natural law that orders us (even after Adam) toward our proper end of communion with God, allowed Aquinas to develop a theory of social and political life focused on human possibility rather than depravity; on human creativity as an expression of our God-given natural gifts, rather than on obedience to a social order whose primary function is to keep evil at bay.\(^\text{191}\)

\(^{190}\) See J. Rawls, supra note 166, at 30-32; M. Sandel, supra note 166, at 2-7.


The moral and spiritual strength of a woman is joined to her awareness that God entrusts the human being to her in a special way. Of course, God entrusts every human being to each and every other human being. But this entrusting concerns women in a special way—precisely by reason of their femininity—and this in a particular way determines their vocation.


This is not to suggest that Christianity alone conceives justice as an expression of the good. Utilitarianism too is based on advancing a conception of the good. J. Rawls, supra note 166, at 23-27.
A theory such as this, which gives priority to the good over the right, is a teleological theory of justice.

Justice conceived with reference to the right, on the other hand, begins with two premises: 1) that individual persons properly choose their own ends; and, 2) that in fact individuals choose a variety of conflicting ends. This presents a dilemma: how to ensure social order without infringing on the individual's free choice of ends. The simple solution of justice conceived with reference to the good—attributing a single overriding end to all—is foreclosed. "As regards happiness, men do have different thoughts about it and each places it where he wants, and hence their wills cannot be brought under any common principle, nor, consequently, under any external law compatible with the freedom of everyone."

The best known solution to this problem—how to formulate just laws, or a system to produce just laws, without reference to a single conception of the good—is that of John Rawls, set out in his *A Theory of Justice*. Of the priority of the right in his own theory, Rawls writes:

The principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good. In drawing up plans and in deciding on aspirations men are to take these constraints into account. Hence in justice as fairness one does not take men's propensities and inclinations as given, whatever they are, and then seek the best way to fulfill them. Rather, their desires and aspirations are restricted from the outset by the principles of justice which specify the boundaries that men's systems of ends must respect. We can express this by saying that in justice as fairness the concept of right is prior to that of the good.

A theory of justice which, like Rawls's, places the right over the good is known as a deontological theory of justice.

The procedural Constitution described by Ely can be strengthened immeasurably by grounding it explicitly in a deontological theory of justice. Ely's denial that the Constitution is designed to produce specified outcomes is at bottom a

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192. See Rawls, supra note 6, at 229-30.
195. Ely implicitly acknowledges this in discussing the ideal of equality and the
denial that the Constitution was formulated, or ought to be interpreted, with reference to the good. The Constitution does not posit and enforce a particular vision of the good and proper ends of human life. Instead, the Constitution assumes the priority of the right over the good and posits a solution to the problem that ordering poses: assuming that people do properly choose their own ends and that in their pursuit of inconsistent ends they are likely to come into conflict, how should we define the proper sphere and conduct of government?196

Madison stated these premises in The Federalist.

As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter will attach themselves. The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to a uniformity of interests. The protection of these faculties is the first object of government. From the protection of different and unequal faculties of acquiring property, the possession of different degrees and kinds of property immediately results; and from the influence of these on the sentiments and views of the respective proprietors ensues a division of the society into different interests and parties.

The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points . . . have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good.197

To say that the Constitution does not embody a particular

insupportable assumption of "pure" republican theory that "the people" are essentially homogeneous. J. Ely, supra note 167, at 79-82.

196. The argument against strict construction of the establishment clause often rests on an inability or refusal to recognize the distinction between deontological and teleological conceptions of justice. In the midst of an otherwise informed discussion of legal positivism, for example, one commentator writes: "The question needs to be posed: to what end does the science of legal positivism aspire?" Comment, supra note 3, at 336.

conception of the good, that it is not a teleological Constitution, is weaker than the claim that the Constitution does not reflect fundamental values and stronger than the claim that it does not specify outcomes. The essential point is that the Constitution does not gather the lives of citizens in an overarching vision of human destiny, or subsume their wills to an overriding vision of the good and proper life. While it protects substantive values, those protections do not add up to a comprehensive vision of human purpose and the Constitution does not authorize the deployment of coercive state power to achieve one. While the Constitution does not specify outcomes, it refrains from doing so for reasons beyond the impossibility of making policy choices at the outset. The Constitution assumes that people do properly choose their own ends, and subjects government to the constraints this imposes.

The deontological Constitution is the same Constitution Ely argues for: a procedural superstructure; a device for collecting legitimating consensus and effecting necessary compromise in the writing and execution of law. The difference between Ely's procedural Constitution and the deontological Constitution lies in the defense of it. The thesis of the deontological Constitution does not require us to minimize or explain away those provisions of the Constitution which articulate fundamental values or substantive outcomes. The deontological Constitution implies only that the substantive, fundamental values which the Constitution does protect do not add up to a comprehensive, internally consistent conception of the good and proper life. The Constitution's protections for contract, equality, guns and privacy do not direct the lives of the citizens living under it to the fulfillment of an ultimate purpose.

C. A Teleological Critique and a Reply

For the moment, I will put off making the positive case for the deontological Constitution in favor of combining it with a complementary account of the establishment clause in Part

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198. In Ely's phrase, the Constitution is not marked by a governing ideology. J. ELY, supra note 167, at 100.

199. This is probably the true meaning of Ely's comment that the substantive protections for guns, religion and contract are an "odd assortment." He means, not that those values are trivial, but that they do not form a comprehensive, coherent whole centered around a guiding philosophy of human purpose. If this is an accurate reading, he is certainly correct.
V. The argument is not textual, like Ely's, of course; nor is it an historical argument. I will argue simply that the deontological Constitution is one we are willing to accept as just and that the test of falsifiability is supported by the same theory of justice. Before turning back to the establishment clause, however, I wish to emphasize the difference between Ely's procedural Constitution, the deontological Constitution and a teleological conception of the Constitution.

200. See infra text accompanying notes 219-31.

201. An historical argument would suffer from the weaknesses common to arguments from Framers' intent. See R. Dworkin, supra note 173, at 34-57; R. Dworkin, Law's Empire 359 (1986).

John P. Diggins suggests the historical argument in his account of the Constitution's neglect of virtue as a political concept. See J. Diggins, The Lost Soul of American Politics: Virtue, Self-Interest and the Foundations of Liberalism 48-99 (1984). Diggins' explanation of why the Constitution is "mostly procedure," J. Ely, supra note 167, at 90, rather than a hortatory catalogue of good ends and the qualities needed to attain them, demonstrates that the key framers of the Constitution were operating on premises similar to deontological liberalism.

First, there was a recognition that the population's being heterogeneous precluded their uniting to create a virtuous society on any model: [T]he Federalist marks a significant departure from the Declaration, in which Jefferson expressed his belief that America constituted "one people" acting together, and from English tradition, in which Parliament was regarded as the institution authorized to speak for the people as a whole. The framers believed instead that authority, although deriving [sic] from the people, could not be expressed directly through them because the masses of citizens not only were incapable of safeguarding their own liberties but were too divided among themselves to bring forth the general good and to engage in the necessary unity of action that could exercise sovereign authority in one body.

J. Diggins, supra at 56. The recognition of heterogeneity and the consequent preoccupation with the danger of "faction" transformed the operative conception of liberty: The idea of liberty also undergoes something resembling a Humean transformation in the Federalist. Here liberty is not so much a natural endowment of man but one of the rights that man possesses to the extent that society recognizes such rights; and the test of rights is whether or not they can be exercised, whether man has the means to give political effect to them. Rights, like property, are an aspect of power, more a social possession than a natural condition, and it was thought that they could be safeguarded in the Constitution not by appealing to "self-evident" truths but by dispersing and countervailing power in order to control it.

Id. at 61-62. Given these premises, religion could not possibly play a significant role in the organization of government:

The framers seemed to have been of two minds about religion. When it was universal, noninstitutional, and uncoerced, religion could possibly constrain action and inhibit desire; when it was particular, doctrinaire, and sectarian, it did more to activate the passions, as a zealous man hungers after righteousness. More fearful of the latter tendency, the framers placed little hope in religion as the bulwark of the Constitution.

Id. at 80.

Diggins, it should be noted, would not concur in the larger deontological argument advanced in this article.
One of my reasons for doing so is the fact that those who argue that strict construction of the establishment clause illegitimately "establishes" a "religion of secular humanism" rely on the premise that the constitution embodies a teleological theory of justice. For example:

The history of the religion clauses and their resulting relationship indicate the theistic concept of law and religion was well entrenched [sic] in our constitutional heritage. Liberty, for example, is understood in the first amendment as emanating from a higher law. As well, the over-all definition of religion, as understood in the first century of American independence, adhered to traditional theistic concepts. James Madison wrote that religion meant a duty which we owe to a creator and the manner of discharging it.202

While addressing the thesis that the Constitution rests on Judeo-Christian premises might be the more direct approach, my larger purposes are better served by rebutting the more general proposition that the Constitution has teleological premises of any kind.203

My second reason for dwelling further on the nature of

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202. Comment, supra note 3, at 340 (footnotes omitted). Another example: Religion, as defined in Davis [v. Beason, 133 U.S. 333 (1890)], involves a belief in a "Creator," which, the Court held, imposes certain obligations upon each individual to obey the will of the "Creator," or Supreme Being. This definition of religion mirrors that understood by James Madison, and those within the historical milieu that drafted the first amendment, and is, therefore, both historically and constitutionally accurate. Moreover, the Court's definition corresponds with American religious heritage and was applicable to a society overwhelmingly dominated by theistic Christianity. This non-sectarian definition, applied to a Judeo-Christian society, is clearly compatible with the first amendment religion clauses.

Whitehead & Conlan, supra note 3, at 8.

203. In addressing the nature of the Constitution, I leave aside a separate, closely related argument made by the apologists of religion. Those who argue for accommodation based on a teleological conception of the Constitution invariably point to the Declaration of Independence as authority:

The traditional theistic concept of positive law as being based on a higher law was well entrenched in American political and juridical institutions during the formative years of the Republic. A higher or objective natural law was the cornerstone of the Declaration of Independence wherein is expressed the theistic belief that "God endows man with certain inalienable rights."

Comment, supra note 3, at 338.

Biblical theism is clearly expressed in such founding documents as the Declaration of Independence, which presupposes that "God" endows men with "inalienable rights."

Whitehead & Conlan, supra note 3, at 25.

The relevance of the Declaration to the interpretation of the Constitution is never spelled out, however. Even John P. Diggins, who makes a sophisticated argument that
the deontological Constitution is to stress a premise of my argument that I stated at the outset: in interpreting the establishment clause there is no refuge in the notion of neutrality. To teach science in public schools rather than religion is to favor the secular. I want to stress the distinction between the procedural and deontological Constitution, in order to emphasize that the latter does not aspire to neutrality. The argument in favor of the deontological Constitution, and in favor of the test of falsifiability, is not that the Constitution so conceived is neutral as between citizens' chosen ways of life: obviously it disfavors a conception of the good life that entails governmental intervention and support in the service of religious ideals. Instead of neutrality, the central ideal of the deontological Constitution might be called indeterminancy. The Constitution has no object, no end in mind, so to speak, for the citizens living under it. A constitution having such an object would place citizens in the service of that idea and so infringe on individual autonomy. Indeterminacy in this sense is not the same as neutrality because it disfavors those who would use government to achieve divine ends. More important, indeterminacy is not morally neutral: the idea is that to use citizens as means to a constitutionally prescribed end is immoral. Accordingly, the deontological Constitution positively favors those means and ends of government that do not posit an end for individual lives lived under it. The larger argument of this article, taken up in Part V, is that the secular—empirical, critical ways of understanding the world, as exemplified in science—is indeterminate in this sense and thus congruent with constitutional government in a way that religion is not.

Exchanging Ely's strong claim that the Constitution is procedural for the weaker claim that it is deontological shifts the ground of the debate between Ely and his detractors. Where Ely's opponents could rebut his claim that the Constitution is procedural simply by pointing to substantive provisions protecting fundamental values, the deontological Constitution

the Declaration ought to form the basis of American political community, recognizes that the Declaration and the Constitution rest on fundamentally different premises:

By 1788, the doctrine of rights had a new political status that no longer required ontological foundations in the laws of nature and of God or classical foundations in the ideas of Montesquieu and Machiavelli. To put it another way, the Declaration of Independence had its justification in the principles that could be derived from nature, classical politics in the ideas of virtue, and the Constitution in the truths that reside in power.

imposes a heavier burden on rebuttal. If the Constitution is not deontological, but teleological—if it posits a coherent, comprehensive theory of the good and proper ends of life—the burden is on the proponents of that position to say what that theory is and to defend it as a specifically constitutional value. It is not enough to point to substantive provisions; it must be possible to add them up.

This shift in the grounds of the debate is well illustrated by the one article which has attacked the deontological basis of Ely’s theory.\(^{204}\) A leading critique of deontological theories of justice is that of Michael Sandel, stated in his *Liberalism and the Limits of Justice*.\(^{205}\) Milton Regan has translated Sandel’s arguments into a constitutional theory which purports to show that the inherent weaknesses of deontology infect Ely’s work. Regan, however, fails to grasp the nature of Ely’s deontological premises and, as a result, his attack fails.

Sandel’s arguments are directed against John Rawls, the leading expositor of the deontological theory of justice.\(^{206}\) Following Sandel’s lead, Regan draws a parallel between Rawls and Ely.

The Rawlsian constitution’s concern with the justice of the political process embodies the priority of the right over the good. Its ideal is the perfect procedural justice of the original position—an ideal that incorporates no substantive conception of the good. This concern for justice is indifferent to the particular values chosen by the political process, as long as that process is structured fairly. . . .

While Rawls’s deontology results in an emphasis on process, Ely’s concern with process is based on deontological premises. First, representation-reinforcing review embodies the priority of the right over the good. Ely’s principal concern is the fairness of the process for assessing competing claims, not the substantive merit of the claims that prevail. His political ideal is thus pure procedural justice, an arrangement whereby outcomes are justified solely by the integrity of the process that produces them.\(^{207}\)

\(^{204}\) Regan, *supra* note 168.
\(^{205}\) M. SANDEL, *supra* note 166. See also A. MACINTYRE, *supra* note 166; R. UNGER, *supra* note 166.
\(^{206}\) Gutmann, *Communitarian Critics of Liberalism*, 14 PHIL. & PUB. AFF. 308, 311 (1985). ("[Sandel’s theory relies on] an interpretation and criticism of Rawls’s theory, which he reasonably assumes to be the best theory liberalism has yet to offer.").
\(^{207}\) Regan, *supra* note 168, at 1102-03.
Based on his assumption that it is Ely's proceduralism that defines his theory as deontological, Regan makes the argument that the Constitution is not procedural, but substantive.\textsuperscript{208} From the fact that the Constitution protects substantive values, Regan leaps to the conclusion that the Court has "undeniably articulated a vision of substantive values."\textsuperscript{209} The Court should continue to do so, Regan concludes, making constitutional adjudication an occasion to answer questions of human purpose and communal identity, in short, to define a guiding theory of the good.

The Supreme Court's articulations of the values animating American society in various historical periods have in some measure provided statements of national identity. Such adjudication has generated a dialogue on what our nation stands for; in Sandel's terms, it has forced us to ask not merely "What shall we choose?" but "Who are we?"

Instances of this phenomenon abound. The history of economic substantive due process doctrine, for instance, reflects evolution in the importance society has assigned to private property. More recent substantive due process decisions have confronted the question of the substantive importance of privacy . . . . The result has been a sustained, explicitly moral dialogue on visions of the good that in part constitute our national identity. For those engaged in the dialogue, the vision of the good we adopt implicates who we are and what we stand for.\textsuperscript{210}

In progressing from the substantive provisions of the Constitution to the Court's defining the nation's "vision of the good," Regan vaults an enormous gap in his theory. Perhaps the Court could define a comprehensive vision of the good that would constitute our national identity.\textsuperscript{211} What that hope overlooks, however, is that the Constitution itself does not contain

\textsuperscript{208} Id. at 1110-17.
\textsuperscript{209} Id. at 1113.
\textsuperscript{210} Id. at 1113-14.
\textsuperscript{211} More likely, it could not. The task Regan proposes for the Court is utopian, to say the least.

These considerations suggest that substantive constitutional review provides perhaps the best institutional opportunity for the discovery of those shared meanings that enter into national, and thus individual, identity. Sandel notes that such a process must be ongoing, and our self-definition open to revision, if we are to achieve a stable identity amidst the flux of experience. By articulating to the nation the meaning of shared values at particular historical moments, substantive constitutional review affirms the stability of those values by suggesting their current application. Such an exercise provides
such a vision. The mere fact that the Constitution contains substantive protections for fundamental values does not mean that those substantive provisions add up to a coherent conception of ultimate good or human destiny. Regan assumes that it does, but the burden is on him to say what that conception is and to defend it as a specifically constitutional value.

He makes no attempt to do so. The most notable feature of Regan's communitarian constitutional theory is a studied vagueness in the use of terms like "shared conceptions of the good,"212 "the substantive values we share,"213 "shared meanings,"214 and "our shared identity."215 Those common meanings, values and shared conceptions of the good are never specified, of course, because they do not exist.216 At least, they

assurance that our shared identity has not dissolved despite the course of history.

Id. at 1121. What this ignores entirely is the fragility of the Court as a political body. Citizens go to court because of conflict, and no court—including and especially the Supreme Court—can ever resolve that conflict in all its dimensions. Any serious theory of judicial review must account for the threat this poses to the Court's perceived legitimacy.

Just as voters with different sets of grievances coalesce to defeat incumbents, and congress asserts itself more vigorously against a President whose public support is eroding, the Court's prestige and authority is of a broad institutional nature, and when the Court expends its store of capital it tends to do so in a cumulative fashion. Since public antagonism, resistance, and retribution appear to have a spill-over effect, if one or another of the Court's rulings sparks a markedly hostile reaction, then the likelihood that subsequent judgments will be rejected is greatly increased even though the later invalidations would, in themselves, be only mildly productive of popular resentment.

J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 156 (1980). Acting under such constraints, the Court cannot possibly embark on a quest or crusade for "our shared identity." To do so would be to court complete destruction, as should be evident from a moment's reflection on Regan's suggestion that Roe and Lochner are models for constitutional adjudication. Regan, supra note 168, at 1113-14.

212. Regan, supra note 168, at 1119.
213. Id. at 1109.
214. Id. at 1109-10.
215. Id. at 1121.
216. The authors of a recent survey of poll results for the period 1926 to 1982 concerning ethnic and religious bias conclude, in part: "Ethnocentrism in both its milder forms of ethnic pride and in-group cohesion and in the more virulent forms of bigotry, discrimination, and xenophobia is still prominent in America (as in other societies)." Smith & Dempsey, The Polls: Ethnic Social Distance and Prejudice, 47 PUB. OPINION Q. 584, 587 (1983).

Regan would reply that deontological liberalism is itself partly responsible for this state of affairs, because, by presupposing pluralism, liberalism fosters it. Regan, supra note 168, at 1122, (quoting M. SANDEL, supra note 166, at 153). The only possible response to this argument is that it blinks reality. The notion that pluralism and individualism in the United States are in any significant degree attributable to a theory
cannot be found in the Constitution in the coherent, comprehensive form Regan's teleological theory requires.

At the root of Regan's error is his misconception of the deontological bases of Ely's theory. It is not proceduralism that defines Ely's theory as deontological; it is the denial that the Constitution embodies any single theory of the good. While Ely may fail to establish that the Constitution is primarily or fundamentally procedural in nature, the weaker claim that the Constitution does not put forward a comprehensive, coherent vision of human purpose is irrefutable. If it can be refuted, again, the burden of doing so is on the teleologists such as Regan.

V. DEONTOLOGY, FALSIFIABILITY AND THE ESTABLISHMENT CLAUSE

What is the connection between advancing belief not falsifiable in principle, the establishment clause and the deontological Constitution? The answer lies in the Kantian roots of deontological justice and in the nature of the political culture the deontological Constitution supposes and supports. Both the deontological Constitution and the test of falsifiability turn on a particular conception of the person as autonomous, in Kant's terms, or, as Rawls phrases it, free and equal.

A. Freedom of Conscience and the Deontological Constitution

The deontological Constitution is a procedural superstructure by which we effect the consensus and compromise necessary to democratic government. It does not suppose any particular outcome of the procedures it sets up. Ely shows at least that the Constitution's text is amenable to this reading, but not that this reading is definitive. The question is, why should we suppose the Constitution requires no particular out-

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218. Rawls, supra note 6, at 233-34.
comes, beyond the fact that writing a Constitution which does so would be difficult?

The short answer is that only this interpretation of the Constitution is consistent with our conviction that the citizens living under it are free and equal. As noted above, the defining feature of a deontological theory as opposed to a teleological theory is the assumption that the right is prior to the good; that the state should be ordered, not to realize some overarching conception of the proper ends of the human existence, but to ensure that each person can pursue his own chosen ends. In any deontological theory, this priority of the right over the good rests ultimately on Kant’s categorical imperative. In its second formulation the categorical imperative is: “Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.” The categorical imperative places the right over the good because to arrange institutions so as to realize a given conception of human purpose is to use persons as means to that realization. In contrast, to order things so as to enable individuals to pursue their own ends is to treat them as ends in themselves.

The deontological Constitution shares this premise. The Constitution does not decline to specify particular outcomes only because to do so is difficult as a practical matter. The Constitution does not even make the attempt because, even if it were possible, to specify a particular result of our political association would be unjust in this Kantian sense. It would treat citizens as means to the attainment of that stipulated result rather than as ends in themselves.

219. Those who assert teleological conceptions of the Constitution in support of accommodationist readings of the establishment clause appear to share the premise that freedom and equality are fundamental constitutional values. See Toscano, supra note 3, at 209-10; Whitehead & Conlan, supra note 3, at 54-61; Comment, supra note 3, at 333.

220. See supra text accompanying notes 190-99.

221. I. KANT, supra note 217, at 47. The basis of the categorical imperative is Kant’s conception of the person as autonomous.

The ground of this principle is: rational nature exists as an end in itself. Man necessarily thinks of his own existence in this way; thus far it is a subjective principle of human actions. Also every other rational being thinks of his existence by means of the same rational ground which holds also for myself; thus it is at the same time an objective principle from which, as a supreme practical ground, it must be possible to derive all laws of the will. The practical imperative, therefore, is the following: Act so that you treat humanity, whether in your own person or in that of another, always as an end and never as a means only.

Id. But see text accompanying notes 222-25.
Deontological theories such as this do not incorporate Kant’s ethics as an unreconstructed whole. His defense of the categorical imperative lacks force for us, because we share neither his psychological assumptions nor his confidence in the deduction of universally valid laws. Rawls, for example, takes a fundamentally different approach in defending justice as fairness, claiming only that his principles of justice represent our "considered opinion in reflective equilibrium."224

I should emphasize that what I have called the "real task" of justifying a conception of justice is not primarily an epistemological problem. The search for reasonable grounds for reaching agreement rooted in our conception of ourselves and in our relation to society replaces the search for moral truth interpreted as fixed by a prior and independent order of objects and relations, whether natural or divine, an order apart and distinct from how we conceive of ourselves. . . . What justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the tra-


Rawls argues that his two principles accurately describe justice because they would be chosen by rational persons in the "original position"; that is, by those selecting the basic features of a society in which they must live. J. RAWLs,' supra note 166, at 17-22. He describes his use of considered opinion in reflective equilibrium in this way:

In searching for the most favored description of [the original position] we work from both ends. We begin by describing it so that it represents generally shared and preferably weak conditions. We then see if these conditions are strong enough to yield a significant set of principles. . . . [P]resumably there will be discrepancies. . . . We can either modify the account of the initial situation or we can revise our existing judgments, for even the judgments we take provisionally as fixed points are liable to revision. By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle, I assume that eventually we shall find a description of the initial situation that both expresses reasonable conditions and yields principles which match our considered judgments duly pruned and adjusted. This state of affairs I refer to as reflective equilibrium.

J. RAWLs, supra note 166, at 20.

In accord with this method, which makes no claims to transcendental truth, Rawls has stressed that justice as fairness is not a theory of the person or a comprehensive moral system, but only a political theory designed to describe the present best conception of justice in a late twentieth century constitutional democracy. See Rawls, supra note 6, at 224-25.
dictions embedded in our public life, it is the most reasonable doctrine for us.\footnote{225}


It is here that Sandel's misreading of Rawls is most acute. As Amy Gutmann writes: "Sandel interprets Rawls as . . . making a metaethical claim: that the foundations of justice must be independent of all social and historical contingencies without being transcendental." Gutmann, \textit{ supra} note 206, at 311-12 (discussing M. \textit{Sandel, supra} note 166, at 16-17). Gutmann continues:

Why saddle Rawls's moral argument for the primacy of justice with this meaning? To be sure, Rawls himself argues that "embedded in the principles of justice . . . is an ideal of the person that provides an Archimedean point for judging the basic structure of society." But to translate this passage into a claim that the grounds of justice can be noncontingent ignores most of what Rawls says to explain his Archimedean point, the nature of justification, and Kantian constructivism. \textit{Id.} (discussing J. \textit{Rawls, supra} note 168, at 584). See \textit{Rawls, Kantian Constructivism, supra}, at 564-67.

Sandel, however, anticipated Gutmann's objection to some extent by acknowledging that Rawls's method does replace Kant's transcendental premises with a more empirical "hypothetical choice situation (the 'original position'), characterized by conditions meant to yield a determinate outcome fit for actual human beings." M. \textit{Sandel, supra} note 166, at 14. Nevertheless, Sandel argues, Rawls's method of defining political principles cannot free him from the moral implications of his theory, particularly the implied conception of the person.

[I]f reflective equilibrium truly works both ways, then the account of human circumstance that emerges once reflective equilibrium is achieved can no more be dispensed with as the incidental product of a fictive contrivance than can the principles of justice themselves. Given the methodological symmetry of the original position, we cannot regard one of its products as chaff to the other's wheat, to be chucked away once the flour has been ground. We must be prepared to live with the vision contained in the original position, mutual disinterest and all, prepared to live with it in the sense of accepting its description as an accurate reflection of human moral circumstance, consistent with our understanding of ourselves.

M. \textit{Sandel, supra} note 166, at 48. \textit{But see infra} note 231.

It is this "understanding of ourselves" with which Sandel is ultimately concerned. His fundamental objection to Rawls's theory—and to any deontological theory—is that it leaves no place for a particular kind of self-understanding that Sandel considers valuable.

On this strong view, to say that the members of a society are bound by a sense of community is not simply to say that a great many of them profess communitarian sentiments and pursue communitarian aims, but rather that they conceive their identity—the subject and not just the object of their feelings and aspirations—as defined to some extent by the community of which they are a part. For them, community describes not just what they have as fellow citizens but also what they are, not a relationship they choose (as in a voluntary association) but an attachment they discover, not merely an attribute but a constituent of their identity.

M. \textit{Sandel, supra} note 166, at 150.

Sandel sums up his critique with the observation that deontological liberalism "forgets . . . that when politics goes well, we can know a good in common that we cannot know alone." \textit{Id.} at 183.
Nevertheless, what defines justice as fairness in a deontological theory of justice is the role the categorical imperative continues to play as part of that "deeper understanding of ourselves."

[C]itizens in a well-ordered society . . . think of themselves as self-originating sources of valid claims . . . People are self-originating sources of claims in the sense that their claims carry weight on their own without being derived from prior duties or obligations owed to society or to other persons, or, finally, as derived from, or assigned to, their particular social role. . . . To take the extreme case, slaves are human beings who are not counted as self-originating sources of claims at all; any such claims originate with their owners or in the rights of a certain class in society.226

The notion of a deontological Constitution makes similar use of the categorical imperative. We make it part of our conception of the Constitution because it describes our best understanding of persons' relation to government. To live under a deontological Constitution is to be assured that one is never in anything like the condition of a slave. The Constitution leaves me free to choose my place in society without reference to any comprehensive system of human purpose which would assign me one regardless of my own desires. As a corollary, whatever demands I make under the Constitution I have a right to make simply by virtue of my being a citizen, regardless of my place in society. The Constitution, in short, places the right prior to the good because to do otherwise would treat citizens living under it as something other than free and equal. The Constitution is best described as a deontological Constitution because such a Constitution is one we are prepared to accept as just.

Consider the alternative. Milton Regan, as I have pointed out,227 omits any pertinent analysis of the Constitution in arguing that the Supreme Court ought to take on the task of defining a national identity, purpose, and vision of the good; but clearly the teleological conception of the Constitution is implicit in what he writes. There is no better argument for the deontological Constitution than the implications of Regan's suggested teleological Constitution. Two passages in particular are notable. "On the general level, Ely fails to appreciate that a nation constitutes a community of shared values that enters

226. Rawls, supra note 225, at 534-44.
227. See supra text accompanying note 211.
into individual identity."

"These considerations suggest that substantive constitutional review provides perhaps the best institutional opportunity for the discovery of those shared meanings that enter into national, and thus individual identity." If individual identity is dependent on national identity, what of individual dignity, worth, and responsibility? It is as if, for Regan, the first half of this century is a blank.

The tribalism of the pan-movements with its concept of the "divine origin" of one people owed part of its great appeal to its contempt for liberal individualism, the ideal of mankind and the dignity of man. No human dignity is left if the individual owes his value only to the fact that he happens to be born a German or a Russian; but there is, in its stead, a new coherence, a sense of mutual reliability among all members of the people which indeed was very apt to assuage the rightful apprehensions of modern men as to what might happen to them if, isolated individuals in an atomized society, they were not protected by sheer numbers and enforced uniform coherence.

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228. Regan, supra note 168, at 1109.

229. Id. at 1121. Regan, like Sandel, hopes to preserve the possibility of the person constituted by community. The deontological Constitution is anathema as a consequence, because it seems divisive. In placing the right over the good and in emphasizing justice over community as a result, the deontological conception of the Constitution breaks down communal bonds and "threatens our ability to realize and act on the basis of our shared values." Id. at 1122-23.

230. Given Regan's reliance on Sandel, it is not surprising that Sandel's discussions of constitutive community also have a disturbing ring:

More generally, Rawls's account rules out the possibility of what we might call 'intersubjective' or 'intrasubjective' forms of self-understanding, ways of conceiving the subject that do not assume its bounds to be given in advance

Intersubjective conceptions allow that in certain moral circumstances, the relevant description of the self may embrace more than a single, individual human being, as when we attribute responsibility or affirm an obligation to a family or community or class or nation rather than to some particular human being. Such conceptions are presumably what Rawls has in mind when he rejects, 'for reasons of clarity among others,' what he calls 'an undefined concept of community' and the notion that 'society is an organic whole' for these suggest the metaphysically troubling side of Kant which Rawls is anxious to replace.

M. SANDEL, supra note 166, at 62-63 (discussing J. RAWLS, supra note 166, at 264).

Rawls, however, declines to rely on such expansive notions of community for reasons quite different from those Sandel suggests, as Rawls later made clear. See infra note 231.

231. H. ARENDT, THE ORIGINS OF TOTALITARIANISM 235 (1951). Arendt's use of the term "atomized society" should not be misinterpreted. She represents it as a fear, not a fact. Deontological liberalism in no way supposes that individuals are or should be
To say that the deontological Constitution meets our best

completely cut off from other individuals or the community. It has often been
misrepresented as doing so.

For deontology insists that we view ourselves as independent selves, independent in the sense that our identity is never tied to our aims and attachments. . . .

But we cannot regard ourselves as independent in this way without great
cost to those loyalties and convictions whose moral force consists partly in the
fact that living by them is inseparable from understanding ourselves as the
particular persons we are—as members of this family or community or a
nation or people, as bearers of this history, as sons and daughters of that
revolution, as citizens of this republic.

M. SANDEL, supra note 166, at 179.

Mark Tushnet makes similar allegations against liberalism in connection with his
tory of the religion clauses:
The historical origins of modern liberal political theory lay in philosophers' reflections on the emergence of the unified nation-state. In order to create a
ational entity strong enough to act in the emerging world polity and to
expand into the world market, the nation-state had to destroy the power of
intermediate institutions standing between the individual and the comprehen-
sive state . . . . Establishing the secular ruler's power would require diminishing
that of the priests.

Tushnet, The Constitution of Religion, 18 CONN. L. REV. 701, 730-31 (1986); see also
Regan, supra note 168, at 1123; Tushnet, Following the Rules Laid Down: A Critique
of Interpretivism and Neutral Principles, 96 HARV. L. REV. 781, 783 (1983); Note, Reinter-
preting the Religion Clauses: Constitutional Construction and Conceptions of the Self, 97 HARV. L. REV. 1468, 1471 (1984). For a reply to the charges made in the earlier
article by Tushnet, see R. DWORIN, supra note 201, at 440 n.19 (1986).

The mistake both Sandel and Tushnet make (aside from Tushnet's reifying the
state) is to infer too much from liberalism's choice of problem. Liberal theories
address the question of the proper relation between the individual and the state. Its
solution to that problem involves denying that the relationship should resemble cer-
tain others—the family, for example—but that should not be taken as denigrating
those other relationships or as asserting that human beings do not need such relation-
ships or as suggesting that the state/individual relationship should supplant all others.
Liberalism simply takes seriously the notion that the state presents a unique moral
problem once it is subjected to constraints of liberty and equality.

It should also be stressed that justice as fairness is not intended as the applica-
tion of a general moral conception to the basic structure of society, as if this
structure were simply another case to which that general moral conception is
applied . . . . The essential point is this: as a practical matter no general moral
conception can provide a publicly recognized basis for a conception of justice
in a modern democratic state. The social and historical conditions of such a
state have their origins in the Wars of Religion following the Reformation and
the subsequent development of the principles of toleration, and in the growth
of constitutional government and the institutions of large industrial market
economies. These conditions profoundly affect the requirements of a worka-
ble conception of political justice: such a conception must allow for a diversity
of doctrines and the plurality of conflicting, and indeed incommeasurable,
conceptions of the good affirmed by members of existing democratic societies.

Rawls, supra note 6, at 225.

Sandel's error in this regard is reflected in his argument that Rawls's method of
reflective equilibrium commits him to advancing an impoverished conception of the
person in conjunction with his principles of justice. See supra note 225; M. SANDEL,
understanding of the relation of the individual to the state is thus to say more than might at first appear. We make the categorical imperative part of our understanding of the Constitution and give the right priority over the good not because we can deduce it, with Kant, from human nature. We interpret the Constitution that way because in light of our particular history and what we know now, we may well fear to do otherwise.

B. The Establishment Clause and Falsifiability in Principle

The deontological Constitution, as I have described it, is a Constitution which does not embody a comprehensive, coherent vision of human purpose. The Constitution supposes that persons do properly choose their own ends and so establishes procedures dedicated only to securing the consensus and compromise needed to carry out the necessary business of government. This suggests a certain rationale for the establishment clause.

To adopt some program which subordinates individuals to the attainment of some single, presumably “higher,” good would evidently run counter to the premises of the Constitution itself. Thus the establishment clause makes explicit what is implicit in the deontological Constitution: that the government will not adopt a teleological program. The disavowal is specific as well as explicit. Among the teleological programs the government will not adopt are those advanced by any and all religions.232

232. The notion that the clause makes an implicit premise of the Constitution an explicit promise has a basis in history:

During the debate, Madison expressly disclaimed taking any position on the question whether an amendment on the matter was needed. When Roger Sherman declared that an amendment was “altogether unnecessary” because Congress had no power “to make religious establishments,” Daniel Carroll replied that an amendment on the subject would “conciliate the minds of the people to the Government,” and Madison agreed with Carroll. Although Madison would not say whether an amendment was necessary, he reminded the House that some state conventions had expressed the fear that Congress might establish a national religion by the exercise of a power under the

\[\textit{supra} \text{ note 166, at 48. It is indeed true that in the process of seeking reflective equilibrium in defining principles of justice, we also define—in the mirror, so to speak—a particular person. The same convictions about the heterogeneity of modern societies, the value of liberty and necessary limits on the use of the state's coercive power which shape principles of justice, also shape the person considering the question of justice as one who recognizes heterogeneity, seeks liberty and values toleration. But the values that person would treat as paramount in considering the question of justice in the state are defined by the particular question at hand; other values that persons do hold and do treat as paramount in deciding other critical questions are in no way impugned.}\]
However, to read the establishment clause as forewearing the teleological programs of religion leaves us somewhat short of being able to decide actual cases. We seem to have a Zorach problem.\textsuperscript{233} If the establishment clause means no more than that the government will not adopt a teleological program, deciding actual cases threatens to involve us in questions of uncalibrated degree. Granted that the government has not officially adopted a religious creed, how far may it go in advancing one? Just like an established church, the adoption of a teleological program stands as a fixed point on the horizon of impermissibility, but seems to be of no help in navigating the immediate area.

The key to escaping that difficulty is the notion of belief not falsifiable in principle. The test of falsifiability bars government's advancing such beliefs because to do so threatens the adoption of a teleological program and because advancing such beliefs in itself violates the categorical imperative to use others as means, not ends.

Recall that a proposition not falsifiable in principle is one which no empirical evidence will refute, but which some, perhaps much, evidence will confirm. Given that basic logical structure, effective dissent from such claims is extremely difficult. One is limited to arguing that the evidence fails to confirm the proposition or that the proposition is false for independent, non-empirical reasons; because certain premises are incoherent or because the logic erected on them is faulty.

Neither approach will ordinarily succeed. Dissenting arguments over what the evidence confirms are unlikely to dent the government position because, as Popper shows, confirming evidence for any plausible claim is so abundant. In contrast, deductive logic is determinate and such objections can be fatal to the government position. For that very reason, however, straightforward logical controversies are likely to be rare. More often, the deductions on each side will be valid; the controversy will lie in first principles. To the extent that those

\textsuperscript{233} See supra text accompanying notes 74-80.
premises are non-empirical, the government’s position again will hold. Because government and dissenter share no common ground and cannot appeal to empirical evidence, the controversy will remain a sterile clash of incommensurables.

Just on the surface, it should be apparent that such barren disputes over non-falsifiable propositions, in which dissent cannot gain a foothold, thwart the political culture contemplated by the deontological Constitution. If the beliefs advanced by an existing government are irrefutable, critical participation in government is impossible. More specifically, government capacity to preclude dissent in this manner is a necessary condition to the adoption or advancement of a teleological program. Claims about ultimate ends are characteristically non-empirical and non-falsifiable, simply because human experience is contingent and fragmentary and cannot fully support such claims. In reading the establishment clause to preclude the advancement of belief not falsifiable in principle, the test of falsifiability precludes the adoption or advancement of the teleological programs of religion, and with it the use of citizens as means, not ends.

At this point, it might be argued that in anticipating and seeking to prevent the preclusion of critical participation in government, the test of falsifiability still displays some of Zorach’s defect. What the test seeks to prevent may be a remote eventuality. However, the problem with Zorach’s approach was not just that it sought to forestall remote effects, but that it framed the establishment clause question as one of degree without giving a scale on which to make such judgments. The test of falsifiability, on the other hand, does not demand that we gauge small and large steps toward the adoption of a teleological program. Instead, it identifies and eliminates a single necessary condition to such an undertaking: the

234. A similar connection between what I call teleological programs and belief not falsifiable in principle is noted by O’Hear in his discussion of Popper’s political philosophy:

Someone who wishes to impose a Utopian blueprint on society will tend to overlook the initial effects of his revolutionary actions, which may well be unpopular and undesirable, because of his belief in the ultimate correctness of his theory about the ideal state. Indeed, he has to become dictatorial, if he is not to modify his blueprint against experience in such a way as to destroy its integrity. He has, in other words, to treat his blueprint as unfalsifiable, to treat human beings and their reactions as being tested by it, rather than vice versa.

A. O’HEAR, supra note 14, at 157.
capacity to advance belief not falsifiable in principle. The test of falsifiability requires governments operating under the deontological Constitution to stay true to the Constitution's intrinsically open nature by means of a single, unequivocal requirement.\(^{235}\)

The argument for the test of falsifiability can also be framed in more formal, Kantian terms; that is, as a corollary to the categorical imperative. As described above, a government which advances belief not falsifiable in principle effectively precludes dissent. In doing so, it makes a demand on the individual which the deontological Constitution abjures: to believe without the freedom to change one's mind; to accept immutable truth and rest content. The person becomes a vessel of belief rather than a participant in knowledge; that is, a means rather than an end in himself. In that sense, advancing belief not falsifiable in principle violates the assumption that citizens under the Constitution are free and equal, an assumption ordinarily summed up, where evidence and belief are concerned, in the term freedom of conscience. Under the test of falsifiability, legislation violates the establishment clause when it denies what the Constitution's basic structure is designed to preserve: an equal liberty to choose one's own ends according to the dictates of conscience.

Madison himself stated the principle in his Memorial and Remonstrance:

\[T]\he Bill violates that equality which ought to be the basis of every law, and which is more indispensable in proportion as the validity or expediency of any law is more liable to be impeached. "If all men are by nature equally free and independent," all men are to be considered as entering into

\(^{235}\) It might still be objected that there is some conceivable teleological program that does not rely on any proposition not falsifiable in principle or that not all propositions not falsifiable in principle entail teleological programs. The only possible response to such an objection, which so far as it goes is well-founded, is to say that the test of falsifiability is a legal standard, which, like any other, relies on common experience and sound judgment. Legal rationality is empirical, instrumental, pragmatic, inductive, or rhetorical—but never deductive, never mathematical. Stick, supra note 6, at 345-50, 363-67; White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. CHI. L. REV. 684 (1985). It is not possible to define a universal criterion which will delineate a discrete class of actions which will always necessarily violate the establishment clause. Law just does not work that way. But some instrumental legal criteria are better than others. Some give a more convincing account of their object and draw a tighter connection between the object and the formula used. The test of falsifiability claims an advantage over Zorach and Lemon on that ground.
Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all, are they to be considered as retaining an "equal title to the free exercise of Religion according to the dictates of conscience." Whilst we assert for ourselves a freedom to embrace, to profess, and to observe, the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yielded to the evidence which has convinced us.  

A government advancing belief not falsifiable in principle violates this precept. A government advancing such belief denies the individual the right to consider and reject any particular belief, regardless of the fact that others have been persuaded by it and may hold the strongest possible convictions on the matter. In short, a government advancing belief not falsifiable in principle violates freedom of conscience and thus the establishment clause.

This invalidating effect is perfectly illustrated in *Aguillard*. What determines the legitimacy of the Creationism Act under the clause is the difference between science and creationism—the manner of belief involved in each, and the consequent difference in the nature of governmental action in advancing each.

A scientific fact is always provisional, amounting to no more than the conclusion that a hypothesis has not yet been falsified, despite more or less rigorous attempts to do so. By their very nature the claims of science are advanced with a standing invitation to challenge, to falsification. In advancing scientific explanations in its schools, Louisiana advanced this invitation as well.

According to its proponents, the Creationism Act would have had an entirely different effect. Under the Act, Louisiana would have advanced "the truth" pure and simple. The creationists appropriated the name of science precisely for its supposed capacity to establish final, incontrovertible truth. Their own account of their beliefs showed that falsifiability in principle played no role in their thinking. Despite its pretensions to "academic freedom," the Act simply offered a

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236. *1 J. Madison, Letters and Other Writings of James Madison* 164 (1865) (emphasis added).
237. *See supra* text accompanying notes 139-52.
238. *See supra* text accompanying notes 160-61.
239. *See supra* text accompanying notes 154-59.
choice between two dogmatic positions, with no invitation to the probing challenge that constitutes real science.

This is a critical difference in light of the deontological Constitution and the political culture it cultivates. The Constitution's open structure contains an invitation like that of science; an invitation to critical participation. The Constitution makes no claims concerning the ultimate end of our political association. Existing law under such a constitution represents our present best judgment of how to arrange matters which concern the state, but that judgment is not a final judgment. Any part of the existing order is open to critique and change. Moreover, the critique and the impetus for change can come from any direction. No argument is ruled out in advance, since to do so would violate the basic assumption that citizens are free and equal under the Constitution.

Because science asserts only propositions which are falsifiable in principle, the state's supporting it does not violate this last requirement; nothing is ruled out in advance. The effect of the Creationism Act was quite different in that it ruled out almost everything in advance. As the testimony of its supporters made clear, the Act was not an invitation to question or to challenge, but instead a prescription for belief. As such, the Act violated the establishment clause because it violated fundamental principles of liberty and equality on which the Constitution and the clause rest. The Act was invalid under the establishment clause because it advanced belief not falsifiable in principle.

The test of falsifiability's grounding in the fundamental congruence between the deontological Constitution and falsifiable belief permits the test to escape an important objection that it could not escape were it founded only on a purported neutrality between religion and non-religion. Teaching evolution instead of creationism is not a neutral choice. The two theories represent utterly incommensurable ways of understanding the world, and the choice between them has profound consequences for the sort of society we will have. Creationism permits one to assert duties, as a citizen, to a Creator; evolution does not. Those whose religious beliefs entail such legally-enforceable duties feel mocked, and rightly so, by the claim that their loss is a consequence of governmental neutrality toward religion.

One advantage of the test of falsifiability is its frank
acknowledgement that the preference for secular ways of understanding does matter. More important is its capacity to justify that preference. Evolution ought to be taught in public schools and creationism should not be, precisely because the latter implies duties to a Creator. If a public school advances religious belief and its implied duties, the natural inference is that those duties are the duties of citizens. The test of falsifiability frankly prefers the secular on the ground that it is no business of the state to keep people in their proper places in a divine plan by enforcing the duties that plan entails. Support for the secular—for indeterminate, empirical, critical approaches to the world, as exemplified in science—is permissible under the Constitution because secular belief does not imply such a plan or make individual dignity or worth depend on whether and how well one fills one's place in it. The test of falsifiability is designed to capture this respect for conscience for establishment clause purposes.

VI. APPLYING AND REFINING THE TEST OF FALSIFIABILITY

Having completed the derivation of the test of falsifiability from its premises in deontological justice, it remains to refine and defend the test. Applying the test's definition of invalidating effects to the cases subjects it to a useful strain, exposing ambiguities, potential weaknesses and, I hope, hidden strengths. The defense advanced in this Part will involve discussions of two major controversies in establishment clause theory as well as a demonstration of the test's capacity to bring order to the cases.

A. Engel and Abington as Paradigm Cases

By defining invalidating effects as I have done, we can treat Engel and Abington—instead of Everson and Zorach—as paradigm cases. Defining invalidating effects as government's advancing belief not falsifiable in principle taps the root of those cases' intuitive appeal. The young minds to which the Bible readings and prayers were addressed were vulnerable—captive, trusting, and lacking in perspective. Standard establishment clause analysis relegates that vulnerability to a minor role as a measure of the threat of an established church. The test of falsifiability, however, treats the vulnerability itself—not just its possible role in someday establishing a church—as a concern of the establishment clause. The children praying and
reading the Bible in Engel and Abington were not being taught to think critically, as presumably they were in their science and civics classes; instead, they were being taught to accept authoritative assertions.\textsuperscript{240} While that might be proper, even necessary, in an authoritarian state, it is not proper in a constitutional democracy because it so clearly runs counter to the Constitution's conception of a free and equal citizenry.\textsuperscript{241}

Other cases directly involving the teaching of children display the same abhorrence of indoctrination evinced in Engel and Abington. This quality in Epperson served as my starting point; in particular, Justice Fortas's use of Meyer, a substantive due process case, to raise the issue of indoctrination in the establishment clause context.\textsuperscript{242} In Aguillard the Court invalidated the Act on the secular purpose prong alone and did so in the strongest terms, summarily declaring creation science a sham.\textsuperscript{243} Despite the weakness of the opinion's logic, it derives force from the same intuitive source Engel and Abington do. Children should be taught to think, not to believe.

\textit{Stone v. Graham} invalidated a law requiring the posting of the Ten Commandments in Kentucky classrooms in a per curiam opinion discussing only the secular purpose prong.\textsuperscript{244} Like Aguillard, Stone is a curt, unequivocal condemnation of indoctrination in the tradition of Engel and Abington. This is apparent not only in the Court's summary disposition of the case, but in the reasoning of the opinion. While the Court condemned the posting of the Commandments on classroom walls—where they could serve only as an admonishment to obedience—the opinion distinguishes a non-authoritarian use of the same text. "This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like."\textsuperscript{245} Treated as intellectual history, the Commandments would be advanced, not for adherence, but for discussion; that is, as propositions falsifiable in principle. In that role, their use

\textsuperscript{240} Of course, they learned by rote too—arithmetic and spelling for example. The difference is that arithmetic and spelling form no part of a religion. See infra text accompanying notes 262-265.

\textsuperscript{241} See supra text accompanying notes 190-99 & 217-31.

\textsuperscript{242} See supra text accompanying notes 113-24.

\textsuperscript{243} See supra text accompanying notes 127-33.

\textsuperscript{244} 449 U.S. 39, 41 (1980).

\textsuperscript{245} Id. at 42.
would not violate the establishment clause.246

This possibility of proper and improper uses of the Ten Commandments suggests that applying the test of falsifiability in a particular case will sometimes require a factual record on the implementation of the subject laws. In Stone, that was not necessary because it was clear from the face of the Kentucky law that the Commandments would not be the subject of searching, critical study. Posting the Commandments on the wall was neither an obvious nor a finely-tailored means to that end. In other cases, however, it will not be clear from the face of the law that its effect is to advance belief not falsifiable in principle. In those cases, an adequate factual record from below will be required.247

The case of Bowen v. Kendrick248 is a perfect illustration. The Court considered whether the Adolescent Family Life Act (AFLA) violated the establishment clause because it permitted

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246. This is not to say that, in order to satisfy the test of falsifiability, the Commandments would have to be treated scientifically, only that they would have to be treated critically. This raises an important point concerning my adaptation of Popper's thought. Popper formulated falsifiability in principle as a criterion for distinguishing science from other branches of knowledge. Here, I use the concept to distinguish a broader class of intellectual activity: that which is consistent with the establishment clause as opposed to that which, when advanced by government, violates it.

This use of the concept is valid because Popper himself has recognized that falsifiability as a criterion of science is "a special case of the wider problem of demarcating criticizable from non-criticizable theories." Popper, Remarks on the Problems of Demarcation and of Rationality, in PROBLEMS IN THE PHILOSOPHY OF SCIENCE 95 (I. Lakatos & A. Musgrave eds. 1968). Indeed, O'Hear argues that falsifiability is much more successful as a criterion of critical rationality generally than it is as a criterion demarcating science in particular. A. O'Hear, supra note 14, at 110-11. I employ the concept only in the former role, arguing in essence that government support of critical activity is legitimate and that government support of non-critical activity is not.

247. This necessity indicates why I have chosen to refer to "belief" not falsifiable in principle, rather than merely "propositions" not falsifiable in principle. The test's definition concerns, not just the logical form of propositions in legislation, but how they are presented and acted upon once the legislation is put into execution. The word "belief" conveys the latter sense, where the word "propositions" would not. In this too, my use of falsifiability is consistent with Popper's own:

I admit that my criterion of falsifiability does not lead to an unambiguous classification. Indeed it is impossible to decide, by analyzing its logical form, whether a system of statements is a conventional system of irrefutable implicit definitions, or whether it is a system which is empirical in my sense: that is a refutable system . . . . Only with reference to the methods applied to a theoretical system is it at all possible to ask whether we are dealing with a conventionalist or an empirical theory.

K. POPPER, LOGIC, supra note 14, at 81-82.

religious organizations to participate in a program promoting chastity as a means of preventing teenage pregnancy. The Court held that the AFLA was not invalid on its face, but remanded to determine whether it was invalid as applied. The Court directed the District Court to determine whether the AFLA aid had been used "to fund 'specifically religious activit[ies] in an otherwise substantially secular setting.'"

The real significance of *Bowen*, however, lies not in the fact that the Court remanded for fact-finding, but in the sort of facts which, if found, would invalidate the AFLA. As Justice Rehnquist wrote on behalf of the majority: "Here it would be relevant to determine, for example, whether the Secretary has permitted AFLA grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." The dissenters were convinced that the statute was invalid on its face, but the invalidating effect they had in mind was the same. As Justice Blackmun wrote:

There is a very real and important difference between running a soup kitchen or a hospital, and counseling pregnant teenagers on how to make the difficult decisions facing them. The risk of advancing religion at public expense, and of creating an appearance that the government is endorsing the medium and the message, is much greater when the religious organization is directly engaged in pedagogy, with the express intent of shaping belief and changing behavior, than where it is neutrally dispensing medication, food, or shelter.

Despite the clear and substantial differences between the majority and dissenters in *Bowen*, then, there was a point of consensus. They differed over fine points of confusion wrought by *Everson* and *Zorach*, but all nine Justices agreed that the inculcation of religious belief would violate the clause.

The test of falsifiability rests on just this point of unanimity. The test's prohibition on government's advancing belief not falsifiable in principle differs from the Court's unanimous condemnation of inculcating religious belief only in its being

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249. *Id.* at 2566-67.
250. *Id.* at 2580-81.
251. *Id.* at 2580.
252. *Id.* at 2581.
253. *Id.* at 2591 (Blackmun, J., dissenting).
formulated with reference to science and the deontological Constitution. *Bowen* shows that the cases which the test treats as paradigms are indeed that. *Engel* and *Abington* alone account for the Court’s unanimity regarding the inculcation of religious belief, or, in my terms, government’s advancing belief not falsifiable in principle.

**B. Extending the Test of Falsifiability Beyond the Paradigm Cases**

Extending the test’s definition of invalidating effects beyond the core of cases involving a threat of indoctrination, however, presents a problem. One reason freedom of conscience has been slighted as an establishment clause value is the simple fact that, where outright religious indoctrination is not threatened, no individual’s conscience is directly at stake. In such cases, freedom of conscience naturally tends to fade into the background of the analysis.

Conscience does not cease to be a concern of the clause, however. As I discuss more fully below, *Lynch v. Donnelly* did not present a case of religious indoctrination, but consider one prominent scholar’s response to the opinion:

Let me report my own immediate and less immediate emotional responses to *Lynch*: At first, it seemed to me a simple slap in the face, a statement that my sensibilities as a Jew counted for nothing. One might put up with that sort of thing from the Pawtucket City Council. After all, I have never been in Pawtucket, and I appreciate the values of federalism enough to understand that I could not fairly be troubled when I choose to visit cities and towns whose residents have decided to celebrate their own homogeneity because I know that I have my own home town to return to, where my sensibilities are taken seriously. When the Supreme Court endorses Pawtucket’s action, however, it denies me that option. It says to me, in effect, “If you don’t like it here, why don’t you go someplace else?” And “here” means, not Pawtucket, but the United States.²⁵⁴

Both consistency and coherence can be improved by taking Professor Tushnet’s reaction to *Lynch* seriously, and treating

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²⁵⁴ Tushnet, *Religion and Theories of Constitutional Interpretation*, 33 Loyola L. Rev. 221, 222 (1987). I do not understand Tushnet to be arguing that federalism could justify the establishment clause violation. He would not be so insensitive to Pawtucket’s Jews.
freedom of conscience as the prime establishment clause value. The test of falsifiability is designed to do just that.

The test's key term in this regard is the word "advance." The word has a pedagogical sense which predominates in the paradigm cases: to put forward for consideration or to inculcate. In other contexts, however, "advance" means to move forward in practice, to strengthen and perpetuate. In the course of applying the test of falsifiability, this ambiguity surfaces as soon as we move away from the paradigm cases. The ambiguity is not vicious, however, because acknowledging the ambiguity and embracing both terms is precisely what enables the test to reach beyond the paradigm cases and decide those cases which do not involve actual instruction in religious belief. For the purposes of the test of falsifiability, then, "advance" means both putting forward or inculcating belief, and strengthening or perpetuating certain beliefs through the use of the state's prestige or its coercive and fiscal power.

Lynch is a good illustration of the test's scope given this broad definition of "advance." The District Court found as a fact that Pawtucket's purpose was not to provide religious instruction. On the face of things it seems obvious that the creche did not inculcate ideas in the way Bible reading, school prayer or the posting of the Ten Commandments do. By presenting religious ideas—immaculate conception in the figure of the Virgin, the divinity of Christ in the adoration of the Magi—the city assisted in their propogation by placing its prestige and fiscal power behind them. If the creche "advanced" belief not falsifiable in principle, it was in the second sense stated above: to strengthen and perpetuate. The test of falsifiability would overrule Lynch on that ground.

The test's employing this broad sense of "advance" not only permits it to reach beyond the paradigm cases; it keeps the test true to those paradigm cases, just as they are true to Madison's conception of the clause. The state may not place its prestige or coercive power in the service of belief not falsifiable in principle: "Because it is proper to take alarm at the first experiment on our liberties." The alarm is justified, not by remote threats, but by the immediate violation of freedom of conscience. The alarm is raised by our judgment that the state's using its power to inculcate, strengthen or perpetuate

256. J. MADISON, supra note 236, at 163.
belief not falsifiable in principle violates deeply held convictions about the state, belief, and the injunction to use others as ends, not as means. Contrary to Zorach's premise, the establishment clause does not present questions of degree. The injustice it condemns is the same on any scale.

However, while the test's embracing the second sense of "advance" permits it to reach beyond the core of cases involving a threat of religious indoctrination, that extended reach itself creates certain difficulties. One of these is the possibility that the test of falsifiability would require governmental hostility to religion. I address that concern below.

Consider the prohibition on public funding of abortion at issue in Harris v. McRae. The court held that the Hyde Amendment withstood scrutiny under the clause, despite the fact that it embodied the Roman Catholic Church's and protestant fundamentalists' position on abortion. The Court held that the congruence was a coincidence, making the benefit to religion permissibly incidental. Justice Stewart's opinion argued: "The Hyde Amendment, as the District Court noted, is as much a reflection of "traditionalist" values toward abortion, as it is an embodiment of the views of any particular religion." What this argument ignores, first, is that the "traditionalist" position is the product of religious traditions, i.e., religious dogma; and, second, that regardless of whether they are nominally religious, those "traditional" beliefs are not falsifiable in principle. The Hyde Amendment supposed some absolutely grounded, immutable truth and advanced it at the expense of individual citizens: poor women who, in the exercise of individual conscience, had decided to terminate their pregnancies. As a violation of conscience, the Hyde Amendment fares no better than Bible reading or school prayer. As such, it ought to have been invalidated under the establishment clause.

Suppose, however, that the Court's characterization of the Hyde Amendment was correct; that while the law advanced...

258. See infra text accompanying notes 267-90.
260. Id. at 318-19.
261. Id. at 319.
belief not falsifiable in principle, those beliefs were not religious, but something else. If the test's proposed definition of invalidating effects will invalidate legislation that cannot be called "religious", then the definition seems too broad; it seems to reach beyond the proper scope of the clause barring establishments of religion.

Put another way, Harris raises the question: What is the relation between the definition of religion under the establishment clause and the term "not falsifiable in principle"? The application of the test of falsifiability in Harris seems to suggest that non-falsifiability in principle is a sufficient defining condition of religion under the establishment clause; that is, that there is no category such as Justice Stewart's "traditionalist" which is both: 1) not religion, and, 2) characterized by belief not falsifiable in principle. In this light, again, the test seems overbroad. Despite the Hyde Amendment's obvious roots in religious doctrine, it seems premature to conclude that there can never be a set of beliefs which is both not falsifiable in principle and not religious. For example, Popper argued that Freudian psychology is not falsifiable in principle. It is also obviously not religious.

In addressing this issue, the logical place to start is with a definition of religion for constitutional purposes. Without entering into the long controversy over defining religion—an issue which arises primarily in free exercise cases—the best approach seems to be that proposed in separate articles by Kent Greenawalt and George C. Freeman. Following Wittgenstein, Greenawalt and Freeman abandon the attempt to define religion by isolating necessary and sufficient traits or conditions. They propose instead to look at religion as a family of characteristics. As Greenawalt writes:

Our society identifies what is indubitably religious largely by reference to their beliefs, practices, and organizations. These include: a belief in God; a comprehensive view of the world and human purposes; a belief in some form of afterlife; communication with God through ritual acts of worship and through corporate and individual prayer; a particular perspective on moral obligations derived from a moral code or from a conception of God's nature; practices involving repen-


263. Freeman, supra note 262, at 1549-59; Greenawalt, supra note 262, at 763-64.
tance and forgiveness of sins; "religious" feelings of awe, guilt and adoration; the use of sacred texts; and organization to facilitate the corporate aspects of religious practice and to promote and perpetuate beliefs and practices. . . .

Should any single feature be absent, religion, as far as general usage is concerned, could still exist. . . . Religions need not share any single common feature, because no single feature is indispensable.264

The test of falsifiability seems to run against this sensible approach by treating non-falsifiability in principle as a necessary feature of religion, a sufficient feature, or both.

The difficulty can be remedied by a further refinement of the test of falsifiability; one which converts the notion of non-falsifiability from a borrowed term of philosophy of science into a term of art for establishment clause purposes. Under the test's proposed definition of invalidating effects, non-falsifiability does not form any part of the definition of religion. The relation between the two is just the reverse: religion forms part of the definition of non-falsifiability. As used in the test of falsifiability, the term "belief not falsifiable in principle" refers to propositions which are not in principle open to testing and revision, as described by Popper,265 and which are, in addition, accompanied by indicia of religion, as described by Greenawalt.

This revision in the definition of non-falsifiability prevents the test's sweeping too broadly. Incorporating indicia of religion into the test of falsifiability limits the reach of the test to only those matters which are the proper province of the establishment clause; that is, matters of religion. To return to the example of Harris, the Hyde Amendment would be invalid under the test's proposed definition of invalidating effects because its non-falsifiable "traditionalist" premises clearly had roots in religion; not just because they were non-falsifiable in Popper's sense. The departure from Popper's sense of the term is obviously necessary. "Belief not falsifiable in principle" naturally acquires new meaning in its role as an establishment clause term of art.

264. Greenawalt, supra note 262, at 767-68.
265. See supra text accompanying notes 139-52.
C. Eliminating Accommodations of Religion Not Required by the Free Exercise Clause

As I have noted, extending the test of falsifiability beyond the core of cases involving a threat of indoctrination suggests another problem: the possibility that the test might require governmental hostility to religion. On the contrary, however, the test requires only that we abandon the notion that the establishment clause must tolerate accommodations of religion which are not actually required by the free exercise clause.

The doctrine of religious accommodation under the establishment clause proclaims a neutral territory between the religion clauses. The theory is that some legislation beneficial to religion is neither demanded by the free exercise clause nor prohibited by the establishment clause. It was first explicitly formulated in Walz: "The limits of permissible state accommodation of religion are by no means co-extensive with the noninterference mandated by the free exercise clause. To equate the two would be to deny a national heritage with roots in the Revolution itself." As the second sentence indicates, Justice Douglas's dictum in Zorach that "[w]e are a religious people whose institutions presuppose a Supreme Being" is a central premise of the doctrine. The fundamental error in that claim—the notion that the Constitution embodies any teleology, Christian or otherwise—has been examined at length above. In the literature surrounding the clause, the leading argument for continued and expanded accommodation rests on a similar historical premise: that the Constitution was designed to promote and rely on individual virtue. That premise too is invalid, for the same reasons.

Aside from the ideal of a virtuous Christian nation, accom-

268. See supra text accompanying notes 190-216.
270. See supra note 201. To judge from The Federalist, the Framers were far more intent on coping with heterogeneity—the problem of "factions"—than with inculcating virtue. That same preoccupation is at the center of the deontological Constitution. See supra text accompanying notes 190-216.

McConnell argues that the government should be allowed to promote "free exercise values" just as it has been allowed to promote "equal protection values." The answer to that is that the equal protection clause has no limiting companion clause comparable to the establishment clause. Adams & Gordon, The Doctrine of Accommodation in the Jurisprudence of the Religion Clauses, 37 DE PAUL L. REV. 317,
accommodations doctrine is supported by a tacit assumption, present since *Everson*, that establishment clause standards should to some extent anticipate and incorporate the demands of the free exercise clause. The "incidental benefits" theory is in essence a rule that, in considering possibly illegitimate benefits to religion, the Court will err on the side of aiding religion rather than risk infringing on its exercise. Hence Justice Black's insistence that general governmental benefits should not be denied to believers for fear of invidious discrimination. This margin of error in applying the establishment clause is the same margin between the clauses where "accommodations" are to be found.

The result of Justice Black's approach, however, is to slight the legitimate demands of the establishment clause itself. For example, depriving parochial schools of fire and police protection would indeed be an act of hostility by the government, but the notion of "incidental benefits" has authorized much more than non-hostility: among other things, the lending of school books in *Allen*. *Allen's* result, however, not only

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Generally: "The inevitable tendency of accommodationism as it is currently practiced—on an *ad hoc*, unprincipled basis—is towards religious favoritism, overt or covert, of mainstream religions . . . ." Note, *Developments in the Law—Religion and the State*, 100 HARV. L. REV. 1607, 1638 (1987).


272. The continuing plague of *Everson* and accommodations is well illustrated in the recent case of Texas Monthly v. Bullock, 109 S. Ct. 890 (1989). The case concerned a tax exemption for religious periodicals. Justice Scalia demonstrated persuasively that the exemption fell squarely within the rule of *Walz*—but he did so in dissent. *Id.* at 909-12 (Scalia, J., dissenting). Writing for a plurality, Justice Brennan escaped *Walz* by stressing, perhaps exaggerating, the extent to which "the benefits derived by religious organizations [in *Walz*] flowed to a large number of nonreligious groups as well." *Id.* at 897; see *id.* at 911 (Scalia, J., dissenting).

In other words, Justice Brennan demanded that religious benefits be 'very incidental'—that they be accompanied by substantial secular effects. In doing so, he compressed the margin for accommodations, ultimately limiting accommodations to measures required by the free exercise clause. See *id.* at 899-900. Justice Scalia argued cogently that Justice Brennan had undermined accommodations doctrine by his construction of "incidental benefits." *Id.* at 912. Scalia himself would treat the two tests as distinct: a benefit's not being incidental would not preclude its being a permissible accommodation. *Id.* at 913. But what made Justice Brennan's attack possible was the fact that accommodations doctrine and the incidental benefits test both rest on the assumption that establishment clause analysis should anticipate the demands of free exercise. By casting the case as one of "incidental benefits" and then denying that premise, Brennan was able to avoid the demands of both *Walz* and accommodations doctrine.
was not required by the free exercise clause; it violated the establishment clause, as *Meek* and *Wolman* later made clear.

The test of falsifiability rejects the validity of religious accommodations altogether on the ground that they lack constitutional warrant and lead to the violation of conscience. While the test eliminates accommodations, however, it is not premised on an unconstitutional hostility to religion. Consider *Everson* again. The rationale for Justice Black's "incidental benefits" theory is, taken alone, perfectly reasonable:

> [P]arents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.  

The test of falsifiability appears to cross the boundary between neutrality and hostility. Its definition of invalidating effects has no natural lower limit which would permit these seemingly genuine incidental benefits to religion. Standing alone, the test would indeed require cutting off fire and police protection to parochial schools on the ground that such benefits preserve the schools' viability and thereby advance belief not falsifiable in principle.

In considering the validity of the test of falsifiability, however, we must bear in mind that it does not stand alone. The test sweeps broadly on its own terms, but an important justification for its doing so is this: where a genuine conflict between the free exercise clause and the establishment clause arises under the test of falsifiability, the free exercise clause will control.

Taking Everson's examples, the test of falsifiability standing alone would require withdrawing police and fire protection and utilities service from parochial schools. However, such deprivations would violate the free exercise clause. Under the test as limited above, the free exercise clause would control and the basic services would be provided. Providing transportation to parochial school students, however, is in no way required by the free exercise clause. The test of falsifiability

274. Free exercise analysis proceeds under a two-part test. The religious plaintiff must show a burden on sincerely held religious convictions. If he succeeds, then the government must show a state interest sufficiently compelling to override the free exercise interest. Wisconsin v. Yoder, 406 U.S. 205, 214 (1971); Sherbert v. Verner, 374 U.S. 398, 403 (1962). The Court in Sherbert held that South Carolina could not deny unemployment benefits to a worker who had been discharged for refusing to work on her Sabbath.

Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.


The withdrawal of fire and police protection and utilities from parochial schools would burden free exercise by forcing religious parents to risk their children's health and safety in order to exercise the right to a sectarian education. See Pierce v. Society of Sisters, 268 U.S. 510 (1925). The burden could never be justified, since any conceivable governmental interest could be served by more narrowly drawn, less burdensome means.

Professor Ira Lupu has proposed an analysis of the burden requirement under which free exercise interests are defined by reference to analogous interests in person or property cognizable under the common law. Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 HARV. L. REV. 933 (1989). The latter would include universally available governmental benefits which are "entitlements" and thus property for due process purposes. Id. at 978. See Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970); Reich, The New Property, 73 YALE L.J. 733 (1964). Applied to the Everson hypotheticals, the withdrawal of fire and police protection and utilities would constitute a burden on free exercise because those governmental benefits are "entitlements."

275. Lyng v. Northwest Indian Cemetery Protective Ass'n, 108 S. Ct. 1319 (1988). In Lyng, Native American tribes challenged the federal government's right to build a road through government-owned land which was also sacred land. The majority held that no burden was imposed on free exercise of religion, because the road had "no tendency to coerce individuals into acting contrary to their religious beliefs . . . ." Id. at 1326. Similarly, the failure or refusal to provide free passage on city buses would have no such coercive effect.

Professor Lupu argues persuasively that the "coercion" test applied by the Lyng majority is too broad. Lupu, supra note 274, at 961-63. Even under Lupu's proposed alternative, however, refusing the bus rides at issue in Everson would not violate the free exercise clause. That governmental benefit could not be considered an
would therefore bar such a benefit to religion.

The test’s expressly deferring to the free exercise clause is not only a necessary limitation; it is a critical part of its advantage over existing law. The test states a strong, even extreme, establishment clause standard that expressly defers to the free exercise clause, but only where necessary and never in advance. By definition, the religion clauses share a single, common border. The test of falsifiability eliminates Everson’s redundant and disastrous anticipation of free exercise claims and Zorach’s teleological “Christian nation” justification for religious accommodation as well. Because it extends the demands of the establishment clause to the very point at which they abut the limitations of the free exercise clause, the test of falsifiability avoids authorizing accommodations to religion which lack constitutional warrant.

The difference in the border between the religion clauses as defined by existing law and the test of falsifiability, respectively, can be seen in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos.276 The lead plaintiff and appellee, one Mayson, was a building engineer who worked in a gymnasium open to the public. The non-profit organizations that owned and operated the gymnasium were affiliated with the Mormon church. Regardless of the fact that Mayson’s work had nothing to do with the beliefs or practices of the church, and regardless of the fact that he did not actually work for the church, Mayson was fired for not being a member of the church.277 In short, an ordinary employer imposed a test of piety as a condition of employment, seemingly discriminating on the basis of religion in violation of the Civil Rights Act of 1964.278

However, the employer’s action was authorized by § 702 of the Act.279 Prior to 1972, the Civil Rights Act exempted only the religious activities of religious organizations from its ban on religious discrimination in employment.280 In 1972, Con-

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277. Id. at 330.
gress extended that exemption to religious organizations' non-religious, non-profit affiliates such as the gymnasium which employed Mayson. In Amos, the Court held that the expanded exemption was a permissible accommodation of religion; that it did not violate the establishment clause, even assuming that it was not required by the free exercise clause.

It is well established, too, that "[t]he limits of permissible state accommodations to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause." There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." Like the other descendants of Everson and Zorach, however, the notion of "permissible state accommodations of religion" is no more defensible than its forebearers. It is an amalgam of incidental benefits for a putative religious people whose institutions presuppose a Supreme Being. In theory, it has no basis in the Constitution, and in practice, as in Amos, it leads to the violation of conscience.

Under the test of falsifiability, the original, core exemption for religious activities contained in the Civil Rights Act would survive scrutiny. A church must sometimes impose religious tests for employment; for example, in determining whom it will permit to serve as a priest. Had the Act not provided this core exemption, it probably would have infringed on free exercise. The test of falsifiability, consequently, would not have struck down the original exemption.

The 1972 expansion of the exemption, however, was not required by the free exercise clause. In United States v. Lee, the Court held that an Amish farmer who employed other members of his sect was not exempt from the obligation to withhold and pay social security taxes. The tax code provided an exemption on religious grounds for self-employed individu-

281. Id.
283. Failure to exempt those positions, the qualifications for which are defined directly by religious doctrine, would force the same impermissible dilemma condemned in Sherbert, Thomas, and Hobbie. See Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 COLUM. L. REV. 1514 (1979).
als. The Court held, however, that a further exemption for employees who profess religion was not required by the free exercise clause. While the law did burden religious belief, that burden was justified by a compelling state interest in the fiscal integrity of the Social Security system.

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

By the same reasoning, the 1972 exemption in the Civil Rights Act was not required by the free exercise clause. The government’s interest in eliminating discrimination on religious grounds is at least as compelling as the fiscal interest at issue in Lee. Like the Amish in Lee, the Mormons in Amos had entered into ordinary commercial activity and were therefore subject to the same burdens as other commercial enterprises; in this case, the obligation to eliminate religious discrimination.

Once free of the limitation imposed by the free exercise clause, the test of falsifiability would invalidate the 1972 exemption. Religious tests for employment provide the employer with the luxury of like-minded underlings, but they also coerce conscience, forcing workers to conform for the sake of earning a livelihood. Consequently, legislation which grants an ordinary employer a license to impose faith as a condition of employment has the impermissible effect of advanc-

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286. 455 U.S. at 256-60.
287. Id. at 261.
288. The contrast with Sherbert, Thomas, and Hobbie is striking. While in those cases the Court condemned the state’s forcing employees to choose between belief and a livelihood, the Court in Amos was willing to permit employers to force the same unconscionable choice on non-believers. The contradiction follows directly from the notion that the establishment clause allows ill-defined accommodations of religion. The “accommodation” recognized in Amos was the freedom to discriminate against non-believers. The test of falsifiability treats Amos in a manner consistent with Sherbert, Thomas, and Hobbie because it permits, under the establishment clause, only that religious discrimination which is required by the free exercise clause.
ing belief not falsifiable in principle. As such, it is invalid under the establishment clause.

The standards of the free exercise clause are not themselves free from difficulty. By permitting them to define the border between the clauses, the analysis I have proposed may leave that border in an uncertain, wavering state. It recalls an analogy drawn by Justice Jackson, concurring in McCollum.

If with no surer legal guidance we are to take up and decide every variation of this controversy . . . we are likely to make the legal "wall of separation between church and state" as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded.

As matters stand, however, the boundary between the clauses is not a wall at all, but a wide, unmarked no-man's land. If the analysis proposed here establishes even a serpentine wall between the clauses—and between church and state—at least the curves are familiar and reasonably constant.

**D. Improving on the "No Endorsement" Test**

Consider the test of falsifiability as it applies to *Marsh v.*

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289. The difficulties are well summarized by Lupu. In deciding the burden question, the court must inquire into sincerity, an act which "cannot escape the distinctly bad aroma of an inquisition." Lupu, supra note 274, at 954. It must decide whether the beliefs are religious, but with no reliable definition. *Id.* at 957-58. Courts have also gauged the degree to which a central, as opposed to an incidental, aspect of the religion is burdened, without a clear defense or standard of centrality. *Id.* at 958-59.


Not surprisingly, given the doctrinal difficulties, particular cases reach inconsistent results. For example, Professor Marshall argues that *Yoder* and *Lee* are inconsistent because the state interest in secondary education is at least as compelling as the interest in taxation. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545, 549 (1983). This is debatable, since secondary education could not be funded without a sound tax system, but the general point is well taken.

Whatever the difficulties, however, the free exercise clause would surely preclude the parade of horrids advanced in *Everson* and, generally, adequately protect religious liberty without the need for unfounded accommodations under the establishment clause. I claim no more than that.

290. 333 U.S. 203, 238 (1948) (Jackson, J., concurring).
Chambers, in which the Court upheld Nebraska's practice of opening sessions of the legislature with a prayer. The legislative prayer may be merely a traditional ritual. It may even be an empty ritual. Nevertheless, the practice places the prestige of the state in the service of prayer. The legislature's praying implies that prayer is effective; an implication which serves to strengthen the complex of non-falsifiable beliefs on which both the practice and the expectation of prayer are founded. Because the state illegitimately advances belief not falsifiable in principle by engaging in the practice legislative prayer is inconsistent with the establishment clause.

Another way to state my objection to the legislative prayer would be to say that the practice improperly "endorses" religion. I have chosen not to use that term so as to avoid confusion with Justice O'Connor's approach to establishment clause questions. It is important to avoid that confusion because the Justice's "no endorsement" test and the test proposed here are quite different. In a recent article, Steven Smith has dissected the "no endorsement" test, pointing out some of its critical weaknesses. Despite the apparent similarities between the "no endorsement" test and the test of falsifiability, the latter escapes Smith's most damaging objections.

Smith objects first that the central term of Justice O'Connor's approach—"endorsement"—is ambiguous. He articulates four different senses in which governmental action

292. 463 U.S. at 783.
294. It is especially important to make the distinction in view of the Court's increasing reliance on the "no endorsement" test. See Texas Monthly v. Bullock, 109 S. Ct. 890, 896 (1989); County of Allegheny v. A.C.L.U., 109 S. Ct. 3086, 3103, 3107 (1989); id., at 3017-3124 (O'Connor, J., concurring); id. at 3124 (Brennan, J., concurring in part and dissenting in part).
296. Some of Smith's objections to the "no endorsement" test are simply not relevant to the test of falsifiability. For example, Justice O'Connor would condemn legislation backed by an "intent to endorse." Smith attacks the very possibility of determining such an intent. Id. at 283-91. The test of falsifiability has no purpose or intent component, for reasons stated at the outset of this Article. See supra text accompanying note 32.
297. Smith, supra note 295, at 276-78.
might endorse religion, from proclaiming one true religion to acknowledging that some citizens are in fact religious.\textsuperscript{298} These different senses of "endorsement" imply standards of varying severity, adding to the general confusion in the area.\textsuperscript{299} Simply prohibiting all forms of endorsement is only one possibility among many, and is not the standard Justice O'Connor likely had in mind. The test of falsifiability, on the other hand, has at least the virtue of being unequivocal on this point: anything which places the prestige of the state in the service of belief not falsifiable in principle is invalid.

The most likely interpretation of Justice O'Connor's standard is "one which permits governmental accommodation of religion but forbids all other forms of endorsement, including exclusive preferment and endorsements of truthfulness or value."\textsuperscript{300} This standard, however, suffers from a fatal defect. It assumes that "accommodation" and "endorsement" are mutually exclusive. In fact, they are complementary; governmental action can easily be both an accommodation and an endorsement.\textsuperscript{301}

The test of falsifiability does not suffer from the same defect. Justice O'Connor's need to distinguish between "accommodations" and "endorsements" arises from her willingness to accept a gap between the religion clauses in which governmental benefits to religion which are not actually required by the free exercise clause are permitted. The test of falsifiability, in contrast, rejects altogether the validity of such religious accommodations. The test treats the religion clauses as sharing a single, common border: one permits only what the other requires. As a consequence, it escapes all forms of the boundary-drawing problem of which the Justice's accommodation/endorsement difficulty is an instance. The test of falsifiability condemns both sorts of benefit to religion.

Smith also points out that condemning legislation which creates a perception of endorsement supposes an ideal perceiver. Such a construct, however, will perceive just those endorsements which the person applying the test wishes it to perceive.\textsuperscript{302} The perception prong, as a consequence, lacks

\begin{itemize}
\item \textsuperscript{298} Id. at 276-77.
\item \textsuperscript{299} Id. at 277-78.
\item \textsuperscript{300} Id. at 279.
\item \textsuperscript{301} Id. at 281-82.
\item \textsuperscript{302} Id. at 292.
\end{itemize}
objectivity and reliability.\textsuperscript{303} The test of falsifiability, on the other hand, has no such indeterminate element. The foundation of the test is the notion of falsifiability in principle. The test thus turns on the logical form of propositions as they appear in the text of legislation and in the legislation's implementation. Although, as I have acknowledged above, applying the test will in many cases raise questions of fact,\textsuperscript{304} the test of falsifiability does have an advantage over the "no endorsement" test in terms of objectivity.

The object of Justice O'Connor's test is to ensure that one's religion is never "relevant in any way to a person's standing in the political community."\textsuperscript{305} Smith argues that there is no logical connection between endorsements in legislation and political standing.\textsuperscript{306} Were clergy prohibited from serving in the legislature the ban would affect their political standing, but such a prohibition could be interpreted as either approving or disapproving of religion.\textsuperscript{307} Conversely, some unequivocal endorsements of religion—"In God We Trust" on coins—have no practical effect whatever on persons' political standing, if by that we mean substantive civil rights.\textsuperscript{308}

The test of falsifiability escapes this objection because it turns on violations of conscience rather than the diminution of political standing. Using coins proclaiming "In God We Trust" is not a debilitating violation of conscience, but it is a violation of constitutional dimension. A violation of fundamental principle is the same on any scale, as the Court has recognized in holding that one may not be compelled to bear the legend "Live Free or Die" on one's license plates\textsuperscript{309} or to pledge allegiance to a graven image.\textsuperscript{310}

Finally, Smith argues that Justice O'Connor's test cannot

\textsuperscript{303} Id. at 293. On a similar note, Smith notes that, by focusing on the perception of endorsements of religion, O'Connor exacerbates the problem of defining religion generally. Almost any government action could be seen by some person as endorsing what he thinks of as religion. The definitional problem is thus incorporated into the heart of the "no endorsement" test. Since the test of falsifiability does not turn on perceptions, it does not share this particular defect. However, defining religion generally is an issue in any test under the establishment clause. I address it with regard to the test of falsifiability. See supra text accompanying notes 259-65.

\textsuperscript{304} See supra text accompanying notes 245-51.


\textsuperscript{306} Smith, supra note 295, at 306.

\textsuperscript{307} Id. at 306-07.

\textsuperscript{308} Id. at 307.


be supported by arguing that governmental endorsements of religion alienate citizens who do not hold the religious convictions endorsed.\textsuperscript{311} Professor Tushnet's reaction to the \textit{Lynch} opinion is an example of such alienation.\textsuperscript{312} As my use of that example above might indicate, the "no alienation" interpretation of the "no endorsement" test brings it closer to my argument based on freedom of conscience. Consequently, Smith's argument on this point is more threatening to the test of falsifiability, and deserves close scrutiny.

Smith points out that government necessarily expresses judgments on matters of belief and that, regardless of which judgment it makes, government will offend some citizen's sensibilities.

Once again, \textit{Lynch} is illustrative: Whether the creche was included in or removed from the Christmas display, the sincere religious sensibilities of some citizens would be offended. Cogent or not, the polemics of what maybe called the "religions right" provide powerful evidence of the alienation and frustration generated by the Supreme Court decisions that have excluded religious practices from areas of public life, such as the schools, and that have established, in the view of some religious believers, an antireligious "secular humanism."\textsuperscript{313}

Thus, avoiding alienation cannot serve as a justification for condemning endorsements, since removing the endorsement may itself cause alienation.

The test of falsifiability escapes this objection by providing a coherent distinction between the alienation felt by those who share the convictions the creche advanced and those who do not. To put it bluntly, the alienation Christians might feel in response to being refused a state-sponsored creche does not count as a violation of conscience entitled to protection under the establishment clause. Under the test of falsifiability, the city's refusal to pay for a creche, or the Court's refusal to permit it to do so, is not action which advances belief not falsifiable in principle.

Now, to say that the disquietude Christians might feel on the removal of Pawtucket's creche is not a violation of conscience deserving of constitutional protection may sound like

\textsuperscript{311} Smith, \textit{supra} note 295, at 309-13.
\textsuperscript{312} See \textit{supra} text accompanying note 254.
\textsuperscript{313} Smith, \textit{supra} note 295, at 311.
hostility toward religion. It is not. Under the test of falsifiability, the free exercise clause is granted priority in order to eliminate genuine infringements of religious liberty.\textsuperscript{314} Beyond that, however, there is no reason to suppose that the establishment clause will treat religion and other sorts of belief similarly in all circumstances. Religion and science, for example, differ fundamentally in their stance toward ultimate truth and, as a consequence, in their status under the deontological Constitution. So, too, do the Virgin and the Magi and Santa and his reindeer.

\subsection*{E. Reordering the Cases}

The test of falsifiability embodies an abhorrence of indoc-trination which, as Bowen indicates, is a deep constant in the cases. That constant has not effected consensus in the establishment clause cases, however, because Everson and Zorach have exerted a contrary and more powerful influence. The result has been a deep rift in establishment clause doctrine.\textsuperscript{315} The test of falsifiability resolves the conflict by permitting the Engel and Abington line to trump Everson and Zorach's progeny. In many cases, this consists of rationalizing the ad hoc distinctions the Court has already made in its attempts to cope with the endemic conflict. In other specific conflicts, reconciliation amounts to nothing but express recognition that the Engel and Abington line should dominate because it has a coherent rationale which the Everson and Zorach side lacks.

Consider the notorious conflict between Allen on the one hand and Meek and Wolman on the other.\textsuperscript{316} The latter cases mark the Court's realization that the "incidental benefits" theory of Everson opens the door to virtually unlimited governmental aid to religion. If the state may provide material assistance to parochial schools so long as the objects themselves have no religious indicia—Allen's standard—the state is free to supply parochial schools with virtually every necessity, on the ground that those necessities provide only "incidental benefits" to religion.

The Court drew the line in Wolman.

\textsuperscript{314} The Christians' demand that the city sponsor the creche certainly would not fall within the requirements of the free exercise clause. Under the test of falsifiability, however, there is no other ground for the state's extending benefits to religion. There is no such thing as a permissible accommodation.

\textsuperscript{315} See supra text accompanying notes 89-111.

\textsuperscript{316} See supra text accompanying notes 38-52 & 80.
It has been argued that the court should extend *Allen* to cover all items similar to textbooks. See *Meek*, 421 U.S. at 385 (Burger, C.J., concurring in judgment in part and dissenting in part); id., at 390-91 (Rehnquist, J., concurring in judgment in part and dissenting in part). When faced, however, with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course.317

What the Court did not say was that the “principles announced in our subsequent cases” were those of *Engel* and *Abington* as reiterated in *Meek*: the fear of a “first experiment” prompted by an abhorrence of indoctrination.

For example, *Meek* invalidated state programs lending instructional materials to parochial schools on terms which could not be plausibly distinguished from the lending of schoolbooks approved in *Allen*.318 In a passage later quoted in *Wolman*, Justice Stewart wrote that:

> The church-related elementary and secondary schools that are the primary beneficiaries of Act 195's instructional material and equipment loans typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; *the teaching process is, to a large extent, devoted to the inculcation of religious values and belief*. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole.319

In other words, the ground for barring the lending of instructional materials in *Meek* was the Court’s fear that the state aid would, directly or indirectly, advance belief not falsifiable in principle. What kept the Court from extending *Allen—as* *Everson* permitted and encouraged it to do—was the same concern for freedom of conscience that animates the “first experiment” cases.

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317. 433 U.S. at 251-252 n.18.

318. *See Meek*, 421 U.S. at 362-63. Justice Stewart stresses that the instructional materials were provided directly to parochial schools, while the books were provided to students. Aside from being a transparent fiction, the distinction between direct and indirect assistance had been rejected two years earlier in *Committee for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 781, 786-87 (1973). Justice Stewart’s distinction also rests on the flawed premises of *Everson’s* “incidental benefits” theory. *See supra* text accompanying notes 27-57.

In Wolman, the influence of Engel and Abington in limiting Allen is even more conspicuous. In addition to invalidating an instructional materials lending program, the Wolman Court overturned Ohio's program providing transportation for parochial school field trips.320

[A]lthough a trip may be to a location that would be of interest to those in public schools, it is the individual teacher who makes a field trip meaningful. The experience begins with the study and discussion of the place to be visited; it continues on location with the teacher pointing out items of interest and stimulating the imagination; and it ends with a discussion of the experience. The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct.321

Field trips may be devoted to religious education, whatever the ostensibly secular destination. Consequently, the transportation program was invalid because it presented a danger of the state's advancing belief not falsifiable in principle.

Neither Meek nor Wolman, however, marked a final break with Everson or addressed the question of conscience as forthrightly as the test of falsifiability would. Books on secular subjects are indistinguishable from field trips to secular destinations in the ease with which they can be diverted to sectarian uses. Yet both Meek and Wolman upheld book lending programs and refused to overrule Allen.322 Engel and Abington's concern for freedom of conscience, never a prominent establishment clause value, served only to limit Allen. The test of falsifiability would make this constitutional value explicit, give Engel and Abington their due and overrule Allen altogether.

Failing to give Engel and Abington due consideration is at the root of other charges of inconsistency. Consider Justice Rehnquist's apparent contention that Wolman is inconsistent in permitting speech and hearing services to take place in the parochial school, while requiring that guidance counseling should take place off premises.323 The Wolman majority's rationale for such a distinction could not be more clear.

320. 433 U.S. at 252-55.
321. Id. at 253-54 (citing Meek, 421 U.S. at 366).
322. Meek, 421 U.S. at 359-62; Wolman, 433 U.S. at 236-38.
The reason for considering diagnostic services to be different from teaching or counseling is readily apparent. First, diagnostic services, unlike teaching or counseling, have little or no educational content and are not closely associated with the educational mission of the nonpublic school. Accordingly, any pressure on the public diagnostician to allow the intrusion of sectarian views is greatly reduced. Second, the diagnostician has only limited contact with the child, and that contact involves chiefly the use of objective and professional testing methods to detect students in need of treatment. The nature of the relationship between the diagnostician and the pupil does not provide the same opportunity for the transmission of sectarian views as attends the relationship between teacher and student or that between counselor and student.\(^{324}\)

Justice Rehnquist’s reluctance to acknowledge this distinction is rooted in his reluctance to acknowledge the establishment clause value on which it depends.

Similarly, the inconsistency between \textit{Levitt} and \textit{Regan} alleged by Justice Rehnquist is wholly illusory.\(^{325}\) By funding teacher-prepared tests, as it had in \textit{Levitt}, New York ran the risk of subsidizing religious education: tests prepared by parochial school teachers clearly might test for, and thereby advance, religious beliefs. “We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church.”\(^{326}\) New York revised the law to limit the reimbursement program to state-prepared tests, the content of which obviously was not under parochial school control.\(^{327}\) In so doing, the state eliminated the possibil-

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\(^{324}\) Wolman, 433 U.S. at 244.

\(^{325}\) Wallace v. Jaffree, 472 U.S. at 111 (Rehnquist, J., dissenting).

In \textit{Levitt} v. \textit{Committee for Public Education}, the Court invalidated a New York program of reimbursement for teacher-prepared tests on secular subjects, expressly rejecting the argument that, since the state required the subjects to be taught, the state could pay the expenses associated with teaching the subjects. Levitt v. Committee for Public Education, 413 U.S. 472 (1973). After \textit{Levitt}, New York revised its legislation so that parochial schools were reimbursed only for the cost of administering state prepared tests; reimbursements for teacher-prepared tests were eliminated. Act of May 23, 1974, ch. 507, 1974 N.Y. Laws, as amended by ch. 508, N.Y. EDUC. LAW § 3601 (McKinney 1981).

\(^{326}\) 413 U.S. at 480.

ity that it would subsidize the inculcation of religious belief.

As in Wolman v. Walter, 433 U.S. at 240, "[t]he nonpublic school does not control the content of the test or its result"; and here, as in Wolman, this factor "serves to prevent the use of the test as a part of religious teaching," ibid., thus avoiding the kind of direct aid forbidden by the Court's prior cases. The District Court was correct in concluding that there was no substantial risk that the examinations could be used for religious educational purposes. 328

New York's restriction on the program struck down in Levitt satisfied the Court in Regan because it satisfied the Court's concern over freedom of conscience. The cases appear to conflict only if one ignores the role of that constitutional value.

Justice Rehnquist's objection to Wolman's permitting speech and hearing diagnostic services to be provided on school premises, while simultaneously requiring therapy to take place off school premises, rests on the same willful disregard of the Engel and Abington line. 329 The same can be said of Professor Choper's argument that Meek erred in barring health services in the parochial school in light of Wolman's permitting speech and hearing diagnostic services to be provided close by. 330 The Wolman majority offered a rationale for their concern with place; of course its prominent critics simply refuse to take it at face value. On the point in question, Wolman merely followed Meek in addressing Engel and Abington's concern with conscience.

We recognize that, unlike the diagnostician, the therapist may establish a relationship with the pupil in which there might be opportunities to transmit ideological views. In Meek the Court acknowledged the danger that publicly employed personnel who provide services analogous to those at issue here might transmit religious instruction and advance religious beliefs in their activities. But, . . . the Court emphasized that this danger arose from the fact that the services were performed in the pervasively sectarian atmosphere of the church-related school. . . . So long as

328. Id. at 656.
329. In his Wallace v. Jaffree dissent, Justice Rehnquist argues that the opinion in Wolman is inconsistent in permitting speech and hearing diagnostic services to be provided on school premises, while simultaneously requiring therapeutic speech and hearing services to be provided off school premises. Wallace v. Jaffree, 472 U.S. 38, 111 (Rehnquist, J., dissenting).
330. See supra note 83.
these types of services are offered at truly religiously neutral locations, the danger perceived in Meek does not arise.\textsuperscript{331}

The danger perceived in Meek was the same as that perceived in Engel and Abington: the danger of indoctrination.

To be sure, auxiliary services personnel, because not employed by the nonpublic schools, are not directly subject to the discipline of a religious authority. But they are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere of religious belief is constantly maintained. \textit{The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present.}\textsuperscript{332}

The reluctance of Rehnquist and Choper to take Wolman at its word regarding location is attributable primarily to a tolerance of indoctrination at odds with Engel and Abington. Not surprisingly, it is completely consistent with the preference for Everson and Zorach which Justice Rehnquist displayed in Mueller.\textsuperscript{333}

While in cases like Wolman and Regan, the test of falsifiability rationalizes the Court's ad hoc distinctions, it resolves most conflicts in the cases under the clause simply by indicating a clear preference of one case over the other.

For example, Justice Rehnquist's contention that Wolman's holding on bus transportation contradicts Everson\textsuperscript{334} may be correct on its face, but by now the resolution of that conflict should be obvious. Everson's premises are hollow, while Wolman's holding on transportation is rooted in the genuine constitutional value of freedom of conscience. Engel and Abington's abhorrence of indoctrination would trump Everson's empty "incidental benefits" theory simply because the latter, but not the former, has a coherent constitutional rationale.

The test of falsifiability would reconcile the sharp conflict

\textsuperscript{331} Wolman, 433 U.S. at 247.

\textsuperscript{332} Meek, 421 U.S. at 371-72 (emphasis added) (citation omitted).

\textsuperscript{333} See supra text accompanying notes 94-99. Justice Rehnquist also makes a trivial objection to Wolman's upholding the provision of speech and hearing services on parochial school premises in light of Meek's striking down an identical program. Wallace v. Jaffree, 472 U.S. at 111 (Rehnquist, J., dissenting). As the Wolman opinion clearly states, the program in Meek was struck down only because it was not severable. Wolman, 433 U.S. at 244; Meek, 421 U.S. at 371 n.21.

\textsuperscript{334} Wallace v. Jaffree, 472 U.S. at 111 (Rehnquist, J., dissenting).
between *McGowan* and *Thornton* in the latter's favor.\(^{335}\) In *Thornton*, the Court held that Connecticut could not require employers to provide a day of rest on any day declared by an employee to be his Sabbath.\(^{336}\) The opinion clearly states the roots of the establishment clause in the categorical imperative, in quoting Learned Hand to the effect that: "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities."\(^{337}\) The majority's distaste for enforced conformity to the dictates of another's conscience is palpable in its description of the statutes:

In essence, the Connecticut statute imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee by enforcing observance of the Sabbath the employee unilaterally designates. The state thus commands that Sabbath religious concerns automatically control over all secular interests at the workplace; the statute takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath. The employer and others must adjust their affairs to the command of the state whenever the statute is invoked by the employee.\(^{338}\)

*McGowan* clearly cannot withstand such scrutiny. *Thornton* condemns the Connecticut law particularly on the ground that: "the statute provides for no special consideration if a high percentage of an employer's workforce asserts rights to the same Sabbath."\(^{339}\) *McGowan*, in contrast, permitted Maryland to declare the majority religion's Sabbath a Sabbath for virtually the entire work force.\(^{340}\) Both *Thornton* and the test of falsifiability indicate a contrary result in *McGowan* because, by forcing the owners of businesses to close on a particular day, Maryland's Sunday closing laws advanced the majority's conviction that that day is sacred.

*Nyquist* and *Mueller* are inconsistent, as I have noted, because the latter upheld Minnesota's system of tax deductions

\(^{335}\) See *supra* note 87.

\(^{336}\) 472 U.S. at 710-11.

\(^{337}\) *Id.* at 710 (quoting *Otten v. Baltimore & Ohio R. Co.*, 205 F.2d 58, 61 (2d Cir. 1953)).

\(^{338}\) *Id.* at 709.

\(^{339}\) *Id.*

\(^{340}\) 366 U.S. at 447-49.
to parochial school parents on a ground the former had expressly rejected: that the parent’s intervening decision concerning how to spend the money provided by the state cured any objection that the state had aided parochial schools.\footnote{341} Justice Rehnquist recognized this contradiction, but used \textit{Everson} to escape it:

\begin{quote}
[T]his case is vitally different from the scheme struck down in \textit{Nyquist}. There, public assistance amounting to tuition grants was provided only to parents of children in \textit{nonpublic} schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both \textit{Allen} and \textit{Everson} on the grounds that "[i]n both cases the class of beneficiaries included \textit{all} school-children, those in public as well as those in private schools."\footnote{342}
\end{quote}

The benefit provided in \textit{Mueller} was an "incidental benefit," where that provided in \textit{Nyquist} was not. The former therefore did not violate the clause, though the latter did.

What is missing from this tidy analysis is the element omitted from \textit{Everson} forty years ago: a plausible explanation of why a benefit’s being incidental renders it innocuous.\footnote{343} While a benefit’s being incidental might indicate the legislature had no invidious purpose, proper purpose alone cannot be dispositive. The focus of analysis under the clause must be on the interests the clause protects and the effect of challenged legislation on those interests. Purpose is relevant only insofar as it indicates likely effects. If legislation provides a benefit to religion in a manner inimical to interests protected by the clause, the benefit’s being "incidental" does not attenuate that harm, or legitimize the legislation under the clause. \textit{Everson} is hollow, and so is Justice Rehnquist’s distinction between \textit{Mueller} and \textit{Nyquist}. While the \textit{Nyquist} opinion also relies too heavily on \textit{Everson}, its result at least is defensible under the test of falsifiability.\footnote{344}

The test disposes of the cases afflicted by \textit{Zorach} in a similar fashion. In a series of paired cases, the Court appears to have validated the greater benefit to religion and struck down

\footnote{342. 463 U.S. at 398 (citation omitted).}
\footnote{343. \textit{See supra} text accompanying notes 27-47.}
\footnote{344. \textit{See infra} text accompanying notes 347-48.}
the lesser.\textsuperscript{345} The source of the difficulty is Zorach's posing an unanswerable question of uncalibrated degree: How much does the challenged legislation advance the likelihood of an established church?\textsuperscript{346} The test of falsifiability is more precise and less subject to outright abuse. It resolves the paired inconsistencies by striking down benefits to religion, great and small, incidental or not, as first experiments on our liberties.

In the first of these pairs, the conflict between \textit{Walz} and \textit{Nyquist} would be resolved in favor of the latter.\textsuperscript{347} Small tax credits and grants to parents of parochial school students clearly advance belief not falsifiable in principle simply by making it possible for children to attend schools where such instruction takes place. The much larger real estate tax exemptions granted directly to churches in \textit{Walz} obviously have the same illegitimate effect on a much larger scale. \textit{Nyquist} survives under the test of falsifiability; \textit{Walz} clearly does not.

The same analysis indicates a preference for \textit{Nyquist} over \textit{Tilton}.\textsuperscript{348} Under the test's proposed definition, enhancing the financial stability of a sectarian college—however incidentally—by contributing to its building fund is indistinguishable from providing for the maintenance and repair of parochial schools. Regardless of the other functions those institutions perform, they are devoted to advancing belief not falsifiable in principle. As such, they are not proper objects of governmental assistance.

The inconsistency between \textit{Lemon}, \textit{Mueller} and \textit{Allen} also dissolves once we have a rationale for preferring one case over another.\textsuperscript{349} \textit{Lemon}'s striking down reimbursements to parochial schools for the cost of textbooks and instructional materials would be dictated by the test of falsifiability, since the benefit clearly would keep parochial schools viable. However desirable such schools may be in general, it is not a proper function of a constitutional government with deontological premises to advance the teleological programs of religion in any fashion, to any degree. To the extent \textit{Mueller}'s authorization of tax benefits to parochial school parents or \textit{Allen}'s lending textbooks to parochial schools is inconsistent with \textit{Lemon},

\begin{footnotesize}
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\item\textsuperscript{345} See \textit{supra} text accompanying notes 85-87.
\item\textsuperscript{346} See \textit{supra} text accompanying notes 74-80.
\item\textsuperscript{347} See \textit{supra} text accompanying notes 74-80.
\item\textsuperscript{348} See \textit{supra} text accompanying note 85.
\item\textsuperscript{349} See \textit{supra} text accompanying note 88.
\end{itemize}
\end{footnotesize}
the test of falsifiability would overrule the former cases. The viability of parochial schools simply is not a proper object of state power.

VII. CONCLUSION

The neglect of freedom of conscience as an establishment clause value has obscured not only the connection between the clause and the Constitution but the nature of the Constitution itself. The ruse of accommodations doctrine, untenable claims of the establishment of secular humanism and the exploitation of the confusion in the cases for the benefit of religion—all are possible only because some relentlessly insist, and many uncritically concede, that law and religion are natural partners in the search for meaning and direction in life. The Constitution, however, reflects a deeper wisdom: that meaning and direction are genuine and good when, in the exercise of conscience, one finds them freely in the family, the community or the church; but that the hand of the state turns meaning into mandate and direction into subjugation.

Like any strict construction of the establishment clause, the test of falsifiability reflects that deeper wisdom by denying religion the force of law. The particular method of the test of falsifiability is to address the violation of conscience directly. It invalidates laws which preclude dissent by putting the force of law and the power of the state behind propositions which cannot be disproven. Legislation or executive action is invalid under the establishment clause when it has the effect of advancing belief not falsifiable in principle. Advancing such belief means to put forward or inculcate such belief or to strengthen or perpetuate such belief through the use of the state's coercive or fiscal power. The only qualification to the test is that it cannot, of course, infringe on rights protected under the free exercise clause. The test of falsifiability does not, however, cede to religion what is not actually required by the free exercise clause. It treats accommodations as just another name for unlawful establishments of religion.

In proposing the test of falsifiability, I have attempted above all to place freedom of conscience at the center of establishment clause analysis. Unless that is done, the clause will never protect individual dignity as well as it might.