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Prayer in Public Schools: Without Heat, How Can There Be Light?, or Narrative as the Reasonable Way to Discuss the Arational. Report on the Second Annual Law Day Symposium Jointly Sponsored by the Center for First Amendment Rights and the University of Connecticut School of Law

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I. INTRODUCTION: POLITENESS IS NOT ENOUGH

Politeness is a virtue, without it discussion would be impossible. But sometimes politeness blocks full communication of emotion-laden messages. As Justice Harlan recognized, sometimes we need to communicate the depth of our feelings about an issue, not just our position on that issue. Religion is such a subject.
I pick up my pen (or more correctly my keyboard and mouse) to report on "Prayer in Public Schools," the Second Annual Law Day Symposium jointly sponsored by the Center for First Amendment Rights [FN6] and the University of Connecticut School of Law. The participants said important things, and said them well. [FN7] But many of the most important parts of the discussion were not fully discussed. This report, therefore, will go slightly beyond fact into storytelling and add a few of the missing shadows. [FN8] The Symposium's problem was politeness.

We were simply too polite-scholarly gentle-beings [FN9] discussing in civilized fashion something we refused to get upset about. [FN10] We carefully *165 highlighted our agreements and understated our disagreements. We, therefore, did not engage the most acute problem: God and the godly are not necessarily polite, civilized, or easy to get along with. [FN11]

King David, for example: when the Ark of the Covenant was carried into the city of Jerusalem for the first time, David stripped to his ephod and danced, almost naked, in front of the entire populace. His well-bred wife, Micah, unsuccessfully upbraided him later for not being more dignified. Micah was punished with childlessness; David, on the contrary, became forefather of the Messiah. [FN12]

The Prophet Elijah did not politely discuss local school boards or the efficacy of a multicultural curriculum with the priests of Baal. He had them killed by an angry mob. [FN13]

God is an even harder case-on some readings. He did ask Abraham to sacrifice his son, Isaac. Many commentators read this story as a condemnation of human sacrifice. [FN14] Kierkegaard, however, insists that God demands the willingness to follow His orders despite our moral or fearful response. [FN15]

God does not always allow freedom of choice. He decided to harden Pharaoh's heart; [FN16] why blame the Egyptians?
God is not an equal opportunity employer. All Catholic priests, like all apostles, are male. [FN17]

*166 Nor is God always a politically correct environmentalist. Neither dew nor rain falls on Mount Gilboa merely because Saul and Jonathan died there in battle. [FN18]

God's Name has been invoked to justify many wars and many deaths. Not only did He order King Saul to kill all the Amaleekites, Saul was punished for showing mercy. [FN19] In short, God is not a subject fully discussible within polite conversation. He is a subject for fear and awe and danger.

The Constitution of the United States was written by people who knew that religion allied with the state often meant war, oppression, and death. The Pilgrims were not just "happy travelers," despite bowdlerized history text books. [FN20] The Religion Clauses of the Constitution deal with the heat produced by the light of God. [FN21]

"Fanaticism," approaching God with heat, is a problem for the *167 academic, main-stream liberal version of the American Dream: a secular country where, despite deeply felt disagreements about ultimate world views, each faction politely supports its policy suggestions with publicly discussible reasons. This is the polite language of the Symposium covered by this Report. Like the Symposium, John Rawls' scenario of the United States is both valuable and appealing, but leaves out the very basis for many persons' choices on public issues. [FN22] Such persons are often called fanatics.

Fanaticism, however, is the wrong word. Stephen Carter is not Jerry Falwell. "Fanaticism" and "bigot" are flag-words used by the "rational" to undercut the importance of those who see reality differently. Let us try "enthusiasm." But whatever word we use, we need to be clear on the limits of our acceptance. The risks of openness are much higher when dealing with religions that refuse to accept diversity and discussion. [FN23] But not all enthusiasts are close minded; many enthusiasts wish to bring their enthusiasm to public, political debates-not to silence oth-
ers.

Enthusiastic religious persons of majority faith-Protestants-feel marginalized by the alleged current insistence that political decisions be discussed in non-religious terms. Steven Carter's The Culture of Disbelief [FN24] awoke sleeping giants in the earth. I personally feel the same need to discuss important practical decisions in terms of my faith-but my faith is not that of the majority. My version of history (where the so-called Golden Age of Spain [FN25] is the aftermath of yet another persecution destroying a vibrant culture, the Golden Age IN Spain [FN26]) sends out waves of warning at politically-aimed Christian God-talk. [FN27]

When majority religious persons insist on including their symbols, myths, and sectarian religious reasoning in the daily operation of the public sphere what happens to the minorities-religious or otherwise? [FN28] The main stream myth of the Pilgrims is that of persons looking for religious liberty. [FN29] The reality (ask any Baptist or Quaker) is that they were intolerant bigots looking for a place where they could live in a homogenous, closed society of their own. [FN30] The Massachusetts Bay Colony offered non-Congregationalists only the "free liberty to keep away ...." [FN31]

No. Politeness is not quite enough when deciding religion's place in society.

But despite politeness, the panelists did present clearly three disparate attitudes. The Reverend Christopher L. Rose ("Rose") expressed the religious reason for church/state separation. Kevin J. Hasson, President of the Becket Fund for Religious Liberty ("Hasson"), suggested a narrow reading of the Establishment Clause based on his view of original meaning. These viewpoints will be reported against a general description of the First Amendment's adoption. Professor Marjorie A. Silver ("Silver") suggested defusing religious-factionalism by teaching about religion as part of a multi-cultural curriculum: teaching, not preaching. Professor Carol Weisbrod ("Weisbrod") highlighted the limitations of this approach. Their remarks will be reported against the opposing policy requests of the Professors' absent antagonists. Finally, the Reporter will sug-
ggest using narrative to continue the discussion. Please note that all footnotes are chargeable to the Reporter.

II. HISTORICAL VIEWS: WHAT DO (DID) THE WORDS MEAN?

Any overview of the historical background of the First Amendment will agree on a few basic facts. Perhaps the most basic is that pre-First Amendment support for church/state separation came from three distinct groups: rationalists who believed that basic ethical and religious truths could be arrived at by independent human reason without the aid of revelation (for example, James Madison and Thomas Jefferson); radical Protestants who believed that religion was tainted when tied to government; practical Federalists who, whatever their views on local government/religion interaction, were frightened by a fight for nation-wide religious control. [FN32]

*170 A. The Need to Protect Religion From Government

1. The Colonial Voice

Roger Williams, who founded Rhode Island after being expelled by the Massachusetts Bay Colony, [FN33] is the classic example of the radical Protestant who feared government involvement would corrupt the church and found no value in coerced "worship." [FN34] This is his voice:

"[F]orced worship stinks in God's Nostrils." [FN35]

"Sir, I must be humbly bold to say, that 'tis impossible for any man or Men to maintain their Christ by the Sword, and to worship a true Christ! to fight against all Consciences opposite to theirs, and not to fight against God in some of them, and to hunt after the precious life of the true Lord Jesus Christ." [FN36]

[T]he faithful labors of many Witnesses of Jesus Christ, extant to the world, abundantly proving, that the Church of the Jews under the Old Testament in the Type, and the church of the Christians under the New Testament in the Antitype, were both separate from the world; and that when they have opened a gap in the hedge or wall of Separation between the Garden
of the Church and the Wilderness of the world, God hath ever broke down the wall it self, re-
moved the Candlestick, and &c. and made his Garden a Wildernesse, as at this day.” [FN37]

*171 2. The Modern Voice

The Reverend Christopher L. Rose ("Rose"), Rector of Grace Episcopal Church, ably repres-
ented this still cherished view. This is his voice: [FN38]

The question of the relationship between religion and the public schools is before us tonight
because of the proposal of the Speaker of the House of Representatives, Newt Gingrich, to pass a
constitutional amendment which would require the restoration of voluntary school prayer. And
so, the question for us is what does he mean by this proposal and what are the motives behind the
suggestion and the vast amount of interest there seems to be in promoting school prayer or a mo-
ment of silence? I think some 70% of Connecticut citizens in a recent newspaper pole were inter-
ested in the notion of a moment of silence, while only 25% or 30% were interested in a mandated
prayer.

I grew up before the time of Engle v. Vitale [FN39] in this very community of West Hart-
ford, and so I was exposed to the practice of mandatory school prayer. It was not a particularly
pleasant experience. Nor was it formative of my values. It was a rote exercise performed daily at
the beginning of the school day. It was not pleasant because I was one of the few Protestant stu-
dents in a predominately Roman Catholic section of the town. And so, when we prayed, we
prayed according to the customs and practices of the Roman Catholic church, which at the time
were not only alien but also abhorrent to me. To be required to pray other than according to my
conscience sent me several times objecting to the principal's office where one time I spent the
week eating my lunch alone by myself after I had refused to say the Roman Catholic grace at
meals with my Irish Catholic teacher in the school cafeteria. I gave little thought to the effect all
of this was having on one of my classmates, Larry, who was Jewish. We were both in the minor-
ity and perhaps there I learned a few of the important lessons, if any, that could be taken away
from the experience.

The whole experience, instead of being formative, merely promoted feelings of hostility toward other religious groups rather than tolerance, and, by the time the Supreme Court decision was implemented in the West Hartford schools, I was beyond the age of early childhood religious squabbles and I hardly noticed the difference when the prayers ceased. Jim Castelli in his book, How I Pray, notes, "I'm 47, *172 and when I was in the ninth grade when we had to stop saying prayers, as I look back, nobody noticed at all. Nobody paid any attention, and I mean nobody was happy, nobody was angry. I think it was just a rote thing."

The vitally important question is just whose prayer Newt Gingrich intends for our children to pray. Obviously, some might say that it should be a Christian prayer as this is a Christian country. I have three responses. First, the Constitution specifically refuses to establish any primacy of one religion over another. Second, on the basis of my Christian faith, I don't wish to take responsibility for the present actions of this government or some of the past actions. I do not want my Christian faith responsible for this government when it turns against the poor or exalts the individual's needs over those of the community or panders to special interests. Finally, if we're going to pray the prayer of the majority, why do we assume some type of Christianity that we each individually like will win? I should be ready for my children to recite Islamic prayers in school. The Muslims in the United States outnumber my group, the Episcopalians.

But, did in fact the Supreme Court decision in 1962 halt school prayer? Certainly not. In my own case, I can recall praying often and especially before quizzes and exams and other difficult moments which all children encounter in public school, praying to be delivered from the class bully, praying for athletic success in games, sports activities, and praying that I would be noticed by the most attractive girl in my class, a prayer that unfortunately went unanswered for many years. There is a lot of prayer in public schools because persons of faith, Christians, Muslims, Jews and others are present there. People of faith already know this. Christians are taught in First Thessalonians to "[R]ejoice evermore [and P]ray without ceasing", to "give thanks [in
everything], for this is the will of God in Christ Jesus for you." [FN40]

While one of the most common definitions of prayer is a conversation with God (which implies some vocalization of the prayer [FN41]) the simplest and best definition I know is that prayer is simply being in the presence of God. [FN42] And, since we who believe that God is always omnipresent *173 to us, we ought, therefore, fulfill the Biblical injunction to transform our lives into prayers offered to God. Prayer can be done as simply a recollection of God's presence at any time, anywhere, without calling attention to yourself, but simply to feel God in your heart.

Prayer, despite Newt Gingrich's suggestion, must come from free choice. Otherwise it is not really prayer. God loves me. For me to love God in response to His love, I have to choose to love Him. Love of God cannot be imposed on me by someone else. Whatever is imposed is meaningless. [FN43] To force a child into mouthing empty words to God against the child's will not only does violence to God to whom the prayer is spoken, but also inhibits the growth of the child's relationship with God. Public prayer is often quite contrary to God's request that "when you pray, use not vain repetitions as the pagans do; for they think that they shall be heard for their much speaking." [FN44] Public prayer on the street corner for the sake of self-aggrandizement is also chastised by the same Biblical text. [FN45]

So what is the purpose of prayer at the beginning of the school day? What is the purpose of prayer at the graduation exercise? And what is the purpose of prayer as Congress opens its session or the Supreme Court opens its session each day? I suppose its intent is to recognize the authority of God over every aspect of our work, but might it not also be the self-sanctification of those who endure those often empty phrases?

Personally, I do not object to a moment of silence at the beginning of the school day. Some persons have proposed five minutes, I think one or two would be sufficient. According to the newspaper poll I mentioned earlier, many of our state's residents would be in favor of that. I have yet to hear a good argument against the concept of the moment of silence. Even nonbelievers and
atheists could use the moment to good effect, collecting themselves and organizing themselves and getting focused or centered for the work of the day. Nothing, however, prevents abuse of such a moment of silence. [FN46] Some educators *174 might be tempted to imply that the students should use the moment of silence for some particular form of prayer.

Nothing, we need to remember, prevents persons of faith from making morning prayer a practice in their homes, either praying with or asking their children to pray by themselves before they leave the house for school. Without school involvement, a parent can set an example for her children by teaching them to pray, to say Grace to themselves quietly bowing their heads before meals, to offer thanks for other things in the day that they are thankful for.

Since parents who wish to, can teach their children to pray, I wonder more deeply why the sponsors desire return to school prayer. [FN47] I suppose the call for school prayer is really a reaction to the perceived decline in morals and values in our society, and I underscore "perceived." Many look on urban violence and suburban materialism and despair of the future of our country. Indeed, as people of good conscience are well aware, there is ample cause for concern. And yet, history is not without God and, as I was taught in my seminary, the kingdom of God will come about without human help, even though many of us think that we are instrumental in bringing that about. [FN48]

What we seem to need, more than mandatory prayer or the primacy of one religion over another, is a return to a commonality of shared values and principals. Keeping religion at arm's length from the public schools, however, will not produce this result. Religion is a major part of the world and American history; you cannot understand either without understanding the religious influences and dimensions of the human race. But perhaps what is most lacking is what happened in ancient societies as a matter of course, and that is the public teaching and debate of values, otherwise known as philosophy. Why not introduce *175 this as a curriculum in public schools and educate our young in the various morale precepts and teachings of each of the world's major religions, be they Judaism, Christianity, B'Hai, Islam, or general philosophical
principals. [FN49] Give them freedom of choice in terms of the development of their own consciences. Let us never forget why our ancestors traveled to these shores, so let us be ever vigilant against establishing the primacy of one religion, whether it's my own, yours or someone else's.

B. Originalism

1. The Modern Voice

Kevin J. Hasson presented a modern point of view that claims validity from the original meaning of the Establishment Clause. This is his voice: [FN50]

The ongoing debate in American society collapses artificially two separate questions into one. The first question is, "Is religion a good idea or a bad idea?" And the second is, "What is constitutional?" To the extent the first question is appropriate in a legal symposium such as this that question is not whether we think religion is good or bad in the abstract, philosophical sense—whether it causes wars or whether it uplifts the human spirit. This is a debate I would be happy to join, but it is not a legal debate. Rather, what we are discussing tonight is whether in the framework of the United States Constitution religion is a constitutional good or a constitutional evil. I think the answer is textually self-evident, that along with speech and publication and assembly, the First Amendment singles out the exercise of religion as a constitutionally good thing. [FN51]

*176 For the second question, I think it is axiomatic that the government may advance any constitutionally good thing provided it does so even-handedly. The government may provide soap boxes for public squares as long as it provides them to everybody. The government may give away free newsprint to newspapers as long as it gives it to all newspapers. Similarly, the government may advance religion (another constitutionally good thing) as long as the government does so evenhandedly.

This view is not, I think, inconsistent with a proper interpretation of the Establishment Clause. That Clause bars Congress (and now the States) from "making any law ... regarding an
establishment of region." Two words are key: "establishment" and "regarding." Neither is mysterious. When the framers of the Constitution wrote, they knew perfectly well what an establishment of religion was. They had just come from one. The Church of England is called The Established Church. In my view, the Establishment Clause in the First Amendment was meant to prohibit only the evil the colonists had fled, the federal government creating an established church. "Respecting" is also not mysterious. At the time the First Amendment was drafted several of the states had established churches. If the clause had merely prohibited Congress from creating an establishment, Congress could have claimed the power to order the disestablishment of a state church. "Regarding" bars the federal government from interfering with state decisions in either direction. Virginia chose to disestablish its state church in 1785 [FN52]; Massachusetts waited till 1833. [FN53] But the decisions were state decisions. The Fourteenth Amendment, as interpreted, of course, extended the ban on government established churches to the states. And I am not advocating revisiting that question. I am simply pointing out that "respecting" had a precise historical meaning that in no way broadens the prohibition on establishments.

In short, I think that for about 50 years we have been asking the wrong question. We keep asking, "Is this or that an establishment of religion?" We should be asking, "Is this violating anybody's free exercise, free speech, or equal protection rights?" In my view, for example, school prayer is not an Establishment Clause problem. The problem with coercive school prayer is that the government may be compelling children to mouth a prayer that they do not agree with. [FN54] That type of *177 compulsion tramples the children's free speech rights and free exercise rights. Children most definitely have the right not to say something they do not believe and the right not to participate in a religious exercise that they do not agree with. My analysis protects those rights. But, unlike the current reading of the Establishment Clause, my analysis does not ultimately lead the government into a search-and-destroy mission for all religious aspects of our culture.

Moreover, Establishment Clause analysis leads to a different remedy than does Free Speech
or Free Exercise analysis. In Engle v. Vitale, [FN55] the plaintiff challenged the use of a non-denominational prayer in the New York State schools. At the beginning of the school day, teachers were required to lead their classes in the following prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." [FN56] The Supreme Court held this to be an unconstitutional establishment of religion even if no objecting students were required to say the prayer. [FN57] I think this situation should have been handled in the *178 same way as the Supreme Court had handled objections by Jehovah's Witnesses to school regulations forcing children to salute the flag. [FN58] To Jehovah's Witnesses, saluting the flag is a religious exercise, albeit an idolatrous one. [FN59] The Supreme Court held that forcing objecting students to join the flag salute was unconstitutional. Unlike the school prayer cases, however, the Court did not stop the class exercise. Jehovah's Witnesses merely watch as the rest of the class recites the pledge. [FN60] I can think of no constitutionally significant difference between Jehovah's Witnesses and flag salutes on the one hand, and conscientious objectors and prayer on the other. No one ought to be forced directly or indirectly to pray a prayer or salute a flag that he or she does not believe in. But it does not follow that the existence of one objector means the whole class is barred from praying or saluting the flag. The critical question is whether anyone is being coerced.

Coercion, of course, is fact specific. With young children, simply holding the exercise is coercive. One cannot expect a six-year-old child to say "My parents say we don't believe that," and to sit down. On the other hand, by the time you reach high school, that may not always be true. There is nothing I loved better than being the one student in the class who disrupted everything. By the time you reach college, it is certainly not true. And then there's the situation which probably occurs with frequency in places like rural Utah where there is a small class, all of whom devoutly want to pray the same morning prayer to the same God and a teacher who shares that desire. In each of these different factual situations, there are different levels of potential coercion, and, therefore, potentially different legal remedies under the Speech and Free Exercise Clauses. But in each, the Establishment Clause is irrelevant.
2. Cacophony, Then and Now

On the history of the Establishment Clause, this Reporter can offer only competing choruses.

Once upon a time and long-long ago, the Supreme Court based its first substantive interpretation of the Establishment Clause on the Court's reading of history: Everson v. Board of Education. [FN61] According to Everson, the Establishment Clause of the First Amendment can be understood by looking at the view points of James Madison and Thomas Jefferson, especially their position in the earlier Virginia battle over the relationship between government and religion. [FN62] The Court assumed, without discussion, that the later incorporation of the Establishment Clause against the states by the Fourteenth Amendment did not change this original meaning. [FN63] The Court invoked a metaphor from one of Jefferson's later-written letters as the core meaning of the Establishment Clause: a wall of separation between church and state. [FN64] Many historians have assaulted Everson's history as bad scholarship; many commentators have argued that the Court relied upon largely irrelevant materials. [FN65]

The attack on Everson as biased myth, not history, is led by "nonpreferentialists" like Hasson. Under this view, federalism, not religion, was the impetus for the Establishment Clause—after all, several states still had religious establishments when they ratified the First Amendment. Nonpreferentialists claim that the super-majority view in eighteenth century North America (a) considered religious belief a vital part of life, (b) assumed that Christianity (usually limited to Protestantism) was the necessary underpinning of morality, (c) assumed that a republican government could only survive with a moral citizenry, [FN66] (d) but thought that the states, not the federal government, should make all major church/state decisions. This last choice was largely pragmatic; no one was sure who would win if the federal government tried to create a homogenous national religion.

On the nonpreferentialists reading, the Establishment Clause bars the federal government from creating a national church. Incorporation is problematic, but at most bars preferential treat-
Irreligion is simply not protected; "civil religion," the invocation of nondenominational theism on behalf of good citizenship, is not an establishment. To go further, nonpreferentialists insist, pushes the Clause beyond the beliefs of even Thomas Jefferson, the most radical separationist of the framing era.

Supporters of the Everson theory do not say the Court got its history right (especially if right means somewhat complete); leading scholars do not currently argue that a broad reading of the Establishment Clause is required by original intent (defined as the meaning of the words in the Eighteenth Century). Instead, Everson's apologists argue that the eighteenth century reading of the words in the Establishment Clause allow a broad reading. While agreeing that nonpreference was definitely part of the Clause's original intent, they argue that we cannot be sure that nonpreference was the limit of original intent. Supporters of the "wall" also point to the complexity of the historical record. The state establishments in 1791, for example, were written to allow support for more than one denomination, and, therefore, could easily be termed "nonpreferentialist"-even though support in fact was granted on a more limited basis.

This Report will limit itself to one vital point in the historical record: if the Framers merely meant "no national church," they could very easily have said it more clearly.

Interpretation by contrast with clearer language is a common technique. Supreme Court justices (including justices with original intent constitutional eyeglasses) often construe muddy statutes by contrasting them to other legislative language that is asserted to require the same outcome. Chief Justice Rehnquist, for example, recently stated that the Federal Election Commission's proffered interpretation of a statutory clause "might carry considerable weight if it were not for the cognate provision" granting the claimed authority in a different setting. Since the cognate provision was clearly worded to allow the claimed authority, Rehnquist concluded that "i t is difficult, if not impossible, to place these sections alongside one another without concluding that Congress intended" the muddy clause at issue to be read differently from
Nonpreferentialists point out, for example, that the Federalists introduced the Establishment Clause to placate state ratifying conventions' requests for an express bar against the federal government's possible creation of a national church. But why is the language in the Establishment Clause so much wider than the language used for this request? Compare: "That there be no national religion established by law"; "no particular sect or society ought to be favored or established by law in preference to others." State constitutional clauses disestablishing churches are also clearer; compare Delaware's "no establishment of any religious sect ... in preference to another." Even more clearly, the Maryland Constitution of 1776 stated that "all persons professing the Christian religion, are equally entitled to protection in their religious liberty"; neither should "any person be compelled to frequent or maintain or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry"; and that the legislature has the power to lay "a general and equal tax, for the support of the Christian religion."

Similarly, earlier versions of the Establishment Clause from the congressional debates on the Bill of Rights are more limited than the final version. Compare Madison's original suggestion to the House of Representatives: "... nor shall any national religion be established ..."; the version sent to the Conference Committee by the House: "Congress shall make no law establishing religion ...."; and the version the Senate sent to the Conference Committee: "Congress shall make no laws establishing articles of faith or a mode of worship ...." with the version which exited the Conference Committee and was ratified by the states: "Congress shall make no law respecting an establishment of religion ...."

3. Even If This Is the Right Genre, Is This the Right Story?

Sometimes we cannot ask what the Framers intended (even if we believe their intent determinative). Justice Scalia faced such a problem in Vernonia School District 47J v. Wayne Action, a
case that required application of the Fourth Amendment to random drug screening of public-
school athletes. [FN84] Since neither public schools nor widely used recreational drugs existed
in colonial America, [FN85] Scalia invoked eighteenth *183 century views on children's liberty
rights. [FN86] Justice O'Connor, on the contrary, looked to eighteenth century views on mass,
suspicionless searches. [FN87] Neither Justice explained why their category was primary.

Many scholars have cited this type of indeterminacy to argue that original intent analysis is
merely a way of smuggling undisputed biases into Supreme Court jurisprudence-in direct con-
tradiction to its announced goal of limiting judicial discretion. [FN88] Ronald Dworkin correctly
points out that, when we try to apply original intent to modern circumstances, the issue is not
whether we should be faithful to the beliefs of the Constitution's authors. As Dworkin's analysis
clarifies, O'Connor and Scalia are disagreeing not about "what the authors' views were but the
primacy of different ways of structuring the same views, with very different consequences."
[FN89]

Like athlete drug problems, modern religious diversity did not exist in the Framers' country.
The outside limit of toleration in eighteenth century North America, therefore, did not extend to
equality (in Hasson's sense) to Judaism or Islam (never mind non-theistic religions such as
Buddhism, Confucianism, and Taoism). [FN90] If we wanted the real voice of middle-
of-the-road eighteenth century toleration, we could turn to Associate Justice Story:

The real object of the First Amendment was not to countenance, much less to advance
Mohammedanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all
rivalry among Christian sects, and to prevent any national ecclesiastical establishment ....
[FN91]

Yet the nonpreferentialists assume that we now cannot prefer nondenominational Christianity
to Judaism and Islam. Use of the Lord's Prayer, the nonpreferentialists argue, should have been
banned as a preference for Christianity, not as an establishment of religion. [FN92] This softening
of the Framers' position makes perfect sense if you are a politician looking for reelection. But
if the test is the Framers' intent, [FN93] why is this a principled stopping place? [FN94]

The Reporter can see no principled reason for nonpreferentialists to protect Jews (or Moslems, Hindus, Buddhists, Ba'hai, etc.), but not agnostics or atheists. In 1991, fifty-six percent of the United States' noninstitutional population over eighteen years of age expressed a "preference" for Protestantism, 25 percent for Catholicism, two percent for Judaism, six percent for some other religion, and eleven percent expressed no religious preference. [FN95] This greater diversity of the population might logically suggest extending the Framers' belief in the need for Protestant backing for good citizenship to a modern belief in the need for some comprehensive doctrine to back the social order. If we need a common moral denominator, we could go to Rawls' overlapping consensus. [FN96] If we want a single authoritative text, we could use the Constitution itself. [FN97] But the existing type of diversity does not support transforming the eighteenth century view that morality required Protestantism into the modern nonpreferentialist position of protection for Jews but not for ethical agnostics.

Nonpreferentialists, perhaps, are willing to allow protection to Jews either because nonpreferentialists consider Judaism to be similar to Christianity, because the rhetoric of antisemitism has a foul taste in the post-holocaust United States, or because Jews are not powerful enough to be a threat. [FN98] None of these reasons rests easily on original intent. None makes this Reporter feel equal, safe, or respected. [FN99]

III. POLICY VIEWS: HOW DO THE WORDS WORK?
A. The View from Today

The real opposite of the historical view insists that Hasson (whether right or wrong about history) is simply asking the wrong question. "What do the words mean?," if interpreted as "What DID the words mean in the time of the Framers?," assumes our problem is restricting judicial discretion. [FN100] Perhaps the real problem is motivating the current population of the United States to ratify [FN101] by action the social contract they did not help draft. [FN102] If this is
the correct question, *186 original intent is not semi-divine guidance. [FN103] Another story:

Once a question arose among the great scholars of the age as to the decision of a certain point of law. Rabbi Eliezer, single-handed, opposed the view of the rest of the sages. He advanced all kinds of arguments to prove that his view was the right one, but these arguments were rejected by the sages. Rabbi Eliezer, seeing that all his arguments were futile, said: "Let the carob-tree, standing near the college, prove that my opinion is the prevailing one." No sooner had Rabbi Eliezer finished his words than the carob-tree jumped one hundred cubits, roots and all. But the sages said: "No proof can be cited from a carob-tree."

"Then let this brook prove that I am right," exclaimed Rabbi Eliezer.

No sooner had Rabbi Eliezer completed his words than the water in the brook reversed its course. But the sages said: "No proof can be cited from a brook."

"Then," said Rabbi Eliezer, "let the walls of this college prove that I am right."

The walls did not collapse out of respect for Rabbi Joshua [President of the college], and did not return to their erect position out of respect for Rabbi Eliezer, and so they stand leaning to this day.

"Let then proof come from heaven that my view is the right one," said Rabbi Eliezer.

Immediately a heavenly voice was heard: "Why do ye contradict Rabbi Eliezer? His opinion is always right."

*187 Rabbi Joshua rose to this feet and said: "The Torah is no longer in heaven. We pay no attention to a heavenly voice for Thou has long ago written in thy Torah, given on Mount Sinai: 'Turn after the majority.'"

Rabbi Nathan afterwards met the Prophet Elijah and he said to him: "What did the Holy One, blessed be He, do at that moment?"

Elijah replied: "God smiled and said: 'My children have won over Me! My children have won over Me.'" [FN104]

Reading the Constitution as gospel from the Framers overlooks many children of God who have become at least partially visible since the eighteenth century. The Establishment Clause was
not aggressively litigated until the 1940s. The reason seems apparent; non-Protestants were invisible. [FN105] An unlitigated assumption about law is not a validation of that assumption. [FN106]

The Framers wore blinders. They did not see, count, respect, or consider non-white, non-Protestant, non-male, non-propertied people when they invoked "inalienable rights" for "all men." [FN107] We cannot simultaneously expect invisible people to abide by our Constitution and deify an interpretation that rests on their invisibility. Even the amorphous "civil religion" invoked by Robert N. Bellah and the Regent's Prayer [FN108] is exclusive. "Civil religion" refers to the religion of European immigrants, starting with the Puritans. This "civil religion" totally ignores Native Americans and African Americans-both of whom were physically abused by these same "religious" majority settlers. [FN109] Jews and Muslims fare only slightly better-and then only by the fortuitous *188 chance that their faith overlaps majority beliefs. [FN110]

B. A Modern Answer to the Modern Question

Professor Marjorie Silver suggested welcoming religion into our schools, but not through prayer. She proposed a multicultural curriculum including teaching about multiple religions-teaching, not preaching. [FN111] This is her voice: [FN112]

I start off with the premise that we are a nation based on a public civil religion. For better or worse, examples are all around us. After the horrible disaster in Oklahoma City, President Clinton got on the radio and asked all Americans to pray for the victims of that disaster. Virtually every presidential inaugural address since Washington has recognized the deity, and most every president has prayed for divine guidance. Every state constitution invokes God's name. Congress added "under God" to the Pledge of Allegiance in 1954. "In God We Trust" was added to all paper money and coins in 1955 and made our national motto in 1956. Some of our most treasured public speeches have invoked the Divine--Lincoln's second inaugural address, Martin Luther King, Jr's "I have a Dream" speech. Even the Supreme Court opens each session with "God Save
the United States and This Honorable Court." Religion in schools has always been and continues to be a source of dissention.

My proposal is not a suggestion for a better way to interpret the Establishment Clause. My proposal is that we incorporate religion into the schools as part of a multicultural curriculum.

Some of the concerns about allowing religion into schools are quite legitimate. I, too, agree that there is really no such thing as a nonsectarian prayer, that that is an oxymoron. And most clergy of most of the major religions seem to agree with that as well and oppose organized prayer in schools. There is also concern about ostracism for nonparticipation. There is concern about peer pressure, and some of that may well be legitimate. There are concerns about interfering with students' and parents' and teachers' belief systems, and I think these need to be addressed. There are concerns about the reaction of the nonbeliever if religion is discussed in schools.

But despite our multiple concerns, I think there are many nonsectarian benefits to be gained. I think we need to view religion or nonreligion as a valued aspect of personal identity. Once we see this connection, we recognize that discussing religion in schools should be a complement to multicultural education. Such discussion can enhance empathy, tolerance, understanding, and respect. I think there are benefits in having students in schools discuss morality and value systems and share their value systems with one another. I think the area needs much further inquiry. We have to figure out how to incorporate religion into the identity that the individual child can share within the community. I think we have to give more discretion back to schools and to teachers in this area, and I think we must create effective remedies for abuse of religious rights and freedoms and think of new creative approaches to doing this, and I think there needs to be room for experimentation and empiricism to figure out what works, what helps children, and what is harmful to children. In conclusion, let me say that one might hope that the amount of constitutional, legislative and litigation activity would ultimately subside once the state and local govern-
ments, the schools and the court adopt parameters that a larger percentage of the population find acceptable. I think for too long we have let the religious right define the debate about religion in schools, and it is time for progressives and moderates to reclaim it.

C. But Are We All Asking the Same Question?

Professor Carol Weisbrod forced us to consider the depth of the liberals' disagreement with the absent speaker, the fundamentalist enthusiast. This is her voice: [FN115]

The Supreme Court has twice upset state laws, backed by fundamentalists, *190 that forced the public schools to teach a Biblically acceptable version of natural history, "creation science." [FN116] The Court labeled creationism an attempt to impose a sect-specific point of view. But, fundamentalists are equally correct in asserting that the "non-sectarian" curriculum is not value-neutral. [FN117] The disagreement is basic; the two sides disagree on the nature of the world itself and on how you determine the truth about the world. [FN118]

We used to assume that problems would go away. In the Enlightenment, educated people like Thomas Jefferson assumed we would find the answers. But we have not. The question remains: how can the modern secular state provide a humanistically based scientific education to everybody when you have groups that are not essentially committed to humanistic scientific values? Scientific values are based on the concept of provisional truth. A scientist forms a hypothesis and accepts it provisionally based on the evidence she has until evidence accumulates against it. But in the theological tradition of revealed religions, truth is not provisional. The truth is given; the object of the world is to preserve the truth that has been given to you.

Evolution is about the gradual development of the world; scientific creationism is about the time sense of Genesis; a world created as one unit. The debate between them concerns the nature of truth. How do you know something is true? Is the Bible a source of knowledge? Is revelation possible? These questions have not gone away.

We all agree that Establishment Clause jurisprudence is a modern phenomenon. This country once had a consensus about some form of Christian civil religion being acceptable. But we now have more radical disestablishment, and we no longer have a consensus that this is a Christian nation. The modern state has no choice but to decide questions about value and ultimate reality; [FN119] the schools need to have a *191 curriculum. But in the post-modern era, the state no longer has any clear basis for deciding such questions. We also need to decide on the nature of groups. [FN120] Groups are necessarily implicated in church/state issues. What is the authority of the church, of the intermediate group, to speak for the individual?

We need to accept that these basic problems will not go away and concentrate on some framework for deciding on action when we cannot decide on substance. Tolerance is not enough.

D. The Absent Speaker

1. The Loud, Though Absent, Voice

Newt Gingrich ("Gingrich"), Speaker of the House, was not present at the Symposium. But we all spoke in the shadow of the proposals he supports. What does Gingrich want, and why does he want it? As Reverend Rose commented, the pro-prayer-in-public-schools movement asserts a connection between a public school system perceived as anti-religious and a perceived collapse in moral behavior. This position is clearly a subset of the argument that religion deserves protection because it helps preserve the ethical code needed for good citizenship. *192 This argument requires us to nurture the subset of Christian beliefs included in Jefferson's Universalist Unitarianism; it does not require solicitude for minority beliefs and practices. [FN121] Practically, if this is all the Religion Clauses are about, they would be unnecessary; political process is enough to protect such majority-held norms. [FN122]

For the Absent Speaker, listen to Jesse Helms' remarks when introducing the Voluntary School Prayer Protection Act on January 4, 1995:

[L]ike so many others, I often contemplate the obvious fact that America is in the midst
of an historic struggle between those who, on the one hand, yearn for a restoration of the heri-
tage of traditional values envisioned by our Founding Fathers and those who, on the other
hand, contend that anything goes no matter how destructive-especially when the Federal
Government finances it. Seldom mentioned is the fact that the Federal Government has no
money except that which it forcibly extracts from the pockets of the American taxpayers
back home in our States.

So, what we have is a struggle for the soul of America. How it is finally resolved will de-
termine whether America will move forward—or end up on history's ash heap, as have so
many nations before us.

The American people are more aware than ever before about what is at stake. They are
sick and tired of crime, pornography, mediocre schools, and politicians who cater to every
fringe group and perverse lifestyle. The voters resoundingly and unmistakably demonstrated
their anger at the polls this past November.

Reader's Digest presaged this public outcry when it published an article a few years ago
titled "Let Us Pray," in which the magazine reported the results of a Wirthlin poll. That poll
found that 80 percent of the American people resent the Supreme Court's ruling that it is un-
constitutional for prayers to be offered at high school graduations. The poll showed that 75
percent of Americans favor prayer in public schools.

This is why I am introducing the Helms-Lott amendment as a bill in the 104th Congress
to be known as the "Voluntary School Prayer Protection Act."

The bill would ensure that student-initiated prayer is treated the same as all *193 other
student-initiated free speech—which the United States Supreme Court has upheld as constitu-
tionally-protected as long as it is done in an appropriate time, place, and manner such that it
"does not materially disrupt the school day." [FN123]

2. A Personal Response from the Reporter

Why are such proposals necessary? What do Jesse Helms, Newt Gingrich, and the Christian
Coalition want? As an outsider, this Reporter thinks (and feels, and fears) that what they want is
to turn public space, and public schools, into a club where outsiders (like this Reporter) are not
eligible for membership. They probably, to be charitable, are not primarily aiming at exclusion.
They want to feel at home in "their own country." They want to publicly educate their children to
be *194 moral citizens so that the United States will continue to prosper. They want to follow
George Washington's advice in the Farewell Speech they so consistently quote: not to "expect
that national morality can prevail in exclusion of religious principle." [FN124] They want to own
the myths and heros of their own country.

This is also my country, however, and I read these myths and heros differently. So I feel
threatened—quite rightly. While I do not fear that they are charging down a slippery slope to the
gas chambers, or the distinctive sugar-loaf hats and yellow disks my ancestors were forced to
wear by Papal edict, I have no wish to be demoted to an outsider in my own country. [FN125]

So I ask again, why do they want this? But let us now be more realistic about the nature of
"they." It is tempting to laugh a sophisticated, Northeasterner's laugh at Jesse Helms. But "they"
includes persons of intelligence, education, and legal acumen: Stephen Carter among others.
[FN126]

The problem is diversity, and the problem is real. Eighteenth century America assumed you
needed some type of shared moral beliefs to make a republican form of government work. Des-
pite vigorous dispute over historical details, most scholars agree to the basic proposition that
even Thomas Jefferson and James Madison had not envisioned a society as diverse as the current
United States. Several religious groups fled persecution and attempted to set up their own private
religious communities in North America. But outsiders came. Practicality forced a coalition of
diverse groups which agreed that their federation *195 would not enforce any one religious out-
look. But the religious elements in this coalition had no philosophical underlining for total di-
versity. The Enlightenment deist intelligentsia of the time did: human reason without revelation
would reach unaided the basic truths of morality which are shared by all revealed religions.

The real question has never been answered: once you give up the Enlightenment belief in inevitable progress to one shared definition of reality, how do you create a theoretical framework for extreme diversity within a single community? Gingrich and company seemingly think you cannot and, partially on that basis, want to tie the United States together into one community by using some form of religion, perhaps civil, perhaps strongly fundamentalist Protestant. John Rawls and other rational liberals have attempted an answer, but it does not cover the full scope of our diversity. Even more frightening to some, it is a secular answer. Hence Stephen Carter's complaint. Two recent attempts to answer the question deserve mention: Franklin I. Gamwell, The Meaning of Religious Freedom: Modern Politics and the Democratic Revolution and Michael J. Perry, Love & Power: The Role of Religion and Morality in American Politics.

Gamwell and Perry, though working in different idioms, end up with the same basic solution: ecumenical dialogue. They both call for the standard market place of ideas with religious views included. Their basic practical dispute with Rawls is Rawls' exclusion of religious views from the public discussion. Theory is more complicated. Gamwell maintains with great detail, in an almost Scholastic voice, that in order to allow religion into this dialogue one needs to accept that religion can be discussed inside reason; it is neither super-rational nor sub-rational. Perry does not completely agree.

Perry suggests a discussion with someone, such as Richard Rorty, who believes that humans cross culturally share only basic biological needs (all else being socialization). Rorty inquires why he should act to protect (or respect) other persons' alleged "natural rights." The upholder of human rights based on the "human condition," Perry asserts, has only three possible answers: (a) definitional ("required by morality") which is a non-answer; (b) for your own good (for example, Rawls' veil of ignorance which can only support a very thin set of entitlements; or (c) doing so is the full definition of living a human life. Perry chooses (c), but acknowledges that his
choice is based on a religious belief. [FN135] Perry does not assert that his religious belief is "rational" in Gamwell's terms. Perry asserts, however, that morally based positions can be changed by discussion and that discussions should invoke emotion as well as logic. [FN136]

Values, to Perry, even if not based on "rationality" are still "reasonable" and "unreasonable." Empathy, therefore, is not out of place as the grounds of an argument. [FN137] Elizabeth Anderson persuasively argues a complex version of a cognate position. She asserts that humans use multiple values in different sorts of decisions and that emotional responses are correctly part of such valuation. She agrees with Perry that one can, and should, be asked to supply reasons for valuations. [FN138] This Reporter suggests that we integrate the hopeful aspects of these positions by moving some of the discussion, both political and academic, into the narrative mode.

IV. NARRATIVE AS SHARED LANGUAGE

"In the beginning God created the heaven and the earth. And the earth was without form and void; and darkness was on the face of the deep. And the Spirit of God moved upon the face of the waters." [FN139] *197 Or did "a wind from God move over the face of the waters"? [FN140] Undeniably, both "spirit" and "wind" are correct translations of the Hebrew word RUACH. [FN141] Christian commentators, of course, identify Genesis' "Spirit of God" with the third person of the Trinity. [FN142] Jews, just as obviously, do not accept either the Trinity or the Christian concept that the "Old Testament" is a mere preparation for the New Testament. [FN143] The retranslation of Genesis was a long-belated emancipation of English-speaking Jews from bondage to a dominant group's counter story about the Jews. [FN144] The difference between silently acquiescing in another's view of your reality and publicly proclaiming your own self-interpretation is shown in a small change in the words of a story. Power is being able to be a spokesperson, being able to give names to reality and hear others use your choice of names. [FN145]

Multiple truths can be reflected in one story. First, small word changes matter; this Reporter, therefore, has attempted to use the speakers' actual voices to minimize mistranslation. Second, a
story may be claimed by more than one group. Third, a story may have multiple, conflicting meanings. Fourth, the commonality of the story may camouflage deep underlying disagreements and power struggles. Fifth, despite underlying disagreements, a shared story may be a bridge for discussion between cultures, even if those cultures are somewhat antagonistic. This last point, unfortunately, is based partly on hope, partly on *198 anecdote, and partly on personal experience. [FN146] But hope is stronger when humor is included in the tale. To quote a First Amendment scholar and a Christian believer, "It is time to tell the stories Elie Wiesel says God created us to hear (and the jokes, I interject)." [FN147]

Religion is commonly discussed, taught, remembered, and felt in stories. "In the beginning ...", is not that different from "Once upon a time ...." Both evoke instant recognition that a shared form of storytelling, hallowed with long communal use, will be invoked along with the form's built-in symbols, metaphors, and emotional depth. [FN148] God knows this: She commanded us to recount the story of the exodus from Egypt every year. [FN149] Communal storytelling helps each Jew fulfill the requirement of "regarding herself as though she personally had gone forth from Egypt." [FN150] The evil child is the one who separates herself from the story-and the mandated parental response is to tell her the story again. [FN151]

Much recent scholarship has asserted that academic and decisional law are also a form of storytelling. [FN152] The proponents of this view *199 tend to be feminists or critical race scholars who suggest using narrative to help those with power to understand the reality of outsiders. [FN153] On this view, "rational" discussion is merely a label used to privilege insiders' stories and create an unrealistic aura of neutrality for pro-insider decisions. [FN154] Even some who are very critical of story-as-scholarship accept that stories may be useful in scholarship if used with analysis. [FN155] One need go no further than this to accept this Reporter's current suggestion. [FN156]

*200 The insistence that narrative is legally or academically important has obvious affinity with the philosophical positions (1) that emotion is cognitive, [FN157] and (2) that multiple
methods of valuation are important because one properly approaches different elements of life with different (often "emotional") responses. [FN158] The law review literature, as yet, is largely silent on the tie between narrative legal scholarship and the "cognitive" theory of emotions. The position is expressly argued, perhaps for the first time, by Professor Susan Bandes. [FN159] Let me briefly outline my version and its applicability to the intersection of religion, law, and politics. Many have used storytelling effectively [FN160] in Religion Clause discussions. Many have used religious stories in support of the narrative mode's usefulness in other areas of legal discourse. [FN161] But the special reason for using storytelling specifically in religious jurisprudence has not been articulated. [FN162] Perhaps it is too clear to need expression.

*201 The current law and economics view chooses for the legal prototype of rationality Langdell's conception of a deductive hierarchy of principles similar to science. [FN163] End values are not analyzed because of the undiscussed premise [FN164] that all values are comparable and commensurate [FN165]-a highly contested position. [FN166]

If you view law in this "rational" mode, religious arguments simply do not fit. Religious arguments are not scientific; they often rest on asserted forms of authority rejected in science; they claim uncalibratable utilities; they claim unverifiable future utilities; they reject the very concept of utility; they refuse to accept the fungibility of similar acts performed for dissimilar reasons; they evaluate ends as well as means. As discussed in the Symposium, religion does not accept sciences' foundational definition of the nature of truth. The narrowly rational law professor faced with a religious argument is in the position of the cannibal presented with a visiting anthropologist who has no kinship ties to the local group. Since the cannibal cannot figure out how to assess the anthropologist's rights and duties (which are defined by the kinship system), the easiest decision is to eat the visitor for dinner. Unfortunately (for those who like an orderly "scientific" world), this religious visitor refuses to go away and brings so many friends that the cannibal cannot eat all of them for dinner without uneconomic waste of resources.

But if the law professor accepts a wider definition of legal reasoning, the problem is not quite
as intractable. Legal reasoning does include storytelling: the hypothetical and the parade of horribles. The underlying structure of these arguments is simple. Your opponent wants outcome z about which the decider is uncertain. You argue that outcome z is only obtainable in a world which includes outcome y. Outcome y is a state of affairs that the decider abhors. You win. You won by telling a story, by describing the world with condition y. You may also argue that the decider is correct to abhor y, but you do not need to do so if your story about y is well presented or the abhorrent nature of y is "obvious" in the decider's world view. [FN167]

Religion, as discussed above, is often approached through stories. [FN168] The law professor (or political disputant) can listen to the religious disputant's story and see if he abhors y. The law professor has practice in listening to and telling stories. The religious disputant has practice in listening to and telling stories. [FN169] The two can converse without agreeing on the origin or authority of the story. While this method is acceptable to many disputants, the narrowly "rational" law professor is uncomfortable admitting that he was convinced by a story which he cannot transform into a logical evaluation.

The law professor now needs an intellectually acceptable way to deal with the story (which has already convinced him). The cognitive theory of emotions and the theory of plural evaluative criteria are two such intellectually acceptable ways for the law professor to deal with the story. I say "two such ways" and will briefly outline two separate arguments presented by two modern philosophers: Martha Nussbaum and Elizabeth Anderson. But while each starts at a different spot, both accept some version of the other. [FN170]

*203 Before I outline these positions, I need to clarify my use of the terms "rational" and "reasonable." Because this Report is intended for a legal audience, I am using "rational" in the narrow meaning accepted by, for example, law and economics scholars. Rational will be logical in a scientific mode. I use "reasonable" to mean "supportable by reasons." This Report does not enter the technical, philosophical debates on the nature of and relationship between reason and rationality defined as terms of art. I also apologize to both readers and sources for the oversim-
Martha C. Nussbaum offers our uncomfortable law professor the support of Aristotle's venerable theory of practical reason. [FN171] Practical reason underlies human choice in the concrete situations where humans actually make choices between actions. Unlike scientific understanding, practical reason cannot discern the proper outcome without the help of emotion. [FN172] In Nussbaum's view, Aristotle's position on practical reason rejected three interwoven Platonic concepts. Aristotle, Nussbaum, and this Reporter (1) claim that all valuable things are not commensurate, (2) claim that particular, i.e., context embedded, judgments are prior to universals, and (3) claim that emotions and imagination are essential to human, reasonable choice. [FN173] Human practical understanding is a complex matter involving the whole soul. Mere theorizing, without emotional contact to the situation, impedes vision. Wisdom has not one, but several, opposites: ignorance, denial, and self-deception. [FN174] Literature, novels, storytelling are important tools in using practical reason across cultural differences:

While it is extremely difficult, and frequently impossible, to assess intuitively, as a possibility for oneself, an ethical or religious treatise from an extremely different cultural tradition, novels cross these boundaries far more vigorously, engaging the reader in emotions of compassion and love that make the reader herself a participant in the society in question, and an assessor *204 of what it offers as material for human life in the world. [FN175]

According to Nussbaum, therefore, Aristotle's conception of practical reason supports the use of storytelling to reach understanding. [FN176]

Even Farber, who criticizes the scholarly value of some legal narrative scholarship, [FN177] approves of practical reason. [FN178] Farber correctly recognizes that the distinguishing trait of practical reason advocates is their understanding that "unreasonable" means more than "illogical." [FN179] Farber approvingly declares this insight to be characteristic of Karl Llewellyn's approach to law. [FN180] Farber then argues that Llewellyn's "situation sense" and current "practical reason" are both supported by recent Artificial Intelligence research into how experts reach de-
cisions; this research confirms the primacy of "generating an initial problem representation." [FN181] This Reporter suggests that the "initial problem representation" of practical reason is a story that embeds the most relevant details into the overall structure of reality. Practical reason is, thus, a powerful theoretical support for accepting the scholarly use of narrative. [FN182]

Elizabeth Anderson also encourages our uncomfortable law professor to feel comfortable when he is convinced by stories, even though she discusses neither narrative nor literature. [FN183] Anderson, however, offers an expressive theory of reasonable action in which each person's life is itself a story written by the protagonist-a story in which the author/character values the "narrative unity" of her creation. [FN184]

*205 For Anderson, one reasonable method of criticizing competing valuations is to contemplate the type of life/story invoked by the valuation. For example, welfare economics is wanting partially because it suggests we use the fertilizer manufactured by Nazis from the bodies of concentration camp victims, [FN185] the Stoics are wrong partially because we cannot even imagine (let alone lead) a "human" life without emotional responses, [FN186] John Stuart Mill's call for equality in marriage is convincing partially because it presents "an appealing picture" of such a relationship. [FN187] Anderson's understanding of how we actually make choices includes listening to and telling stories of what a human life would consist of if that choice were made. [FN188] Anderson suggests such strategies work because choices are imbedded in the rich context of a specific life [FN189]-what Nussbaum would label Aristotelian practical reason. The obvious next step is to recognize, as Nussbaum and De Souza expressly assert, that literature, i.e., storytelling, is the practical way to access contexts we have not yet personally experienced. [FN190] Nussbaum and Anderson, therefore, converge.

My current point, the use of stories, is mere background in Anderson's work, but the type of moral theory which can be supported by storytelling is illuminating. Anderson in theory, like the United States in practice, is constructing a society where diversity coexists with reasoned discussion of choices. By seeing each life as a separate narrative with its own narrative unity, Anderson
can allow multiple right answers to the question: What should I do in this type of situation? [FN191] Anderson, however, does this without destroying objectivity—some answers can be wrong. [FN192] Let us now take one step backwards to an overview of Anderson's position.

Anderson begins her analysis by positing that human intuition and life experiences are central criteria for the adequacy of any moral theory. [FN193] Anderson observes that "people experience the world as infused with many different values." [FN194] Ethical theory, therefore, needs to deal with a multiplicity of values. Anderson describes these values in terms of the differing, partially emotional attitudes people take towards other persons, beings, objects, or life experiences. [FN195] Anderson also points out that we value, not just actions or end-states, but having the appropriate emotional attitude (relationship with the other) when we choose the action or end-state. [FN196] Anderson additionally observes that our multiple attitudes are incommensurable—using the three common markers of incommensurability:

(1) the goods in question meet the standards measured by the scale in very different ways; (2) there are no gross differences in the degree to which each good exemplifies its own way of meeting the standards; and (3) meeting the standard in one way is not categorically superior to meeting it in the other way. [FN197]

Anderson's example of incommensurability contrasts how Darwin meets the standard of brilliance (in science) with how Bach meets the standard of brilliance (in music). We would say neither that they are equally brilliant nor that one is more brilliant than the other. If one had displayed additional brilliance, for example if Darwin had suggested insights in an additional scientific field, we would still not judge that Darwin's brilliance now makes him more brilliant than Bach. [FN198]

Similarly, we cannot legitimately collapse into one value the differing ways we approach friends, lovers, pet animals, meat animals, replaceable store-bought goods, and the irreplaceable family-heirloom necklace our mother gave us when we got married. That life may force choices between preserving these incommensurable objects is tragedy—not proof of the commensurability
asserted by, for example, welfare economics. [FN199] Nor are all "wants" morally equal: mere whims should not be confused with needs; unreflective choices should not be confused with reason-based decisions. [FN200]

The correct attitude toward political choices, to Anderson, requires approaching them in a committed, fraternal relationship with our fellow citizens. Political decisions, such as prayer in public schools, therefore, require public discussion and justification of the reasons behind alternative proposals. [FN201] And, as indicated above, this public discussion includes storytelling and the invocation of emotions.

Welcoming emotions into self-consciously "rational" discussions may be new. But the process of obtaining understanding (respect, cooperation, justice, mercy) from someone by engaging their empathy is not new. [FN202] Nor is the practical observation that storytelling may invoke empathy. Narrow rationality does not always work. [FN203] Why should we, then, always speak in a "rational" voice?

We speak in a "rational" voice because "rational" is a positive value word. Speakers need to claim rationality to keep from being pejoratively labeled "irrational." But our human world is not exhausted by the rational/irrational word pair. We have rational, ARATIONAL, and irrational. [FN204] What is arational can be judged. The fitting question is whether the arational act, value, or emotion is a reasonable response, i.e., one for which you can give satisfying reasons. [FN205] But an enthusiastic voice frightens those listeners who feel safer inside rationality and logic. These listeners have overlooked the limitations of logic. Logic is merely the handmaiden of value. [FN206] Logic merely allows us to choose between means after we have arationally chosen an end. Ends-choice may be messy, but life insists that we make such choices. Rationality is not enough.

Once we accept that rationality (though quite useful) is not the only useable mode of discourse, we need to ask the next question: When is storytelling helpful? This Reporter has argued
that religious jurisprudence (both political and academic) is a near-perfect candidate. As discussed by the Symposium panelists, we (both as persons living in a very diverse society and as academics) need to find a way to choose between actions; we need a method that can be shared by rationalists and believers—even fundamentalist believers. Liberalism's rationality privileges one side. Revelation privileges the other. Neither side sees any reason to accept the other's grounds of argument. But both can tell stories—even if they view the authority behind at least some of the stories differently. Both can judge the reasonableness of responses inside stories. Storytelling certainly does not fix the problem. But it does present one shareable language.

The shareable language of stories, furthermore, has the additional virtue of being usable by persons of varied education and background. Narrative discussion, therefore, empowers persons outside the educated elite—one of the main goals of current narrative legal scholarship.

How does one judge inside a story? Let me tell you a story:

*209 One day three men were traveling together, and when Sabbath approached they halted and prepared to rest. As no money is allowed to be carried on one's person on the Sabbath, the men found a safe hiding place for their money. They trusted one another, and all three travelers hid their money in the same spot. When the Sabbath was over, they hastened to the spot, and discovered that the money had been stolen. It was clear that one of the three was the thief, for there was no other man about who knew the hiding place; but which one had taken the money?

They appeared before King Solomon for trial. He said to them: "I know that you are men experienced in the ways of the world. I would like you to help me decide a very difficult case which was submitted to me by one of my vassal kings. This is the story:

"In one of the king's provinces, there lived a maiden and a youth. One day, the maiden and the young man promised one another under oath not to marry without obtaining first the
other's permission. In the course of time, the young people were separated and the girl be-
trothed to a man whom she loved, but she refused to marry him until the companion of her
youth gave his consent.

"She then took much gold and silver and together with her betrothed she set out to find
the friend of her youth. After a long search she found him, and offered him a great sum of
money if he would give his consent to her marriage to the man whom she now introduced to
him.

"'You can keep the gold and silver for yourself,' said the friend of her childhood, 'and I
give you my best wishes and congratulations.' Now this young man loved the friend of his
youth very much, but he sacrificed his own feelings for the sake of her happiness.

"The happy young couple thanked their friend heartily and started on the way home. On
the road, they were surprised by an old highwayman, who was about to rob the young man of
his money and of his bride. The girl told the highwayman the story of her life, and pleaded
with him: 'If the friend of my youth has sacrificed his great love for me for the sake of my
happiness, how much more should you, an old man, give up your evil intent, and let me go
my way?' Her words touched the heart of the aged brigand, and he touched neither the girl
nor the money.

"Now," continued Solomon, "the king wishes me to decide which of the three persons ac-
ted most nobly, the girl, the youth, or the highwayman, and I should like to hear your views
on the question."

The three men were so elated by the honor bestowed upon them by the king that they for-
got their own dispute, and one of them said: "I admire the girl who kept her oath so faith-
fully."

The second one said: "The youth acted most nobly; for the sake of making happy the girl
he loved, he sacrificed himself and allowed her to wed another."

*210 "As for me, I give all the credit to the highwayman," said the third man. "He had the
opportunity of taking both the girl and the money, but not only did he surrender the woman,
but he also refrained from taking the money."

"This man admires the brigand," thought Solomon; "he praises the highwayman who abstained from taking the money. This proves that he himself is greedy for money." The king then cross-examined the man, who finally admitted that he had stolen the money, and pointed out the spot where he had hidden it. [FN211]

The hopefulness of the move to narrative comes from our ability to evaluate emotional responses. This ability provides the answer to Sanford Levinson's central attack on Perry's viewpoint: Why should a secularist be impressed by a religious argument? [FN212] The secularist can be reached by demonstrating to her that the religious valuations are reasonable (even if arational). Stories are one way of demonstrating reasonableness. As Perry points out, Biblical and other religious stories are a good way to invoke empathy (and sometimes shared values) in ecumenical discussions. [FN213] So are stories of nonmainstream religions. So are stories of women who feel left out of the power structure of their churches. These are the believers' First Amendment cognates of the hypothetical in "rational" law review articles. The genre, thus, is available on both sides of the discussion even in academia; discussion is, therefore, possible between the two sides.

This enriched marketplace of narrative-embodied ideas allows us to try and find solutions acceptable to a majority. [FN214] It does not, however, guarantee that we will do so. [FN215]

Do we need a guarantee? The United States is, after all, an experiment. [FN216]

*211 To reframe the problem in the thinner language of legal rationality, is a guarantee worth its price in the market? This Reporter would argue that a "guarantee" is only available if we create a homogeneous society. To do so we would need to eliminate the discordant elements of the existing diversity—either symbolically or physically. Symbolic elimination is a return to the majority's refusal to deal with minority concerns; this risks retaliation by minorities—remember the riots of the 1960s. Physical elimination means mass deportations or multiple genocide. [FN217] I
reject the livability of these stories. At most, the absence of a guarantee supports the sour grapes conclusion that the United States would be easier to govern if it had not become so diverse. This is intuitively true, but hardly helpful.

In summary, GOD is an END. [FN218] Let us choose Her arationally. Let us use reason to discuss how to live in peace with those who call on Her by other names, or do not call on Her at all. But let us listen with our ears and heads and hearts to the stories which illustrate [FN219] Her importance to those who rationally recognize their arational need to be close to Her.

BUT, but, but ... let us be careful not to let majority stories overwhelm all the Others; [FN220] let us be careful not to add one more layer of power to the powerful. [FN221] *212

V. CONCLUSION: A MORE HOPEFUL LEGEND. [FN222]

God's Real Name is the unpronounceable Tetragrammaton. [FN223] When Abram covenanted with the True God, he was rewarded with a new name containing one letter from the Tetragrammaton, becoming the Patriarch Abraham. [FN224] Similarly, Abram's wife Sarai became the Matriarch Sarah. [FN225]

The Name is not just a reward for the righteous. The Name is magic. Rabbi Ishmael flew to heaven by pronouncing the Name. [FN226] The Golum, a clay pre-robot, was animated and controlled by pronouncing the Name. [FN227] Joseph learned 70 languages overnight when given a new name using one letter of the Name. [FN228]

The solution to the Establishment Clause problem is simple: rename the Supreme Court! Perhaps we should rename its members? Or perhaps we should rename the President of the United States? Or would the Speaker of the House be a better choice?

Perhaps we do not have to bid as high as the Divine Name. Alexander the Great was bribed not to place his image near the alter in the Second Temple by the promise that all male Jews born that year would be named Alexander. [FN229] Does anyone bid a Newt?
[FN1]. Associate, Kirkland & Ellis; Adjunct Professor IIT-Chicago Kent School of Law. The opinions expressed in this article (unless otherwise labeled) are solely those of the Reporter, a religiously confused Jew with a sense of humor and a self-protective desire for strict separation between church and state. The Reporter has consciously chosen humor as a method of approaching a problem too painful, and too large for full, direct discussion. The choice of humor is acceptable in some cultures. See, e.g., the works of Sholom Alechem; Jonathan Swift, A Modest Proposal. If humor is insulting in the reader's culture, the Reporter begs forgiveness.


[FN2]. T-shirt epigram used by Evangelical church. See Lena Williams, Preaching the Gospel with the Shirt on Your Back, N.Y. TIMES, March 29, 1992, § 1, at 40.

[FN3]. T-shirt epigram, authors unknown.

[FN4]. "[A]ny complete conception of politics must make room for a host of (sometimes competitive, sometimes complementary) practices, not all of them polite." MICHAEL J. PERRY, LOVE & POWER: THE ROLE OF RELIGION AND MORALITY IN AMERICAN POLITICS 144 (1991); see also LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 243 (rev. ed. 1994) (hereinafter "Levy") ("[R]eligion is a subject that is overladen with emotion. Religion goes to the core of human existence.").

[FN5]. See Cohen v. California, 403 U.S. 15, 18 (1971) (state could not inflict criminal penalties because man wore jacket emblazoned "FUCK THE DRAFT"; "words are often chosen as much for their emotive as their cognitive forces").

[FN6]. The Center for First Amendment Rights, Inc., an organization with an educational mission, sponsors educational conferences, follow-up outreach teaching and community sessions on

[FN7]. The participants in the Second Annual Law Day Symposium included:
Milton Sorokin, Esquire, President, The Center for First Amendments Rights, Inc.
Hugh Macgill, Dean, University of Connecticut School of Law
Justice Robert I. Berdon, Connecticut Supreme Court
Marjorie A. Silver, Associate Professor, Touro College of Law
Kevin J. Hasson, President, General Counsel, The Becket Fund for Religious Liberty
Rev. Christopher L. Rose, Rector, Grace Episcopal Church
Carol Weisbrod, Ellen Ash Peters, Professor of Law, Univ. of Connecticut
Malla Pollack, Associate, Kirkland & Ellis, Adjunct Professor IIT Chicago-Kent School of Law

[FN8]. The Report does not attempt complete coverage of the enormous literature on religion or the religion clauses; it merely adds enough background for the reader to attach the speakers' remarks to the most relevant theoretical position. The remarks of the speakers are repeated with minimal editing and in the first person for reasons discussed infra Section IV. All footnotes, however, are the Reporter's.

[FN9]. Any Star Trek fan will recognize the future's politically correct expression. As the Klingon Azetbur insisted in Star Trek VI: The Undiscovered Country, saying that Terrans hold it self-evident that all humans have in inalienable rights is racist by its very terms.

[FN10]. Dean Macgill expressed "regret that our panelists are entirely too civil and too tolerant ..."
"all too many people feel that whether someone else believes in one God or twenty does pick their pocket or might break their leg, and we are united in fear of those people ... what do [we say] when we run into the person who says, 'I don't give a damn about Muslims. I don't give a damn about Catholics. I don't give a damn about Jews. I am whatever I am and that's the way everyone's supposed to be?'" Accord RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE 21, 260 (2d ed. 1995) (fear of sectarian religion is reasonable outgrowth of religious wars).

[FN11]. In the words of Dean Macgill, "What we need[ed was] a first class raving fundamentalist bigot to whom God speaks directly." But the choice of words is intended for grabbing audience attention at a Symposium. In an article, this language is unfortunate. We needed someone who was passionate about the centrality of religion to the formation of moral personalities. "[I]t is important not to be 'McCarthyite about the Christian right.'" STEPHEN L. CARTER, FORWARD THE CULTURE OF DISBELIEF (1994); accord NEUHAUS, supra note 10, at 55 (one of few socially acceptable prejudices in the current United States is against fundamentalists, especially those from the rural South). Cf. Brown v. Polk County, Iowa, 63 U.S.L.W. 2218 (8th Cir. July 31, 1995) (No. 93-3313) (en banc) (Title VII protects "born again" Christian who was fired partially because of visible religiosity at work such as keeping a Bible on his desk).

[FN12]. 2 Samuel 6:12-23.

[FN13]. 1 Kings 18:40.


[FN15]. SOREN KIERKEGAARD, FEAR AND TREMBLING 54-67 (Howard V. Hong & Edna H. Hong eds. & trans., Princeton Univ. Press 1983) (1843). Compare Ivan Karamazov who refused to worship a being capable of condemning even one innocent person to torture to save the world. FYODOR DOSTOEVSKI, THE BROTHERS KARAMAZOV 296 (Bantam Classic
paperback ed. 1981). Compare CHARLES B. CHAVEL, Introduction to II MAIMONIDES, THE COMMANDMENTS vi (Charles B. Chavel ed. & trans., Soncino Press 1967) (Judaism involves both fear of and love for God. Love is displayed by keeping the positive commandments; fear by keeping the negative commandments.).

[FN16]. Exodus 7:3, 13.

[FN17]. See, e.g., CARTER, supra note 11, at 75-80 (whether women should or should not be priests is a question of God's will, not of whether modern society considers sexism reprehensible).


[FN19]. 1 Samuel 15:3-35. President Lincoln suggested that the death toll of the Civil War was God's way of forcing repayment for the horrors of slavery; if so, He was taking vengeance on surrogate sinners. See President Abraham Lincoln, Second Inaugural Address at Capitol (March 4, 1865) (in INAUGURAL ADDRESSES OF THE PRESIDENT OF THE UNITED STATES 143 (1989)) ("Yet, if God wills that [the war] continue, until all wealth piled by the bonds-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn by the sword, ... still ... the judgments of the Lord are true and righteous altogether.") (internal quotations omitted); see also Christopher L. Eisgruber and Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. CHI. L. REV. 1245, 1265 (1994) ("But while religion sponsors the highest forms of community, compassion, love, and sacrifice ... it also sponsors discord, hate, intolerance, and violence.").

[FN20]. A misdescription decried by several members of the Symposium's audience. See tape of proceedings.
The Torah was created before heaven and earth. It was written in black fire on white fire. I HYMAN E. GOLDIN, THE BOOK OF LEGENDS: TALES FROM THE TALMUD AND MIDRASH 1 (Jordan Publishing Co., 1937) (1929). See also John 1:1 ("In the beginning was the Word, and the Word was with God, and the Word was God."). JACQUES DERRIDA, HOW TO AVOID SPEAKING DENIALS 29 (1989), reprinted in LANGUAGE OF THE UNSAYABLE: THE PLAY OF NEGATIVITY IN LITERATURE AND LITERARY THEORY 3-70 (Ken Frieden trans., Sanford Budick and Wolfgang Iser ed., Columbia Univ. Press (1989)) ("Language has started without us, in us and before us. This is what theology calls God.") (quoted in AICHELE, supra note 1, at 129). (The legend of Rabbi Chanina: "When the gentle rabbi, wrapped in the scrolls of the Torah, was flung upon the pyre of the Romans for having taught the Law, and when they lit the fagots, the branches still green to make this torture last, his pupils said, 'Master, what do you see?' and Rabbi Chanina answered, 'see the parchment burning, but the letters are taking wing' ... 'yes, surely, the letters are taking wing'"") ANDRE SCHWARZ-BART, THE LAST OF THE JUST 374 (Stephen Becker trans., Atheneum 1960); Cf. Moderator Hugh Macgill ("[T]here are different colors of light; there are different angles of light, and there could hardly be a topic that can be examined or regarded from more different angles than the one that is our subject.").

Compare, e.g., JOHN RAWLS, POLITICAL LIBERALISM 212-54 (1993) (hereinafter "Rawls") (advocating political discussion be couched in values inside the overlapping consensus between holders of competing comprehensive positions) and Cass R. Sunstein, INCOMMENSURABILITY AND VALUATION IN LAW, 92 Mich. L. Rev. 779, 828 (1994) (Establishment Clause as one way American political liberalism intentionally puts religious valuation outside the political sphere), with, e.g., CARTER, supra note 11; KENT GREENAWALT, RELIGIOUS CONVictions AND POLITICAL CHOICE (1988); NEUHAUS, supra note 10; PERRY, supra note 4 (all of the above requesting a somewhat larger role for religious values in public, political dialogue).
[FN23]. See RAWLS, supra note 22, at 39, 41, 58-66, 144 (limiting consensus to reasonable comprehensive doctrines, i.e. those supporting liberalism's acceptance of pluralism); Daniel O. Conkle, Religious Purpose, Ignorance, and the Establishment Clause, 67 IND. L.J. 1991 (arguing that close-minded, "inerrant" religious beliefs should be treated differently than open-minded "dialogic" religious beliefs); NEUHAUS, supra note 10, at 8, 21 (recognizing reasonableness of fearing fundamentalists and fanatics). Note that Conkle's position is based on taking religion seriously as a source of self-identification and as a source of truth. Daniel O. Conkle, God Loveth Adverbs, 42 DEPAUL L. REV. 339, 346 (1992). Conkle has expanded this argument to the claim that unless we are willing to intelligently discriminate between religions, we will doom religion to political inconsequentiality. Daniel O. Conkle, Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law, 10 J. L. & REL. 1 (1993-94).

[FN24]. For example, it was publicly endorsed by President Clinton. Remarks by President Clinton in a Photo Opportunity During White House Interfaith Breakfast, U.S. Newswire, Aug. 30, 1993, available in LEXIS, News Library, US file. But see Kathleen M. Sullivan, God as a Lobby, 61 U. CHI. L. REV. 1655 (1994) (negative assessment of Carter's book as asking to have your cake and eat it too; underplaying sectarian conflict; and suggesting policies that may lead to devaluation of religion); Kathleen M. Sullivan, Religious Participation in Public Programs, 59 U. CHI. L. REV. 195 (1992) (arguing that religious groups have large roll in American politics). Carter's book and the somewhat similar Love and Power by Michael Perry have both been criticized by Sanford Levinson as somewhat counterfaculty asserting that religious discussion is not allowed in the public square when the reality is merely that religious discussion is disliked by leading liberals such as John Rawls and Bruce Ackerman. In addition, Levinson correctly points out that Perry and Carter speak in the non-enthusiastic language of liberals, generally support liberal political views, and provide no reason why religious-authority based arguments would be helpful in persuading a secularist. Sanford Levinson, Religious Language and the Public Square, 105 HARV. L. REV. 2061, 2063 (1992); Sanford Levinson, The Multicultures of Belief and Dis-
belief, 92 MICH. L. REV. 1873, 1891 (1994). See also Theodore Y. Blumoff, Disdain for the Lessons of History, 20 CAP. U. L. REV. 159, 186-86 (1991) (persons arguing that religion has been marginalized talk as if they had missed last three decades which included political input from the Moral Majority, the Reverends Billy Graham, Martin Luther King, Jesse Jackson, Pat Robertson, Jerry Falwell, and Theodur Hesburgh). See Anthony Champagne, Religion as a Public Interest Group, in RELIGION AND POLITICS 111, 166 (Religion is deeply involved in political life of United States and cannot practically be removed; "wall of separation" is a useful myth.). But see NEUHAUS, supra note 10, at 24, 103 (public insistence that United States is a secular society is quite recent; public political rhetoric of fundamentalists and their allies is a populist reaction to an edict from irreligious elites).

[FN25]. Which begins in 1492 with the defeat of the Moorish kingdom of Grenada.

[FN26]. Which ended in 1492 when the Christian defeat of Moorish Grenada allowed the Christians to expel any Jew who refused to convert to Catholicism.

[FN27]. See NEUHAUS, supra note 10, at 144-45 (noting that many Jews fearfully argue for strict church/state separation; reporting one rabbi's comment, "when I hear the term 'Christian-America,' I see barbed wire").

[FN28]. The Orthodox Jewish definition of a Jew is someone born of a Jewish mother or converted under Orthodox law. I, on the contrary, accept as more relevant, at least for this discussion, the definition arrived at in discussion groups at Zionist youth-group meetings: a Jew is someone who will find a brick thrown through her living room window during the next pogrom. Similarly some assert that if racial violence breaks out in the United States, rich persons of color will be forced to stand with poor persons of color. Robert A. Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 481 (1984). This is not "victim-talk"; it is a call to action before you become a victim. See generally Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411, 1431 (1993) ("Describing yourself as a victim has a self-fulfilling and self-
perpetuating feature; and yet, failing to acknowledge or assert one's victimization leaves the harm unaddressed and the perpetrators unchallenged.

[FN29]. Everson v. Board of Educ., 330 U.S. 1, 8 (1947) ("A large portion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches.").

[FN30]. Id. at 9-10; see also THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 6-28 (1986).


[FN33]. See, e.g., Hall, supra note 31, at 465-68.

[FN34]. See, e.g., MARK DEWOLFE HOWE, THE GARDEN AND THE WILDERNESS (1965) (so construing Williams' writings); but see Hall, supra note 31, at 481 (arguing Williams valued the state more than Howe recognizes). Some scholars have disputed the importance of Williams' legacy both because Rhode Island did not ratify the Constitution in time to be heard during the First Amendment drafting process and because Rhode Island was a byword for barbarism in the other colonies.


[FN36]. Letter from Roger Williams to Governor John Endicott (cir. August-Sept. 1651), in 1


[FN38]. All footnotes, however, are by the Reporter.


[FN40]. 1 Thessalonians 5:16-18.

[FN41]. See, e.g., REUVEN HAMMER, ENTERING JEWISH PRAYER 3 (Schocken Paperback 1994) ("Individual prayer may be mainly a way of communicating with God ...."). Cf. 1 Samuel 1:12-16 (Eli, the priest, thought Hannah was drunk as she stood in front of the ark because he could see her mouth move but could not hear her words of prayer.).

[FN42]. See HAMMER, supra note 41, at 6-7 (Prayer is "a moment of consciousness of the sacred"); "ultimately prayer is a way of experiencing the reality of God in the world and of relating to that reality.").


[FN46]. Cf. Wallace v. Jaffree, 472 U.S. 38 (1985). Wallace involved a series of three Alabama statutes. The first established a mandatory moment of silence for meditation at the beginning of the public school day in grades one through six. Id. at 40 n.1. The second allowed, but did not
mandate, all public school classes to start with a moment of silence for meditation or voluntary prayer. Id. at n.2. The third, allowed all public school teachers to begin the school day by leading "willing students" in prayer and included this sample prayer written by Governor Wallace: "Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May Your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen." Id. at n.3. Among the prayers actually used in public schools under this state statute were the Lord's Prayer and "God is great, God is good, let us thank him for our food." Id. at 44 n.23.

[FN47]. See Christopher L. Eisgruber, Madison's Wager: Religious Liberty in the Constitutional Order, 89 NW. U. L. REV. 347, 395 (1995) (nothing bars devout from silent prayer during school day; moment of silence at beginning of school day makes "prayer a matter of public notice and communal participation" and thus is unconstitutional since coercive and exclusive).

[FN48]. Cf. Principle 12, THE THIRTEEN BASIC PRINCIPLES OF FAITH, reprinted in Appendix IV to I MAIMONIDES, supra note 15, at 279-80 (belief that the Messiah will come, even though he tarries).

[FN49]. See Marjorie Silver infra notes 111-120 and accompanying text.

[FN50]. All footnotes, however, are by the Reporter.

[FN51]. Note from the Reporter: But unlike speech, publication and assembly, the First Amendment also singles out religion as a "bad" thing. Compare U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion"); id. U.S. CONST art. VI, § 2 ("but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.") with id. U.S. CONST. amend. I ("Congress shall make no law ... prohibiting the free exercise [of religion]."). Hasson disagrees with this Reportorial comment. His position is that the various religion clauses are not in tension: what the Constitution disparages is the com-
pulsion involved in establishments and test oaths—not the religious component. Telephone inter-
terview with Hasson (Sept. 19, 1995). The Reporter's response is that this reasoning means the
Constitution chooses free exercise, rather than its religious component as a good thing—thus un-
dercutting suggested distinctions between the proper protection for non-theistic as opposed to
theistic ethical beliefs.

[FN52]. GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 37


ified that coercion by itself is not a determinate test especially if "coercion" is not used in a broad, realistic way. McConnell, supra, at 145-46, 158 (prayer at a graduation ceremony is coercion since attendance is not voluntary, the price of missing the prayer is missing your own gradu-
ation). McConnell also asserts that coercion and endorsement tests are not helpful where the gov-
ernment action has actual, not just symbolic, impacts. Id. at 165. McConnell's current position is
that an establishment exists when government acts have the purpose or probable effect of in-
creasing religious uniformity by forcing or inducing a contrary religious practice. Id. at 168-69.
But see Kathleen M. Sullivan, Religion and Liberal Democracy, 59 U. CHI. L. REV. 195, 197,
211 (1992) (arguing that McConnell's pro-pluralism position ignores "unstated corollary" of the religion clauses; "the negative bar against establishment of religion implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes."); "the Establishment Clause uniquely privileges the right of conscientious objection to religious activity, speech, or expenditures by government."); See Ira C. Lupu, Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion, 140 U. PA. L. REV. 555, 596 (1991) (privileging the secular over the religious is constitutionally required and politically desirable).


[FN56]. Id. at 422.

[FN57]. Id. at 423 (decision reversed the New York Court of Appeals which had upheld the practice provided "the schools did not compel any pupil to join in the prayer over his or his parents' objection").


[FN59]. Id. at 629. The Pledge at issue did not include the later added words "under God." Id. at 628-29.

[FN60]. Factual clarification from Reporter: in Barnette, state statute enforced expulsion for students who refused to recite the pledge. Such students could be sent to reformatories and their parents were liable for criminal prosecution for causing delinquency. Id. at 630. Three Jehovah's Witnesses brought suit on behalf of themselves, their children, and all persons similarly situated. The suit requested an injunction barring the State Board of Education from enforcing against them the State's regulation requiring school children to salute the flag. Barnette v. West Virginia State Bd. of Educ., 47 F. Supp. 251 (S.D. W. Va. 1942), aff'd, 319 U.S. 624 (1943). The requested injunction was granted. Id. at 255. Nothing in either opinion suggests that the plaintiffs ever asked the courts to consider a broader remedy.

[FN62]. Id. at 11-14.

[FN63]. Incorporation had already been announced. Murdock v. Pennsylvania, 319 U.S. 105 (1943) (relied upon in Everson, 330 U.S. at 8). Several scholars argue that incorporation did affect the Clause's meaning. See, e.g., Christopher L. Eisgruber and Lawrence G. Sager, The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct, 61 U. CHI. L. REV. 1245, 1271-72 (1994) (Equal Protection Clause of the Fourteenth Amendment may have changed combined affect of First Amendment's religion clauses); Lupu, supra note 54, at 568 n.35 (elimination of state establishments and incorporation changed meaning of Establishment Clause); Michael A. Paulses, Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication, 61 NOTRE DAME L. REV. 311, 318, 331 (1986) (incorporation was error; if we cannot undue that mistake, we should at least limit the problem by focusing on whether a government policy generates inequities of religious liberty among adherents of different faiths).

[FN64]. Letter from President Jefferson to the Danbury Baptist Assoc. in Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoted by Everson v. Board of Educ., 330 U.S. 1, 16 (1947)).


[FN66]. But see Lupu, supra note 54, at 597-98 (religions undercut citizens' ability to make democratic decisions by fostering deference to authority).

[FN67]. At least one scholar argues that the Free Exercise Clause, but not the Establishment
Clause, should be incorporated against the states. Akhil Reed Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1159 (1991). But see, e.g., Lupu, supra note 54, at 568 n.35 (two religion clauses work together and cannot be separately incorporated).

[FN68]. For a description of "civil religion," see, e.g., ROBERT N. BELLAH, CIVIL RELIGION IN AMERICA, reprinted in AMERICAN CIVIL RELIGION 21 (Russell E. Richey & Donald G. Jones ed. 1974). For an argument that "religion" in the Religion Clauses should not be read to limit 'civil religion' (relying on plain meaning historically recovered and on sociology), see Michael M. Madigan, Comment: The Establishment Clause, Civil Religion and the Public Church, 81 CAL. L. REV. 293 (1993).


[FN70]. See, e.g., THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); LEVY, supra note 69, at 80; Laycock, supra note 54.

[FN71]. LEVY, supra note 69, at xxii. The same theoretical parity and factual disparity probably would result in 1990s United States if vouchers were allowed for religious school attendance.

[FN72]. For detailed discussion of each historical item and their contradictory interpretations see sources cited supra notes 69 and 70.


[FN75]. Id. But see Richard A. Posner, Law and Literature: A Relation Reargued, 72 VA. L. REV. 1351, 1373 (1986) ("To postulate that ... every statute is a seamless whole, misconceives the nature of the legislative process.").

[FN76]. 2 Jonathan Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 553 (reprint 1974).

[FN77]. 3 ELLIOT, supra note 76, at 659. New York's suggestion was almost identical. 1 ELLIOT, supra note 76, at 328.

[FN78]. Del. Const. of 1779, art. 29 (Bradley, supra note 52, at 49 (quoting 1 Federal and State Constitutions of the United States (Ben Perley Poore comp. 1924)).

[FN79]. BRADLEY, supra note 52, at 35 (quoting 1 FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES 819 (Ben Perley Poore comp. 1924)).

[FN80]. Id. at 87.

[FN81]. Id. at 92.

[FN82]. Id. at 93.

[FN83]. BRADLEY, supra note 52, at 94-95.


[FN85]. Id. at 2390.

[FN86]. Id. at 2391 n.4.

[FN87]. Id. at 2398-2400 (O'Connor, J., dissenting).


[FN90]. See, e.g., Laycock, supra note 54, at 913-19; Smith, supra note 65, at 613 n.181.


[FN92]. CORD, supra note 53, at 163 (discussing Murray v. Curlett, 374 U.S. 203 (1963)).

[FN93]. At least one commentator takes the position that while we should start Constitutional exegesis with the plain meaning of the words in the eighteenth century, we may look elsewhere if we can clearly demonstrate that understandings and assumptions about reality have changed sufficiently to justify departure. Madigan, supra note 68, at 307 n.59. This Reporter would argue that sufficient change has occurred to totally undermine the relevance of the eighteenth century view about religion, but Madigan disagrees.

[FN94]. The argument may be slightly more consistent with acceptable views when the Fourteenth Amendment incorporated the First Amendment against the states, but Cord, for example, does not argue this.

[FN95]. UNITED STATES DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1994 70, Table 85 (114th ed. 1994).

[FN96]. RAWLS, supra note 22.

[FN97]. Textual support exists:

The Senators and Representatives ... and the Members of the several state Legislatures, and all executive and judicial Officers, both of the United States and of the several states, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

[FN98]. Cf. Lupu, supra note 54, at 586 (allowing political branches to accommodate multiple religions would result in inequitable privileging of main stream, customary, less threatening sects).

[FN99]. Cf. Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440 (Stevens, J., dissenting) (Establishment Clause protects a reasonable observer of differing faith from feeling "like an outsider in matters of faith, and a stranger in the political community." This is one of two alternate forms of the Endorsement Test). See McConnell, supra note 54, at 147-57. As to putting your faith in current societal perceptions of your value, consider this well known story: "Now there arose a new king over Egypt, who knew not Joseph. And he said unto his people, ... Come, let us deal wisely with [the children of Israel], lest they multiply .... Therefore, [the Egyptians] set task masters over them to afflict them with burdens." Exodus 1:8-11.

[FN100]. "[T]he main danger in judicial interpretation of the Constitution ... is that the judges will mistake their own predilections for the law." Antonin Scalia, Originalism: The Lesser Evil, 57 U. CIN. L. REV. 849, 863 (1989). Originalism also ignores evidence that the Framers did not wish later generations to follow eighteenth century views. As Jefferson said to Madison "the earth belongs in usufruct to the living" and "the dead have neither powers nor rights over it." See ELY, supra note 88, at 11 (quoting Letter From Jefferson to Madison, in THE WRITINGS OF THOMAS JEFFERSON 116, 121 (P. Ford ed. 1895)).

[FN101]. See, e.g., Mary E. Becker, The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective, 59 U. CHI. L. REV. 453, 455 (1992) ("Given that women were excluded from the process that produced the Bill of Rights and that few women occupy high government positions today, we should question the legitimacy of our purported democracy."); Sanford Levinson, Pledging Faith in the Civil Religion: Or, Would You Sign the Constitution?, 29 WM. & MARY L. REV. 113, 143-44 (1987) (his Constitution is "fluid []"; commits its signors to "a process of becoming, and to taking responsibility for constructing the political vision"; "less a series of propositional utterances ... than a commitment to taking political conversation seri-
ously.

Randall Kennedy, *Afro-American Faith in the Civil Religion: Or, Yes, I Would Sign the Constitution*, 29 WM. & MARY L. REV. 163, 165 (1987) (in American history, most Afro-Americans have chosen to support the Constitution based on "a normative judgment about the evolving character of this elusive thing we call 'the Constitution.' At the center of that judgment is a vision of the Constitution as promise."). But see id. at 166-67 (acknowledging with respect the alternative decision by alienated Afro-Americans; "I have no Constitution and no country.").

[FN102] The drafters of the Constitution were themselves usurping authority. They allowed 9 states to empower changes to the Articles of Confederation even though the Articles required all states to ratify such changes. LEVINSON, supra note 97. The free assembly clause was originally intended to allow another Constitutional Convention if the newly adopted Constitution was unsatisfactory in operation. Amar, supra note 67, at 1152-53. For a liberal discussion of the inter-generational problem, see RAWLS, supra note 22, at 273-74 n.12 (modifying his earlier position on "just savings"). At least one scholar attempts to solve a cognate religious problem (why an ancient covenant is binding on current Jews who did not participate in its formation) by interpreting prayer as acknowledgement and acceptance of God's kingship. HAMMER, supra note 41, at 22-23.

[FN103] This article only discusses the nonpreferentialist-originalist disagreement, but other frameworks are also possible, both for the Religion Clauses and for Constitutional interpretation in general. For example, Christopher L. Eisgruber argues that the Constitution deals with religion structurally by encouraging diversity, materialism, and public schools; these structural methods have been so successful in defusing any threat of religious faction that we no longer need the strict separation required by current Supreme Court jurisprudence. Eliminating that wall, however, will not create a more devout society. Eisgruber, supra note 47. Philip Kurland argued that religion could not be the basis of any government classification, beneficial or detrimental. Philip B. Kurland, Of Church and State and the Supreme Court, 29 U. CHI. L. REV. 1 (1961). Ira Lupu argues that the Establishment Clause is primarily a comparative, equal liberty provision.

[FN104]. III GOLDIN, supra note 21, at 204-06. One vein of feminist biblical scholarship goes further and asserts that "the litmus test for invoking Scripture as the Word of God must be whether or not biblical texts and traditions seek to end relationships of domination and exploitation." AICHELE, supra note 1, at 248 (quoting ELIZABETH SCHUSSLER FIORENZA, BREAD NOT STONE: THE CHALLENGE OF FEMINIST BIBLICAL INTERPRETATION 15 (1984)).

[FN105]. Moderator Macgill pointed this out in his opening remarks to the Symposium. See NEUHAUS, supra note 10, at 22.


[FN107]. See, e.g., Becker, supra note 101, at 453 ("free white men of property designed the Bill of Rights in a political process from which they excluded most Americans and all women."); Ruth B. Ginsburg, Speaking in a Judicial Voice, 67 N.Y.U. L. REV. 1185, 1186-88 (1992); Laycock, supra note 54, at 919.
The prayer constitutionally barred from the New York State public schools in *Vitale*, 370 U.S. at 421. Text is quoted supra text accompanying note 56 [in Hasson's remarks].

CHARLES H. LONG, CIVIL RIGHTS-CIVIL RELIGION: VISIBLE PEOPLE AND INVISIBLE RELIGION, in AMERICAN CIVIL RELIGION 211 (Russell E. Richey & Donald G. Jones eds., Harper & Row 1974). One Native-American Biblical scholar chillingly points out that his people are biblically represented by the Canaanites-who are destroyed by the Israelites' "home-coming." AICHELE, supra note 1, at 284-86.

The Reporter adds her personal voice to all the other Jews who object to the term "Judeo-Christian" beliefs-especially when used by a Christian who merely assumes Jews agree with him. See, e.g., Blumoff, supra note 24, at 183 ("Judeo-Christian tradition" is an oxymoron). Accord PERRY, supra note 4, at 89 (expressing preference for the terminology "the Jewish and Christian traditions"; Perry is a Protestant); NEUHAUS, supra note 10, at 209 (use of "Judeo-Christian," in place of 'Christian' is a "mere cosmetic change").

Some scholars question whether multiculturalism is sufficiently open to religious views. See, e.g., Michael W. McConnell, "God is dead and we have killed him!": Freedom of Religion in the Post-Modern Age, 1993 B.Y.U. L. REV. 163, 179 (1993) (Multiculturalism is actually "another distinct ideological position hostile to the traditional culture.").

The footnotes, however, were added by the Reporter. Professor Silver's views are presented here in an extremely abbreviated version. For a fuller explanation, see her article infra in this issue of QLR.

[FN114]. See Laycock, supra note 54, at 919.

[FN115]. All footnotes, however, have been added by the Reporter.


[FN117]. John Rawls admits that liberalism is not neutral in effect even though he considers liberalism neutral in aim. RAWLS, supra note 22, at 193-94 n.28. He also recognizes liberalism's problem with educating children from Fundamentalist families. Id. at 195-200 (asserting that state has duty to enlarge these children's choices of world view). For a complex discussion of the relationship of education to the issue of individual versus group versus state control of personal identity, see Carol Weisbrod, Minorities and Diversities: The "Remarkable Experiment" of the League of Nations, 8 CONN. J. INT'L L. 359 (1993) (using post WWI experience to explicate current disagreements).

[FN118]. See CARTER, supra note 11, at 176 ("Creationist parents ... want to know why it is that the school has the right to teach their children lies."). See also Eisgruber, supra note 47, at 352 (any scheme for dealing with religion in the United States, must deal with the "practical tension between reason and revealed truth").

[FN119]. See, e.g., Cass Sunstein, The Partial Constitution 4-7 (1993) (status quo is the product of government influence); Eisgruber, supra note 47, at 356 (government policy will inevitably affect religious developments).

[FN120]. For a discussion of the religion clauses asserting that individuals have greater rights than do groups, see Ira C. Lupu, Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination, 67 B.U. L. REV. 391, 422-23 (1987). But see, e.g., Frederick Mark Gedicks, Toward a Constitutional Jurisprudence of Religious Group Rights, 1989 WIS. L. REV. 99 (advocating strong constitutional protection of the rights of religious groups and arguing that strong groups help individual autonomy by limiting power of government); Michael
The status of groups, as opposed to individuals, is determinative in, for example, voting rights cases. Compare *Miller v. Johnson*, 115 S. Ct. 2475, 2486 (1995) ("At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class ...") (internal quotation marks and citations omitted) with *id.* at 2506 (Ginsburg, J., dissenting) ("In adopting districting plans, however, States do not treat people as individuals. Apportionment schemes, by their very nature, assemble people in groups."). For a multifaceted discussion of groups, see Special Issue: Mediating Institutions: Beyond the Public/Private Distinction, 61 U. CHI. L. REV., No. 4 (1994). For two religious perspectives emphasizing the communal nature of religion, see *HAMMER*, supra note 41, at 15-17 ("Religion is not what we do with an aloneness, but what we do with our togetherness."); *STANLEY HAUERWAS, TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS INTO CHRISTIAN ETHICS* 2 (Univ. of Notre Dame Press, second printing 1985) ("all moral behavior is social ... "the personal" is a social construction").

[FN121] See, e.g., Eisgruber, supra note 47, at 359-60.

[FN122] Id. But even the Constitution seems insufficient to protect minority religions. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Assoc.*, 485 U.S. 439, 476 (1988) (Brennen, J., dissenting) (dissenting from Court's holding that building a road through land sacred to Native Americans does not violate the Free Exercise Clause; Court disregards both marginal utility of the road and resulting total destruction of the aggrieved religion).

(a) GENERAL. - Notwithstanding any other provision of law, no fund made available through the Department of Education shall be provided to any State or local educational agency that has a policy of denying, or that effectively prevents participation in, constitutionally-protected prayer in public schools by individuals on a voluntary basis.

(b) LIMITATION. - No person shall be required to participate in prayer or influence the form or content of any constitutionally-protected prayer in public schools."

S. 27, 104th Cong. 1st Sess. (1995). In addition, the following Amendment to the Constitution was introduced on January 4th, 1995 by Senator Byrd on behalf of himself and Senator Helms: "Nothing in this Constitution, or amendments thereto, shall be construed to prohibit or require voluntary prayer in public schools, or to prohibit or require voluntary prayer at public school extracurricular activities. "S.J. Res. 7, 104 Cong., 1st Sess. (1995). A somewhat different constitutional amendment was proposed in the House by Mr. Stearns on February 3, 1995: "Nothing in this Constitution shall prohibit the inclusion of voluntary prayer in any public school program or activity. Neither the United States nor any State shall prescribe the content of any such prayer." H.R.J. Res 67, 104 Cong., 1st Sess. (1995). Another constitutional amendment was introduced by Mr. Murtha on June 4, 1995: "Nothing in the Constitution shall be construed to prohibit individual prayer in public schools or to prohibit public school officials from including voluntary prayer in official school ceremonies and meetings. Neither the United States nor any State shall prescribe the content of any such prayer." H.R.J. Res. 94, 104 Cong., 1st Sess. (1995). Tennessee has also submitted proposed amendments to Congress. See 141 CONG. REC. S8023-03, *S8032 and 141 CONG. REC. H.5753- 01, * H5753. The Christian Coalition has announced a Contract with American Families which includes a right to communal public prayer. CHRISTIAN COALITION, CONTRACT WITH THE AMERICAN FAMILY 9 (Moorings 1995). As the Reverend Rose mentioned, the Court never barred voluntary individual prayer. Some of the recent suggestions mention "voluntary" community prayer. This seems to change the meaning of the word "voluntary"-involuntarily being in an audience listening to something you do not like is no longer involuntary. But see McConnell, supra note 54, at 158 (choice between missing your
graduation and listening to prayer is coercive). In addition, some of these proposals implicitly re-
move the bar against government endorsement of religion-a school could seemingly arrange a 
morning prayer if non-believers were allowed to listen silently-Hasson's suggestion for the cor-
rect remedy.

[FN124]. George Washington's Farewell Address cited in BRADLEY, supra note 52, at 123; re-
lied upon by Jesse Helms, 141 CONG. REC. S224 (Jan. 4, 1995) (quoting different section of 
same admonition).

[FN125]. The fear that mainstream American Protestants do not truly respect religious minorities 
is fueled by the unacceptable statements made even by self-conscious respecters of minorities. 
Richard John Neuhaus in his call for a sacred public square rejects one that excludes minorities 
from "the civil covenant of common citizenship." NEUHAUS, supra note 10, at 52. Yet he 
brushes off the United States' near destruction of the Mormon Church, id. at 161, and blandly as-
sumes that public empowerment of the "Judeo-Christian" tradition will protect the allegedly ten 
percent of the United States population that does not find this tradition "morally normative for 
personal and public life." Id. at 145-46. Even Christian feminist Biblical scholars regularly con-
flate Christianity with the United States. AICHELE, supra note 1, at 240.

[FN126]. The Reporter means this as a warning against engaging with a mere stereotype of the 
speaker rather than with the speaker's argument or agenda. See Stephen L. Carter, Academic 
Tenure and "White Males" Standards: Some Lessons from the Patent Law, 100 YALE L.J. 2065, 
2067 (1991) (reaction to a fellow scholar who thought knowledge of Carter's race would have 
enriched her reaction to an article on religion; "I believe in dialogue; I believe in people talking 
to each other rather than around each other or to caricatures of each other").

[FN127]. See, e.g., SIDNEY E. MEAD, THE LIVELY EXPERIMENT: THE SHAPING OF 

[FN128]. This, of course, is Professor Weisbrod's question.
So do many scholars. See, e.g., NEUHAUS, supra note 10, at 86 (public square cannot remain empty; if religion is ousted, the State becomes God).

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This is Perry's term. PERRY, supra note 4. Gamwell uses the less euphonious description "a free political discourse that is also a full political discourse because it includes adherents of a plurality of religions, that is, a political discussion and debate in which differing religious convictions are or can be publicly advocated and assessed." FRANKLIN I. GAMWELL, THE MEANING OF RELIGIOUS FREEDOM: MODERN POLITICS AND THE DEMOCRATIC RESOLUTION 10 (State Univ. Press 1995). Perry and Gamwell agree only on the practical answer, but the current Report does not require a discussion of Perry's and Gamwell's large philosophical differences.


RAWLS, supra note 22, at 22-28.

PERRY, supra note 4, at 31-42.

Id. at 99 ("Moral positions ... are a matter of feeling as well as thinking.").


ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS (1993).

[FN140]. Id.

[FN141]. Hebrew does not use a preposition delineating the relationship between "God" and "wind" (or "spirit").

[FN142]. New Scofield ed. at 1 n.d.

[FN143]. See, e.g., Scofield ed. at x ("T[he Old Testament is the preparation for Christ.").

[FN144]. Similarly the canard that Jews have horns—as depicted in Michelangelo's statute of Moses—is also based on a mistranslation. When Moses returned from Mt. Sinai with the second set of tablets "KARAN OR," beams of light, came from his forehead. The Latin Vulgate translated the phrase as "horns of light." Exodus 34:19; PENTATEUCH & HAFTORAHS, supra note 14, at 368.

[FN145]. See PIERRE BOURDIEU, LANGUAGE AND SYMBOLIC POWER 236-43 (Gino Raymond & Mathew Adamson trans., Harvard Univ. Press, Third Printing 1994). See also ROBERTO MANABEIRA UNGER, KNOWLEDGE AND POLITICS 80 (Free Press 1975) ("He who has the power to decide what a thing will be called has the power to decide what it is."); William N. Eskridge, Gaylegal Narratives, 46 STAN. L. REV. 607, 625 n.88 (1994) (law is "a dynamic struggle for description among different linguistic and normative (nomic) communities"); David Luban, Difference Made Legal: The Court and Dr. King, 87 MICH. L. REV. 2152, 2152 (1989) ("Legal argument is a struggle for the privilege of recounting the past."); Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511, 530-31 (1992) ("Naming is significant. One of the most important and empowering aspects of telling your own stories is the ability to choose the terms you use about yourself.").
I was, while an undergraduate, the delegate from Hillel (the major Jewish organization on campus) to my college's Council of Religious Clubs. This position included the mind-opening experience of being escorted by assorted believers to their services and of escorting them to mine. The most joyful and fruitful sharing was the chance to show Christians what the Last Supper was like (in its modern idiom), a community Seder.


See, e.g., Kim Lane Scheppele, Foreword: Telling Stories, 87 MICH. L. REV. 2073, 2085 (1989) (signalling function of "Once upon a time ...").

I MAIMONIDES, supra note 15, at 167-68.

Id. at 168 (editor's Note quoting Mishnah).

PASSOVER HAGGADAH.

Litigators, of course, win cases by offering jurors a believable, sympathetic story. See, e.g., JAMES W. MCELHANEY, TRIAL NOTEBOOK IN LITIGATION 53 (The Journal of the Section of Litigation, American Bar Assoc., Vol. 21, No. 3, Spring 1995); STEPHEN VINCENT BENET, THE DEVIL AND DANIEL WEBSTER 53-55 (Rinehart & Co., Inc. 1937) (Webster bets the Devil that he can convince any American judge and jury to release a New Hampshire
man from the contract in which he had sold his soul to escape bad luck. The Devil convenes a
court from the damned. Webster's closing argument "painted a picture of ... things long forgot-
ten" so that "for the moment, [the judge and jury] were men again, and knew they were men." They found for the defendant, announcing that "Perhaps 'tis not strictly in accordance with the
evidence ... but even the damned may salute the eloquence of Mr. Webster."). One Religion
Clauses practitioner has argued that such cases have a special need for a full record, a "thick
text," for correct judicial decision. William Bently Ball, Accountability: A View from the Trial
Courtroom, 60 GEO. WASH. L. REV. 809 (1992); see Ira C. Lupu, The Trouble with Accom-
modation, 60 GEO. WASH. L. REV. 743, 776 (1992) (supporting Ball's position).

[FN153] Examples of such scholarship include DERRICK A. BELL, FACES AT THE BOT-
TOM OF THE WELL: THE PERMANENCE OF RACISM (1992); PATRICIA J. WILLIAMS,
THE ALCHEMY OF RACE AND RIGHTS (1991). Works arguing the value of narrative in-
A. Fajer, Can Two Real Men Eat Quiche Together? Story Telling, Gender-Role Stereotypes, and
Legal Protection for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511 (1992); Gary Peller,
The Discourse of Constitutional Degradation, 81 GEO. L.J. 313 (1992). The position, or some
extreme forms of it, have also been severally criticized. See, e.g., Arthur Austin, Storytelling De-
constructed by Double Session, 46 U. MIAMI L. REV. 1155 (1992); Daniel A. Farber and Suz-
anna Sherry, Telling Stories Out of School: An Essay on Legal Narratives, 45 STAN. L. REV. 807 (1993) (hereinafter Farber & Sherry, Telling Stories); Daniel A. Farber and Suzanne Sherry,
The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth, 46 STAN. L. REV. 647 (1994); Mark Tushnet, The Degradation of Constitutional Discourse, 81 GEO. L.J. 251 (1992). For a good introduction to narrative scholarship, see the Symposium reported in Au-
gust 1989 MICH. L. REV., Vol. 87. This Report assumes that storytelling has some value and ar-
gues from that basis that the storytelling mode has a special value in discussion of religious-legal
issues.

"Just as conventional notions of objectivity failed to recognize the authority of the voices of the relatively powerless, alternative notions of authority in subjective accounts are defective in their inattention to material, historical experiences beyond individual subjectivity." Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411, 1437 (1993).

"There is a remarkable degree of consensus, in recent philosophical work-and in anthropological and psychological work as well-that emotions are not just mindless pushes and pulls, but forms of perception or thought, highly responsive to beliefs about the world and changes in beliefs." (footnotes omitted); Martha C. Nussbaum, *Aristotle, Feminism, and Needs for Functioning*, 70 TEX. L. REV. 1019, 1021-22 (1992) (asserting that Aristotle viewed emotions as rational).

[FN159]. Bandes, supra note 154.

[FN160]. See, e.g., Frederick Mark Gedicks, The Integrity of Survival: A Mormon Response to Stanley Hauerwas, 41 DEPAUL L. REV. 167 (1992) (rejecting the position that organized churches should not use political means to protect their freedom because the Mormon Church was almost destroyed by government persecution); Emily Fowler Hartigan, Surprized By Law, 1993 B.Y.U. L. REV. 147 (mixing personal narrative and parable with analysis); Lupu, supra note 152.


[FN162]. Use of Biblical Narrative in political discourse has been advocated by both Perry and Coleman, with warnings not to use it in sectarian fashion. JOHN A. COLEMAN, AN AMERICANSTRATEGIC THEOLOGY 193-95 (Paulist Press 1982); PERRY, supra note 4, at 89. Rupp asserts that ethical criticism of political decisions needs the power invoked by appeal to the images and stories of particular religious traditions; he also cautions that believer-users of such arguments must accept that these images and stories are persuasive, rather than binding, outside the generating tradition. GEORGE ERIK RUPP, FROM CIVIL RELIGION TO PUBLIC FAITH
172-91 in RELIGION AND POLITICS.

[FN163] See, e.g., Nussbaum, supra note 157, at 1637-38 (arguing for more systematic inquiry into methodological choices). Discussion of "law and economics" as a monolith is, of course, a simplification. Even Richard Posner's own views are complex. For example, Posner took all of the following positions in one recent book, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (Harvard Univ. Press 1990). Law's basic method is practical, rather than scientific. Id. at 71-72, 78, 454-69. Intuition is our basic and most confident source of knowledge. Id. at 77. Methods of interpreting literary texts are largely irrelevant to interpreting legal texts. Id. at 393. Judges should encourage their empathetic faculties, but should not discard conventional legal principles. The call for more use of empathy is badly taken both because judges do not have the time and because empathy has bias towards persons most like ourselves. POSNER, supra, at 411-13. Note that Posner's definition of the "practical reason" used in law is the type of methods used by a noncredulous person to form beliefs about matters that cannot be verified by exact observation or logic. Id. at 71-72. This definition both implies that science and logic are preferred guides when available and differs from Nussbaum's account.

[FN164] This Reporter asserts that silence on these issues is also a highly visible signal both that end values are not important and that the choice between end values is based on mere personal whim.


[FN167] For an example of this tactic in law review articles, see Martha C. Nussbaum, Skepticism About Practical Reason in Literature and the Law, 107 HARV. L. REV. 714, 714-716 (1994) (article opens with three anecdotes about Pyrrho illustrating his bizarre behavior; "the ancient arguments are [illuminating of the modern arguments because they are] ... more explicit..."
about the change in ways of life that they require of their adherents.

[FN168]. So are other asserted truths, but that is several different essays. See MARTHA C. NUSSBAUM, FORM AND CONTENT, PHILOSOPHY AND LITERATURE 5, in MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE (Oxford Univ. Press 1990) (“certain truths about human life can only be fittingly and accurately stated in the language and forms characteristic of the narrative artist”).

[FN169]. Stories, even Bible stories, are not limited to the fundamentalist side of religion. Stanley Hauerwas, for example, argues for a narrative approach to ethics mediated by the decider's particularist religious tradition. STANLEY HAUERMAS, TRUTHFULNESS AND TRAGEDY: FURTHER INVESTIGATIONS INTO CHRISTIAN ETHICS 15-39 (Univ. of Notre Dame Press, 2d. ed. 1985). Hauerwas defines a particular religious faith as the acceptance of a certain set of stories as canonical. Id. at 38. The Bible may be interpreted in many non-traditional ways and by very non-traditional methods. See, e.g., AICHELE, supra note 1 (collectively written introduction and critique to seven modern methods of Biblical interpretation).

[FN170]. Other theories involving emotional rationality and plural value systems exist. See, e.g., RONALD DE SOUSA, THE RATIONALITY OF EMOTION 45, 169-74 (MIT Press 1991) (arguing that emotions are rational in a different sense than cognitive or strategic rationality whose criteria are respectively truth and success; emotions are axiologically rational, i.e. emotions control what their holder experiences as salient to the holder's situation); EXPLAINING EMOTIONS 4 (Amelie Oksenberg Rorty ed., Univ. of California Press 1980) (collecting essays by 20 authors each of whom considers emotions to be rational in some sense).

[FN171]. NUSSBAUM, supra note 168, at 40.

[FN173]. Id. at 55.

[FN174]. Id. at 81.

[FN175]. Id. at 96. See also ROGER SCRUTON, EMOTION, PRACTICAL KNOWLEDGE AND COMMON CULTURE 535, in UNDERSTANDING EMOTION (Amelie Oksenberg Rorty ed., Univ. of California Press 1980) ("Understanding the emotion of another as it is felt-understanding its true intentionality-may require the imagination of a poet.").

[FN176]. See DE SOUSA, supra note 170, at 182 (Humans originally learn emotions through paradigm scenarios which "are drawn first from our daily life as small children and later reinforced by the stories, art, culture to which we are exposed. Later still, in literate cultures, they are supplemented and refined by literature.").

[FN177]. See Farber & Sherry, supra note 153.


[FN179]. Id. at 540.

[FN180]. Id.

[FN181]. Id. at 556.

[FN182]. Eskridge has argued that Farber's conservative pragmatism allows only a moderate value for narrative scholarship, but that prophetic pragmatism and social constructionism support narratives' greater value in legal scholarship. Eskridge, supra note 153.

[FN183]. ANDERSON, supra note 158.

[FN184]. Id. at 24, 38-43. Cf. PIRANDELLO, SIX CHARACTERS IN SEARCH OF AN AUTHOR (play in which characters in an unwritten play are upset by potential author's desire to re-
move "extraneous" details of their story).

[FN185] ANDERSON, supra note 158, at 77.

[FN186] Id. at 73.

[FN187] Id. at 110.

[FN188] Id. at 92 ("One must be able to tell a story that makes sense of the ideal, that gives it some compelling point, that shows how the evaluative perspective it defines reveals defects, limitations, or insensitivities in the perspectives that reject these valuings."); id. at 109 (One "class of critical strategies appeals to experiences whose most illuminating or compelling descriptions invoke alien intuitions.").


[FN190] See supra notes 175 and 176 and accompanying text.

[FN191] ANDERSON, supra note 158, at 94. Feminist Biblical scholars doing the hermeneutics of survival also stress the multiplicity of truths. AICHELE, supra note 1, at 253.


[FN193] Id. at 1 ( Treatise begins by looking at how "[p]eople experience the world.").

[FN194] Id.

[FN195] Id. at 5.

[FN196] ANDERSON, supra note 158, at 73-79 (discussing agent-centered restrictions on conduct, such as the immorality of betraying one's friend even though this specific betrayal would minimize friend-betrayals by others thus being proper under a monist, value-maximization theory).
Id. at 55.

Id. at 55-56.

Id. at 57-59, 63. See NUSSBAUM, supra note 147, at 63-66; HAUERWAS, supra note 120, at 37-38.

ANDERSON, supra note 158, at 141-47.

See id. at 158-63 (Anderson does not specify prayer in public schools).

See Robert A. Burt, Constitutional Law and the Teaching of the Parables, 93 YALE L.J. 455, 478 (1984) (Supreme Court's race opinions use the pedagogic technique of persuading insiders that they are just as vulnerable as outsiders and, thus, invoke empathy and obedience to the Court's pronouncements).

"What protects us against Nazism is not the belief that reason can prove it is wrong. What protects us is outrage." Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1, 55 (1984).

Cf. DE SOUSA, supra note 170, at 5 (distinguishing arational from irrational but using different definition from Reporter's).

ANDERSON, supra note 158, at 93. See Singer, supra note 203, at 26 (The question of what we should do "is not a question that can be resolved once and for all by a rational decision procedure. Rather, our views of what we should do are the result of experience, emotion, and conversation.").


Cf. NEUHAUS, supra note 10, at 167 (same Biblical stories can be told on both sides
of a political dispute).

[FN208]. Perry's "ecumenical dialogue" has been strongly criticized for requiring a separation between belief and faith that is impossible for all except trained theologians. See Athornia Steele, The Role of Religion in Politics, 20 CAP. U. L. REV. 201, 213 (1991).

[FN209]. See, e.g., Scheppele, supra note 148, at 2098. Importantly, Anderson asserts congruently that "[t]he project of ranking all legitimate ways of life on an impersonal scale of intrinsic worth is action-guiding only for upper-class members of status-based societies, who have the freedom to chose the most 'honorable' ways of life and to force others to perform the less 'intrinsically valuable' but socially necessary functions." ANDERSON, supra note 158, at 57.

The shareable language of stories also works by redirecting attention. Outside of formally set legal criteria lurk facts deemed irrelevant by existing precedent. Remember the unasked questions Mari Matsuda's female law student of color does not ask her criminal law professor teaching a Miranda-type rape hypothetical: Was the suspect a person of color? Was the questioning police officer white? What was the victim's race? Mari J. Matsuda, When The First Quail Calls: Multiple Consciousness as Jurisprudential Method, 14 WOMEN'S RTS. L. REP. 297, 298 (1988). As a storyteller Matsuda makes the unasked questions relevant to the reader by tying them to the protagonist's emotions. Id. Storytelling invokes the axiological rationality of emotion, emotions' control of what we perceive to be salient to the situation. See DESOUSA, supra note 170, at 169-74. Storytelling questions assumptions that certain facts are irrelevant. It expands the criteria used in judging.

[FN210]. Hauerwas provides an answer in non-narrative form. "The test of each story is the sort of person it shapes." HAUERWAS, supra note 120, at 35. According to Hauerwas, we individually recognize the implications of stories because of our life experience and exposure to other stories. Stories are properly adopted if they help us release ourselves from destructive alternatives, see through current distortions, provide non-violent solutions, and help us deal with tragedy. Id.
[FN211]. II GOLDIN, supra note 21, at 124-26.

[FN212]. See infra note 213. Of course, the "rational" have to be convinced to listen. Stanley Fish asserts they cannot do so because liberalism would self-destruct if it admitted that rationalism is merely a point of view. Stanley Fish, Liberalism Doesn't Exist, 1987 DUKE L.J. 997.

[FN213]. PERRY, supra note 4, at 88-91.

[FN214]. Rawls' "overlapping consensus" aims at shared values. I am more modestly hoping for shared choices of action. Israel, for example, can still accept the fundamentalists' practical support, despite its angry non-acceptance of Christian fundamentalists' views on Jews' place in eschatology. NEUHAUS, supra note 10, at 144-45, 166.

[FN215]. PERRY, supra note 4, at 83. Accord ANDERSON, supra note 158, at 97 (no guarantee that moral justificatory discussion will result in solutions to all disputes).

[FN216]. See, e.g., MEAD, supra note 32; NEUHAUS, supra note 10, at 189. Cf. Burt, supra note 202, at 471 ("The parables in effect only teach the proper question so that, once taught this, the true initiates teach themselves the proper answer."'). But see Singer, supra note 203, at 64, (quoting R. BERSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE OF HERMENEUTICS AND PRAXIS (1983)) ("Far from being inimical to democracy, conflict-handled in democratic ways, with openness and persuasion-is what makes democracy work, what makes for the mutual revision of opinions and interest."').

[FN217]. Burt suggests the slightly lower price of creating armed enclaves. Burt, supra note 202, at 479 & n.79. I reject that solution's liveability as well.

[FN218]. And the beginning. Revelations 1:8. "Thou wert God from the beginning even as Thou wilt be God until the end." SABBATH AND FESTIVAL PRAYER BOOK 84 (Rabbinical Assembly of America and United Synagogue of America, 1956 printing) (quoted from the morning service for Sabbath and Festivals).

Cf. Blumoff, supra note 137, at 181 (Perry approaches problem of using sectarian language in political dialogue with a merely cognitive understanding of the "profoundly alienating ordeal of listening to a public debate in which the speakers simply assume that all members of the audience share Christo-centric beliefs.").

Compare Bandes, supra note 153, at 7-8 ("the notion of an outsider narrative provides a crucial normative grounding for narrative scholarship, and thus the limiting principle which explains why more narrative is not always better"; arguing for exclusion of victim impact statements in sentencing hearings) with id. at 81 ("But just as notions of narrative and empathy cannot determine our values for us, neither is the notion of outsider narratives outcome-determinative ... the hard question still remain.").


Moses when ordered to return to Egypt to proclaim their coming liberation to the Jews asks for God's name; see also PENTUTEUCH & HAFTORAHS, supra note 14, 215-16 (comments on Exodus 3:13-16); HAMMER, supra note 41, at 44, 89-90, 123 (same).


[FN226] III GOLDIN, supra note 21, at 290.


[FN228] I GOLDIN, supra note 21, at 216-18.

[FN229] III GOLDIN, supra note 21, at 18.

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