

Introduction

Conservatism and the Constitution

A tall, dignified-looking man stood at a podium one morning in May 1986, in Anniston, Alabama. The occasion was Calhoun County Law Day, and a prayer breakfast was being held inside a local Christian church. W. Brevard Hand, a federal judge and Alabama native, was there to speak of weighty and troubling matters dear to his heart. “Immorality is spreading throughout our society,” Hand warned his audience. A moral epidemic had, he told, been set loose by “a weakening of the traditional religious foundation of our society”—the firm Christian foundation on which men and women acquired self-discipline. This posed a problem for lawyers and judges, who had “the obligation to know and understand the basic laws of life and our government” and needed to “stand forthrightly and insist that these be properly taught and understood in all their glory by our fellow man, so that these laws may be followed as a way of life.”¹

While traditional, Bible-based morality was being displaced from society, government, and law, Hand told the group of lawyers, so was it “fast becoming substituted by reliance on a man centered philosophy.” On the basis of this man-centered, humanistic worldview, Americans were increasingly giving themselves license to rely on their own moral compasses, detached from the religious sensibilities that come from the word of God. This worldview was insidiously causing people to believe “that man is his own law giver and judge who can, by summary individual judgment, . . . determine what is moral and what is immoral, and if he so wishes change evil to good or good to evil.”²

More than people’s private thoughts and behaviors were being affected, Hand warned. Nothing less than our system for making and

enforcing law – the very system that his audience was gathered that day to honor – was falling victim to the human-centered worldview. Hand was explicit. This worldview had taken hold of American culture, teaching that moral judgments ought to rest on merely subjective premises. Deluded by this worldview, legislators were less frequently grounding laws in biblical morality and more frequently treating the process of distinguishing right from wrong as a “situational and personal” matter best relegated to the private sphere. Courts had likewise been harmed. Nowadays, federal judges, under the cover of the U.S. Constitution, created personal rights that accommodated all kinds of immoral behavior. Hand concluded that the humanistic worldview was gutting the people’s capacity to act in their collective best interests under law. Instead, “the lowest moral principle [had] prevail[ed],” causing society and government to become “virtually amoral.”³

Hand had recently been mulling over legal briefs he had received, in anticipation of an upcoming trial, *Smith v. Board of School Commissioners of Mobile County*, over which he would preside. Hand’s opinions in *Smith v. Board* and its earlier sister case, *Jaffree v. Board*, were the opinions for which he would become best known. There he was on Law Day giving a public address, prior to the *Smith* trial’s commencement, revealing his affinity with a cornerstone of the plaintiffs’ argument. Hand was no disinterested party to either *Jaffree* or *Smith*. Those cases provided him with a broad audience, within Alabama and among constitutional lawyers throughout America. They were the signature moments of his auspicious – or notorious – judicial activism.⁴

This book explores events in Mobile, Alabama, from 1981 to 1987. Centermost were the *Jaffree* and *Smith* cases. Most of the roles in the two cases were played by conservatives disgusted by liberal morality and liberal government. Many of them argued inside Hand’s courtroom that the Supreme Court’s rulings on church-state separation had run roughshod over the interests of ordinary citizens and so deserved somehow to be reversed. Over the course of the conflict, the position of some of the central characters evolved. Their actions, along with Hand’s Law Day speech, reveal a conservative movement whose legal strategy confronted obstacles and underwent change at the same time as the movement was attaining unprecedented political success.

The Mobile conflict began in 1981. Ishmael Jaffree – an agnostic, African American, and parent of three students in Mobile public schools – brought suit against the Mobile County school board and the governor of Alabama. Jaffree issued what he believed to be the simple and irrefutable

demands that Mobile schoolteachers cease to lead their classes in daily recitations of prayer and that a state law allowing classroom prayer be struck down. Jaffree knew that he had case law on his side, particularly the Supreme Court's 1962 *Engel* decision, which had been issued in response to a situation very similar to the one now confronting his children. Jaffree considered his case airtight.⁵

Jaffree was wrong. From the outset, his demands evoked nearly universal approbation and resistance among local residents and state officials. Jaffree ran headlong into a city whose power structure and culture were dominated by the Christian Right that had recently become more politically active and influential than at any previous time in the twentieth century. Even though African Americans played no role in the organized political resistance to Jaffree, local opposition to his suit did not vary by race or by class, with black traditional religiosity co-opted by Mobile's conservative establishment. With near uniformity, Mobilians responded not as whites and blacks but as Christians offended and outraged at this strange man who seemed to them to hate God and not care about children's souls. They understood themselves to be normal, decent people defending themselves against a foreign invasion of sorts.⁶

Jaffree's conservative opponents were informed by a worldview that cherished self-discipline, personal responsibility, private enterprise, Bible-based morality, and government by free citizens. Theirs was the worldview of the post-World War II right. Most of the characters during the story's early phase – Judge Hand, state lawmakers, evangelical attorneys, a prominent white Baptist preacher from Mobile, and his white congregants – were united especially by one element in this worldview, a mistrust of threats against Christianity. Their efforts were bolstered by a handful of local black schoolteachers and principals, whose own intense faith made them valuable allies. Jaffree's opponents were unwilling to countenance one man's brazen challenge to their right to raise children who respected God's absolute authority. As Mobile resident Hand told a local church congregation, obedience to God was something that children "have to be taught – carefully taught. And there is nothing wrong with that."⁷

When Jaffree challenged Hand's widely held assumption, he did more than contest a classroom practice and state law. Jaffree publicly defied the foundational rituals of a culture and community built on conformity with conservative Christian ideals. Jaffree's neighbors were asserting themselves in the throes of the 1960s, a period considered by many Christians to be marked by a widespread disregard for God and country. These Alabamians, along with conservatives all over the United States, took a

political stand against what they saw as a culture of self-indulgence and permissiveness, a culture of decadence and immorality. For them, Jaffree signified this decadence and immorality. He threatened an educational process meant to equip children with the self-discipline needed to thrive in a free polity based on republican government.⁸

At trial, Jaffree ran head on into none other than Hand, a judge ill disposed to entertain his complaint. Jaffree also encountered an unexpected party – a group of local evangelicals whom Hand allowed to intervene in the case. Despite its status as defendant, the group did not support the teachers, local school board, and state legislature named in Jaffree’s suit. Rather, the intervenors’ goal was to demonstrate that they, and not Jaffree, were the true victims of practices of the Mobile public schools. The intervenors’ lawyers seized on an argument, circulating in recent years, that public schools were nowadays permeated by an antitheistic religion named “secular humanism.” So prevalent was this antitheistic religion, the lawyers claimed, that it assumed the power of a state establishment of religion, in violation of the First Amendment’s Establishment Clause. The intervenors made this argument clearly and persuasively. In so doing they provided an odd symmetry to the *Jaffree* trial. The Mobile schoolteachers and school board sat center stage, defending themselves along two fronts. Attacking on one front was Ishmael Jaffree, attempting to eliminate all traces of traditional religion from the Mobile public schools. From the other flank came the intervenors, trying to purge Mobile classrooms of secular humanism. The plaintiff officially charged the schools with transgressing the Establishment Clause; the intervenors essentially did the same. Both challengers looked to Hand to make the schools more hospitable to people such as them.⁹

Neither challenge became the basis for Hand’s ruling, even though the plaintiffs had gained Hand’s notice and would stick in his mind. Hand’s opinion in *Jaffree* concurred with the arguments raised by the defendants, in whose favor he found. His primary concern in the case was with the role of the federal courts over state and local policy. He and the entire federal judiciary, he ruled, had no proper jurisdiction over Alabama schools. Hand’s *Jaffree* opinion was imbued with the antijudicialism that had animated conservatism since its calls for massive resistance in the wake of *Brown v. Board of Education*.¹⁰

The triumphant defendants based their case primarily on the republican majoritarianism prominent in the postwar conservative worldview – the same worldview that informed Hand. They contended that it was no business of the U.S. government, and particularly its courts, to tell state governments or local schools how to manage their church-state affairs.

Most instrumental in advancing this argument was the school board's expert witness, James McClellan. A former aid to senators Jesse Helms, Orrin Hatch, and John East, McClellan was among the most influential constitutionalists in the insurgent conservative movement of the 1970s and 1980s known as the New Right. He was highly placed in a cadre of lawyers dubbed by Sidney Blumenthal as the "counter-establishment," an influential group seeking to diminish the courts' power of judicial review, reassign power from the federal government down to the individual states, and weaken the Justice Department's commitment to rectifying violations of civil rights. McClellan was a leader among this group of constitutional lawyers with close ties to the Reagan administration. His views on the Constitution were well known in the legal establishment. McClellan brought to the *Jaffree* defendants an air of serious thinking about the issues under consideration in the case.¹¹

To say that Hand was swayed by McClellan's testimony would be an understatement. Hand typically had few compunctions in crafting opinions out of arguments he encountered at trial. In finding for the *Jaffree* defendants, Hand made McClellan's position his own. Hand's opinion made copious use of not only McClellan's trial testimony but also a recent McClellan essay that spoke to these very matters. In his testimony, McClellan urged the judge to challenge Supreme Court precedent. The judge obliged. *Jaffree* was a disquieting opinion, focused entirely on reversing decades of Establishment Clause jurisprudence. The Court had interpreted "establishment" of religion too broadly, Hand contended; the Constitution's framers had intended that the government refrain from favoring only a single Christian denomination over another, not religion in general. The twentieth-century Court's erection of a "wall of separation" between church and state, according to Hand, represented an arrogant disregard for and disruption from the framers' intentions. There was thus no sound constitutional basis for finding Alabama in violation of the Establishment Clause. More startling yet was Hand's assertion that the First Amendment could not rightly constrain the individual states. Because the First Amendment did not mention the states, and because the Fourteenth Amendment did not explicitly incorporate the First Amendment, the Establishment Clause was not binding on state governments. Indeed, Hand declared – again borrowing from McClellan – that Alabama, or any other state, was free to establish a religion if it so chose. The Establishment Clause properly served to protect the states from federal interference. Even if he were to interpret the Establishment Clause broadly, as the Court had done since 1947, he still would not apply it to a state government.¹²

This book examines Hand's judicial opinions, speeches, articles, and interviews in context of a conservative worldview that took shape after World War II, and especially during the 1960s. It was, I argue, a cohesive worldview consisting of two intertwined strands. *Jaffree* combined those strands in perfect harmony. One strand was political, a stance toward government. As other conservatives had done for decades, Hand asserted the primacy of republican majoritarianism within the lawmaking process. Hand understood himself to be in complete consonance with the authors of the Constitution, who, he believed, had intended to provide for self-rule by popular majorities as executed by the people's elected representatives. The United States, through most of its history, had been a republic, Hand maintained. Judges acted at the consternation of the republic when they inserted themselves into the political process – which they did when they interpreted the Constitution so loosely as, in effect, to overrule the popular will. For him and others on the right, federal judges – Hand's colleagues – were the *bêtes noires* of government. The “judicial activism” perpetrated by liberal judges in particular, Hand charged, was destroying the American political system. He would do what he could to preserve democratic republicanism against their ravages.¹³

Another tenet of Hand's political conservatism was the federalism complementing his republicanism. Hand belonged to a generation of right-wing lawyers and judges who believed that a great share of sovereignty needed to be transferred from the national down to the state governments. One characteristic of republicanism on the state level, as James Madison recognized long ago, was its relative homogeneity, which gave rise to popular majorities forming more readily. This was a virtue within Hand's worldview. Popular majorities expressed the will of a discernable “people,” he believed, and it was with popular will where morality and decency resided. Hand's favor toward state governments manifested in his disgust for his fellow U.S. judges who, it seemed to him, too readily struck down state laws and local policies. When they did so, those federal judges – unelected and unaccountable – frustrated popular will at the level where it operated with the greatest efficacy. One casualty of overzealous federal judicial review, Hand believed, was public policy informed by Christian values. The ubiquity of prayer in Alabama schools rested on supportive state law and local custom. When federal judges trod over the practice, Hand contended, they robbed the people of their right to build schools dedicated, as the people saw it, to the well-being of community, society, and government. Hand's colleagues eviscerated both popular sovereignty and moral education.¹⁴

The political majoritarianism in Hand's worldview was interconnected with a second strand, this one moral in nature. Post-Sixties American conservatives looked to the culture of "ordinary" citizens, rather than that of so-called cultural elites, to provide sustenance for popular self-government. Such ordinary citizens were more likely than others, it was said, to bequeath to their children a morality based in self-reliance, which had its roots in the work ethic historically associated with Protestantism. Such ordinary citizens were the people identified by Richard Nixon's handlers as the "silent majority." These Americans purportedly worried that the Court was doing more than violating their right to self-government. So too, they feared, was the Court, along with other institutions dominated by liberals, propagating a culture of self-indulgence and permissiveness. As much as any other institution, the Court, it was said, operated on the basis of a cultural-elite worldview that sanctioned obscenity, criminality, wanton sexuality, atheism, and socialism. Conservatives looked to the private-enterprising, God-fearing popular majority, through elected representatives, to reassert their political sovereignty and take back their government from the "robed masters" on the Supreme Court. It was especially important, for conservatives, that so-called ordinary Americans regain control over public schools from the secularists and socialists who now dominated them. Instilling Bible-based morality into children bred self-discipline and self-reliance. Informed by self-discipline and self-reliance, young citizens developed readiness for the liberty and democracy on which effective self-government was based. Self-government, in turn, reinforced the personal responsibility and initiative needed by members of a healthy, morally sound culture and society. Conservatism's moral strand sustained the political; the political strand reinforced the moral.¹⁵

Hand esteemed the ethic of self-reliance that, he believed, could still be found in his own local culture. To be sure, he admitted, his fellow Alabamians could and did pass bad laws. To do so was the people's right. But Hand had enough faith in ordinary Alabamians to trust that they would make laws consonant with Christian morality and the self-reliance to which it gave rise. One of the worst effects of judicial overreach, Hand believed, was to limit private morality's political capacity to strengthen states and local communities. Federal judges who enforced church-state separation within public education stifled moral instruction and thereby diminished children's opportunities to learn the self-discipline that allowed for self-government. Socialized to seek self-indulgence, many young adults of the present day preferred protection by the state over

responsibility for self-rule. For Hand, federal judges were, by and large, not to be trusted because their overreach would obstruct moral reproduction and enfeeble republican rule.

Like many on the right, Hand accused the liberal establishment of weakening the character of the American people by offering to take care of them and solve all their problems. Conservatives such as Hand scorned the New Deal and Great Society largely on moral grounds. Hand believed human beings to be weak and given to temptation. All too easily, they manifested a childish dependence on government. Hand and like-minded others charged the welfare state with tempting Americans into sloth and decadence and thereby destroying their capacity to act freely and responsibly. Hand called on liberalism's opponents to instill freedom and responsibility in young citizens with care and resolve. Conservatives such as Hand saw it as crucial, now more than ever, to inculcate faith in God, reliance on self, and respect for the democratic-republican process. These would shield Americans from the liberal temptation; they would preserve individual freedom and governmental accountability.¹⁶

Reckoning with Hand deepens our understanding of postwar conservatism's symbiotic political and moral components. Hand's opinions exemplify conservative constitutionalism and clarify its complex relationship with conservative morality. His opinions were political writings. From the bench, as well as in speeches and articles, Hand aimed, however possible, to limit the liberal contagion. Christian habits of mind and a republican system of government were, for him, halves of a singular whole. Only a self-ruling people could reproduce self-reliance; only a self-reliant people could assert self-rule. Hand looked on the Court as the progenitor of political and cultural decline, the rapist of the Constitution. Americans seemed either not to know or not to care about the Court's destructive impact, and so he resolved to inform as many of them as he could. His rulings did not attract notice as widespread as those of William Rehnquist; his speeches were heard by fewer people than were the congressional declarations of Strom Thurmond or Barry Goldwater; his writings did not reach a public as broad as the readerships of journalists William Buckley and James Kilpatrick. But many people did take notice of Hand, albeit sometimes with disdain. His judicial opinions embodied the primary conservative conviction that a free citizenry responsible to itself needed somehow to impede its nation's descent into judicial oligarchy.¹⁷

The Eleventh Circuit would rebuff Hand's *Jaffree* ruling. In 1985, the appellate court's decision was upheld by the Supreme Court, even as the

Court's ruling in *Wallace v. Jaffree* spawned three dissenting opinions. One, by Justice Rehnquist, expounded on Hand's themes in a blistering attack on the Court's Establishment Clause jurisprudence. Notwithstanding Rehnquist's dissent, the Court remanded the case back to Hand and instructed him to ensure that Alabama schools established no religion. So ordered, Hand resolved to fulfill the mandate in an unconventional manner. He would show the justices the untenability of fully and equitably sanitizing the classroom of all religious influences. To make his point, he refocused his attention on the *Jaffree* intervenors. Although he had not based his 1983 ruling on their arguments, he had noted them favorably. Indeed, his opinion had promised that he would readdress their arguments should circumstances warrant. Hand had left open a door through which he would reenter the case if and when he was ordered to apply the restrictions of the Establishment Clause to Alabama schools. Having been directed to do just that, he returned to the intervenors' complaint and indicated that it demanded redress. Hand realigned the *Jaffree* parties, offering the intervenors, if they wished, the chance to become plaintiffs in a new case. They so wished. *Smith v. Board* was launched.¹⁸

Smith signaled a portentous moment in American jurisprudence and politics. From the 1950s onward, many on the right had bemoaned what they considered the federal courts' unconstitutional intrusion into the affairs of state legislatures. In response, conservatives attempted, over nearly three decades, to curb the federal courts' jurisdiction over state legislatures regarding a number of key issues. Among them was the right of local communities to conduct organized, aloud religious exercises in the classroom. Congress entertained numerous attempts to restore local, majoritarian control over school prayer, as well as over desegregation, busing, abortion, and other matters. Speaking as "the people," conservative activists and officials aimed to take back their government. Their goal was to restore biblical morality, self-reliance, and republican control to a government that had strayed from American values.¹⁹

By the time that the parties in *Smith v. Board* submitted their initial memoranda in 1985, it seemed as though these attempts had come to naught. For conservatives of the mid-1980s, the rights revolution overseen by the Supreme Court was proving hard to assail. Criminals were still being granted *Miranda* rights; schoolchildren continued – at least in theory – to receive Bible-free public education. It appeared that, for the foreseeable future, the constitutional rights of minorities and others marginalized by the majoritarian political process would enjoy

protection by the federal courts. Some conservative intellectuals concluded that the judiciary had so usurped the people's power to rule themselves that the people might not soon regain their rightful sovereignty.²⁰

Dire circumstances required bold thinking. Around the time of *Smith*, astute lawyers involved with Christian conservative causes were recognizing that not all was lost. It dawned on some that they could perhaps leverage the rights revolution to their advantage. In legislative proposals, amicus briefs, and litigation strategies, a handful of religious conservatives began calling for an expansive application of the First Amendment. Increasingly, they downplayed their longtime self-identification as “the people” besieged by the federal courts, and instead re-presented themselves as a minority within the American polity. For the first time in recent history, evangelicals solicited intervention by the federal courts on their own behalf. They asked the judiciary not to refrain from judicial activism, but to insert itself in church-state affairs. Indeed, they asked the judiciary to treat them as one of the “discrete and insular minorities” whose rights demanded special protection. Insightful Christian conservatives reimagined the judiciary as a potential friend able to help restore their lost influence in the public sphere.²¹

The lawyers for the *Jaffree* intervenors were among the growing number of Christian conservative cause lawyers writing briefs and trying cases throughout the United States. In representing the *Jaffree* intervenors, they had advanced the sort of civil-rights claims then gaining traction on the right. Their arguments had registered with Hand and would now guide him, from realignment of the *Jaffree* parties through delivery of his *Smith* opinion. Forced to recognize the federal courts' authority over the states on church-state matters, he now asserted that authority toward unusual ends. Hand applied the Establishment Clause in an expansive, unprecedented manner. Alabama, he ruled, was in violation of the First Amendment by having established the “religion” of secular humanism through its use of textbooks advancing a human-centered morality that, by its nature, denigrated God-centered religions.²²

The rights revolution became, for Hand, a tool for protecting Christianity's place in the schools. He knew that his *Smith* ruling could not realistically be implemented; he knew that it would gain little support. That was his point. *Smith* was made tongue-in-cheek. With his admittedly outrageous ruling, he suggested to the legal establishment that, if Christian conservatives could be burdened with checking their most deeply held values at the classroom door, then liberals and secularists