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A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence

John E. Joiner

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NOTE:

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"History is a voice forever sounding across the centuries the laws of right and wrong. Opinions alter, manners change, creeds rise and fall, but the moral law is written on the tablets of eternity."—Froude

"History is bunk."—Henry Ford

I. INTRODUCTION

Justice Holmes once said, "A page of history is worth a volume of logic."[1] Nowhere does that sentiment ring more true than in the context of discerning the proper scope of the Establishment Clause. Unfortunately, since 1947 the Supreme Court has severed the Clause from its historical roots, abandoning the lessons of its poignant historical experiences. The result has proved catastrophic, as the Court's Establishment Clause jurisprudence seems to shift, sometimes drastically, with every personnel change on the Court.[2] Nonetheless, history may be as poor a barometer of the Clause's intended scope as are the Court's inconsistent decisions. Indeed, the history of the Establishment Clause is not only confusing, but mired in minutiae and readily manipulated. Unwary jurists consistently fall prey to its simple deceptiveness and overlook its unquantifiable complexity. The ominous result is an Establishment Clause jurisprudence which is one-sided and distorted, a jurisprudence without substance and historical support.

The Establishment Clause prohibits Congress from making any law "respecting an establishment of religion."[3] Although the plain language of the Clause would seem to indicate that it proscribed only establishments as they were commonly known to the Framers, i.e., legislative designation of an official state church, courts have read much into the term "respecting" and concluded the Clause's reach is broader than its face suggests.[4] Engaged in an inherent (and necessary) conflict with the Establishment Clause is the Free Exercise Clause, which forbids Congress from enacting any law prohibiting the free exercise of religion.[5]

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1. New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

2. For an example, see *infra* notes 422-26, 440 and accompanying text, which discuss the impact of Justice O'Connor upon the Court's Establishment Clause jurisprudence.

3. U.S. CONST. amend. I.

4. For an argument suggesting that the plain language approach has been incorrectly and without explanation rejected, see William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109 (1987).

5. U.S. CONST. amend. I. One author argues that the Religion Clauses "must be construed

Given the breadth and generality of the Clause's language, it is not surprising that many interpretations have been proffered. Nonetheless, most historians and jurists generally adopt one of two views: separationism or nonpreferentialism.[6] Separationism, which is the view most often espoused by the Supreme Court, advocates, as its name suggests, strict separation between church and state.[7] Separationists allege that the Constitution and the Establishment Clause prohibit any and all federal government aid to religion.[8] The competing view of nonpreferentialism in essence proffers that the Framers intended the Establishment Clause to prohibit only congressional establishment of a national church and elevation of one religious sect to a preferred status over other sects.[9] Hence, nonpreferentialism permits government support for religion provided no religions or religious sects are excluded from receipt of the benefit.[10]

This article begins with a brief overview of the Establishment Clause's adoption and the writings of James Madison and Thomas Jefferson, the two figureheads upon which the Supreme Court most regularly relies to support its decisions and its endorsement of separationism. Specifically, the article examines Madison's *Memorial and Remonstrance* and Jefferson's Danbury letter and Virginia Bill for Religious Freedom. Following this discussion, the article briefly outlines the rise of the *Lemon* test, the traditional standard developed by the Court to resolve Establishment Clause disputes. It then traces the Supreme Court's Establishment Clause jurisprudence and examines its two most recent pronouncements: *Rosenberger v. Rector & Visitors of the University of Virginia*[11] and *Capitol Square Review & Advisory Board v. Pinette*.[12] Finally, the article evaluates the merits and historical accuracy of the Court's Establishment Clause jurisprudence. In this respect, it concludes that the Court's decisions in this area, and the test on which those decisions are based, are riddled with historical inaccuracies. These inaccuracies include the Court's gross overemphasis on, and misunderstanding of, the individual church-state viewpoints of both Thomas Jefferson and James Madison.[13] Not only has the

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as never in contradiction." Carl H. Esbeck, *A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?*, 70 NOTRE DAME L. REV. 581, 594 (1995). This assertion ignores, however, that the Clauses frequently *must* be in conflict—they protect different interests and seek conflicting objectives. The Establishment Clause limits the state's involvement in religion while the Free Exercise Clause protects religious expression. Therefore, whenever religious expression is curtailed by the Establishment Clause, the two are in contradiction.

6. For an interesting debate regarding the merits of each view, see Robert L. Cord & Howard Ball, *The Separation of Church and State: A Debate*, 1987 UTAH L. REV. 895.

7. Note that even the Court has not gone so far as to say all aid, even that which is incidental, is restricted. As will be shown, however, the Court's tendencies have historically leaned far more to the separationist side than any other.

8. ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 19 (1982).

9. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 112-13 (1994).

10. For an interesting historical overview of the tension between nonpreferentialists and strict-separationists, see John Witte, Jr., *The Theology and Politics of the First Amendment Religion Clauses: A Bicentennial Essay*, 40 EMORY L.J. 489 (1991).

11. 115 S. Ct. 2510 (1995).

12. 115 S. Ct. 2440 (1995).

13. For discussions of Madison and Jefferson, see *infra* notes 40-63, 462-94 and accompanying text.

Court characterized Jefferson and Madison as indisputably separationist, it has further attributed their views to every Framer of the Bill of Rights and found the concept of separationism to be inherent in the Clause itself.[14] As such, the Court has ignored and belittled the views of virtually every person involved in the framing of the Establishment Clause. The Court further ignored history when it incorporated the Clause and subsequently applied it to the states via the Fourteenth Amendment.[15] This incorporation dramatically altered the federalist structure the Framer's intended to inhere in the Clause and has resulted in chaos, as the Court has been forced to engage in a number of roles for which it is ill-suited. These roles include Court micromanagement of religious issues in public schools,[16] Court decisions as to the amount and types of aid states may render to private religious schools,[17] and a host of other local and regional issues the Framers intended the states, rather than the national government, to resolve. As such, this author posits that the Court should return the vast majority of those decisions to the states, and allow local citizens to make these delicate and sensitive determinations.[18]

II. ADOPTING THE AMENDMENT

It was to fulfill a campaign promise that Madison stood on June 8, 1789, to address the First Congress and introduce preliminary versions of the Religion Clauses.[19] His first proposal read: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[20] Not to be hurried, the House referred Madison's proposals to committee, where they remained until the House debates of August 15.[21] During this time, the committee, which included Madison, altered the amendment to read as follows: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."[22] The rewording was not complete, however, for, again on August 15, the House adopted by a 31-20 vote a version stating, "Congress shall make no laws touching religion, or infringing the rights of conscience."[23] The final changes came on August 20, when the House at long last settled on the following wording and submitted this amendment to the Senate: "Congress shall

14. *See infra* notes 79-81 and accompanying text.

15. For a discussion and critique of this incorporation, see *infra* notes 77-78, 508-28 and accompanying text.

16. For a discussion of the public education cases, see *infra* notes 170-275 and accompanying text; for a critique of those decisions, see *infra* notes 449-61 and accompanying text.

17. For a discussion of the aid to parochial school cases, see *infra* notes 73-169 and accompanying text; for an analysis of those decisions, see *infra* notes 444-48 and accompanying text.

18. *See infra* notes 508-28 and accompanying text.

19. ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGION CLAUSES 17 (1990).

20. *Id.*; CORD, *supra* note 8, at 7; LEVY, *supra* note 9, at 95.

21. ADAMS & EMMERICH, *supra* note 19, at 17.

22. *Id.*; LEVY, *supra* note 9, at 96.

23. ADAMS & EMMERICH, *supra* note 19, at 18; LEVY, *supra* note 9, at 101.

make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[24]

Much debate has centered around the significance of the House's use of language in these various proposals. In short, the evidence is insufficient to assert confidently either that the changes were made in response to simple stylistic differences or were meant to embody substantive variations in the meaning of the proposals themselves.[25] Recall that the amendment first before the floor that day read: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." This proposal spawned a variety of reactions, ranging from fear that it would "abolish religion altogether,"[26] to doubt that it was necessary at all.[27] Without expressing an opinion as to the amendment's utility, Madison believed it necessary to calm those who in the State Conventions feared that Congress would act under the Necessary and Proper Clause to establish a national religion or infringe the rights of conscience.[28] He therefore furthered a version which on its face prevented Congress from establishing a national religion.[29] The use of "national," however, met resistance because it implied that "this [a national] form of Government consolidated the Union" and thereby invaded those rights reserved to the states.[30] Although Madison disagreed, he did not press the motion further.[31] Representative Livermore noted his discontent with the amendment as written and proposed the version temporarily adopted.[32]

No comparable records of the Senate's debate, which began on September 3, exist. Because of the debate's secret nature the record notes only that the Senate considered and dismissed three motions.[33] These read as follows: First, "Congress shall make no law establishing one religious sect or society in preference to others"; second, "Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society"; and third, "Congress shall make no law establishing any particular denomination of

24. ADAMS & EMMERICH, *supra* note 19, at 18; LEVY, *supra* note 9, at 101.

25. Nonetheless, the scant legislative history suggests most members participating in the House debate concerned themselves primarily, if not exclusively, with two objectives: protecting the rights of conscience, or religious freedom in the form of religious choice, and alleviating fears that Congress could create, or establish, a national religion. Commentators are in virtual consensus that these were fundamental, legitimate fears which the Framers meant to address in the Religion Clauses. The point of contention, however, is whether the Framers intended the Clauses to encompass *only* these apprehensions. Certainly, some weight must be accorded the fact that Madison directed all his comments to free exercise and formal establishments. Even Representative Gerry, who opposed use of the term national, did so not out of any opposition to the term's inherent concept or because he considered the amendment's reach to extend beyond prohibition of a national church, but rather because he feared an Antifederalist backlash. LEVY, *supra* note 9, at 98-99.

26. *Id.* at 97.

27. *Id.*

28. ADAMS & EMMERICH, *supra* note 19, at 17; CORD, *supra* note 8, at 9; LEVY, *supra* note 9, at 97.

29. ADAMS & EMMERICH, *supra* note 19, at 17; LEVY, *supra* note 9, at 98.

30. ADAMS & EMMERICH, *supra* note 19, at 18.

31. *Id.*; LEVY, *supra* note 9, at 99.

32. LEVY, *supra* note 9, at 98.

33. *Id.* at 102.

religion in preference to another."[34] Unable to agree on any of these three proposals, the Senate that day adopted a proposal which included the simple statement, "Congress shall make no law establishing religion."[35] Following the House's example of indecisiveness, however, the Senate returned six days later to pass its final version: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[36]

The House rejected the Senate's proposed amendments, and in an attempt at reconciliation suggested a joint committee.[37] This committee formulated the following proposal: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[38] On September 25, the Senate approved this wording, and with it the Religion Clauses.[39]

III. MADISON AND JEFFERSON

Unfortunately, the men who framed the First Amendment did not explain, at least in detail, what actions they collectively believed the Establishment Clause encompassed. Although undoubtedly all the Framers believed the Clause prohibited the formal establishment of a national religion, it is not clear what, if any, other actions beyond formal establishment the Clause restricted.[40] Nonetheless, courts and commentators have proffered various constructions.[41] None of these constructions, however, has been so hotly debated or yielded such dramatic results as the one proffered by the Supreme Court in 1947 in *Everson v. Board of Education*.[42] There, the Court not only unanimously endorsed separationism, but based its decision exclusively on the views, acts, and writings of James Madison and Thomas Jefferson.[43] The Court did so despite the fact that Jefferson did not even participate in the framing, adoption, and ratification of the Establishment Clause and that Madison was only one of many Framers.[44] Given the Court's continuing propensity to frame its historical dialogues in terms of Madison's and Jefferson's church-state jurisprudence, the following discussion describes those writings which the Court consistently relies upon.

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34. *Id.*

35. *Id.*

36. ADAMS & EMMERICH, *supra* note 19, at 18; CORD, *supra* note 8, at 9.

37. ADAMS & EMMERICH, *supra* note 19, at 18; CORD, *supra* note 8, at 9; LEVY, *supra* note 9, at 103.

38. LEVY, *supra* note 9, at 103-04.

39. *Id.* at 104.

40. STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOMS 18-19 (1995).

41. *Compare* the separationist view of Leonard Levy, *supra* note 9, *with* the nonpreferentialist view of Robert Cord, *supra* note 8.

42. 330 U.S. 1 (1947).

43. *Everson*, 330 U.S. at 8-14. For a discussion of *Everson*, see *infra* notes 73-89 and accompanying text.

44. For a critique of the Court's overemphasis of Madison and Jefferson in its decisions, see *infra* notes 462-506 and accompanying text.

A. *Madison's* Remonstrance

In the annals of Religion Clause jurisprudence, history reserves only Jefferson a pedestal so high as Madison, who was not only the fourth President of the United States, but also a ratifier, and in essence the creator, of the Bill of Rights. One of Madison's earliest encounters with religion and government came in 1785, when in response to a proposed Virginia bill attempting to impose a tax on Virginia property owners to support Christian teachers, he authored a tract entitled "Memorial and Remonstrance Against Religious Assessments, 1785."[45] In this *Remonstrance*, Madison proffered fifteen arguments against passage of the bill. Primary among these was the importance of free exercise of religious conscience.[46] To this end, Madison wrote, "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him."[47] Madison further stated that the legislature was without such authority as to enact the bill.[48] If society lacked any authority over religion, it was axiomatic that society's appointed representatives could exercise no such influence; to do so was tyrannical.[49] Finally, Madison was concerned with the proven historical pattern that ecclesiastical establishments tainted and corrupted religion.[50]

Undoubtedly, the *Remonstrance* sheds light on Madison's position regarding church and state. Without question, he opposed any taxes or other coercive payments the proceeds of which specifically and exclusively supported any one religion or religious endeavor.[51] Indeed, the *Remonstrance* focused upon the dangers of exalting one sect or one religion over all others. The *Remonstrance* did more, however, than simply address establishments. It grounded the right to free exercise of religion in natural law, indicating the paramount reverence Madison accorded religious freedom.[52] For Madison, protection of these liberties entailed casting the church and the national government into mutually exclusive spheres and forbidding each from encroaching on the other's appointed domain.

B. *Jefferson's Danbury Letter and Virginia Bill for Religious Freedom*

Undoubtedly, Thomas Jefferson's metaphor that the Establishment Clause erects a wall of separation between church and state is the most quoted statement in the annals of Establishment Clause jurisprudence.[53] Notwithstanding

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45. James Madison, *Memorial and Remonstrance Against Religious Assessments, 1785*, *reprinted in* CORD, *supra* note 8, at 244-49; *see also* ADAMS & EMMERICH, *supra* note 19, at 12; ANSON P. STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 55 (1964).

46. CORD, *supra* note 8, at 244.

47. ADAMS & EMMERICH, *supra* note 19, at 12; CORD, *supra* note 8, at 244; STOKES & PFEFFER, *supra* note 45, at 56.

48. CORD, *supra* note 8, at 245.

49. *Id.* ("Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body . . . . The Rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are Tyrants.").

50. *Id.* at 246.

51. ADAMS & EMMERICH, *supra* note 19, at 12; CORD, *supra* note 8, at 246.

52. CORD, *supra* note 8, at 246.

53. Interestingly, Jefferson was not the original author of the metaphor. That credit belongs

this fame, the metaphor's actual utility as an indicator of Jefferson's intent is limited.[54] The letter in which the phrase appears, an 1802 response to the Danbury Baptist Association, neither offers any explanation of what exactly this wall is nor any discussion of whether it is absolute.[55] That Jefferson, in using this metaphor, intended the wall to sever completely government and religion is at best untenable, at least, insupportable. This does not suggest, however, that Jefferson did not advocate a rigid separation, but that such tendencies are best developed by other evidence.

It is not Jefferson's Danbury letter, but rather his renowned proposal entitled "A Bill for Establishing Religious Freedom" that demonstrates Jefferson's insights regarding religious liberty. One historian has gone so far as to proclaim the bill "the most important document in American history, bar none."[56] Despite its modern repute, the bill's path to enactment was a long and storied one.

Introduced in the Virginia legislature in 1779, it proved too radical and thus was not enacted until 1786.[57] In the interim, the general assessment controversy diverted all of Jefferson's and Madison's attention from the Bill, as they found themselves locked in a fierce struggle[58] with those seeking to institute a tax which undoubtedly curtailed religious liberty. Indeed, it was this assessment controversy which led to Madison's *Remonstrance*. Once Jefferson and Madison orchestrated the assessment's defeat in 1785, both returned their attention to Jefferson's Bill, which finally passed on January 19, 1786.[59]

The Bill began with a sparkling preamble emphasizing the gravity of religious freedoms. There, Jefferson stated, "Almighty God hath created the mind free, and manifested his supreme will that free it shall remain, by making it altogether insusceptible of restraint."[60] In addition, Jefferson con-

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to Roger Williams, who wrote in 1644 that when a religion "ha[s] 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 itself, removed the candlestick, etc., and made his garden a wilderness, as at this day." ADAMS & EMMERICH, *supra* note 19, at 5-6; *see also* STOKES & PFEFFER, *supra* note 45, at 52 (discussing Roger Williams's contributions to the religious freedom debates and influence upon Thomas Jefferson).

54. Consider the following remarks Chief Justice Rehnquist leveled at "the wall" in 1985: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years." Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

55. For a reproduction of Jefferson's letter, see CORD, *supra* note 8, at 112-13.

56. Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159, 160 (1990) (quoting Harvard historian Bernard Bailyn).

57. STOKES & PFEFFER, *supra* note 45, at 52; Dreisbach, *supra* note 56, at 163-64.

58. Fearful of the unexpectedly strong support for the assessment, which was sponsored by Patrick Henry, Jefferson disclosed to Madison a possible course of action: "What we have to do I think is devoutly to pray for his [Henry's] death." Dreisbach, *supra* note 56, at 166. As Dreisbach notes, however, Madison had a much more sensible solution: have Henry elected Governor so as to remove him and his influence from the state's legislative body. *Id.* In the end, Madison won out and Henry was elected Governor. *Id.*

59. ADAMS & EMMERICH, *supra* note 19, at 12; Dreisbach, *supra* note 56, at 169 n.60.

60. Thomas Jefferson, A Bill for Establishing Religious Freedom, 1785, *in* ADAMS & EMMERICH, *supra* note 19, at 110 (emphasis omitted).

demned forced contributions for the propagation of religion, and staunchly characterized the opinions of humanity as beyond the jurisdiction of the civil government.[61] Also prohibited under the Bill were government compulsions upon the citizenry to frequent or support religious institutions.[62] Not surprisingly, the idea expressed in the Bill's conclusion parallels that in Madison's *Remonstrance*—that free exercise rights emanate from natural law and cannot be compromised by governmental coercion or persecution.[63] Noticeably, the Bill failed to mention any restriction on religious establishments.

IV. THE CLAUSE AND THE COURT: A HISTORY

A. *Introduction*

Between the ratification of the Establishment Clause and 1947, the Supreme Court rendered few Establishment Clause decisions, and thus had no cause to develop a comprehensive framework for resolving Establishment Clause disputes. Of the few Establishment Clause decisions actually made, none were meaningful or contrary to the understood meaning of the Clause: the national government could not establish religions, but state governments were free to legislate on the subject.[64] Given this understanding, it is natural that few conflicts over the Clause's scope occurred. In the late 1800s and early 1900s, however, the movement to apply the provisions of the Bill of Rights to the states gained momentum.[65] As such, it was inevitable that the debate would arise over whether the Establishment Clause should, or would, apply to the states via the Fourteenth Amendment. Beginning with *Everson*, which is discussed immediately below, the Supreme Court's answer to that question was a resounding yes. With the application of the Establishment Clause to the states, however, a new host of problems developed. These problems included the extent to which the Clause would apply to the states and the degree to which existing state institutions, legislation, and practices would be altered by that application.

Incorporation created an additional, and significant, difficulty—how to construe the Clause so as to ensure its consistent application. From 1947 to 1971, the Court searched for a malleable yet effective framework. During this period, it decided cases based mostly upon its own intuitions of those actions it collectively believed the Clause was intended to prohibit. Not surprisingly, the result was a jurisprudence without much consistency. In 1971, however, the Supreme Court in *Lemon v. Kurtzman*[66] established a three part test for use in resolving Establishment Clause issues.[67] Although the Court had de-

61. *Id.* at 110-12.
62. *Id.* at 111.
63. *Id.* at 112.
64. SMITH, *supra* note 40, at 18.
65. CORD, *supra* note 8, at 93-101; SMITH, *supra* note 40, at 51.
66. 403 U.S. 602 (1971).
67. For a discussion of *Lemon*, see *infra* notes 112-26 and accompanying text. The Court in *Lemon* prohibited cash subsidies to parochial school teachers because the authorizing statutes excessively entangled the state governments of New York and Rhode Island with religion. *Lemon*,

lineated each of the factors in previous decisions, *Lemon* marked the first time the Court combined the factors to form a comprehensive framework. To be valid under that new framework, a statute must have a secular legislative purpose, must have a principal or primary effect which neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion.[68] A determination of excessive entanglement consists of "examin[ing] the character and the purposes of the institutions that are benefitted, the nature of the Aid that the State provides, and the resulting relationship between the government and the religious authority."[69]

Oddly enough, the line of cases subsequent to the creation of the *Lemon* framework has proved no more consistent than the cases decided before the test's existence.[70] Indeed, nearly twenty-five years after *Lemon*, the Court continues to struggle with the seemingly insurmountable issue of how to define the scope of the Establishment Clause and articulate its prohibitions into a workable framework. It appears that the Court has conceded that the *Lemon* articulation is not that framework.[71] Although not authoritatively disposed of, the Court has not applied the test in any Establishment Clause decision since 1993.[72]

The discussion that follows demonstrates the struggle faced by the Supreme Court in its search for a standard. As will be shown, the Court's opinions reflect a collective failure on the part of the Justices from 1947 to the present to agree on the mandates inherent in the Establishment Clause. This dilemma is reflected in the Court's decisions, whether in the private or public educational sphere, or the areas of higher education and religious symbols.

B. *Education and the Establishment Clause*

A vast majority of the Establishment Clause cases before the Court concern education. In particular, disputes implicating public education arise with alarming frequency. For example, issues before the Court on a regular basis have included—and continue to include—the constitutionality of school prayer, Bible reading in classrooms, creationism, and the so-called "released time" programs. Aid to private religious schools, and parochial schools in particular, has also stirred much debate. In fact, it was a dispute over parochial school aid from public generated funds which embarked the Court on the road to the confusion now abundant in its Establishment Clause jurisprudence.

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403 U.S. at 612-13.

68. *Id.*

69. *Id.* at 615.

70. *Compare* the pre-*Lemon* instructional materials turmoil, *infra* notes 90-111 and accompanying text, *with Lemon* itself and the post-*Lemon* chaos regarding the cash subsidies cases, *infra* notes 112-49 and accompanying text.

71. For a discussion of the *Lemon* test's demise, see *infra* notes 416-43 and accompanying text.

72. *See infra* notes 432-35 and accompanying text.

1. Aid to Parochial Schools

a. Everson *and the Beginning*

The Court's first Establishment Clause decision of the modern era was its 1947 decision in *Everson v. Board of Education*.[73] The substantive issue in *Everson* involved a New Jersey statute which granted local school districts the authority to make rules and enter into contracts for the transportation of schoolchildren to and from school.[74] The statute made no distinction between private and public schools, but rather made accessibility to the aid contingent upon the school not operating for profit.[75] A taxpayer challenged the statute because part of the reimbursement went to Catholic parochial school students;[76] hence, the law purportedly constituted a prohibited establishment of religion.

The Court first held that the Fourteenth Amendment's Due Process Clause encompassed the restrictions found in the Establishment Clause.[77] The Establishment Clause thus incorporated, the Court was free to apply it to state and local governmental action, including the New Jersey statute in *Everson*.[78] It then delved into what it perceived to be the Clause's relevant history. In so doing, it turned to Jefferson's Bill for Religious Liberty and Madison's *Remonstrance*.[79] With respect to the Bill for Religious Liberty, the Court boldly stated that the concerns expressed in the Virginia Bill mirrored exactly those enshrined in the Establishment Clause.[80] The Court then invoked Jefferson's wall of separation metaphor as grounds for the no-aid, strict separationist interpretation it adopted.[81] Although it rejected the nonpreferentialist position,

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73. 330 U.S. 1 (1947).

74. *Everson*, 330 U.S. at 3 n.1.

75. *Id.* This, of course, operated to allow public schools and non-profit private schools access to the aid.

76. *Id.* at 3. One commentator attributes the dispute in *Everson*, at least in part, to the intergroup tensions between Protestants and Catholics which developed in the post-World War II period. RICHARD MORGAN, THE SUPREME COURT AND RELIGION 81 (1972). Morgan posits that during World War II Roman Catholics lost their consciousness of themselves as a minority group, and that once the war was over, Catholics' attempts to exert their own identity and influence their own culture were perceived by Protestants as disturbing and aggressive. *Id.* at 81-82.

77. Although the Court had previously held that the First Amendment applied to the states, Cantwell v. Connecticut, 310 U.S. 296 (1940), it had not until *Everson* explicitly incorporated the Establishment Clause. For a critique of the Court's decision to incorporate the Establishment Clause, see *infra* notes 508-28 and accompanying text.

78. Note that a majority of Supreme Court Justices have never favored "total incorporation," or the incorporation of every right found in the first eight amendments. *See* Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992) [hereinafter Note]. Rather, the Court has adopted a theory of "selective incorporation," which Justice Cardozo has described as those specific pledges of particular amendments found to be "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become operative on the states." *Id.* (citing Palko v. Connecticut, 302 U.S. 319 (1937)).

79. *See Everson*, 330 U.S. at 8-14.

80. *Id.* at 13.

81. *Id.* In the Court's words:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for

the majority found the New Jersey statute constitutional,[82] apparently in part out of fear that to otherwise hold would preclude all religions and religious denominations from receiving, because of their faith, the benefits of public welfare legislation.[83] For the Court, its decision coincided perfectly with the Constitution's mandate that government be neutral with respect to religion. Because the majority characterized the benefit as flowing to the student rather than the school,[84] it had little difficulty finding the requisite governmental indifference. The law, therefore, was not one respecting an establishment of religion.[85]

Justices Jackson and Rutledge each wrote vigorous dissents which agreed with the majority's analytical framework but disagreed with its conclusion. Jackson leapt into an in-depth discussion of Catholic dogma, apparently reading the statute, which was facially neutral, as if it discriminated against all religious schools not Catholic.[86] Moreover, there was no indication that there existed within the school district any not-for-profit private schools of other faiths (or of no faith) that had been denied aid. Hence, Jackson's conclusion that the statute as applied violated the Establishment Clause was unsupported and premature.[87] In contrast, Justice Rutledge characterized Jefferson's Virginia Bill, as well as Jefferson's views on church and state, as inapposite to the majority's conclusion.[88] He also took issue with the majority's assertion that the use of funds was for a public purpose—namely that of education of children.[89]

> entertaining religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and state."

Id. at 15-16 (citations omitted).

82. *Id.* at 18.

83. *Id.* at 16.

84. *Id.* at 18.

85. *See id.*

86. *Id.* at 21 (Jackson, J., dissenting).

87. Jackson stated that, "As applied to this taxpayer by the action he complains of, certainly the Act does not authorize reimbursement to those who choose any alternative to the public school except Catholic Church schools." *Id.* The statute did, however, authorize expenditures to any private school whether religious or non-religious, which complied with its terms, i.e., was not operated for profit. If no alternative private schools existed within this specific school district, then Jackson's presumption imposed a burden on the parochial schools which was not only misdirected but also impossible to meet. If no other eligible schools existed, then the Catholic schools should not have been denied aid unless evidence suggested that the statute was created to specifically aid Catholic schools. Jackson mentioned no such evidence.

88. *Id.* at 29 (Rutledge, J., dissenting).

89. *Id.* at 49, 51, 52-53. Under Rutledge's views, however, religious institutions and religious people acting for religious purposes are ineligible to receive the benefits of public aid and social welfare legislation. This constitutes discrimination *against* religion and could potentially chill free exercise rights. Finally, consider that Rutledge's position rings of an unconstitutional condition—to secure a legislatively or constitutionally permitted benefit a person would be required to forego exercising constitutional rights guaranteed under the First Amendment's Free Exercise Clause.

b. *The Post-*Everson *Turmoil: Instructional Materials*

Sixteen long years after its ratification of separationism, the Supreme Court set out to more clearly delineate the bounds within which such schools may receive aid from the public coffers. Anything but clarity, however, resulted from this line of cases. In *Board of Education v. Allen*,[90] a 1968 case, the Court held constitutional a New York statute that required school districts to loan textbooks to students in grades seven through twelve who were enrolled in any school within the district.[91] The statute did not differentiate between public and private schools, or religious and non-religious schools. Rather, it was a blanket authorization. Relying on the *Everson* rationale, the Court characterized the law as simply making "available to all children the benefits of a general program to lend books free of charge."[92] Moreover, the statute authorized only the loan of secular books, and each book loaned was approved by public school officials.[93] Given the secular nature of the books, the Court refused to abandon its *Everson* rationale, or "child-benefit theory,"[94] and accordingly found the statute not contradictory to the mandate of separation imbedded in the Establishment Clause.[95]

If *Everson* and *Allen* reflected the Court's accommodationist tendencies, *Meek v. Pittinger*[96] embodied its separationist propensities first expressed in *Everson*. In *Meek*, the Court held unconstitutional a statute authorizing public school officials to lend instructional materials directly to nonpublic schools.[97] These materials included books, periodicals, documents, pamphlets, photographs, maps, charts, and globes.[98] Although these materials, like the textbooks in *Allen*, were self-policing and neutral, the Court declared them unconstitutional, stating that the nonpublic schools, rather than the students, were the primary beneficiaries.[99] Despite this ruling, the Court upheld a separate section of the Act which authorized public school officials to lend secular textbooks to religious schools.[100] Yet the Act defined textbooks as books,[101] which the Act further defined as instructional materials,[102] which the Court declared unconstitutional.[103]

The Court only two years following *Meek* passed judgment on yet another instructional materials dispute in *Wolman v. Walter*.[104] *Wolman* involved an Ohio statute which authorized public officials to provide nonpublic school

90. 392 U.S. 236 (1968).
91. *Allen*, 392 U.S. at 238.
92. *Id.* at 243.
93. *Id.* at 244-45.
94. *See* LEVY, *supra* note 9, at 154.
95. *Allen*, 392 U.S. at 248.
96. 421 U.S. 349 (1975).
97. *Meek*, 421 U.S. at 366.
98. *Id.* at 355 n.4.
99. *Id.* at 364-66.
100. *Id.* at 362.
101. *Id.* at 354 n.3.
102. *Id.* at 355 n.4.
103. *Id.* at 366.
104. 433 U.S. 229 (1977).

students not only with instructional materials and equipment and books, but also with standardized testing and scoring services, diagnostic services, therapeutic services, and field trip transportation.[105] After again confirming the constitutionality of secular textbook loan programs,[106] the Court, in a surprising extension of its parochial school decisions, held that Ohio could constitutionally furnish testing and scoring,[107] diagnostic,[108] and therapeutic services.[109] These services, according to the Court, posed insubstantial threats, lacked educational content, or were offered at religious neutral locations.[110] Notwithstanding these rulings, the Court was unwilling to disturb its conclusion in *Meek* that the Establishment Clause prohibited states from loaning instructional materials and equipment to nonpublic schools.[111]

c. *Cash Subsidies and Tax Exemptions*

The parade of parochial school aid cases marched on in *Lemon v. Kurtzman*,[112] where the Court addressed aid to religious schools of an entirely different nature—cash subsidies to parochial schools and their teachers. The companion cases at issue involved statutes passed by the Pennsylvania and Rhode Island legislatures out of concern over the quality of the education at each states' nonpublic schools.[113]

The Rhode Island Act authorized public officials to reimburse nonpublic school teachers of secular subjects up to 15% of their current annual salary.[114] The statute further required eligible schools to submit financial data to the state for determination of the appropriate subsidy amount.[115] Moreover, the Act required eligible teachers to use only secular teaching materials and

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105. *Wolman*, 433 U.S. at 233.
106. *Id.* at 238.
107. *Id.* at 240-41.
108. *Id.* at 241.
109. *Id.* at 247-48.
110. *Id.* at 242, 244, 248.
111. *Id.* at 249-50. The only distinction between the *Meek* and *Wolman* programs was that the materials and equipment in *Meek* were loaned directly to the school, whereas in *Wolman* it was the pupil or the pupil's parent who was, theoretically, loaned the equipment. *Id.* at 250. Justice Blackmun, presumably with a straight face, noted that "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." *Id.* Yet it was this very distinguishing characteristic which the Court deemed so essential in both *Allen* and *Meek* with respect to the textbook programs.

Even further clouding matters in *Wolman* was the Court's fickle decision that it violated the Establishment Clause for nonpublic schools to use public school buses for field trips to "governmental, industrial, cultural, and scientific centers." *Id.* at 252, 255. The Court characterized the bus services in *Everson* as different in nature than the bus services at issue in *Wolman*. The transportation services in *Everson* were routine in that the children were bused only to and from school. *Id.* at 253-54. In contrast, the services in *Wolman* were unique, in that the students were bused to the field trip sites. *Id.* Moreover, field trips are, at least for the Court, rendered meaningful only through the efforts of the individual sectarian teacher. *Id.* at 254. Hence, for the Court, the risk was simply too great that such a teacher would seize the moment and unconstitutionally foster religion. *Id.*

112. 403 U.S. 602 (1971).
113. Rapidly rising costs and low teacher salaries were particular fears the statutes were designed to reverse. *Lemon*, 403 U.S. at 607, 609.
114. *Id.* at 607.
115. *Id.* at 607-08.

teach only secular subjects.[116] The Pennsylvania law, in contrast, authorized the subsidy directly to the parochial schools for those expenses accrued for teacher's salaries, textbooks, and instructional materials.[117] Only courses in math, modern foreign languages, physical science, and physical education were eligible for these reimbursements.[118] Like Rhode Island, however, Pennsylvania required the schools to use specific accounting procedures, submit specific financial data, and if necessary undergo a state audit.[119]

After the Court delineated the three part *Lemon* test,[120] it proceeded to apply its new framework. It began by accepting as valid the requisite secular purpose as described by the respective statutes. It never determined, however, whether the statutes' principal effect advanced religion.[121] Instead, it skipped to the third element and concluded that both statutes excessively entangled government and religion.[122] Because of both the extensive governmental controls necessary to determine compliance and the fact that parochial schools involve "substantial religious activity and purpose," the Court refused to uphold the laws.[123] It distinguished *Allen* by noting that books can be independently inspected once to determine their contents; to assure teacher compliance, however, requires a "comprehensive, discriminating, and continuing state surveillance."[124] The Pennsylvania statute suffered from a further defect in that the aid flowed directly to the school.[125] Coupled with the political divisiveness inherent in the subsidies, the number and nature of entanglements proved too many and too pervasive to justify a finding of constitutionality.[126]

A statute similar in effect but different in design to the one in *Lemon* was that passed by New York granting a package of benefits to nonpublic schools and their students. Specifically, the statute, which was challenged in *Committee for Public Education & Religious Liberty v. Nyquist*,[127] provided direct

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116. *Id.* at 608.
117. *Id.* at 609.
118. *Id.* at 610.
119. *Id.* at 609-10.
120. Recall that the *Lemon* test proscribes statutes, policies, and actions that have sectarian purposes, primarily affect or advance religion, and foster an excessive entanglement between government and religion. *Id.* at 612-13; *see supra* text accompanying notes 66-69.
121. *Lemon*, 403 U.S. at 613-14.
122. *Id.*
123. *Id.* at 616-17.
124. *Id.* at 619.
125. *Id.* at 621.
126. Disputes over aid to teachers would continue to haunt the Court. Fourteen years after *Lemon*, the Court invalidated two Michigan school district programs using public school funds for various nonpublic school programs and classes. School District of the City of Grand Rapids v. Ball, 473 U.S. 373, 375 (1985). The Shared Time program, which was offered during the school day involved a variety of remedial subjects. *Id.* The Community Education program, in contrast, was offered at the conclusion of the school day. *Id.* at 376. The activities in both programs occurred inside the nonpublic school buildings. *Id.* at 375-76. Although Shared Time program courses were taught by public school teachers, instructors in the Community Education program were conducted by nonpublic teachers, who usually taught at the same nonpublic school where they rendered their Community Education program. *Id.* at 377. The Court struck both programs down, holding that each failed the purpose prong of the *Lemon* test. *Id.* at 385. Of primary importance to the Court were both the effective subsidy provided by the programs, *id.*, and the "substantial risk of state-sponsored indoctrination." *Id.* at 387.
127. 413 U.S. 756 (1973).

grants to nonpublic schools for facilities maintenance and repair as well as tax exemptions and tuition grants to students. Not surprisingly, the Court found all challenged authorizations of the statute unconstitutional.[128]

The provisions authorizing facilities maintenance and repair, which possessed the requisite secular purpose, had the primary effect of advancing religion by allowing sectarian schools to finance all necessary facilities upkeep from taxpayer revenues.[129] Similarly, the tuition reimbursement program also failed to meet the purpose requirement.[130] To this end, the Court noted that "by reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools."[131]

The final component of the New York benefits package bestowed tax exemptions upon parents of nonpublic school students, provided the parents' income was greater than $5000 but less than $25000.[132] As with the tuition grants, however, the Court rejected the argument that the provision was constitutional because the parent rather than the school was the beneficiary.[133] The more difficult task for the Court lay in distinguishing the tax exemption at issue in *Nyquist* from the one in *Walz v. Tax Commission*,[134] a case in which the Court held that the Establishment Clause was not violated by granting churches wholesale tax exemptions.[135] It effectively contrasted *Walz* by noting first that the tax exemption there served the noble purpose of minimizing church and state involvement,[136] and, second, that the exemption essentially applied to a class of organizations composed of many non-religious institutions.[137]

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128. *Nyquist*, 413 U.S. at 769.

129. *Id.* at 774.

130. *Id.* at 783.

131. *Id.* The excessive financial relief referred to by the Court, however, simply did not exist. The statute capped grants at $100 per child; moreover, a qualifying parent's income could be no greater than $5000. *Id.* at 780. Given these statistics it is doubtful the grants influenced a great number of, if any, parents to send their children to nonpublic schools. Indeed, the opinion overlooked that supplying textbooks and transportation to students similarly lessened the financial burden on parochial school students.

132. *Id.* at 790. The effect was to ensure that all parents of nonpublic school students earning under $25,000 received either a tuition reimbursement grant or a tax credit.

133. *Id.* at 791.

134. 397 U.S. 664 (1970).

135. *Walz*, 397 U.S. at 680.

136. *Nyquist*, 413 U.S. at 793. The Court delineated this as follows:

> To be sure, the exemption of church property from taxation conferred a benefit, albeit a an indirect and incidental one. Yet the "aid" was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. The exemption . . . tends to complement and reinforce the desired separation insulating each from the other. Furthermore, elimination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes. The granting of the tax benefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

Id.

137. *Id.* at 793-94. The class of organizations consisted of corporations and associations organized exclusively for "the moral or mental improvement of men and women, or for religious,

Tax exemptions were again the issue in *Mueller v. Allen*.[138] There, Minnesota allowed taxpayers a deduction for various educational expenses, including tuition, textbooks, and transportation.[139] Although the statute was facially neutral and applied to parents of students attending both public and nonpublic schools,[140] its purpose and effect were suspect because Minnesota law generally prohibited public schools from charging tuition.[141] Nonetheless, the Court considered this facial neutrality paramount in distinguishing the modest deductions available there from the grants and exemptions in *Nyquist*.[142] Moreover, the Minnesota deductions flowed only to the individual parents rather than to the schools themselves,[143] and were part of a comprehensive program of similar deductions provided for in the Minnesota tax laws.[144] Given these distinctions, the Court found the Minnesota statute constitutional.[145]

Justice Marshall, in dissent, took the majority to task for its form over substance decision, which in effect allowed deductions strikingly similar to the exemptions and grants found unconstitutional in *Nyquist*.[146] Describing the majority's attempt to distinguish tax deductions from tax credits and exemptions as "a distinction without a difference,"[147] Marshall relied on the indisputable fact that most of the deduction's beneficiaries were parents of parochial school children.[148] As such, the statute's primary effect unconstitutionally advanced religion.[149]

d. *The Use of Federal Funds*

In 1985 the Court decided *Aguilar v. Felton*,[150] its most criticized and inequitable parochial school aid decision. The facts were simple: New York City used federal funds to provide remedial instruction to children of low-income families on parochial school grounds.[151] The classrooms were free of religious symbols and the government provided the requisite materials.[152]

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bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library, patriotic, historical or cemetery purposes." *Walz*, 397 U.S. at 667 n.1.

138. 463 U.S. 388 (1983).

139. *Mueller*, 463 U.S. at 391 n.1.

140. *Id.* at 397.

141. *Id.* at 405 (Marshall, J., dissenting).

142. *Id.* at 398. The maximum deduction available was $700. *Id.* at 391. The actual tax savings were, of course, much lower.

143. *Id.* at 399.

144. *Id.* at 396.

145. *Id.* at 403-04.

146. *Id.* at 405.

147. *Id.* at 411.

148. *Id.* at 405. Justice Rehnquist, speaking for the majority, countered, "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law." *Id.* at 401.

149. *Id.* at 414.

150. 473 U.S. 402 (1985).

151. *Aguilar*, 473 U.S. at 405-06.

152. *Id.* at 407.

Only public school personnel effectuated the remedial instruction.[153] Yet, because the aid was "provided in a pervasively sectarian environment,"[154] the necessary oversight fostered an excessive entanglement between church and state.[155] Justice Brennan, who wrote for the majority, feared government agents roaming parochial school halls suspiciously peering inside classrooms and searching profusely for a hint of sectarian influence penetrating the state funded classes.[156] Unfortunately for the 20,000 New York City schoolchildren his decision affected, Brennan proffered no evidence to substantiate this alleged need for pervasive state oversight.

The Court's most recent parochial school aid pronouncement occurred in 1993 in *Zobrest v. Catalina Foothills School District*.[157] The dispute in *Zobrest* centered around James Zobrest, who had been deaf since birth.[158] Although a pupil in the public schools through grade eight, his parents hoped to enroll him in a private religious school for his upcoming ninth grade term.[159] To this end, both James and his parents sought, under the federal IDEA[160] program designed to benefit disabled children, to procure a sign-language interpreter for James's use while attending the private school.[161] Although state officials cited the Establishment Clause as a bar to complying with James's request,[162] the Court sided with Zobrest and found that furnishing the interpreter for use in a private, religious school did not violate the Establishment Clause.[163]

In reaching this conclusion, the Court considered the nature of the benefits received by Zobrest determinative.[164] In particular, the fact that the federal program provided aid to any disabled child without regard to public-private or sectarian-nonsectarian distinctions proved convincing.[165] Furthermore, instead of providing benefits directly to the parochial school, the program merely ensured "that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents."[166] Because of this choice, no financial incentive existed for James's parents to prefer sectarian to public schools.[167] As a final determinative factor, the Court noted that the school itself was not relieved of any expenses that it

153. *Id.* at 406.
154. *Id.* at 412.
155. *Id.* at 413.
156. *Id.* at 414.
157. 113 S. Ct. 2462 (1993).
158. *Zobrest*, 113 S. Ct. at 2464.
159. *Id.*
160. 20 U.S.C. § 1400 (1992). IDEA is an acronym for the Individuals with Disabilities Education Act. *Zobrest*, 113 S. Ct. at 2464.
161. *Zobrest*, 113 S. Ct. at 2464.
162. *Id.*
163. *Id.* Mention of the *Lemon* test was noticeably absent in *Zobrest*. For an argument that the Court nonetheless relied on the factors embodied in *Lemon*, see Lisa S. Pierce, *Making Aid Without* Lemon*?*, 63 U. CIN. L. REV. 565 (1994).
164. *Zobrest*, 113 S. Ct. at 2467.
165. *Id.*
166. *Id.*
167. *Id.*

would have incurred had the government not provided the interpreter.[168] Hence, one is hard-pressed to find fault with the Court's assertion that in *Zobrest*, "Handicapped children, not sectarian schools, are the primary beneficiaries of the IDEA."[169]

2. Public Education and the Establishment Clause

a. *Released Time Programs*

In 1948, just one year after its historic decision in *Everson*, the Court in *McCollum v. Board of Education*[170] decided its first public education case and addressed the so called "released time" programs. Under these arrangements, students in public schools were "released" during the school day from regular classes to receive religious instruction. In *McCollum*, this instruction was carried out by religious teachers inside the schoolhouse.[171] Only those students whose parents consented could attend the religion classes; other students were excused from participation but remained confined on school grounds.[172] Writing for an 8-1 majority, Justice Black found that the program violated the Establishment Clause and was therefore unconstitutional.[173] Of primary importance to the Court was the use of the state's compulsory education machinery to provide students for religious instruction classes.[174] This, according to Black, was an impermissible use of the tax-supported public schools to aid religious groups in spreading their faith.[175]

Proponents of released-time programs were not discouraged by the mandate of separation inherent in *McCollum*, and just four years later managed to bring the issue before the Court once again. The released time program in *Zorach v. Clauson*[176] presented an interesting twist on the *McCollum* program—the students under the *Clauson* plan received instruction not on school grounds but instead at various religious facilities.[177] So in both cases the instruction occurred during the school day, but in *McCollum* the religious teachers went to the children, while in *Clauson* the children went to the religious teachers. Drawing on this distinction, a 6-3 Court found the *Clauson* program constitutional. Speaking for the majority, Justice Douglas stated that "[t]he First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State."[178] Effecting such an assumption, rather than making the state neutral, Douglas observed, would render it hostile to religion.[179] Such hostility is neither mandated by the Constitution nor in ac-

168. *Id.* at 2469.
169. *Id.*
170. 333 U.S. 203 (1948).
171. *McCollum*, 333 U.S. at 209. Teachers included Catholic priests, Jewish rabbis, and Protestant instructors. *See id.*
172. *Id.* at 207-09.
173. *Id.* at 210. The lone dissenter was Justice Reed. *Id.* at 238.
174. *Id.* at 212.
175. *Id.* at 210.
176. 343 U.S. 306 (1952).
177. *Clauson*, 343 U.S. at 308.
178. *Id.* at 312.
179. *Id.*

cordance with our history as a religious people.[180] In any event, and despite the apparent inconsistencies between the two released time decisions, *Clauson* nonetheless continues to serve as the Court's definitive answer to the released time issue.[181]

b. *School Prayer, Bible Reading, and Creation Science*

The zenith of the Court's separationist campaign, as well as its most controversial Establishment Clause decision, was handed down a decade after *Clauson* when in *Engel v. Vitale*,[182] a 6-1 Court declared that prayer in school was unconstitutional.[183] The prayer at issue in *Engel* was nondenominational and read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[184] Students not wishing to recite the prayer were allowed either to remain silent or leave the room.[185] In contrast to the Free Exercise Clause, however, Establishment Clause claims do not *require* that a coercive element be present.[186] Hence, the opportunity for students to not participate played no role in determining the recital's constitutionality. Rather, the relevant issue was simply whether the state had forged an unconstitutional union between religion and government. Given that here the state had composed an

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180. *Id.* at 314. Douglas expounded on this notion as follows:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.

Id. at 313-14.

181. Justices Black, Frankfurter, and Jackson each wrote dissenting opinions, essentially arguing that there were no distinctions between *McCollum* and *Clauson*. Justice Black in particular relied upon a supposed element of coercion implicit in the state's compulsory education laws. *Id.* at 318 (Black, J., dissenting). Black, however, confused the compulsion to attend public schools with the compulsion to attend the religion classes; the second was a result of free exercise, the first was not. Attendance at the religion classes required parental consent, and because the instruction itself was removed from the school grounds, the attendant air of authority and endorsement in *McCollum* ceased to exist in *Clauson*.

Note, however, that the released time programs should be constitutional only to the extent that they do not "punish" dissenters or those who for whatever reason opt out of attending the religion classes. For these students, the school should not during this time become, as Justice Jackson feared it would, a "jail for the pupil who will not go to Church." *Id.* at 324 (Jackson, J., dissenting).

182. 370 U.S. 421 (1962).

183. *Engel*, 370 U.S. at 424. Justices Frankfurter and White did not participate in the Court's decision.

184. *Id.* at 422.

185. *Id.* at 430.

186. *Id.* This does not mean, however, that laws which establish religion do not coerce compliance. "When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.* at 431. This element, however, is an issue to be resolved under the Free Exercise Clause. Compare Justice Douglas's concurring opinion which states that "there is no element of compulsion or coercion in New York's regulation." *Id.* at 438.

official prayer to be recited by a group of Americans, the Court had little difficulty finding such a forbidden coupling.[187]

Public reaction to the Court's decision, although expected to be harsh, was extremely intense.[188] In Congress, representatives and senators rushed to sponsor a nullifying constitutional amendment.[189] One senator rhetorically queried whether "we, too are ready to embrace the foul concept of atheism."[190] Another maintained that "the Supreme Court has made God unconstitutional."[191] Criticism of the decision was not, however, limited to federal officials. The Conference of State Governors voted unanimously to call for an overruling constitutional amendment.[192] Members of the clergy were "shocked and frightened" and marvelled at the Court's insensitivity to America's religious tradition.[193] One popular evangelist noted the increasing secularization of the United States and argued that "[t]he Framers of our Constitution meant we were to have freedom of religion, not freedom from religion."[194]

Although intense, the criticism was not unanimous. In fact, several Protestant organizations and individuals, including the Joint Baptist Committee on Public Affairs, *The Christian Century*, and the Reverend Martin Luther King, opposed the movement for a constitutional amendment, as did nearly all Jewish organizations and rabbis.[195] Unexpectedly, many of the nation's major newspapers, including the *New York Times* and the *Washington Post*, supported the decision.[196] In any event, the movement and support for a constitutional amendment dwindled as none of the proposals garnered the necessary two-thirds majority.[197]

Notwithstanding this reaction, the Court only one year later in *Abbington Township School District v. Schempp*[198] considered and held unconstitutional the equally divisive issue of Bible reading in public schools. *Abbington Township* consisted of two companion cases in which the legislature of Pennsylvania and the Board of School Commissioners of Baltimore mandated that the

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187. *Id.* at 425. Interestingly, Justice Douglas, a member of the *Everson* majority which upheld the New Jersey law against an Establishment Clause attack, admitted his decision was wrong. Recall that *Everson* was a 5-4 decision. *See supra* text accompanying notes 73-89.

188. The effects on the Court's Establishment Clause jurisprudence were great as well. In fact, Professor Ira Lupu describes the decision, along with the other school prayer cases, as one of five crucial gestures of the Court in its "embrace of the separationist ethos" between 1947-1980. Ira C. Lupu, *The Lingering Death of Separationism*, 62 GEO. WASH. L. REV. 230, 233-34 (1994).

189. STOKES & PFEFFER, *supra* note 45, at 378.

190. *Id.*

191. LEVY, *supra* note 9, at 185.

192. STOKES & PFEFFER, *supra* note 45, at 378.

193. *Id.*

194. *Id.* (statement of Reverend Dr. Billy Graham).

195. *Id.* at 379.

196. *Id.* Press support was certainly not unanimous. Indeed, Levy reports that "newspaper headlines screamed that the Court had outlawed God from the public schools." LEVY, *supra* note 9, at 185.

197. LEVY, *supra* note 9, at 185. In recent years there has been renewed increase in securing a constitutional amendment to restore prayer in schools. For one author's view that such an amendment impedes upon religious freedoms, see Robert S. Peck, *The Threat to the American Idea of Religious Liberty*, 46 MERCER L. REV. 1123 (1995).

198. 374 U.S. 203 (1963).

Bible be read aloud to students at the beginning of the school day.[199] Specifically, Pennsylvania required that at least ten verses be read and the Lord's Prayer thereafter recited.[200] No comments accompanied the reading and those children whose parents requested in writing were excused.[201] These nonparticipants, however, could in effect not escape the reading, as it was broadcast over the school's intercommunications system.[202] Baltimore's plan was substantially similar. It authorized one chapter to be read from the Bible and authorized nonparticipation if the child's parents consented.[203]

In a precursor to the *Lemon* test, the Court examined the "purpose and the primary effect of the encroachment," and noted that enactments which either advance or inhibit religion violate the Establishment Clause.[204] Hence, to withstand Establishment Clause scrutiny "there must be both a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[205] Applying these principles, the Court found both the Pennsylvania and Baltimore directives unconstitutional.[206] Although both laws had secular purposes, the primary effect of each was religious in nature.[207] Moreover, the Court reiterated its earlier implicated position that coercion is not a predicate for an Establishment Clause violation.[208] As such, the ability of students to opt out of the readings was irrelevant.[209]

In his concurrence, Justice Brennan launched into an exhaustive historical discussion, but in an odd move simultaneously eschewed history. Instead of strict reliance on history, Brennan preferred to base his decision upon "whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."[210] Hence, Brennan stated that fruitless searches into the minds of Madison, Jefferson, Washington, and the other Founders to determine what each would have thought, either individually or collectively, with respect to modern church-state issues were useless. Invoking John Marshall's often used but essentially meaningless utterance that "we must never forget that it is a Constitution we are expounding," Brennan proclaimed that the Court should only use the Founders' history for its broad purposes rather than

199. *Abbington Township*, 374 U.S. at 205, 211.
200. *Id.* at 207.
201. *Id.*
202. *Id.*
203. *Id.* at 211.
204. *Id.* at 222.
205. *Id.* (quoting McGowan v. Maryland, 366 U.S. 420, 442 (1961)).
206. *Id.* at 226-27.
207. *Id.* at 223-24. Proponents of both programs asserted that each was passed for secular reasons, such as "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." *Id.* at 223.
208. *Id.*
209. *Id.* at 224-25.
210. *Id.* at 236 (Brennan, J., concurring).

its specific practices.[211] Brennan failed to recognize, however, that specific practices are the broad purposes put into action.

In 1985 the specter of school prayer again reared its head, this time in the intensely controversial guise of moments of silence. Since 1962 and the Court's decision outlawing school prayer, critics had been searching faithfully for a comparable surrogate which could pass constitutional muster. At least twenty-five states had found what appeared to be a workable constitutional substitute.[212] These states authorized moments of silence at the beginning of each school day, during which students were free to meditate, pray, or simply sit quietly. The empowering legislation in these various states, however, only authorized a moment of silence—neither the statute, nor in theory the public school officials, encouraged students to use the moment of silence for prayer. Alabama fell into this category until 1981, when it amended its moment of silence statute to authorize a "period of silence 'for meditation or voluntary prayer.'"[213] Just one year later in 1982 it further amended the statute to allow teachers to lead willing students in a voluntary prayer.[214] These amendments led to *Wallace v. Jaffree*,[215] an extraordinary case which for many reasons[216] wound its way quickly through the federal dockets to the Supreme Court.

Significantly, the plaintiff in *Wallace* did not challenge Alabama's original and still valid moment of silence statute. Rather, plaintiff objected to the two amended versions, which in his mind, encouraged prayer, either silently or aloud.[217] Moreover, because the Court in a previous opinion had ruled the second amended version, which authorized teachers to lead willing students in prayer, unconstitutional, the sole and narrow issue considered was the addendum to the statute which explicitly authorized use of the moment of silence for voluntary prayer.[218] Applying *Lemon*, the Court concluded that the statute's sole purpose was to advance religion.[219] Both the legislative history and the testimony of the bill's primary sponsor made this determination an easy one. State Senator Donald G. Holmes, when testifying before the District

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211. *Id.* at 241. Brennan's view held that the Establishment Clause prohibits "those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice." *Id.* at 295.

212. Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring).

213. *Id.* at 40.

214. *Id.*

215. 472 U.S. 38 (1985).

216. One of these reasons was the maverick opinion of the district court judge, who rebelliously concluded that the two amended statutes were an attempt by Alabama to encourage religious activity, but proceeded to find them constitutional because "the establishment clause of the first amendment to the United States Constitution does not prohibit the state from establishing a religion." *Wallace*, 472 U.S. at 41, 45. In short, the judge single-handedly attempted to expunge the Court's previously determined Fourteenth Amendment incorporation of the Establishment Clause. Not surprisingly, the Court took offense at the judge's attempted rebellion and reaffirmed its commitment to incorporation. *Id.* at 48-49.

217. *Id.* at 41.

218. *Id.* at 41-42.

219. *Id.* at 55-56.

Court, stated the bill was "an effort to return voluntary prayer to our public schools" and that passage of this bill was "a beginning and a step in the right direction."[220] When asked if this was his sole motivation for passage of the bill, he stated, "I did not have no other purpose in mind."[221] Similar statements appeared in the statute's legislative history.[222] Contrasting this intent with a law which simply protects "every student's right to engage in voluntary prayer during an appropriate moment of silence,"[223] the Court stated that the statute's endorsement of the manner in which the moment of silence was to be used violated the principle of government neutrality toward religion.[224]

The Court's most recent statement addressing school prayer is its 1992 decision of *Lee v. Weisman*,[225] in which the Court held prayer at graduation ceremonies unconstitutional. Writing for the majority, Justice Kennedy noted the pervasive involvement of government and religion in commencement prayers.[226] Following this, he briefly mentioned the *Lemon* test[227] but then based his opinion on the supposed element of coercion implicit in the commencement exercise,[228] all the while overlooking that the Court had expressly repudiated the existence of such a factor, either implicit or explicit, in Establishment Clause claims.[229]

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220. *Id.* at 43.

221. *Id.* at 57.

222. *Id.* at 57 n.43.

223. *Id.* at 59.

224. *Id.* at 60. All indications are that had the statute proffered some secular purpose, it would have survived scrutiny. For example, Justice Powell in concurrence stated outright that he "would vote to uphold the Alabama statute if it also had a clear secular purpose." *Id.* at 66 (Powell, J., concurring). Similarly, Justice O'Connor differentiated the Alabama statute from other moment of silence authorizations because its unavoidable conclusion pointed to the state's intent to endorse prayer in public schools. *Id.* at 77 (O'Connor, J., concurring). Justices Rehnquist, White, and Burger supported a finding of constitutionality in spite of the statute's alleged voluntary prayer endorsement. *Id.* at 85-91 (Burger, J., dissenting). Justice White considered the statute as merely providing a preemptive legislative answer to a student's inquiry as to whether the moment of silence could be used for prayer. *Id.* at 91 (White, J., dissenting). Burger remarked that simply amending the statute to permit voluntary prayer did not constitute an endorsement, and, furthermore, no evidence existed which suggested that the entire Alabama legislature accepted the sponsor's motive. *Id.* at 85-87 (Burger, J., dissenting). Rehnquist attacked the Court's strict-separationist history, and again put forth his historical argument for nonpreferentialism, claiming that even generalized endorsements of voluntary prayer did not violate the Establishment Clause. *Id.* at 113-14 (Rehnquist, J., dissenting).

225. 112 S. Ct. 2649 (1992).

226. *Lee*, 112 S. Ct. at 2655.

227. *Id.*

228. *Id.* at 2661 ("The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform."). Kennedy reiterated this coercion element throughout the opinion. For example, at another point, he states:

> The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least maintain a respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 2658; *see supra* text accompanying note 186.

229. For an argument in favor of Justice Kennedy's coercion test, see Timothy C. Caress, *Is Justice Kennedy the Supreme Court's Lone Advocate for the Coercion Element in Establishment Clause Jurisprudence? An Analysis of* Lee v. Weisman, 27 IND. L. REV. 475 (1993); *see also* Symposium, *Religion and the Public Schools After* Lee v. Weisman, 43 CASE W. L. REV. 795

For this reason, Blackmun and Souter wrote concurring opinions, both joined by Stevens and O'Connor. Blackmun applied the *Lemon* test and concluded that the prayer served an unconstitutional religious purpose.[230] Moreover, Blackmun believed that the government, by placing its imprimatur upon the prayer, had undoubtedly advanced and promoted religion.[231] For his part, Souter wrote to defend the Court's no-aid approach of forty-five years from what he may have perceived as increasing pressure to embrace a more accommodationist, nonpreferentialist philosophy.[232] This wing of the Court, now numbering four,[233] voiced itself in Scalia's dissent, which bashed both Kennedy's coercion test (described by Scalia as the Court's "psycho-journey")[234] and the concurring Justices reliance on *Lemon*.[235] As one commentator notes, *Lee v. Weisman* was just the first shot in the commencement prayer battle.[236]

Between the prayer issues involved in *Wallace* and *Lee*, the Court addressed a public education issue of a different kind—whether states could require public school teachers to instruct students on the topic of "creation science." The case which presented this issue, *Edwards v. Aguillard*,[237] involved a Louisiana statute requiring public schools which taught evolution to also teach what it termed creation science, or "the scientific evidence for creation and inferences from those scientific evidences."[238] Despite the fact that

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(1993) (debating whether *Lee v. Weisman* marked the end of the *Lemon* test and served as a prelude to development of a coercion test).

230. *Lee*, 112 S. Ct. at 2663 (Blackmun, J., concurring).

231. *Id.* at 2664.

232. *Id.* at 2667 (Souter, J., concurring). Ironically, both Souter and Scalia drew from the same historical practices and works, including those of Madison, to reach their diametrically opposed conclusions. *Id.* at 2674, 2680.

233. These four were Justices Scalia, White, and Thomas, as well as Chief Justice Rehnquist. *Id.* at 2678.

234. *Id.* at 2684.

235. *Id.* at 2685. In contrast to limiting religious harmony, Scalia characterized the scenario as follows:

> The founders of our Republic knew the fearsome potential of sectarian religious belief to generate civil dissension and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a toleration—no, an affection—for one another than voluntarily joining in prayer together, to the God whom they all worship and seek. Needless to say, no one should be compelled to do that, but it is a shame to deprive our public culture of the opportunity, and indeed the encouragement, for people to do it voluntarily. The Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that can not be replicated. To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.

Id. at 2686.

236. LEVY, *supra* note 9, at 204.

237. 482 U.S. 578 (1987).

238. *Edwards*, 482 U.S. at 581. In 1968, the Court had grappled with a substantially similar problem. In Epperson v. Arkansas, 393 U.S. 97 (1968), the Court held invalid an Arkansas statute which prohibited public schools from teaching, or using any textbook which taught the theory of evolution. *Id.* at 98-99. Although the Court recognized the power of the state to proscribe the scope of its public school curriculum, it held that such power did not extend to those acts whose purpose was to excise a particular topic because it was contrary to widely held religious beliefs

the Louisiana legislature's stated purpose in passing the Act was to protect academic freedom,[239] the Court probed the substantial legislative history and concluded that the legislature had identified no clear secular purpose.[240] Instead, the Court concluded the Act's primary purpose was to "advance the religious viewpoint that a supernatural being created humankind."[241] Although the Court reached this conclusion by purportedly relying on the Act's legislative history,[242] Justices Scalia and Rehnquist pointed out in dissent that the history evidenced *no intent* to advance religion.[243] Instead, the history, as recorded over a period of nearly a year, demonstrated that the Act's stated purpose was indisputably secular.[244] According to Scalia the majority relied not on the stated purpose of the Act in striking it down, but rather on the religious motivations of those who initially passed the Act.[245] Hence, the majority overlooked that the Establishment Clause does not forbid laws passed for religious motivations, but rather laws that have the purpose of advancing religion.[246] Moreover, the Court had historically accepted a legislature's stated secular purpose without subjecting that purpose to any examination, let alone the type of legal gymnastics required to imply a nonsecular purpose to the Louisiana law here.[247] Nonetheless, the majority was unable to conceive of a nonreligious theory of creationism, and more or less equated creation science with the theory of creation as proffered in the Bible.[248] Given this mindset, it is no doubt the Court never wavered from its conclusion that the Louisiana law's primary and unconstitutional purpose was to advance religious beliefs.

c. *Equal Access*

At the same time that the moment of silence, commencement ceremony, and creation science disputes were brewing, another issue involving the public schools was coming to a head. That issue was equal access to public school facilities—access not only for students but also for other community organizations. The first case to address this issue was the 1990 decision of *Board of Education of the Westside Community Schools v. Mergens*.[249] There, a Nebraska secondary school cited the Establishment Clause and an express school board policy in denying Bridget Mergen's request to form a Christian club at

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and violative of the Establishment Clause. *Id.* at 107-08.

239. *Edwards*, 482 U.S. at 581.

240. *Id.* at 585.

241. *Id.* at 591.

242. *Id.* at 591 n.10, 591-92.

243. *Id.* at 610 (Scalia, J., dissenting).

244. *Id.* at 620-21.

245. *Id.* at 614-15.

246. *Id.*

247. *Id.* at 613.

248. *See* LEVY, *supra* note 9, at 192. Justice Brennan

> regarded creation science as if it were an oxymoronic term for a religious belief; he did not address himself to the fact that it claimed to be scientific and to rest on scientific evidence. He saw only the relation between creationism and the Book of Genesis. In that regard his opinion for the Court was unfair and misleading.

Id.

249. 496 U.S. 226 (1990).

the school.[250] This denial, based on the Court's separationist precedent, was made in spite of the school's recognition of at least thirty other student groups.[251] In response to the denial, Mergens, who was a student at the school, sued the school board under the Equal Access Act, a federal law which prohibited public secondary schools receiving federal financial assistance from denying students equal access to open forums based on the content of the students' speech.[252]

Although the school board raised the shield of the Establishment Clause as its defense, the majority effectively side-stepped the issue by limiting its holding to the conclusion that the Act itself required the school to allow the club.[253] The critical issue thus became whether, as the school board alleged, the Act itself violated the Establishment Clause. In holding that it did not, the Court noted that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[254] To this end, the Court proceeded to apply the *Lemon* test and deemed it met, finding both a secular legislative purpose which was not intended to endorse or disapprove of religion, and no excessive government/religion entanglement.[255]

An open issue after *Mergens* was whether public schools which had policies allowing community groups to use school facilities after the conclusion of the school day were compelled to prohibit use of the grounds to religious groups or groups with religious purposes. The Court addressed this issue in *Lamb's Chapel v. Center Moriches Union Free School District*,[256] and in a relatively brief opinion concluded that no Establishment Clause violation occurred by allowing a church group after-hours access to show a film, the viewing of which was open to the public, on school grounds.[257] According to the Court, these factors ensured the absence of any realistic danger that outsiders would perceive the school as endorsing a religion or creed.[258] As did the coercion issue in *Lee v. Weisman*, this inquiry into endorsement evoked strong responses from Justices Scalia and Kennedy, who both concurred in the decision.[259] Notwithstanding this internal quibbling among the Justices, it at least appears that given *Mergens* and *Lamb's Chapel*, the Court as a whole is committed to preserving equal rights of access for, and preventing unfair discrimination against, religious groups and groups with religious messages seeking to use public school facilities.

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250. *Mergens*, 496 U.S. at 232-33.
251. *Id.* at 231.
252. *Id.* at 233 (citing 20 U.S.C. §§ 4071-4074 (1992)).
253. *Id.* at 247.
254. *Id.* at 248.
255. *Id.* at 248-50, 252.
256. 113 S. Ct. 2141 (1993). For in-depth discussions of *Lamb's Chapel*, see Wirt P. Marks, *The* Lemon *Test Rears Its Ugly Head Again*: Lamb's Chapel v. Center Moriches Union Free School District, 27 U. RICH. L. REV. 1153 (1993); Robert P. Viar, Jr., Lamb's Chapel v. Center Moriches Union Free School District: *A Modest Home for God in the Public Schools*, 71 U. DET. MERCY L. REV. 965 (1994).
257. *Lamb's Chapel*, 113 S. Ct. at 2148.
258. *Id.*
259. *Id.* at 2149, 2151.

Undoubtedly, one of the Court's oddest and most unjust public school cases is the 1994 decision of *Board of Education of Kiryas Joel Village School District v. Grumet*.[260] Kiryas Joel is a village composed entirely of members of the Satmar Hasidic sect,[261] who attempt, at all costs, to avoid assimilation into the modern world.[262] To this end, all children attend private religious schools, except for the few, numbering approximately forty, who are mentally handicapped.[263] Although these children received special education services from public school teachers at a nearby parochial school, this practice ceased in 1985.[264] After the Court's mandate in *Aguilar*, these children were forced to attend public schools outside the village.[265] This arrangement lasted only a short time, however, as most parents removed their children from the secular schools because of the attendant emotional distress and trauma wrought by the children's attendance.[266] To alleviate the problem, the New York legislature passed in 1989 a statute creating a separate school district for the village.[267] This district was designed to deal particularly with the needs of the handicapped children, and all evidence suggested that the only school operated by the new district provided special education for these handicapped children.[268] Moreover, Kiryas Joel students were not the only members of this school; several neighboring districts sent similarly handicapped children to the Kiryas Joel school district. In fact, two-thirds of the students came from outside the village.[269]

Notwithstanding that the authorizing statute made not one mention of religion, and that the only courses offered at the school were secular in nature, the Court found the Kiryas Joel district unconstitutional.[270] Justice Souter, writing for a 6-3 majority, concluded that the New York legislature had unconstitutionally created a school district based on nothing but the inhabitants' religion.[271] In short, Souter noted that "a state may not delegate its civil authority to a group chosen according to a religious criterion."[272] To do so violated the Establishment Clause's mandates of government neutrality.[273]

In a blistering attack on the majority's incredulous decision, Justice Scalia, joined by Justice Thomas and Chief Justice Rehnquist, took the Court to task

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260. 114 S. Ct. 2481 (1994). For discussions of *Kiryas Joel*, see Basilios E. Tsingos, *Forbidden Favoritism in the Government Accommodation of Religion:* Grumet *and the Case for Overturning* Aguilar, 18 HARV. J.L. & PUB. POL'Y 867 (1995) (maintaining that *Kiryas Joel* conforms with the requisite separation of church and state); Note, *Sorting Through the Establishment Clause Tests, Looking Past the* Lemon, 60 MO. L. REV. 653 (1995) (discussing the Justices' failure to develop a workable alternative to the *Lemon* test).

261. *Kiryas Joel*, 114 S. Ct. at 2484.
262. *Id.* at 2485.
263. *Id.* at 2486.
264. *Id.* at 2485.
265. *Id.*
266. *Id.*
267. *Id.* at 2486.
268. *Id.*
269. *Id.*
270. *Id.* at 2484.
271. *Id.* at 2487.
272. *Id.* at 2488.
273. *See id.* at 2491.

for its blindness to the facts and its obtuse application of the Establishment Clause. In dissent, Scalia remarked that, "The Court today finds that the Powers That Be, up in Albany, have conspired to effect an establishment of the Satmar Hadism; I do not know who would be more surprised at this discovery: the Founders of our Nation or Grand Rebbe Joel Teitelbaum, founder of the Satmar."[274] Scalia, whose historical analysis is sometimes questionable, grasped the issue here. As historian Leonard Levy notes, Scalia perceived the Satmar Hadist's peculiarities as cultural, not religious; hence, to hold, as Souter and the majority did, that protection of this small minority sect violated the Establishment Clause is inapposite to the very reason for the entire Constitution's existence.[275] In short, *Kiryas Joel* represents little more than the culmination of forty years of unduly rigid separationism.

3. Higher Education and the Establishment Clause

Establishment Clause challenges to statutes and policies involving higher education are not only fewer in number but also lower in profile than those concerning primary or secondary education in both private and public schools. This is due in part to the widely-held creed that higher education, and university campuses in particular, hold innate a preeminent level of academic freedom. Moreover, the Court understands that university students are less impressionable than schoolchildren, whose sensitive needs it seeks to protect from overwhelming religious pressures.

As with aid to parochial schools, aid to religiously-affiliated colleges and universities generates a substantial amount of the higher education Establishment Clause litigation. Consider in this respect *Tilton v. Richardson*,[276] a 1971 decision in which the Court sustained provisions of a federal act "provid[ing] construction grants for buildings and facilities used exclusively for secular educational purposes."[277] Although private religious institutions undoubtedly benefitted from the grants, the Act itself was facially neutral, and "carefully drafted" to ensure the colleges would engage in only secular functions within the federally funded facilities.[278] As such, the holding, like those in *Everson* and *Allen*, simply permitted sectarian institutions to participate in and receive the benefits of neutral governmental assistance programs.[279]

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274. *Id.* at 2505-06 (Scalia, J., dissenting).

275. *See* LEVY, *supra* note 9, at 256. Levy further noted that this case was about the special needs of handicapped children and "not at all about religious education." *Id.* As such, the child-benefit theory, which neither the majority or the dissent considered, should have been controlling. *Id.*

276. 403 U.S. 672 (1971).

277. *Tilton*, 403 U.S. at 674-75.

278. *Id.* at 679. Note, however, that the Court did strike down one provision limiting the use on secular restrictions to twenty years. *Id.* at 683. Because there was no guarantee and mechanism for ensuring that the facilities would not then be used for sectarian activities, the Court effectively extended the provision's time frame and the corresponding restriction on sectarian use to the life of the facility. *Id.*

279. *Id.* at 679.

A statute similar in effect to that in *Tilton* was at issue in *Hunt v. McNair*.[280] The mechanism through which the state tendered the aid, however, was substantively different. South Carolina permitted colleges and universities to submit to a state authority proposals for construction of various educational facilities.[281] Upon receipt of a proposal, the authority issued revenue bonds, the proceeds of which the college received and used to fund the proposed project.[282] The college, in turn, conveyed the project to the authority, which then leased the project back to the college until the institution paid back the bond amount.[283] By adhering to this procedure the authority ensured no taxpayer funds supported private religious institutions.[284] Unable to significantly distinguish the aid in *Hunt* from that approved only two terms before in *Tilton* the Court sustained the South Carolina statute.[285]

Three years after *Hunt*, the Court in *Roemer v. Board of Public Works of Maryland*[286] sustained a Maryland statute authorizing grants to private colleges. Although the funds could be used only for secular purposes,[287] the subsidies were undoubtedly substantial and of a more pervasive nature than the construction grants or revenue bonds at issue in *Tilton* or *Hunt*. As in *Tilton*, however, the Court relied on its "participation in government benefit programs" rationale to lend credence to its decision.[288] Lost in the shuffle, however, was the fact that in *Tilton* and *Hunt* the legislation authorized benefits on a neutral basis—that is, both public and private parties purportedly benefitted equally. Here, the law by its terms applied only to private institutions. Hence, the only conceivable rationale for the Court's invocation of the government benefit theory posits that to preclude private religious institutions from government aid distributed to other private institutions constitutes discrimination against, or governmental hostility towards, religion.

The Court in *Roemer* further delineated the function and scope of the primary effect analysis in the higher education context. Relying on the approach set forth in *Hunt*, the Court characterized the primary-effect element as both prohibiting state aid from flowing to institutions so pervasively sectarian that secular activities cannot be separated from sectarian ones, and permitting funding only of those secular activities which can be so separated.[289] Here, although religion or theology courses were mandatory and some classes began with prayer, the Court deemed both requirements met.[290] Important in this respect was that faculty hiring decisions were made on a religion-blind basis, ensuring the appropriate level of professional standards as well as relegation of

280. 413 U.S. 734, 736 (1973).
281. *Hunt*, 413 U.S. at 736-37.
282. *See id.* at 737-38.
283. *Id.*
284. *Id.* at 738.
285. *Id.* at 746-49.
286. 426 U.S. 736 (1976).
287. *Roemer*, 426 U.S. at 740-41.
288. *Id.* at 745-47.
289. *Id.* at 753-54.
290. *Id.* at 756-57.

religious matters to the periphery of the overall institutional environment.[291] As to matters of sectarian funding, the Court uncharacteristically appeared content to trust the judgment of the state oversight council and the institutions themselves.[292]

One of the Court's most reasonable (and reasoned) Establishment Clause decisions is *Witters v. Washington Department of Services for the Blind*.[293] There, the Court held the Clause did not prevent a state from providing financial assistance, as part of a comprehensive statute authorizing aid to visually handicapped persons, to a blind person attending a private religious college and studying for a career in the ministry.[294] In short, the Court reasoned the aid flowed only to the religious institution as "a result of the genuinely independent and private choices of aid recipients."[295] Hence, the individual, rather than the state, made the decision to support the religious institution.[296] Moreover, because the statute made the aid available to Witters regardless of where he chose to pursue his education, it devised no financial incentive for him to choose sectarian education over secular education.[297]

It was not aid but access at the heart of the dispute in *Widmar v. Vincent*,[298] a 1981 case in which the Court required a university to permit religious groups to meet in university facilities.[299] By opening its doors generally to other groups, the university had created an open forum and was therefore obligated to justify its discriminations and exclusions.[300] Because the university's only rationale for excluding the group was the religious content of its speech,[301] the First Amendment required the university to proffer a compelling interest for its discrimination.[302] Although the Court agreed that complying with the constitutional mandates inherent in the Establishment Clause constituted a compelling interest, it nonetheless held that neutral policies were not "incompatible with this Court's Establishment Clause cases."[303] Such open-forum policies, the Court concluded, had neither a religious purpose nor the primary effect of advancing religion.[304] Nor, as the university alleged, would allowing religious groups access create a perception of state endorsement of religion, any more than allowing a "Young Socialist Alliance" group access would confer a state imprimatur of socialism.[305] Hence, at least in this

291. *Id.* at 757-58.
292. *Id.* at 760.
293. 474 U.S. 481 (1986).
294. *Witters*, 474 U.S. at 482.
295. *Id.* at 488.
296. *Id.*
297. *Id.*
298. 454 U.S. 263 (1981).
299. *Widmar*, 454 U.S. at 264-65.
300. *Id.* at 267.
301. *Id.* at 269.
302. *Id.* at 270.
303. *Id.* at 271.
304. *Id.* at 273.
305. *Id.* at 274.

instance, both the Free Speech and Free Exercise Clauses limited the applicability of the Establishment Clause.[306]

C. *Religious Symbols and the Establishment Clause*

The debate over establishment, and the corresponding controversy over nonpreferentialism and separationism, rarely exists outside of the educational context. Nonetheless, the most recent addition to the long list of potentially divisive Establishment Clause issues is the placement of governmentally sponsored religious symbols on public or private land during the holiday season. In only two decisions regarding the appropriateness of such symbols, however, the Court managed to produce a multiplicity of inconsistent opinions. In 1984 the Court in *Lynch v. Donnelly*[307] sustained an Establishment Clause attack against a forty-year Pawtucket, Rhode Island tradition of displaying a city owned creche, or nativity scene, in a private park owned by a non-profit organization.[308] Secular decorations of the holiday season, such as a Christmas tree, a Santa Clause house, reindeer pulling Santa's sleigh, and a host of cut-out figures, surrounded the creche.[309] Applying the *Lemon* test, the Court characterized the city's erection of the creche as having the secular purpose of depicting "the historical origins of this traditional event long recognized as a National Holiday."[310] Nor, the Court asserted, did including the creche in the display advance religion.[311] Instead of articulating this assumption, however, the Court simply noted the benefit to religion here was no greater than that conferred in other decisions, such as *Allen*, *Everson*, and *Roemer*.[312]

The dissenters, led by Justice Brennan, attacked the Court for characterizing the creche as a secular symbol representative of the holiday season.[313] The religious message necessarily present in the creche's very existence was not eliminated simply by surrounding it with secular holiday symbols.[314] In short, the presence of Rudolph and Santa in no way diminished the message of the creche—"that God sent His son into the world to become a Messiah."[315] Given the creche's irrefutable religious content, its placement by a public body, even on nonpublic land, benefitted religion and therefore violated the Establishment Clause.[316]

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306. *Id.* at 276.
307. 465 U.S. 668 (1984). For criticisms of this decision, see Glenn S. Gordon, Lynch v. Donnelly: *Breaking Down the Barriers to Religious Displays*, 71 CORNELL L. REV. 185 (1985); Joshua D. Zarrow, *Of Crosses and Creches: The Establishment Clause and Publicly Sponsored Displays of Religious Materials*, 35 AM. U. L. REV. 477 (1986).
308. *Lynch*, 465 U.S. at 671.
309. *Id.*
310. *Id.* at 680.
311. *Id.* at 681-82.
312. *Id.*
313. *Id.* at 709 (Brennan, J., dissenting).
314. *Id.* at 708.
315. *Id.* at 711.
316. *Id.* at 695.

Four years later, *Allegheny County v. ACLU*[317] forced the Court to reckon with its decision in *Lynch*. Like *Lynch*, the dispute in *Allegheny County* involved a creche; unlike *Lynch*, however, it also involved a menorah.[318] Both symbols were situated on public property, but in different locales.[319] Yet, in an odd move, the Court required the county to remove the creche but allowed the menorah to remain. Placement of the creche on the "Grand Staircase" of the county courthouse sent the "unmistakable message that [the County] support[ed] and promot[ed] the Christian praise to God that is the creche's religious message."[320] Unlike the creche in *Lynch*, the one here was not surrounded by secular manifestations of the holiday season. Hence, the county had unconstitutionally endorsed religion.[321]

A group of dissenters characterized the Court's conclusion on the creche issue as "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents."[322] Following *Lynch*'s lead, Kennedy depicted the county as simply celebrating the season.[323] Given that the creche represented no real threat to religious liberty and that the county had not used its governmental power to further any Christian interests, he failed to see the rationale for its invalidity.[324]

Further entangling the decision was the menorah issue. Only two of the five Justices, Blackmun and O'Connor, who declared the creche unconstitutional believed the menorah to be constitutional. Three members of the majority consistently concluded that both violated the Establishment Clause. In contrast, the four dissenters, White, Rehnquist, Scalia, and Kennedy all thought both the menorah and the creche constitutional. Hence, it is Blackmun and O'Connor who accounted for the different outcomes.

In the majority opinion addressing the menorah, from which Brennan, Marshall, and Stevens, who had voted for holding the creche unconstitutional, dissented, the Court relied on two facts to support its holding. First, the menorah had a cultural as well as a religious message.[325] Therefore, acknowledging Chanukah as a secular holiday coincided with and was consistent with the tradition of celebrating Christmas as a secular holiday.[326] Second, the menorah was merely a component of a larger display which included a 45-foot Christmas tree.[327] As such, the tree predominated the display and overshadowed the 18-foot tall menorah, which served simply as a reminder "that

317. 492 U.S. 573 (1989).
318. *Allegheny County*, 492 U.S. at 578.
319. *Id.*
320. *Id.* at 579, 600.
321. *Id.* at 599-600.
322. *Id.* at 655 (Kennedy, J., dissenting). For a discussion of the numerous opinions in *Allegheny County*, see Barbara S. Barrett, *Religious Displays and the First Amendment*: County of Allegheny v. American Civil Liberties Union, 13 HARV. J.L. & PUB. POL'Y 399 (1990).
323. *Allegheny County*, 492 U.S. at 663.
324. *Id.* at 664-65.
325. *Id.* at 613-14.
326. *Id.* at 615.
327. *Id.* at 617.

Christmas is not the only traditional way of observing the winter-holiday season."[328]

O'Connor tacked a different approach but reached the same conclusion as the majority. Important to her, however, was a sign accompanying the menorah and tree exhibit which stated, "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom."[329] The city's erection of the menorah, therefore, constituted not an endorsement of religion but rather a "message of pluralism and freedom."[330] Hence the distinction between the religious message inherent in the creche and the political message attendant to the menorah serves to reconcile O'Connor's seemingly inconsistent opinions.

V. RECENT ESTABLISHMENT CLAUSE DECISIONS

A. Capitol Square Review & Advisory Board v. Pinette[331]

Capitol Square, handed down on the last day of the Court's 1995 term, was despite its dissentious features an easy case. Indeed, it was the nature of the facts rather than the constitutionality of the action which created a hotbed of controversy. At the heart of the debate was the appropriate use of Capitol Square, a 10-acre public plaza encircling the Columbus, Ohio statehouse.[332] The Square enjoyed a century old history as a public forum for "free discussion of public questions, or for activities of a broad purpose."[333] To regulate access to the forum, Ohio law vested control over the permit process to the Capitol Square Review Board (Board), which traditionally allowed broad access and diverse groups to conduct events in the Square.[334] In late November 1993, the Board acted on two applications.[335] It granted one, denied the other.[336] The application approved permitted a rabbi to erect a menorah.[337] The application denied prevented the Klan from erecting a cross.[338] To substantiate its denial of the Klan's application, the Board cited both the Ohio and United States Constitutions.[339]

After an unsuccessful attempt to procure administrative relief, the Klan's leader, Vincent Pinette, sued the Board in federal district court.[340] Despite the Board's assertion that the Establishment Clause prevented it from permitting the Klan to display its cross, that court issued an injunction requiring the

328. *Id.*
329. *Id.* at 635 (O'Connor, J., concurring).
330. *Id.*
331. 115 S. Ct. 2440 (1995).
332. *Capitol Square*, 115 S. Ct. at 2444.
333. *Id.*
334. *Id.*
335. *Id.* at 2445.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.*
340. Capitol Square Review & Advisory Bd. v. Pinette, 844 F. Supp. 1182 (S.D. Ohio 1993).

Board to grant the permit.[341] In support of its decision the district court weighed heavily both the First Amendment protection accorded free speech and the lack of evidence indicating that display of the cross constituted state endorsement of religion.[342] On appeal, the Sixth Circuit affirmed.[343] Hence, the Klan's cross went on display in Capitol Square.[344]

Although the 1993-94 Holiday season came and went, the Capitol Square dispute lingered until June 29, 1995, when a 7-2 Supreme Court affirmed the lower courts' decisions. The Court, however, proved incapable of reaching a consensus as to the rationale underlying its conclusion. Rather, the fragmented Court could produce only a plurality opinion, as well as three rounds of concurrences and two dissents. Justice Scalia spoke for the four member plurality, which also included Chief Justice Rehnquist, and Justices Kennedy and Thomas.[345] At the outset, he rejected the Klan's attempt to recharacterize the issue not as one regarding establishment of religion but as one regarding content-based speech discrimination. The Court, Scalia remarked, would hear the case as the lower courts decided it and the parties presented it.[346] Hence, the sole issue for decision was that pertaining to the Establishment Clause.[347]

The Board's decision to ground the Klan's denial in the Establishment Clause proved in hindsight to be cataclysmic. As the plurality noted, the Klan's display constituted private expression subject to the full protection of the First Amendment's Free Speech Clause.[348] Moreover, because Capitol Square constituted a public forum, the Board could prohibit protected conduct, such as the Klan's, only if the restriction was narrowly drawn to serve a compelling state interest.[349] Although the Court agreed with the Board that compliance with the Establishment Clause constituted a compelling state interest, it refused to characterize the Klan's attempt to erect a cross in a traditional public forum as an act prohibited by the Establishment Clause.[350] To this end, it adopted a per se rule of constitutionality for religious expression which is "(1) purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."[351]

In reaching this conclusion, the Court relied on *Lamb's Chapel* and *Widmar*, noting that in both it rejected identical Establishment Clause defenses because of the variety of the forum's uses, the lack of direct sponsorship of the questioned activity, and the incidental benefit conferred upon the particular religious group.[352] Despite the obvious similarities, the Board forced the

341. *Id.* at 1188.
342. *Id.* at 1186-88.
343. Capitol Square Review & Advisory Bd. v. Pinette, 30 F.3d 675 (6th Cir. 1994).
344. *Capitol Square*, 115 S. Ct. at 2445.
345. *Id.* at 2440.
346. *Id.* at 2445.
347. *Id.*
348. *Id.* at 2446.
349. *Id.* In the absence of such an interest, the Board could only impose reasonable time, place, and manner restriction. *Id.*
350. *Id.* at 2446-50.
351. *Id.* at 2450.
352. *Id.* at 2447.

Court to address one distinguishing characteristic—the Square's proximity to the statehouse.[353] In essence, the Board maintained the Court should find the restriction constitutional because observers could conceivably mistake the Klan's expression as a religious message supported and endorsed by the state.[354] The Court in response noted simply, "We find it peculiar to say that government promotes or favors a religious display by giving it the same access to a public forum that all other displays enjoy."[355]

The plurality opinion sparked a variety of responses. Although Justice Thomas agreed with and joined in the plurality's opinion, he wrote separately to denote that the Klan's expression was essentially and indisputably political rather than religious.[356] Nonetheless, because the Board presented an Establishment Clause defense, the Court decided the case applying Establishment Clause jurisprudence.[357] In contrast, O'Connor, who did not join the plurality, emphasized her discontent with the plurality's characterization of the appropriate jurisprudential standard and its adoption of a per se rule.[358] In addition, she believed it important that the display bear a sign disclaiming government sponsorship of the exhibit.[359]

For his part, Souter wrote to degrade the per se rule, which he characterized as an irrebuttable presumption, and to reinforce the perhaps forgotten ability of the Board to ban all unattended displays in the Square.[360] Another apparent danger Souter feared was that while on the Square the cross "would have been the only private display on the public plot."[361] Despite the Board's legitimate apprehensions, however, Souter felt its response inappropriate.[362] Rather than simply banishing the display altogether, Souter argued, the Board should either have required the Klan to post a disclaimer or banned all unattended displays from the square.[363] Because it opted for neither of these alternatives, it could not in good faith claim the display endorsed any religious message inherent in the Klan's cross.[364]

In dissent, Justice Stevens advocated a bright-line rule which "created a strong presumption against the installation of unattended religious symbols on public property."[365] Stevens considered the unattended displays in *Capitol Square* to be of a fundamentally different nature than the private speakers in both *Lamb's Chapel* and *Widmar*.[366] Unattended displays inherently convey a

353. *Id.*
354. *Id.*
355. *Id.* The Court further distinguished *Allegheny County* and *Lynch*, two previous display cases the Board relied upon, by noting that those cases involved, respectively, unequal access to the forum and a display which did not endorse religion. *Id.* at 2448.
356. *Id.* at 2450 (Thomas, J., concurring).
357. *Id.* at 2447-50.
358. *Id.* at 2451, 2454 (O'Connor, J., concurring in part).
359. *Id.* at 2453.
360. *Id.* at 2457, 2459 (Souter, J., concurring in part).
361. *Id.* at 2461.
362. *Id.*
363. *Id.* at 2461-62.
364. *Id.* at 2462.
365. *Id.* at 2464 (Stevens, J., dissenting).
366. *Id.* at 2471.

message which, unlike oral speech, cannot be disassociated from the state, and in fact can be reasonably perceived as state endorsement of the expression. Indeed, "when a statue or some other freestanding, silent, unattended immoveable structure—regardless of its particular message—appears on the lawn of the Capitol building, the reasonable observer must identify the State either as the messenger, or at the very least, as one who has endorsed the message."[367] Hence, in Stevens's view, a public body which permitted any group to erect unattended religious displays on public property violated the fundamental principles enshrined in the Establishment Clause.

Problems abound in Stevens's approach. Foremost among these is its hostility towards religious speech. For example, under Stevens's framework, only unattended *religious* displays are prohibited. Exhibits erected for any other motive, no matter how unpopular or distasteful, are allowed. This result is rendered even more absurd when one considers the preeminent protection afforded religious expression under the Free Exercise Clause. Yet Stevens would bestow upon the state the power to exclude "unattended symbols when they convey a type of message with which the state does not wish to be identified."[368] Perhaps Stevens overlooks that the First Amendment protects all speech, not simply that which happens to conform with a given public body's perception of the appropriate. At one point, Stevens noted, "I think it obvious, for example, that Ohio could prohibit certain categories of signs or symbols in Capitol Square—erotic exhibits, commercial advertising, and perhaps campaign posters as well—without violating the Free Exercise Clause."[369] In short, Stevens attempted singlehandedly to relegate a vital facet of private religious speech "to a realm heretofore inhabited only by sexually explicit displays and commercial speech."[370] As Scalia pointedly concluded, however, "It will be a sad day when this Court casts piety in with pornography, and finds the First Amendment more hospitable to private expletives than to private prayers."[371]

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367. *Id.* at 2467.
368. *Id.* at 2468.
369. *Id.*
370. *Id.* at 2449.
371. *Id.* Professor Rodney Blackmun describes why protection of religious speech is critical to American democracy:

> Religious discourse is a form of speech, and religious activity and practice, even if not considered forms of speech, are found in primitive and advanced states alike. The reason why religious activity is so ubiquitous is because it fills needs. Humans tend to seek answers to ultimate questions: Why am I here? What is the meaning of life? How should I relate to other living creatures and nature itself? How did life develop? How should I act? Is there any life to which I can aspire that transcends this earthly one? Is it an innate aspect of the human psyche to engage in religious speculation, or is it a reflection of our collective state of ignorance that will become stated in time when science can supply more answers to basic questions? Either way, the centrality of religious thought and practice to much of humankind cannot be easily denied. If our democratic state is to exist for the fulfillment of human needs, then this religious expression and practice must be regarded as a very important value to be protected along with other forms of speech.

Rodney J. Blackmun, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 287-88 (1994).

B. Rosenberger v. Rector & Visitors of the University of Virginia[372]

Rosenberger, unlike *Capitol Square*, involved a novel Establishment Clause issue: whether a university which provided payments to outside contractors for various student group expenses could refuse payment because a student paper "primarily promot[ed] or manifest[ed] a particular belie[f] in or about a deity or ultimate reality."[373] Perhaps Justice O'Connor best characterized the dilemma confronting the court as one "at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities."[374]

The University of Virginia (University), in an attempt to "enhance the University environment,"[375] allowed various student groups to apply for funding distributed from the Student Activities Fund (SAF), which was comprised and replenished by a mandatory fee of $14 per student per semester.[376] University guidelines charged the student council with responsibility for distributing SAF resources, and further required that in lieu of direct payments to the particular student groups, the council should reimburse the group's creditors directly.[377] Funding, however, was not automatic. In fact, only those groups who first obtained CIO, or Contracted Independent Organization status, were eligible for consideration.[378] Importantly, University policy excluded religious organizations from achieving CIO status.[379]

In 1990, Rosenberger, the complainant, formed Wide Awake Productions, or WAP, to publish a school paper dedicated to "challeng[ing] Christians to live, in word and deed, according to the faith they proclaim and to encourage students to consider what a personal relationship with Jesus Christ means."[380] Despite this mission, the University awarded WAP CIO status, evidencing it did not consider WAP a religious organization.[381] Nonetheless, the Appropriations Committee, as did all subsequent University bodies, denied WAP's request that $5862 be paid to its printer for expenses associated with printing its publication.[382] The committee based its denial on WAP's University prohibited status as a religious activity in that "the newspaper promoted or manifested a particular belief in or about an ultimate deity."[383] Unwilling to be subjected to what he considered blatant religious discrimination, Rosenberger (and WAP) filed suit in district court, alleging violations of their free speech, free press, and free exercise rights, as well as their right to equal protection of the law.[384] The district court entered summary judgment against WAP, citing the

372. 115 S. Ct. 2510 (1995).
373. *Rosenberger*, 115 S. Ct. at 2513.
374. *Id.* at 2525 (O'Connor, J., concurring).
375. *Id.* at 2514.
376. *Id.*
377. *Id.* at 2414-15.
378. *Id.* at 2514.
379. *Id.* at 2515.
380. *Id.*
381. *Id.* University Guidelines defined a religious organization as one "whose purpose is to practice a devotion to an acknowledged ultimate reality or deity." *Id.*
382. *Id.*
383. *Id.*
384. Rosenberger v. Rector & Visitors of the Univ. of Va., 759 F. Supp. 175, 176-78 (W.D.

Establishment Clause as a bar to releasing the funds.[385] After the Fourth Circuit affirmed, Rosenberger filed for and was granted certiorari. In a narrow 5-4 decision, the Supreme Court reversed.

The majority, led by Justice Kennedy, characterized the SAF as a forum for speech purposes and found that its refusal to authorize the reimbursement was a form of invidious viewpoint discrimination.[386] In depicting the restriction as one which restricted only "those student journalistic efforts with religious editorial viewpoints," the Court noted the skewing effect on the marketplace of ideas.[387] To this end, the Court relied on its conclusion in *Lamb's Chapel*, where it held that a school's refusal to permit a religious group access to show a Christian film constituted viewpoint discrimination.[388] In an attempt to evade this already stretched *Lamb's Chapel* rationale, the University asserted that funds were fundamentally different from facilities.[389] In short, the University argued funds are scarce, facilities are not.[390] The Court in response turned the University's argument on its head and remarked that under this premise the University could engage in viewpoint discrimination in the *Lamb's Chapel* context if physical space exceeded money.[391] Because the Establishment Clause forbad such discrimination, the University could likewise not justify its viewpoint discrimination on economic scarcity grounds.[392] Finally, the Court feared the broad sweep of the University's restriction, noting that if pressed to its bounds it could preclude "funding of essays by hypothetical student contributors named Plato, Spinoza, and Descartes."[393] Moreover, because the prohibition applied to atheists as well, the policy would preclude the writings of Karl Marx, Bertrand Russell, and Jean-Paul Sartre.[394] Given these concerns, the University's refusal to allow Rosenberger and WAP to participate in SAF funding constituted a denial of their free speech rights.[395]

This free speech protection, however, would be trumped if the University could demonstrate that the Establishment Clause mandated its restriction.[396] Unfortunately for the school, the Court held the Establishment Clause imposed no such prohibitions, and then characterized the SAF program as one emanating neutrality and evenhandedness.[397] Rather than seeking to advance religion, the program's object was "to open a forum for speech and to support various student enterprises, including the publication of newspapers, in recognition of the diversity and creativity of student life."[398] Nor, the Court

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Va. 1992).

385. *Id.* at 182-83.
386. *Rosenberger*, 115 S. Ct. at 2517.
387. *Id.* at 2517-18.
388. *Id.* at 2517.
389. *Id.* at 2519.
390. *Id.*
391. *Id.*
392. *Id.*
393. *Id.* at 2520.
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.* at 2521-22.
398. *Id.* at 2513.

opined, could the program be construed as University endorsement of religion, especially given the extensive measures and disclaimers the school required CIOs to implement.[399]

The final card played by the majority tendered the indisputable fact that no funds flowed directly to WAP.[400] Although the Court conceded the expenditure of funds, it preferred to focus upon the nature of the benefit WAP received. In this respect, the SAF program did not differ from one in which the University provided eligible student groups access to its printing services.[401] Indeed, when viewed in this light, religion benefitted only incidentally.[402]

In her concurrence, Justice O'Connor articulated several reasons for her decision, noting first the independence maintained between the student groups and the University.[403] Because school guidelines required explicit disclaimers, readers of WAP were on notice that it was not a University sponsored publication.[404] Second, the mechanism by which the University distributed funds ensured no impermissible uses.[405] To this end, O'Connor characterized the situation as analogous to one where the school simply made available on an equal basis a printing press for student use.[406] Third, the numerous publications, in addition to WAP, funded by SAF served to decrease the likelihood that readers would perceive the University as endorsing the publication's religious message.[407] Finally, O'Connor reasoned the possibility that a dissenting student could refuse to pay into the fund protected the fee from a Free Speech Clause challenge and ensured few disputes over the issue of religious funding.[408]

Justice Thomas, who agreed with the Court's opinion, wrote only to disagree with the dissent's historical conclusions.[409] In short, the dissenters, led by Souter, offered Madison's *Remonstrance* as evidence that the Establishment Clause necessitated the University's SAF restriction.[410] Unfortunately, Souter mischaracterized and distorted the *Remonstrance* in an attempt to render it applicable to the issue at hand. The *Remonstrance* involved an assessment to support Christian teachers; unlike the exaction upon the students here, it did not involve using a common pool fund to bestow, on a neutral basis, benefits to a variety of institutions without regard to secular or sectarian viewpoints. As such, the tax which prompted the *Remonstrance* was of a different nature than the "tax" imposed in *Rosenberger*.[411] Following this historical

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399. *Id.* at 2523.
400. *Id.*
401. *Id.* at 2524.
402. *Id.*
403. *Id.* at 2526 (O'Connor, J., concurring).
404. *Id.* at 2527.
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.* O'Connor's emphasis on this point lacks substance, however, because there was no mechanism through which an objecting student could receive a pro-rata reimbursement.
409. *Id.* at 2528 (Thomas, J., concurring).
410. *Id.* at 2535-36 (Souter, J., dissenting).
411. After discussing the *Remonstrance*, Souter proceeded to cite the Virginia Bill. *Id.* at

discussion, the dissenters ridiculed the Court's reliance on the channel through which the funds flowed and its characterization of the restriction as viewpoint rather than content discrimination.[412] Indeed, in Souter's mind, the Court for the first time, and in direct contravention of convincing Establishment Clause jurisprudence, upheld "direct core funding of core religious activities by an arm of the state."[413]

In short, *Rosenberger* posed an unusual issue for decision. In this respect many would contend Souter's dissenting opinion simply lends credence to the homage that hard cases make bad law. Unfortunately, *Rosenberger* does not fall into this category. Its facts were straightforward, the inequitable effect on WAP obvious. Yet the dissent consisted of unrealistic and unfounded assumptions regarding the threat posed to religious freedom by the alleged Establishment Clause breach. Even more upsetting is Souter's failure to mention the University's unabashed double-standard with respect to funding publications of a religious nature. In fact, nowhere does the dissent, which critically perused WAP's publication for a Christian message, note that the "University has provided support to The Yellow Journal, a humor magazine that has targeted Christianity as a subject of satire, and Al-Salam, a publication 'to promote a better understanding of Islam to the University Community.'"[414] Indeed, only Justice O'Connor recognized the Court was treading new ground and acknowledged the inadequacy of strict reliance on precedent. Unlike the dissenters, however, the majority, including O'Connor, proved willing to make an equitable decision based on a thorough understanding of what government neutrality entails.[415]

VI. ANALYSIS OF THE COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE

Rosenberger and *Capital Square* represent the culmination of the Court's inability to delineate a workable Establishment Clause framework. In addition, the decisions exemplify the frustration engendered between the Justices with respect to which, if any, framework is worthy of selection and application. Consider the legal landscape before *Rosenberger* and *Capital Square*. The *Lemon* test, which was twenty-four years in the making before its explicit adoption in 1971, was considered an unabashed failure, having lingered on uselessly for twenty-five years after its creation. Yet despite the criticism heaped on *Lemon* from courts and commentators, the Court had not expressly

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2536-37. Unfortunately, he conveniently overlooked the Bill's religious presumptions and its historical context as one of many Virginia laws passed by Madison and Jefferson which dabbled in religious matters. *See infra* notes 488-90 and accompanying text.

412. *Rosenberger*, 115 S. Ct. at 2544, 2549-50.

413. *Id.* at 2533.

414. *Id.* at 2527 (O'Connor, J., concurring).

415. For more detailed discussions of *Rosenberger*, see Ralph D. Mawdsley & Charles J. Russo, *Religion in Public Education:* Rosenberger *Fuels an Ongoing Debate*, 103 ED. LAW REP. 13 (1995) (arguing that *Rosenberger* was merely the culmination of an equal access movement that began with *Widmar* and included *Mergens* and *Lamb's Chapel*); David Schimmel, *Discrimination Against Religious Viewpoints Prohibited in Public Colleges and Universities: An Analysis of* Rosenberger v. The University of Virginia, 102 ED. LAW REP. 911 (1995) (maintaining that *Rosenberger*'s legal impact upon Establishment Clause jurisprudence will be limited and narrow).

repudiated it. Nonetheless, the Court had not applied the test in any of its Establishment Clause decisions rendered in the last two terms. Instead, it had simply ignored, as it for the most part did in *Rosenberger* and *Capitol Square*, *Lemon*'s existence. Failure to formally repudiate *Lemon* did not, however, prevent the Court from continuing its dialogue over what framework should replace the admittedly defunct *Lemon* test. Undoubtedly, as *Capitol Square* and *Rosenberger* evidence, unanimity in this respect is not likely to occur in the near future. Consider that in these two cases alone, the Justices proffered at least three different tests: O'Connor's endorsement test, the per se test applied in *Capitol Square*, and the historical test of the Rehnquist, Scalia, Kennedy, and Thomas wing. Although the survival of any of these tests is tenuous and speculative at best, it at long last appears that the Justices agree that *Lemon*'s limited utility does not justify its continued application. In this respect the following discussion traces *Lemon* from its inception to its demise. The critique then turns to the educational arena, where the Court reaped the inconsistent results sowed from its endorsement of separationism and its adoption of *Lemon*. The reasons for these failures, inattentiveness to, and ignorance of, history, are then discussed. In short, *Lemon* failed because it, like most of the Court's Establishment Clause jurisprudence, is based on inaccurate history. To this end, the discussion attempts to characterize the views of Madison, Jefferson, and the other Framers and Founders in a fair, and often overlooked, historical light. This historical misinterpretation is itself based on the Court's most fundamental mistake—its incorporation of the Establishment Clause and its subsequent application to the states. This analysis proffers that the incorporation decision, and the Court's subsequent attempts to use originalist, Framers' intent to justify its regulation of even-handed, nonpreferential state actions with respect to religion is inapposite to the Clause's inherent federalism component and is therefore the root of the Court's inability to render equitable and historically supported Establishment Clause decisions.

A. *The Failure of the* Lemon *Test and the Fruitless Search for Workable Standards*

The Court's Establishment Clause jurisprudence is, to say the least, a mess. Sadly, even the Justices themselves acknowledge the "hopeless disarray" which permeates the inconsistent stack of "embarrassing" Supreme Court Establishment Clause announcements.[416] Much of the turmoil can be traced to the Court's resolute adherence to the maligned *Lemon* test. Fortunately, there has been in recent years a strident shift away from this jurisprudence in which inconsistency was the only hallmark.[417]

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416. *See, e.g.*, *Rosenberger*, 115 S. Ct. at 2532 (Thomas, J., concurring); Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting). Note that since *Everson* the Court has decided at least 140 Establishment Clause decisions. *See* Stuart D. Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247 (1995).

417. In *Aguillard*, Justice Scalia had the following to say about the effect of *Lemon* upon the Court's Establishment Clause doctrine:

Chief Justice Rehnquist, the ringleader of the *Lemon* malcontents, initiated the shift away from the historically baseless test in 1985. There, in *Wallace v. Jaffree*,[418] he voiced discontent with both the purpose and entanglement prongs. The purpose element, he noted, was particularly useless given the Court's acceptance of virtually every legislature's proffered secular purpose.[419] Such pretextual inquires unnecessarily tempted legislators to simply express a secular purpose so as to ensure compliance with the purpose prong.[420] In contrast, the entanglement element created the "insoluble paradox" of requiring public officials to closely monitor parochial schools under the purpose or effect prongs, yet at the same time concluded that overarching supervision created an unconstitutional entanglement.[421]

Justice O'Connor, although a newcomer to the Court, also expressed doubts about *Lemon*'s usefulness in *Wallace*.[422] Nonetheless, she argued for its retention in hope that the Court could refine *Lemon* so as to ensure it not only reflected accurate historical interpretation but "also proved capable of consistent application."[423] She further lobbied for adoption of her view, expressed the year before in *Lynch v. Donnelly*,[424] that the "Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community."[425] This determination, O'Connor further asserted, required the Court to determine, under *Lemon*'s purpose and effect prongs, "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement."[426]

In 1987, Scalia jumped on the anti-*Lemon* bandwagon by not only characterizing the test as having no basis in history and yielding unprincipled

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> Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional. We have said essentially the following: Government may not act with the purpose of advancing religion, except when forced to do so by the Free Exercise Clause (which is now and then); or when eliminating existing governmental hostility to religion (which exists sometimes); or even when merely accommodating governmentally uninhibited religious practices, except that at some point (it is unclear where) intentional accommodation results in the fostering of religion, which is of course unconstitutional.

Aguillard, 482 U.S. at 636.

418. 472 U.S. 38 (1985).

419. *Wallace*, 472 U.S. at 108 (Rehnquist, J., dissenting). The purpose prong posed other problems as well. For instance, courts frequently held that the purpose prong reflected the erroneous assumption that the "Establishment Clause imposes a constitutional disability on religion . . . rather than a protection of religious liberty." Michael S. Paulsen, Lemon *Is Dead*, 43 CASE W. RES. L. REV. 795, 801 (1993). The purpose prong thus "misleadingly implied (and many courts thus held) that laws motivated by a desire to promote religious freedom or to accommodate religious practice automatically constitute an Establishment Clause violation." *Id.*

420. *Wallace*, 472 U.S. at 108.

421. *Id.* at 109. The entanglement prong was under increasing fire; in *Aguilar v. Felton*, Justice O'Connor boldly stated, "I question the utility of entanglement as a separate Establishment Clause standard in most cases." Aguilar v. Felton, 473 U.S. 402, 422 (1985) (O'Connor, J., dissenting).

422. *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring).

423. *Id.* at 69.

424. 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

425. *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

426. *Id.*

results,[427] but also by advocating that the Court abandon the purpose element entirely.[428] By the time the Court decided *Lamb's Chapel* six years later, Scalia, and Thomas and Rehnquist along with him, were advocating that the Court scrap *Lemon* completely.[429] To this extent, Scalia forcefully advised, "I will decline to apply *Lemon*—whether it validates or invalidates the government action in question—and therefore cannot join the opinion of the Court today."[430] His remarks regarding *Lemon* were justifiably hostile:

> The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.[431]

Indeed, as Scalia noted, a majority of the current Justices had personally condemned the test in one form or another, but the Court as a whole, despite numerous opportunities, had never specifically repudiated it.[432]

The 1994 *Kiryas Joel* decision marked the turning point in the efforts of Rehnquist, Thomas, Kennedy, Scalia, and O'Connor to rid Establishment Clause jurisprudence from *Lemon*'s sour effects. Although the Court did not, and has not, specifically countenanced that *Lemon*'s days are over, it has not applied the test in any case decided since 1993. In *Kiryas Joel*, only Justice Blackmun clung to the principles enunciated in *Lemon*.[433]

This trend away from *Lemon* continued in 1995 in both *Rosenberger* and *Capitol Square*. Noticeably, the *Capitol Square* plurality (Rehnquist, Scalia, Kennedy, and Thomas) applied neither *Lemon* nor O'Connor's increasingly popular endorsement test. Rather, it created the per se rule described above. Not surprisingly, O'Connor, joined by Souter and Breyer, advocated the endorsement test. In the unattended display context, O'Connor argued, endorsement would occur if a reasonable observer, knowledgeable of the "history and context of the community and the forum in which the religious display exists,"[434] would believe the display to be endorsed by the state. Justice

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427. Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

428. *Id.* at 640.

429. Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (1993) (Scalia, J., concurring).

430. *Id.* at 2150.

431. *Id.* (citations omitted).

432. *Id.*

433. Board of Education of Kiryas Joel Village Sch. Dist. v. Grumet, 114 S. Ct. 2481, 2494-95 (Blackmun, J., concurring). Scalia, while disagreeing with the Court's *Kiryas Joel* decision, wholeheartedly supported its "snub" of the *Lemon* test. *Id.* at 2515 (Scalia, J., dissenting). He correctly pointed out, however, the difficulties the Court imposes by not specifically denouncing the test. For example, the *Kiryas Joel* parties produced over 80 pages of briefs devoted solely to the test's principles. *Id.*

434. *Capitol Square*, 115 S. Ct. at 2455.

Stevens also applied the endorsement test but differed with O'Connor over the proper level of knowledge the Court should attribute to the reasonable observer.[435]

The *Rosenberger* Court, like the *Capitol Square* Court, was dominated by the Rehnquist, Scalia, Kennedy, and Thomas wing. Hence it ignored both *Lemon* and the endorsement test, which O'Connor loyally and steadfastly defended.[436] Instead, Justice Kennedy characterized the necessary inquiry as "one into the purpose and object of the governmental action in question and . . . into the practical details of the program's operations."[437] Kennedy's opinion also emanated nonpreferentialist tendencies, noting at one point that "the apprehensions of our predecessor involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects."[438] To this end, the Souter dissent, perhaps too secure in the Court's historical separationism, admonished that the nonpreferential battle was waged and lost long ago.[439] Perhaps Souter is ignorant to the Scalia wing's intent to replace separationism with nonpreferentialism. In any event, it will be neither Scalia nor Souter, but O'Connor who will determine the direction of the Court's Establishment Clause jurisprudence.[440]

The very real possibility is that regardless of the test applied, Establishment Clause cases will inevitably yield inconsistent decisions. Sadly, even a Supreme Court Justice has admitted that the only guiding source in this jurisprudential area is the Justices' personal and political views.[441] One commentator reaches precisely this result:

> If the Court should repudiate the test . . . it would surely employ similar considerations . . . . Moreover, tests have little to do with decisions; the use of a test lends the appearance of objectivity to a judicial opinion, but no evidence shows that a test influences a member of the Court to reach a decision he or she would not have reached without that test. And Justices using the same test often arrive at contradictory results.[442]

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435. *Id.* at 2466 n.5 (Stevens, J., dissenting).

436. *See Rosenberger*, 115 S. Ct. at 2526.

437. *Id.* at 2521.

438. *Id.* at 2522.

439. *Id.* at 2537 n.1 (Souter, J., dissenting).

440. As *Rosenberger* depicts, Rehnquist, Scalia, Kennedy, and Thomas will continue to support nonpreferentialism; likewise, Souter, Stevens, Ginsburg, and Breyer are undoubtedly separationist. Hence, O'Connor and her endorsement test will tack the Court's Establishment Clause future. Note that O'Connor's endorsement tests are, for the most part, well received by scholars. For a critique of the test, see Matthew S. Steffey, *The Establishment Clause and the Lessons of Context*, 26 RUTGERS L.J. 775 (1995) (maintaining that the endorsement test is correct in its focus on the context of the dispute).

441. Justice Jackson observed:

> It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins . . . . Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions.

McCollum v. Board of Education, 333 U.S. 203, 237-38 (1948) (Jackson, J., concurring)

442. LEVY, *supra* note 9, at 156.

In this respect, consider that even though the bell has tolled for *Lemon*, disputes are already arising over the scope of the endorsement test.[443]

B. *The Education Mess*

1. Private Education

Nowhere has the effects of the Court's inability to articulate a standard been more profound than in the sphere of education. Consider that the Court decided many of these cases before it delineated the *Lemon* test. As such, it was forced to conform or distinguish those pre-*Lemon* decisions once it articulated the *Lemon* test. Moreover, education cases crop up with such frequency that in many instances the Court has not even applied the *Lemon* test when resolving an Establishment Clause dispute over education. In short, the disputes have outlived the test that was designed to resolve them. The result is a sphere of Establishment Clause jurisprudence which is distorted and filled with meaningless distinctions.

This unfortunate byproduct is especially true in the context of aid to parochial schools, where time and again the Court has reiterated that the Establishment Clause permits incidental benefits and does not preclude religious schools and their students from partaking in neutral government benefit programs. Yet even a cursory analysis of its decisions belies this assertion. Consider in this respect Chief Justice Rehnquist's lengthy but pointed summary of the Court's aid to parochial school decisions:

> [A] State may lend to parochial school children geography textbooks that contain certain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children may write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools, but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing services inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered

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443. Note also that *Lemon* still has some, if few, supporters. In this vein, see Carol F. Kagan, *Squeezing the Juice from* Lemon: *Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621 (1995) (arguing that a modified *Lemon* test provides a suitable framework for Establishment Clause jurisprudence).

> reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[444]

Simply put, the Court has become mired in separationist dogma and consequently lost sight of the children disadvantaged by its decisions.[445] Although the separationist fear[446] is understandable, none of the above situations, considered either individually or cumulatively, bestow upon religious schools a substantial, direct financial gain. Indeed, all the benefits Justice Rehnquist summarized are unrelated to the schools' religious emphasis and for the most part unadaptable to sectarian purposes.[447]

A second and equally divisive concern in the parochial school arena constitutes the appropriateness of providing tax relief to parents of children who attend parochial school. Undoubtedly, these parents "bear a particularly great financial burden in educating their children."[448] They are not, as many claim, double taxed, because taxes by their nature are mandatory while parochial school attendance is not. Yet parents of parochial school children contribute greatly to the maintenance of public schools. By contributing through taxes to the health of the public education system but sending their children to parochial schools, these parents effectively subsidize the education of public school students. Hence, those adverse to tax credits or exemptions for parents of parochial school students would do well to consider the resultant strain on both the public education system and the public coffers should enrollment in nonpublic schools vastly decline. Consider that if the number of private school students were to decrease and the pool of public school students necessarily increase, the per student expenditures for public school students would fall dramatically, thereby drastically reducing the quality of public school education. When considered in this light, the effect of a paltry tax credit, deduction, or exemption is negligible at most.

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444. Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (citations omitted).

445. One commentator states that an unduly rigid separationism affects American society, not just schoolchildren, in drastic ways. Lupu, *supra* note 188, at 279. Lupu posits, in fact, that strong separationism favored irreligion by advocating secular rationality, which is in turn partial to a particular set of institutions. *Id.* Nor "is secular rationality particularly conducive to the life of the spirit, without which it may not be possible for a nation to thrive." *Id.*

446. Separationists are concerned not that religious schools will lead to a formal establishment but rather that the more substantive and direct the aid becomes, the less the schools resemble religious schools and the more they resemble public schools which merely emphasize religion. While one could conceive of situations where this could occur, e.g., if public funds were used to pay religious school teacher's salaries, none of the parochial school aid cases discussed posed any real threat of such an egregious effect.

447. Levy resolved the issue as follows: "If proper restraints exist on the funds for parochial schools so that tax monies are not spent for religious purposes and the aid rendered is comparable to the value of the secular education provided by the schools, fairness again seems to be on the accommodationist side." LEVY, *supra* note 9, at 179.

448. Mueller v. Allen, 463 U.S. 388, 402 (1983).

2. Public Education

An unfortunate side effect of both the Court's rulings and strict-separationist pressure has been the ability of overzealous public interest lawyers[449] to threaten school boards with litigation, and thereby frighten them into submission and foreclose all discussion of religion in the public school curriculum.[450] This does not have to be so. The Establishment Clause prohibits only those interactions between public schools and religion which are designed with a religious purpose to reap benefits for a religion or a religious sect. The Establishment Clause does not and could not prohibit discussion of religious literature or the instruction of students in subjects such as religious history or religious philosophy—provided, that is, that such courses contain themselves to the objective study of religion.[451] Simply put, there is a difference between teaching and preaching, and it is the line separating the two that public schools may not cross. As Justice Black so eloquently put it in *McCollum*:

> Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. Yet the inspirational appeal of religion in these guises is often stronger than a forthright sermon . . . . Certainly a course in English literature that omitted the Bible and other powerful uses of our mother tongue for religious ends would be pretty barren. And I should suppose it is a proper, if not an indispensable, part of preparation for worldly life to know the roles that religion and religions have played in the tragic story of mankind. The fact is that for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences . . . . One can hardly respect a system of education that would leave the student wholly ignorant of the currents of religious thought that move the world society for a part in which he is being prepared.[452]

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449. Levy made the following comments regarding this problem: "The American Civil Liberties Union has not always understood. Suits brought by the ACLU to have courts hold unconstitutional every cooperative relationship between government and religion can damage the cause of separation by making it look overrigid and ridiculous." LEVY, *supra* note 9, at 240. For an example of overrigid absurdity, see John M. Hartenstein, *A Christmas Issue: Christian Holiday Celebration in the Public Elementary Schools is an Establishment of Religion*, 80 CALIF. L. REV. 981 (1992), in which the author posits that, among other things, creating Christmas art and decorations, singing Christmas carols, and decorating the classroom and exchanging gifts at Christmastime, violate the Establishment Clause. *Id.* at 1026.

450. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141, 2149 (Scalia, J., concurring).

451. *See* Justice Clark's majority opinion in *Abbington Township*, where he posits:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.

Abbington Township, 374 U.S. at 225.

452. McCollum v. Board of Education, 333 U.S. 203, 236 (1948).

Yet one has to wonder how many students at any level of public education have a basic understanding of the tenets and the history of the major religions. So long as comparative religious studies are ignored, then students in public schools will not only be indoctrinated with distorted history but also possess a fundamental lack of understanding regarding the advancement of civilization.[453] Moreover, failure to emphasize secular courses in comparative religion and religious history may aid in the production of generations of children who possess no moral code.[454] While it is certainly not a function of public education to indoctrinate children with religion, it is the sad realism that if public schools do not attempt to provide pupils with moral guidance and some semblance of a framework for resolving moral dilemmas and making moral choices, then many students will never receive such instruction. Although the study of morality may be attempted and perhaps accomplished without a discussion of how various religions approach moral problems, it is indisputably not complete without such discourse.[455] It is this function which the objective study of religion best serves.[456]

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453. For a similar conclusion, see Warren A. Nord, *Religion, the First Amendment, and Public Education*, 8 B.Y.U. J. PUB. L. 439 (1994), where the author states:

> There are, however, good secular, liberal reasons for requiring the study of religion in the public schools.
>
> A liberal education must avoid indoctrination. We indoctrinate when we systematically avoid giving students the intellectual and imaginative resources to make sense of competing interpretations of contested matters. . . . [A] good deal of what we teach students—about history, nature, morality, and human nature—is religiously contested, yet students are taught virtually nothing about religious interpretations of these contested matters. In this respect, public education is strikingly illiberal; public education indoctrinates students against religion.

Id. at 439.

454. Consider in this regard, Justice Jackson's dissent in *Everson*. There, he stated that our public school system

> is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion.

Everson, 330 U.S. at 23-24. Jackson's assumptions are unrealistic. Religious views, as are most others, are usually developed during childhood and adolescence. It is highly unlikely that one who has no concept of either the function of religion or an understanding of the major world religions, will, upon completion of secular studies, be better fitted to choose his religion.

455. Unfortunately, this is the alternative currently in favor. One author explains the inconsistencies between this view's supporters and their justification—liberal neutrality—for supporting this view, as follows:

> This is the phenomenon of selective multi-culturalism: boundless tolerance and respect for some voices, and ruthless suppression of others.
>
> . . . .
>
> The effect of selective post-modernism is to allow secular ideologies to use political muscle to advance their causes, including using the public schools to inculcate their ideals, without even the psychological constraint of liberal neutrality, but at the same time to preserve liberal formalism in court to ensure that religion is not included in the public dialogue. Thus, in New York City the children are read Heather Has Two Mommies in the first grade and given information on anal intercourse in the sixth; but, as the Tenth Circuit recently held, The Bible in Pictures must be removed from the shelf of the first grade classroom library.

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, 187-88.

456. Note that such a study would not be complete without discussing the option of irreligion,

Fear of Establishment Clause litigation has also chilled the willingness of legislatures and school districts to authorize moments of silence, which, contrary to popular belief, the Court has not deemed unconstitutional. In fact, the very Court that declared unconstitutional the Alabama statute in *Wallace v. Jaffree* remarked that "[t]he legislative intent to return prayer to the public schools, is of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday."[457] In that same case, Justice Powell agreed fully with Justice O'Connor's assertion, which stated:

> Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during or after the schoolday. Alabama has facilitated voluntary silent prayers of students who are so inclined by enacting [a law] which provides a moment of silence in appellees' schools each day. *The parties to these proceedings concede the validity of this enactment.*[458]

Hence, states are free to authorize moments of silence provided they do not, explicitly in the statute or its history, or as applied through teachers, encourage students to use the moment for prayer. Because moment of silence statutes do not aid, even incidentally, religion or religious sects, or favor religion over irreligion, they should withstand Establishment Clause challenges. Similarly, because moments of silence possess no coercive element sufficient to trigger a Free Exercise Clause attack, they constitute a workable compromise between mandatory school prayer and perceived separationist hostility towards religion. Indeed, as Justice O'Connor noted in *Wallace*, "It is difficult to discern a serious threat to religious liberty from a room of silent, thoughtful schoolchildren."[459]

In short, the Supreme Court's attempt to micromanage the smallest influence of religion in the nation's public schools has proved disastrous. Instead of recognizing that cultural and religious practices vary by locale, it has imposed a single standard by which it measures every state practice touching religion. Rather than attempting to understand and compensate for these innumerable differences, however, the Court should return to local school districts and state legislatures control over its public school curriculum. If nothing else, *Kiryas Joel* stands as a reminder of what happens when the Court interferes in effective local solutions to solely local problems.[460] Concerning the Court's oversight of public schools, a perceptive Justice once posited, "However wise this Court may be or may become hereafter, it is doubtful that, sitting in Washington, it can successfully supervise and censor the curriculum of every public

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or atheism, which like religion proffers an outlook on life and offers a method of moral problem solving.

457. Wallace v. Jaffree, 472 U.S. 38, 59 (1985).

458. *Id.* at 67 (O'Connor, J., concurring) (emphasis added).

459. *Id.* at 73. Chief Justice Burger, in dissent, remarked that he would add to O'Connor's statement, "even if they choose to pray." *Id.* at 90 (Burger, J., dissenting). He then quoted sarcastically from Horace, "The mountains have labored and brought forth a mouse." *Id.*

460. *See supra* notes 260-75 and accompanying text.

school in every hamlet and city in the United States. I doubt that our wisdom is so nearly infallible."[461]

C. *(Mis)Interpreting Framers' Intent*

The Supreme Court's entire Establishment Clause jurisprudence, including its ill-fated *Lemon* test, is grounded in its separationist interpretation of Framer's intent. Unfortunately, a person reading the Supreme Court's Establishment Clause opinions would presume first that Madison and Jefferson opposed any governmental support, be it state or national, of religion, and second, that no other Founder or Framer expressed any views on the matter. While correct to an extent, such unnecessarily broad statements are misleading. Although Madison and Jefferson were strong advocates of separation of church and state, neither adhered to, or practiced while in public office, an overly rigid separation. In this respect, the Court, as well as many commentators, conveniently overlook the acts and writings of Madison and Jefferson which either conflict with separationism or reflect a nonpreferentialist tendency. Moreover, those who overemphasize Madison's *Remonstrance* and Jefferson's Danbury letter and Virginia Bill for Religious Freedom inadvertently simplify Madison's and Jefferson's church-state jurisprudence.

1. Madison

Consider in this respect that the *Remonstrance* is only one of many documents of a religious nature penned by Madison. In fact, only four years after writing the *Remonstrance*, Madison drafted the Bill of Rights, including, of course, the Establishment Clause. His first draft, which was not adopted, read as follows: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."[462] Although critics rightly dismiss this initial version as insignificant in determining the collective intent of the Framers, it serves one crucial purpose: as the sole product of Madison, it is demonstrative of his, and only his, intent at the time he introduced it.[463] Because Madison was unsure whether the House would adopt his proposed amendment wholesale, the assertion that it fails to reflect his intent is illogical.[464] Clearly, Madison's first proposal manifested a fundamental concern with prohibiting the national government from establishing a national religion.[465]

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461. Epperson v. Arkansas, 393 U.S. 97, 114 (1968) (Black, J., concurring).

462. ADAMS & EMMERICH, *supra* note 19, at 17.

463. *See* CORD, *supra* note 8, at 26.

464. *Id.*

465. Levy states that nonpreferentialist assertions that Madison meant only a national church when adopting the amendment are groundless. LEVY, *supra* note 9, at 123. Levy's claim belies the available legislative history. While Madison may certainly have intended more, the scant history and all the debate indicate that Madison, and the other Framers for that matter, were concerned with national establishments. As will be shown, however, this does not mean Madison's views can be characterized as nonpreferential.

Other acts and documents further demonstrate that Madison developed not a simple separationist viewpoint, but a complex church-state jurisprudence, which was in some instances separationist, in other instances nonpreferentialist. For example, not only did Madison oppose including ministers in the census,[466] but he also objected vehemently, as a member of the Continental Congress in 1785, to an attempt by that Congress to reserve, in the Northwest Ordinance, public land for religious use throughout townships in the western territories.[467] Despite these undoubtedly separationist acts, Madison later served on the Congress committee that authorized congressional chaplains.[468] Moreover, as a member of that same Congress, Madison never objected to a proclamation for a day of thanksgiving to allow "the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to peaceably establish a Constitution of government for their safety and happiness."[469]

Madison's actions as the fourth President further cloud the issue. While in office, he issued three proclamations for days of fasting and one for a day of thanksgiving.[470] Although these proclamations were undoubtedly of a religious nature, Madison nonetheless vetoed two different bills concerning religious matters. The first involved a congressional attempt to reserve federal land for a Baptist church which, because of a surveying error, had constructed its building upon federal land.[471] Congress's solution summarily granted the land to the church.[472] Madison, however, objected to the transaction and vetoed the bill because it "comprise[d] a principle and precedent for the appropriation of funds of the United States for the use of and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'"[473] The second bill Madison vetoed an attempt by Congress to incorporate an Episcopal church in the District of Columbia.[474] Despite these vetoes, Madison approved chaplains for the armed forces,[475] an action entirely inconsistent with

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466. *Id.* at 130. To this end, he stated that with regard to those
> employed in teaching and inculcating the duties of religion, there may be some indelicacy in singling them out, as the general government is proscribed from interfering, in any manner whatsoever, in matters respecting religion; and it may be thought to do this, in ascertaining who, and who are not ministers of the gospel.

Id.

467. *Id.* at 129. Madison voiced this opposition in a letter in which he stated, "How a regulation, so unjust in itself, so foreign to the Authority of Congress . . . and smelling so strongly of an antiquated Bigotry, could have received the countenance of a Committee is truly a matter of astonishment." *Id.* at 129-30. Notwithstanding Madison's admonitions, the Northwest Ordinance included a provision reading, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." CORD, *supra* note 8, at 61.

468. CORD, *supra* note 8, at 25.

469. *Id.* at 28.

470. ADAMS & EMMERICH, *supra* note 19, at 25.

471. LEVY, *supra* note 9, at 119.

472. *Id.*

473. *Id.*

474. ADAMS & EMMERICH, *supra* note 19, at 25.

475. LEVY, *supra* note 9, at 121.

the views expressed in his Baptist church land grant veto that no appropriation of government funds could be used to support religion.

Taken together, it is at the least difficult, if not impossible, to assimilate this mass of writings and acts and produce a definitive, comprehensive statement of Madison's intent with respect to church and state. Fortunately, one of Madison's own writings, entitled the "Detached Memoranda,"[476] clarifies much of the confusion. Although Madison wrote the Detached Memoranda after the end of his political career in 1817, it remained undiscovered until 1946, when it was found in the family papers of William C. Rives.[477] In the Memoranda, Madison took a very broad view of the Establishment Clause, contending that thanksgiving day proclamations, other religious proclamations, and congressional chaplains all violate the Constitution. He articulated this as follows:

> Is the appointment of Chaplains to the two houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?
>
> In strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids anything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid out by the entire nation.
>
> The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles . . . .[478]

This portion of the Memoranda denotes two important points. First, Madison believed the Constitution forbad more than just establishments of religion. As stated above, he construed the Constitution to prohibit "anything like an establishment of religion." Second, despite his presidential proclamations and his membership on the committee that approved the congressional chaplains, he considered them unconstitutional. It is unclear, however, whether he considered the above issues and actions unconstitutional at the time he made the proclamations and appointments, or whether these views developed over the course of three decades and were ultimately embodied in the Memoranda. The evidence dictates that it must be the latter. It is unlikely that the same Madison who spoke out vehemently against legislative proposals regarding religion would meekly submit without objection to the proposal of chaplains had he

476. James Madison, untitled manuscript, *reprinted in* Elizabeth Fleet, *Madison's 'Detached Memoranda'*, 3 WM. & MARY Q. 534, 535-68 (1946).

477. CORD, *supra* note 8, at 29. The document was purportedly in Madison's handwriting and authentic. *Id.*

478. Madison, *supra* note 476, at 558.

thought them unconstitutional.[479] The same can be said of the Madison who issued thanksgiving day and other religious proclamations while President, but who in the Memoranda asserted that presidential proclamations of this nature were unconstitutional.[480] It stretches reason to assume that Madison, the most outspoken figurehead of the separationists for thirty years, did so, as he claimed in a letter in 1822, for political expediency.[481] Rather, it is more likely he considered the proclamations constitutional at the time he made them, but later changed his mind.

Although this is a subtle distinction, its meaning is crucial. If Madison believed the acts constitutional when drafting the Constitution and the Bill of Rights and while serving as President, then as Cord states, "Madison should be judged on his behavior, statements, and actions while he was a public servant in the House and in the Presidency, making policy and accountable for it."[482] To the extent one attempts to discern the intent of Madison as a Framer this is correct. Note that even if Madison, as a public servant, considered the proclamations and appointments unconstitutional, no evidence exists to suggest the majority of the remaining Framers shared this view and enshrined it in the First Amendment. Certainly when one considers Madison's intent on a singular rather than a collective level, the Detached Memoranda makes unmistakably clear that Madison, after contemplating the matter for many years, concluded that religious proclamations, congressional chaplains, and any other legislation[483] concerning religion *should be* unconstitutional. In other words, if Madison believed that proclamations and chaplains were constitutional when he approved them, then when using Madison as a barometer of original Framers' intent, commentators should not rely on his later, more stringent views such as those expressed in the Detached Memoranda. This is so because, as the debates evidenced, Madison was deeply involved in articulating to the other Framers what he believed the Clauses to mean. It is not a fair historical determination of intent to attribute to the other Framers views developed by Madison *after* the framing. Those views are relevant only to the extent that they are used to ascertain Madison's intent apart from the other Framers, i.e., his individual church-state jurisprudence which only developed into the strict views expressed in the Memoranda nearly thirty years after the Constitution and Bill of Rights were framed.

2. Jefferson

Unlike Madison, whose works other than the *Remonstrance* have been simply ignored, the works of Jefferson have been unabashedly misinterpreted, and none more so than the fabled Virginia Bill for Religious Freedom.[484] Al-

479. *See* CORD, *supra* note 8, at 32-33.
480. LEVY, *supra* note 9, at 123.
481. CORD, *supra* note 8, at 31.
482. *Id.* at 36.
483. In the Detached Memoranda, Madison also indicated, by way of an example in Kentucky, his opposition to attempts to exempt churches from taxes. Madison, *supra* note 476, at 555.
484. This is not to suggest that courts and scholars have not ignored those acts and writings of Jefferson which are inconsistent with the view adopted by that court or scholar, but rather that

though the Supreme Court has alluded to this Bill on many occasions for support of Jefferson's intent, it has severed the Bill from its historical context and manipulated its intention and effect. Consider, for example, the Court's sweeping assumption in *Everson* that the ideas expressed in the Virginia Bill were not merely consistent with, but embodied and were in fact the same as the provisions later enshrined in the First Amendment.[485] This assumption effectively renders irrelevant the experiences and intent not only of every Framer not involved in the Virginia struggle, but also of every state but Virginia. In fact, the Bill has no bearing whatsoever on the intent of the Framers with respect to the Establishment Clause. It was passed by the Virginia legislature before the Establishment Clause even existed. Moreover, even had the Clause existed, the Bill would be virtually irrelevant. Because the Establishment Clause concerns only the national government, the state governments, including Virginia's, were free to deal with religion as they so chose. Hence, to this end the Bill's only interpretive use is as a barometer of Jefferson's—and to a great extent, Madison's—impressions of the appropriate church and state relationship.[486] Note that Jefferson's noninvolvement in the framing of the Constitution and the Bill of Rights further decreases the Virginia Bill's utility as a reflection of the Establishment Clause.[487]

Jefferson was more consistent, although not entirely consistent, than Madison with respect to his actions regarding religion while serving as a public official. For example, as President, Jefferson demonstrated a separationist bent when he broke with the proclamation tradition instituted by Washington and Adams, and refused to issue pronouncements for days of thanksgiving and national prayer. CORD, *supra* note 8, at 40. He explained his reasons in a letter to a Presbyterian clergyman:

> I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, disciplines, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the States, as far as it can be in any human authority.

Id. Although Jefferson's letter reveals his belief that presidential religious proclamations conflicted with the Religion Clauses, it also underscores his objections to the proclamations on *federalism* grounds. *Id.* Hence, even in the absence of the Religion Clauses, Jefferson would not have issued any religious proclamations.

Notwithstanding Jefferson's break with tradition, he signed into law three extensions of an act which purported to, among other things, "regulate the grants of land appropriated . . . for the society of the United Brethren for propagating the gospel among the heathen." *Id.* at 45. Jefferson further sought and received congressional approval of a treaty with the Kaskaskia Indians contingent upon the national government using federal funds to support a Catholic priest and assist the tribe in constructing a church. *Id.* at 38.

485. Everson v. Board of Education, 330 U.S. 1, 13 (1947).

486. Not all commentators agree. For example, Richard Morgan concludes that Madison's *Remonstrance* set the stage for the Virginia Bill which in turn led to development of a "secularist theory of religious freedom and separation of church and state which within a few short years came to underpin and inform the religion clauses of the new First Amendment." MORGAN, *supra* note 76, at 18. The deficiency in this view, however, is that not all the Framers of the First Amendment participated in drafting either Madison's *Remonstrance* or the Virginia Bill for Religious Liberty. Thus, Morgan's view belittles the views and intent of those nonparticipating Framers.

487. Chief Justice Rehnquist noted the irrationality of the Court's heavy reliance on Jefferson by stating, "He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment." Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

Courts and commentators also have conveniently overlooked the historical context overlaying the Bill. Again, *Everson* serves as an example. There, Justice Rutledge opened his dissent by quoting the preamble to Jefferson's Virginia Bill and proceeded to state, "I cannot believe that the great author of those words, or the men who made them law, could have joined in this decision."[488] Rutledge was wrong. He either ignored or was not aware that Jefferson, Madison, and all the rest of the Virginia Bill supporters passed statutes much more entangled with religion than the one at issue in *Everson*. Indeed, passage of the Bill was part of a "comprehensive revision of Virginia's laws, which included: A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers; A Bill for Appointing Days of Public Fasting and Thanksgiving; and A Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage."[489] Clearly, these bills dabbled not only in religious subjects modern courts would unhesitatingly label unconstitutional, but also on subjects much more pervasively supportive of religion than simply busing children to and from religious schools. Yet the very legislature that passed the Bill for Religious Freedom passed these bills as well.[490]

Finally, consider the religious nature of the Bill, which instead of being neutral as regards religion, presumed a belief in God.[491] Because of modern separationist dogma with respect to any law which espouses a religious preference, those courts which have historically touted the Bill's grandeur would be required to strike it down should a state enact it today.[492] The absurdity of this belies both common sense and the Constitution.

Modern courts, in their quest for separationist support, have interposed their misunderstanding of history upon the Virginia Bill. Undoubtedly,

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488. *Everson*, 330 U.S. at 29 (Rutledge, J., dissenting).

489. ADAMS & EMMERICH, *supra* note 19, at 23-24.

490. Note that the separationists are not alone in their misinterpretation of history. Consider, for example, the opinion of Justice Thomas in *Rosenberger*, where his historical assessment, although more accurate than Souter's, was not flawless. Admittedly, he understood the underlying nature and limitations of both the *Remonstrance* and the Virginia Bill. For example, he correctly noted that Madison objected not to religious participation in neutral government programs but to a specific tax imposed solely for the benefit of Christian teachers. Rosenberger v. Rector & Visitors of the Univ. of Va., 115 S. Ct. 2510, 2529 (1995) (Thomas, J., concurring). Nonetheless, Thomas proceeded to adopt a nonpreferentialist view, and unfortunately based this conclusion in part on Madison's *Remonstrance*. *Id.* at 2529-30. Although Thomas correctly assumed Madison sought to prevent the national government from establishing a national church, he failed to mention Madison's Detached Memoranda, which clearly foreclosed any nonpreferentialist assumptions regarding Madison's church and state jurisprudence. Indeed, it is these uninformed oversights that reduce the credibility of Thomas's opinion. Consider also Thomas's discussion of the historical support for excluding churches from property taxes. *Id.* at 2531. In this section, Madison's name is nowhere to be found, yet in the Detached Memoranda he explicitly indicated his opposition to such exemptions. Perhaps sensing the incompatibility of Madison's views with his own, Thomas rightly remarked that "the views of one man do not establish the original understanding of the First Amendment." *Id.* at 2530. In short, Thomas should have ended his historical appraisal upon correctly concluding that "there is no indication that at the time of the framing [Madison] took the dissent's view that the government must discriminate against religious adherents by excluding them from more generally available government financial subsidies." *Id.*

491. Dreisbach, *supra* note 56, at 187.

492. *See id.* at 188 (citing American Jewish Congress v. City of Chicago, 827 F.2d 120, 136 (7th Cir. 1987) (Easterbrook, J. dissenting)).

Jefferson supported separation of church and the national government. His refusal to issue thanksgiving and other religious day proclamations is but one example of this conclusion. Nonetheless, Jefferson, as did Madison and every other Framer, professed and practiced the belief that the states were free to legislate with respect to religion.[493] There were no limits on state power to do so. The various Virginia bills pertaining to religion exemplify this federalism-based precept. Furthermore, the notion that Jefferson favored a separation of church and state is true only when considered in its historical context of state freedoms.[494] But Jefferson, and Madison for that matter, did not live in a United States where the Supreme Court turned the Constitution inside out; moreover, neither lived in the era of incorporation and federally imposed state restraints. Surely, had they lived in such times, they would be most distressed to see their tools, which were designed to ensure religious liberty, used so spuriously and deceptively to destroy it.

3. The Lost Founders

An unfortunate byproduct of the understandable tendency of jurists and commentators to emphasize the views of Madison and Jefferson is the corresponding failure to consider the view of the other Framers and Founders. Indeed, noticeably absent from most discussions of church and state are the views of some of the nation's earliest and most esteemed leaders, such as George Washington, John Adams, John Marshall, and others.[495] Many of these individuals were "political centrists," who not only "looked favorably on organized religion as necessary for social cohesion," but also "believed that religion was an essential cornerstone for morality, civic virtue, and democratic government."[496]

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493. *See* Poppel, *supra* note 416, at 250 ("In the search for the original intent of the Framers concerning the Religion Clauses, one fact is taken as irrefutable by virtually all commentators: at the time of the ratification of the Constitution, it was not the intention of the Framers to apply the Religion Clauses to the States.").

494. One commentator has articulated this precept as follows:

> Where the Court has gone astray in its Religion Clause jurisprudence is in using the original intent of the Framers to justify a Religion Clause jurisprudence with respect to First Amendment limitations on state action. The only clear "original intent" of the Framers is that the Religion Clauses were not to apply to the states. Once the Court decided to incorporate the Religion Clauses against the states, it nullified the importance of "original intent" in this area, at least with respect to defining the limitations imposed on the states. The grand searches for original intent seen in *Everson*, *Wallace*, and other opinions are futile once it is understood that, while the Framers of the First Amendment might have had an intention regarding the application of the Religion Clauses to the national government, they had no such intention regarding application of the clauses to the states except that they were not intended to apply to the states.

Id. at 267-68.

495. Levy stated that Madison's view, which Levy claims to be strict separation, "was widely shared by the other framers of the Constitution." LEVY, *supra* note 9, at 119. This conflicts with Adams's and Emmerich's position that the Founders (including the Framers) shared a wide variety of views; Madison's and Jefferson's did not predominate. ADAMS & EMMERICH, *supra* note 19, at 26. For a discussion of the personalities of the Framers, see Frederick M. Gedicks, *The Rise and Fall of the Religion Clauses*, 6 B.Y.U. J. PUB. L. 499 (1992).

496. ADAMS & EMMERICH, *supra* note 19, at 26. Consider in this vein Benjamin Franklin, who, although better known for other endeavors, played an important role in the early formation of the United States, and deserves mention here. Franklin, a Framer at the Constitutional Conven-

Washington exemplified this description. As President he proclaimed a national day of thanksgiving for the people to acknowledge "that great and glorious Being for the civil and religious liberty with which we are blessed."[497] The following reply to the Jewish Congregation of Newport further indicates both his great respect for religion and his enthusiasm for religious freedom: "It is now no more that toleration is spoken of, as if it was by the indulgence of one class of people, that another enjoyed the exercise of their inherent natural rights."[498] While in office, Washington also effected a treaty in which the United States paid one thousand dollars to build a church.[499] This action, more than any other of Washington's Presidential tenure, is inapposite separationism. If as separationists contend, any governmental regulation respecting religion is prohibited, then Congress violated the First Amendment three years after it became effective.[500] Moreover, while Washington was an unavowed advocate of religious freedom and toleration, his actions, particularly his proclamations, indicate he did not believe the Constitution precluded all federal government action with respect to religion. To this end, consider the following remarks delivered at his farewell address:

> [L]et us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.[501]

Hence, while Washington certainly was not supportive of a national church or establishment or preferential treatment for any one sect, he likely believed that national encouragement of religious practice both was necessary and permitted to preserve social order and maintain the moral good.[502]

Other prominent figures shared Washington's convictions. John Adams, for example, not only continued Washington's practice of declaring days of

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tion in 1787, was bothered by the slow progress of the group. He stated:

> I have lived, Sir, a long time, and the longer I live, the more convincing proofs I see of this truth—that God Governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire cannot rise without his aid? We have been assured, Sir, in the sacred writings, that "except the Lord build the House they labor in vain that build it." I firmly believe this . . . .
>
> I therefore beg leave to move—that henceforth prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the Clergy of this City be requested to officiate in that Service.

CORD, *supra* note 8, at 24-25. Although the motion was seconded, no vote was ever taken on it because of fear expressed by others that although such a motion might have been proper at the beginning of the Convention, if it was not adopted, the public might perceive that the Convention's troubles were so great as to resort only to divine assistance. *See id.* at 25.

497. CORD, *supra* note 8, at 26.

498. *Id.* at 27.

499. *Id.* at 58.

500. *Id.*

501. George Washington, Farewell Address, 1796, *in* ADAMS & EMMERICH, *supra* note 19, at 21.

502. *See, e.g., id.* ("He believed that 'Religion and Morality are the essential pillars of Civil society' and affirmed that everyone should be 'protected in worshipping the Deity according to the dictates of their consciences.'").

Thanksgiving, but declared two national fast days to allow for the "promotion of that morality and piety without which social happiness can not exist nor the blessings of a free government be enjoyed."[503] Chief Justice John Marshall admitted that "[l]egislation on the subject [religion] is admitted to require great delicacy, because freedom of conscience and respect for our religion both claim our most serious regard."[504] By using the term legislation, Marshall implicitly rejected a broad construction of the Establishment Clause because separationism by definition precludes legislation.

Consider also Justice Joseph Story, Associate Justice of the Supreme Court from 1811 to 1845, who in his treatise on the Constitution said the following with regard to religion:

> The real difficulty lies in ascertaining the limits to which government may rightfully go in fostering and encouraging religion. The real object of the First Amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.[505]

These statements presuppose that the Constitution permits the federal government, within prescribed limits, to use legislation to foster or encourage religion.[506]

To be sure, one cannot categorically characterize the Framers or Founders collectively as strict-separationist or nonpreferentialist. It is instead both more accurate and more reasonable to depict, as the evidence suggests, that the Framers' views on church and state fell along a continuum which spans these two extremes.[507] The Supreme Court has, unfortunately, relied exclusively on the separationist writings of James Madison and Thomas Jefferson when considering Establishment Clause disputes. The Court has reduced the Establishment Clause to nothing more than the collective intent of those two figures. In any event, the Court's long held view, first proffered in *Everson*, that the Framers' intent was indisputably separationist is historically baseless and inaccurate.

D. *Federalism and the Problem with Incorporation*

As evidenced by the preceding case discussion, virtually every Establishment Clause case involves disputes between individuals and state or local

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503. *Id.* at 27.

504. *Id.* at 28. Marshall further stated: "The American population is entirely Christian and with us, Christianity and Religion are identified. It would be strange indeed, if with such a people, our institutions did not presuppose Christianity, and did not often refer to it, and exhibit relations with it." *Id.* Although few would argue that the modern United States is as religiously homogeneous as when Marshall made his statement, his characterization demonstrates that not all Framers thought the Constitution prohibited the national government from interacting with religion and religious institutions.

505. CORD, *supra* note 8, at 13.

506. For an argument that Story's views never led anywhere and were in effect meaningless, see MORGAN, *supra* note 76, at 40.

507. *See* ADAMS & EMMERICH, *supra* note 19, at 22.

governmental bodies. Only a scant few involve actions by the national government. Moreover, the entire jurisprudential area is relatively young, dating back only to 1947 and the *Everson* decision. In fact, *Everson* was the first substantive Establishment Clause case heard by the Supreme Court, despite the fact that the Clause had been in place for over 150 years. During this period, it was the state governments, rather than the federal government, which exercised control over religious legislation. It was only when the Establishment Clause was incorporated in *Everson* that the Clause's mandates became binding upon the states via the Fourteenth Amendment's Due Process Clause. The Court's decision to fully incorporate the Establishment Clause has proved to be a poor one.[508] Mountains of litigation have resulted, and problems which were previously resolved on a state and local level are now being decided by various branches of the federal government which are insensitive to local preferences, cultures, and problems.[509] More fundamental difficulties which plague the Establishment Clause's incorporation are its lack of historical support and its rebuke of the federalism upon which its passage was based.

In short, any understanding of the Establishment Clause must be based on an understanding of federalism. Federalism essentially mandates that the federal government is one of enumerated powers, and that it may not, theoretically, and consistent with the Constitution, take any actions not specifically and explicitly authorized by the Constitution's text.[510] This incontrovertible view of federalism with respect to the Establishment Clause persisted for over 150 years, during which time the Supreme Court twice condoned it: first in *Barron v. Baltimore*,[511] later in *Permoli v. New Orleans*.[512] Those in favor of

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508. Others agree. For example:

> [C]onfusing case law has led the Justices themselves to describe their Establishment Clause doctrine as a muddle that lacks clear principles and departs from the intent of the Framers. Some commentators have argued that this doctrinal confusion was the inevitable consequence of the Court's decision to incorporate the Establishment Clause against the states in spite of the intent of the Framers of the First Amendment.

Note, *supra* note 78, at 1702.

509. One commentator states that

> perhaps the most important value to be served by restoring state authority over religion would be the federalist value of decentralized decisionmaking. This method of political organization confers two principal benefits. First, states and localities can better respond to the needs and interests of the majority of their citizens than the national government because they can tailor their laws to suit local conditions and preferences.

Id. at 1715.

510. Given these restricted federal powers, Madison and many other Framers felt a bill of rights unnecessary. LEVY, *supra* note 9, at 125. Because the Constitution did not grant Congress any power to legislate with respect to religion, speech, etc., the populace, at least theoretically, had no reason to fear federal usurpation of state power. Rather, Madison believed that neither the Constitution nor explicit guarantees would assure religious liberty. Instead, he declared that it was a multiplicity of sects, i.e., religious pluralism, that protected and secured religious liberty. *Id.* With numerous sects, one sect would be less likely to accumulate sufficient power to oppress the others. *Id.*

511. 32 U.S. (7 Pet.) 243 (1833).

512. 44 U.S. (1 How.) 589 (1845). In addressing the New Orleans ordinance in *Permoli*, the Court stated, "There is no repugnancy to the constitution, because no provision thereof forbids the enactment of law or ordinance, under state authority, in reference to religion. The limitation of power in the first amendment of the Constitution is upon Congress, and not the states." *Permoli*, 44 U.S. (1 How.) at 606.

extending the Establishment Clause's provisions to the states, however, found their fortune in the Fourteenth Amendment, which prohibits states from depriving any person of life, liberty, or property without due process of law. With respect to the Establishment Clause, the critical issue thus became whether state legislation respecting an establishment of religion constituted a deprivation of liberty.[513]

There can be no doubt that the Framers of the Fourteenth Amendment did not intend its liberty component to embody the Establishment Clause restraints.[514] The proposed Blaine Amendment confirms this. In 1875, just seven years after the ratification of the Fourteenth Amendment, Representative James G. Blaine sought approval of an amendment stating that, "No state shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof."[515] This language, of course, correlates exactly with that in the Religion Clauses, which constrain only Congress. Although the amendment passed, it lacked the necessary two-thirds majority for submission to the states.[516] Its mere introduction, however, to a Congress which included twenty three members of the Congress which drafted the Fourteenth Amendment, illustrates undeniably that those who framed of the Fourteenth Amendment did not intend it to apply the Establishment Clause to the states. In short, had the Congress believed the Fourteenth Amendment encompassed the Establishment Clause, there would have been no need to affix to the Constitution a redundant amendment encompassing the Religion Clauses.

As it turned out, however, the Supreme Court ignored this intent, and in 1947 held in *Everson* that the Establishment Clause applied to the states via the Fourteenth Amendment.[517] The incorporation process began, however, at least seven years before in *Cantwell v. Connecticut*.[518] There, the Court said:

> The fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the states as incompetent as Congress to enact such laws.[519]

With these words, the Court cast the die that led to the Establishment Clause's incorporation seven years later.

In the abstract, few would argue that the mandates of the First Amendment should not apply to the states as well as Congress. Indeed, free speech and free exercise of religion are two notions undoubtedly fundamental to the concept of ordered liberty. Yet some sense an inherent distinction between free

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513. *See* LEVY, *supra* note 9, at 148.

514. Indeed, the evidence suggests that the Fourteenth Amendment was not designed to incorporate any provisions embodied in the Bill of Rights. *See* Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 945 (1951).

515. *Id.* at 941.

516. *Id.* at 944.

517. Everson v. Board of Education, 330 U.S. 1 (1947).

518. 310 U.S. 296 (1940).

519. *Cantwell*, 310 U.S. at 303.

speech and free exercise and the establishment of religion.[520] These scholars assert that the Establishment Clause, unlike the other First Amendment clauses, does not protect individual freedoms or grant a right to engage in some specific action.[521] In short, because establishment of religion need not necessarily restrict an individual's free exercise rights, ordered liberty can exist in the absence of Establishment Clause incorporation.[522] As one commentator notes, however, Madison, Jefferson, and several preeminent religious founders believed prevention of establishment essential to freedom.[523] To the extent that this encompasses only formal establishments, I agree. But incorporating the Establishment Clause and interpreting it to prohibit states from nonpreferentially fostering and encouraging religion is inapposite to the First Amendment, which by its terms reserved religion for the states. Indeed, permitting states to make informed public policy decisions as to whether to encourage religion through nonpreferential means in no way detracts from any plausible notion of liberty.[524]

The federalist nature of the First Amendment theoretically renders the national government incapable of legislating, even nonpreferentially, with respect to religion. Yet that same Amendment theoretically preserves for the states legislative dominion over religion. Hence, the Court has disrupted the delicate balance of power intended by the Framers. The result is that the Court has proscribed every governmental body—local, state, and national—from enacting nonpreferential legislation on religious topics.[525]

As a feasible compromise, incorporation of the Establishment Clause should apply to the states only to the extent that it prohibits them from creating formal establishments and enacting religious legislation which exalts one religion or religious sects over others. The sensitive choice as to whether it

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520. One commentator noted:

> The Framers intended the Establishment Clause to embody a principle of federalism. That is, the original purpose of the Clause was to prevent Congress from interfering with the variety of church-state relationships that existed in 1791. For this reason, the Establishment Clause was a uniquely poor candidate for incorporation against the states.

Note, *supra* note 78, at 1700.

521. *See* LEVY, *supra* note 9, at 228.

522. *Id.*

523. *Id.*

524. Indeed, states should today possess this right to *protect* religions. Unlike 200 years ago, as one author notes, "The great problem today is not the threat that religion poses to public life, but the threat that the state, presuming to embody public life, poses to religion." Richard J. Neuhaus, *A New Order of Religious Freedom*, 60 GEO. WASH. L. REV. 620, 632 (1992).

525. Others share this view. Consider the remarks of one commentator:

> In particular, since the incorporation of those clauses, the Court has infused its decisions with considerations of original intent and history that have the effect of misinterpreting the meaning of the Religion Clauses as they are applied to the states. The result . . . has been the alteration of the basic structure of those clauses; what began as a limitation of federal power designed to promote government regulation of religion at the state level, if there was to be any regulation of religion at all, has been turned upside down so that today the dominant force shaping church-state relations are the federal courts in general and the Supreme Court in particular. [T]he Court has failed to heed the belief of the founders that civil authority in religious matters, to the extent it could be exercised, was a state function.

Poppel, *supra* note 416, at 249.

wishes to expend valuable resources to foster, aid, or encourage[526] religion should rest with a state and its citizens.[527] Unlike the Supreme Court's approach, which was to fully incorporate and apply to the states the Establishment Clause and then spend two decades creating a historically unsupported and undoubtedly unworkable standard, this modified incorporation framework is consistent with both history and the Framers' intent. Indeed, as one commentator notes:

> [T]he only consensus among the Framers of the First Amendment about the appropriate relationship between church and state was to allow the states to decide the issue themselves. Thus, the only theory of the Establishment Clause that accurately captures the collective intent of the Framers and reflects their divergent views is federalism.[528]

VII. CONCLUSION

Modern Supreme Court Establishment Clause jurisprudence is based on both misinterpreted history and unfounded historical assumptions. Indeed, despite the wishes of Scalia or Souter, the Framers cannot be classified as either nonpreferentialist or strict-separationist. Rather, the history of the Establishment Clause demonstrates that no one philosophy emerged which clearly represented the entire group's beliefs. Moreover, the Supreme Court's incorporation of the Establishment Clause rendered the use of Framers' intent to

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526. Encouragement of religion does not consist of prayer in schools or Bible reading in schools, but rather tax exemptions for parents who send their children to private religious schools, use of public school buses for sectarian school students to go on secular field trips, and teaching various religious (and nonreligious) approaches to morality in the public school system.

527. To this end, I do not advocate overturning the incorporation doctrine in its entirety, rather just a shift in its jurisprudential focus which reflects more Court respect for state rights and local decisions. Few are so naive as to faithfully, and foolishly, propose that the Court abolish the incorporation doctrine. However, the Court "might reinterpret precedents, distinguishing away some, blunting others, and making new law without the appearance of overruling or disrespecting the past." LEVY, *supra* note 9, at 232.

528. Note, *supra* note 78, at 1705. One commentator offers a compelling point in this respect: it is almost inconceivable that the Supreme Court will abandon the incorporation doctrine, and highly unlikely that it would ever modify the incorporation doctrine sufficiently to solve the problems currently facing it. As such, modern scholars are essentially avoiding the issue, which can be stated as follows:

> [E]ven scholars who have criticized the incorporation of the establishment clause have typically assumed that the clause continues to restrict the national government, as it was originally intended to do. But even that assumption seems unwarranted. If the religion clauses were an allocation of jurisdiction over religion to the states, and if that allocation has to be undone, then there is no justification—no *originalist* justification grounded in the First Amendment's religion clauses, at least—for holding even the national government to restrictions grounded in a jurisdictional arrangement that has long since been repudiated.
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> More generally, the effort to develop an authoritative constitutional law of religious freedom based on the religion clauses of the First Amendment is in a sense similar to an effort to discuss the states' current constitutional authority to permit or regulate liquor on the basis of the Eighteenth Amendment, while ignoring the inconvenient fact that this amendment has been repealed. If there is to be constitutional law on either subject, it will have to be derived from some other source.

SMITH, *supra* note 40, at 50.

analyze state religious legislation inapposite to the Framers' understanding of the republic. It is like trying to put a round peg in a square hole—something just does not fit. That something is federalism. In short, it existed in 1789, but for all practical purposes exists in name only now. Recall that in the Framers' era, states were free to legislate with respect to religion; they could establish religions or restrict religious freedom—they were writing on a blank page. Incorporation, however, disrupted this balance of power. Hence, it is merely guesswork to suggest that Madison or Jefferson would have approved or disapproved of this or that bill. No one knows how any of the Framers would regard modern religion clause jurisprudence. For sure, most would not even recognize it as a product of the Constitution and Bill of Rights they created over 200 years ago. Likewise, most would also consider the federal government's encroachment into the sphere of state power, with respect to religion and innumerable other matters, palpable violations of their republican ideal.

Unfortunately, for nearly fifty years the Court has adhered to an unduly rigid separationist viewpoint. As a result, modern Courts must fight the temptation, and increasingly the popular demand, to shift too far the other way. The incorporation model proposed earlier grants states discretion as to whether or not to aid religion in evenhanded, neutral manners. Such an approach accounts both for the separationist fear of formal establishments and the nonpreferentialist appreciation for federalism. Finally, both sides would do well to recall the words of Chief Justice Rehnquist, who said, "The true meaning of the Establishment Clause can only be seen in its history."[529] In this respect, nonpreferentialists must recognize the importance of the Establishment Clause's underlying rationale—to secure the broadest possible level of religious freedom and protect the sanctity of the church. Similarly, separationists should heed the warning of John Adams, the nation's second President, who maintained, "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[530]

John E. Joiner

529. Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).
530. ADAMS & EMMERICH, *supra* note 19, at 27.