St. Mary's Law Journal

Volume 22 | Number 1 Article 6

1-1-1990

# Is Lemon a Lemon - Crosscurrents in Contemporary Establishment Clause Jurisprudence.

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# COMMENT

## Is *Lemon* a Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence.

**Stuart W. Bowen, Jr.**

*Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it.*[1]

—Benjamin Cardozo

## I. INTRODUCTION TO THE PROBLEM: CREATIVE ORIGINALISM

### A. *Building the Wall*

In 1947 the United States Supreme Court initiated modern establishment clause[2] jurisprudence by issuing an opinion[3] that produced a policy-oriented result from reasoning based on original intent.[4] The Court reached this result by extracting, out of context, Thomas Jefferson's "wall of separation" metaphor from a letter he wrote over ten years after the establishment clause's adoption and making that metaphor the opinion's theoretical centerpiece.[5] That metaphor became the focus for subsequent establishment clause

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1. Berkey v. Third Ave. Ry. Co., 155 N.E. 58, 61 (N.Y. 1926).

2. U.S. CONST. amend. I, cl. 1. The establishment clause requires that "Congress shall make no law respecting an establishment of religion. . . ." *Id.*

3. Everson v. Board of Educ., 330 U.S. 1, 15 (1947). Justice Black, writing for the majority, stated the crux of the opinion by defining the establishment clause to mean:

> 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 . . . . 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. . . . 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.*

4. *See Everson*, 330 U.S. at 11-12 (Court sought original intent of the establishment clause from framers' writings). Justice Black relied almost exclusively on the writings of James Madison and Thomas Jefferson as the basis for interpreting what the framers intended. *Id.*; Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 820 (1973)(White, J., dissenting) (Court's desire to implement national policy on church and state relations created imposing "wall of separation"). *See generally* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 1-13 (1987) (examining the historical implications of *Everson*); Bradley, *Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause*, 18 CONN. L. REV. 827, 842 (1986) (Court's establishment clause jurisprudence result of desired national policy regarding church and state relations); Bradley, *Dogmatomachy - A "Privatization" Theory of the Religion Cases*, 30 ST. LOUIS U.L.J. 275, 287-88 (1986) (propagation of policy goals, not historical reliance, basis for Court's establishment clause rulings); Cornelius, *Church and State - The Mandate of the Establishment Clause*, 16 ST. MARY'S L.J. 1, 20-21 (1984) (nothing in Constitution mandated "wall of separation").

5. *Everson*, 330 U.S. at 16-18. Justice Black relied on Jefferson's letter to the Danbury Baptists, which was first quoted by the Court in *Reynolds v. United States*. *Id.*; *see also* Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Jefferson's letter to the Danbury Baptist Convention). Jefferson's letter stated:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign rever-

analysis, and set a philosophical tone that resonated through all future decisions regarding church and state activity.[6] Operating under the assumption that the "wall of separation" represented the establishment clause's true meaning,[7] the Court gradually developed a series of tests designed to determine whether particular state action impermissibly breached that wall.[8]

The current version of this jurisprudential development is the *Lemon*

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ence that act of the whole American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus *building a wall of separation between church and state.*

*Id.* (emphasis added). In *Reynolds*, Chief Justice Waite said that, as to matters of religion, Jefferson's view "was the authoritative declaration as to the scope of the establishment clause." *Id. See generally* J. EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 242-45 (1987) ("wall of separation" was taken out of context by Court). Jefferson probably was paraphrasing Roger Williams, founder of religiously tolerant Rhode Island, who wrote: "[w]hen they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world . . . His garden and paradise . . . must be walled in peculiarity unto Himself from the World. . . ." *Id.* at 243; Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 12-13 (1978-79) (Roger Williams' view of separation forbade only governmental aid to religion that hindered religious freedom).

6. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 53 n.37 (1985) (quoting *Everson*'s application of "wall" metaphor); Lemon v. Kurtzman, 403 U.S. 603, 612 (1973) (*Everson*'s "wall of separation" created a "forbidden territory" regarding state action in religious affairs); Epperson v. Arkansas, 393 U.S. 97, 106 (1968) (used "wall of separation" to strike down statute prohibiting the teaching of evolution); Engel v. Vitale, 370 U.S. 421, 425 n.20 (1962) (quoting Roger Williams on strict separation of church and state); Torcaso v. Watkins, 367 U.S. 488, 493 (1961) (Court used "wall of separation" to invalidate religious test for state office); McCollum v. Board of Educ., 333 U.S. 203, 211 (1948) (relied on "wall of separation" to invalidate students early release from school for religious training). *See generally* Note, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645, 646-50 (reviewing history of Court's application of "wall of separation").

7. *Everson*, 330 U.S. at 18. Justice Black's opinion reflected a belief that religion and state affairs were separate spheres, and that the law should substantiate that separation through the establishment clause. *Id.*

8. *See* School Dist. of Abington v. Schempp, 374 U.S. 203, 222 (1963) (Court developed "purpose/effect" test stating if statute's effect or purpose advanced or inhibited religion, then legislation violated establishment clause); Board of Education v. Allen, 392 U.S. 236, 243-47 (1968) (supplying teaching materials to parochial school did not violate "purpose/effect" test); Epperson v. Arkansas, 393 U.S. 97, 108-09 (1968) (applying "purpose/effect" test to invalidate Arkansas antievolution statute); Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (property tax exemptions for religious organizations not violative of establishment clause). In *Walz*, Chief Justice Burger applied the "purpose/effect" test but defined the effects prong to mean that state action may not create excessive governmental entanglements with religion. *Id.* at 674-75; Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). The Court created a three-pronged test requiring state action: (1) to have a secular purpose; (2) to have a primary effect that neither inhibits nor advances religion; and (3) to avoid excessive governmental entanglements. *Id. See generally* Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 151-59 (1987) (providing evolution of establishment clause tests since *Everson*).

test,[9] prescribed in 1971, which has yielded a number of establishment clause cases whose contradictory conclusions have blurred the legal effect of the "wall of separation."[10] The three-pronged *Lemon* test requires that for state action to pass establishment clause scrutiny it must: (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive governmental entanglements with religion.[11] Despite recent conflict regarding its workability,[12] the *Lemon* test continues

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9. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

10. The Court has issued conflicting decisions regarding the taxation of religious organizations. *Compare* Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, __, 110 S. Ct. 688, 699, 107 L. Ed. 2d 796, 814 (1990) (state tax statute had secular purpose, did not advance or inhibit religion, and created no excessive entanglements) *with* Follett v. McCormick, 321 U.S. 573, 582-83 (1944) (license tax on religious booksellers burdened free exercise) *and* Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (license tax on door-to-door evangelists burdened free exercise). *Compare* Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 905, 103 L. Ed. 2d 1, 20 (1989) (tax exemption for religious publications violative of establishment clause) *with* Walz v. Tax Comm'n., 397 U.S. 664, 673 (1970) (taxing church property does not burden right to free exercise of religion). The court has also handed down contradictory decisons regarding religious displays on public property. *Compare* County of Allegheny v. ACLU, __ U.S. __, __, 109 S. Ct. 3086, 3115-16, 106 L. Ed. 2d 472, 512 (1989) (display of creche violated establishment clause, but menorah and Christmas tree display did not) *with* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (display of creche scene on public property not impermissible endorsement of religion). The problem of state-sanctioned prayer has also caused conflict. *Compare* Wallace v. Jaffree, 472 U.S. 38, 68-69 (1985) (invalidating compulsory prayer in public schools) *with* Marsh v. Chambers, 463 U.S. 783, 795 (1983) (permitted statute requiring legislative prayer). The use of school facilities within a "religious" context has yielded contradictory Court decisions. *Compare* Wolman v. Walter, 433 U.S. 229, 248 (1977) (allowing state counseling of private school students away from parochial school) *with* Meek v. Pittenger, 421 U.S. 349, 372 (1975) (denying state guidance counseling for students on parochial school grounds). *See generally* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 8-9 (1987) (Justices' political agenda prompted creation of test); Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113, 1113-20 (1988). Professor Conkle explored the conflict between the "originalists," who rely on the framers' intent to interpret the establishment clause, and the "nonoriginalists," who rely on contemporary social conditions. *Id.*; Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905, 935 (1987) (essential values underlying establishment clause require reformulation of the *Lemon* test); Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 839 (1984) (inconsistency in *Lemon* test application led to doctrinal mess in establishment clause jurisprudence); Choper, *The Religious Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 680-81 (1980) (conflicts created by establishment clause and free exercise clause interpretations have yielded serious inconsistencies in the caselaw); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 4-12 (1978-79) (framers' views on meaning of word "establishment" differ from strict separation compelled by Jefferson's "wall").

11. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). *See generally* Simson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987) (examining the Court's application of *Lemon*'s three-pronged test).

12. *See* Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 905, 103 L. Ed. 2d

to be the Court's chosen method for determining whether state action violates the establishment clause.[13]

## B. *Structural Faults*

The modern Court's adherence to the premise that the establishment clause compelled a "wall of separation" between church and state activity has caused recurrent problems in applying the *Lemon* test.[14] This premise evolved from the Court's desire to derive an acceptable method for identifying impermissible church and state relations. Thus, the Court implicitly formulated a definition of the word "establishment" that greatly differed from the framers' original understanding.[15] If the Court had adopted an approach that accurately reflected the framers' intent, it would have obviated much of the consequent establishment clause litigation, and would have left a clearer, more durable framework for the resolution of subsequent establish-

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1, 20 (1989) (deeply divided Court held tax exemptions for religious publications violated establishment clause); County of Allegheny v. ACLU, __ U.S. __, __, 109 S. Ct. 3086, 3115-16, 106 L. Ed. 2d 472, 512-13 (1989). In *County of Allegheny*, a divided Court could not agree on the proper application of the *Lemon* test in finding that a creche display on public property violated the establishment clause, but the display of a menorah did not. *Id.*

13. *See* Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, __, 110 S. Ct. 688, 698, 107 L. Ed. 2d 796, 814 (1990) (affirmed standard *Lemon* analysis in ruling religious organization subject to state taxes); *Texas Monthly, Inc.*, __ U.S. at __, 109 S. Ct. at 896, 103 L. Ed. 2d at 9 (1989) (applied *Lemon* test to find tax exemption for religious publication violative of establishment clause); County of Allegheny, __ U.S. at __, 109 S. Ct. at 3100-01, 106 L. Ed. 2d at 493-95 (1989) (Court affirmed use of *Lemon* test as standard tool for determining whether state action violates establishment clause).

14. *See Texas Monthly, Inc.*, __ U.S. at __, 109 S. Ct. at 909, 103 L. Ed. 2d at 25-32 (1989)(Scalia, J., dissenting) (application of *Lemon* to deny tax exemption not founded on Constitution, precedent, or history); Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987)(Scalia, J. dissenting) (criticizing inconsistent application of *Lemon* test); Aguilar v. Felton, 473 U.S. 402, 419 (1985) (application of *Lemon* criteria too formalistic); Mueller v. Allen, 463 U.S. 388, 394 (1983) (*Lemon* test nothing but helpful signpost). *See generally* Beschle *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 163-65 (1987) (cataloging alternatives to *Lemon* test's application including Justice O'Connor's refinement of *Lemon*); Comment, *The Lemon Test and Subjective Intent in Establishment Clause Analysis: The Case for Abandoning the Purpose Prong*, 76 KY. L.J. 1061, 1067-69 (1987-88) (Court has inconsistently applied the *Lemon* test); Note, *Bowen v. Kendrick: The Malleable Lemon Test*, 40 MERCER L. REV. 1063, 1076-77 (1989) (Court has invoked *Lemon* test, then failed to apply); Note, *Developments in the Law - Religion and the Law*, 100 HARV. L. REV. 1606, 1644-50 (1987) (analyzing inherent problems in applying the *Lemon* test); Recent Development, *The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis*, 37 VAND. L. REV. 1175, 1198-1200 (1984) (examining weaknesses in Court's application of *Lemon* test).

15. *See* Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113, 1129-1145 (1988) (comparing arguments that Supreme Court did and did not accurately apply framers' understanding of establishment clause in *Everson*).

ment clause controversies.[16]

To remedy the confusion that has ensued from the application of the establishment clause through the *Lemon* test, the Court should clarify its analysis by abandoning *Lemon* and adopting a test that more accurately reflects the framers' original understanding of the word "establishment."[17] An establishment clause test faithful to the framers' original understanding would proscribe state action which has religious purposes, and thereby provide more distinct parameters regarding the establishment clause's scope.[18] This proposed test would examine whether the purpose of a challenged state law is to advance a particular religious creed or doctrine or prescribe a mode of religious worship. Narrowing *Lemon*'s scope by eliminating "effects" and "entanglements" analysis would not emasculate the precedential power of previous establishment clause decisions, but instead would limit future litigation by replacing the indeterminate "wall of separation" with clearer, purpose-based limits on state action regarding religion.[19]

Formulating a new establishment clause test faithful to the framers' understanding of the word "establishment" requires careful examination of the relevant historical sources. Thus, this comment will begin by exploring the colonial controversies regarding state-sponsored religious denominations, and then follow with a thorough analysis of the establishment clause's legislative history. The analysis of the legislative history will focus particularly on the alternative wordings proposed during the adoption debates. This comment will then chronologically review the Supreme Court's application of the establishment clause, beginning with an overview of early establishment clause decisions followed by a more detailed examination of contemporary cases. Finally, this comment will propose an alternative test designed to

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16. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 3-4 (1987) (analyzing impact of *Everson*'s policy-oriented result). Professor Bradley believes that Justice Black's majority opinion created a tone of strict separation which affected the nature of subsequent establishment clause analysis. *See id.* at 4-5. *See generally* Note, *Praying for Direction: The Establishment Clause and the Supreme Court*, 10 NOVA L.J. 217, 218-44 (1985) (tracing increase in establishment clause litigation from 1960-1985).

17. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 144-45 (1987) (hypothesizing alternatives to *Everson*'s legacy). If Justice Black had taken a broader account of history, the parameters of the establishment clause would have become clearer, and the subsequent confusing judicial developments would have been obviated. *See id.*

18. *See* T. CURRY, THE FIRST FREEDOMS 206-07 (1986) (reviewing Senate debates on establishment clause). The Senate proposed more exact and revealing language regarding proscriptions on the establishment of religion. *Id.* The Senate's proposal, which would have provided clearer limits on state action, read: "Congress shall make no law establishing articles of faith or a mode of worship." *Id.* at 207.

19. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 144-46 (1987). Professor Bradley believes that a reformulation faithful to the framers original understanding of the establishment clause would cause the biggest upheaval in academic circles, not in the practical realm. *Id.*

more faithfully measure whether state action impermissibly causes an establishment of religion.

## II. FOUNDATIONS OF MEANING: RELIGION IN COLONIAL AMERICA

In colonial America the meaning of the phrase "establishment of religion" was widely understood as a state preference for one religious denomination over others.[20] Many of those who had come to the new world were members of minority denominations who had fled Europe to escape religious persecution.[21] Despite their idealistic search for religious tolerance and liberty of conscience, the early colonists ironically established state-sponsored religious denominations which, in some states, resulted in a repressive intolerance of minority faiths.[22] However, no dominant national church evolved. Instead, geographical factors defined the nature and extent of religious establishments.[23] The New England colonies rejected traditional state establishments, and instead structured their laws to promote the local establishment of Congregationalism.[24] The Southern states, which had retained substantial ties with England, established Anglicanism as their state church.[25] The Mid-Atlantic states experienced diverse religious growth, and thus exhibited

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20. *See* T. CURRY, THE FIRST FREEDOMS 209 (1986). Colonial Americans understood "establishment" to mean the exclusive state preference for one religious denomination over others. *See generally* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1594-1609 (1989) (describing framers' understanding of "establishment" at time of creation of establishment clause).

21. *See* Everson v. Board of Educ., 330 U.S. 1, 8-10 (1947) (strife in Europe caused by established churches brought settlers to America); *see also* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1561-81 (1989) (detailing colonial background that provided foundation for establishment clause arguments); R. CORD, SEPARATION OF CHURCH AND STATE 4 (1982) (colonies were formed by religious dissidents fleeing European repression).

22. *Everson*, 330 U.S. at 9-14. The American colonists established societies that discriminated against religious minorities, particularly Catholics, Quakers, and Baptists. *Id.*; *see* Zorach v. Clauson, 343 U.S. 306, 318-20 (1952) (problem of zealous sectarians generated need for establishment clause); *see also* T. CURRY, THE FIRST FREEDOMS 132-33 (1986) (reviewing the variety of sects in colonial America).

23. *See* School Dist. of Abington v. Schempp, 374 U.S. 203, 314 n.5 (1963) (at least eight colonies had established churches). *See generally* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 19-54 (1987) (overview of the regional break-down of religion in colonial America).

24. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 20-27 (1987). The establishment of Congregationalism in New England caused divisive disputes regarding the propriety of state-established churches. *Id. See generally* T. CURRY, THE FIRST FREEDOMS 105-33 (1986) (detailing difficulties in establishment of Congregationalism in New England).

25. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 30-33 (1987) (Anglican dominance extensively affected politics of colonial South). *See generally* T. CURRY, THE FIRST FREEDOMS 134-58 (1986) (reviewing establishment of Anglicanism in Southern states).

the greatest, though still limited, tolerance of religious minorities.[26]

Debate over the power of state-established churches in prerevolutionary America focused on the political implications of state-sanctioned denominational preference.[27] Underlying these debates, however, was the generally accepted belief that the colonies comprised a Christian nation, a belief which yielded an intolerance for religious minorities.[28] By 1775, ten of the thirteen colonies had established some form of state religion.[29] However, by the time of the Constitutional Convention in 1787, only five state-established churches remained.[30] The trend towards disestablishment, inaugurated by the Revolutionary War, continued until, by 1833, all states had abolished denominational preferences.[31]

## III. WHAT DID THE FRAMERS INTEND?

### A. *In Search of Madison and Jefferson*

The modern Supreme Court's initial analysis of the establishment clause involved a thorough historical analysis of the framers' original understanding of the clause.[32] In particular, the Court looked to the writings and ac-

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26. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 46-52 (1987). Rhode Island exhibited the most religious toleration, followed by Pennsylvania, Delaware, and New Jersey. *Id.*

27. *See* T. CURRY, THE FIRST FREEDOMS 125-129 (1986) (examining debate between Anglicans and Congregationalists over what constituted a state establishment of religion in colonial America). *See generally* Kurland, *The Origin of the Religion Clauses in the First Amendment*, 27 WM. & MARY L. REV. 839 (1986) (providing overview of colonial intellectual foundations and debates that set stage for creation of establishment clause).

28. *See* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1568-75 (1989) (comparing the varying degrees of religious liberty found in the colonies); Note, *Developments in the Law - Religion and the State*, 100 HARV. L. REV. 1606, 1614 (1987) (reviewing lack of toleration for religious dissidents and minorities in colonial America).

29. A. REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 96-97 (1985). Connecticut, New Hampshire, and Massachusetts permitted the local establishment of Congregationalism, and Virginia, North and South Carolina, New York, Maryland, New Jersey and Georgia had established the Anglican Church as a state church. *Id.*

30. *See* R. CORD, SEPARATION OF CHURCH AND STATE 4 (1982) (gradual disestablishment of state churches occurred after American War of Independence). *See generally* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1575-79 (1989) (recognizing break with Revolutionary War as impetus for constitutional period that led to examination of relationships between church and state).

31. *See* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1582 (1989) (religious pluralism gradually forced disestablishment in all states); R. CORD, SEPARATION OF CHURCH AND STATE 4 (1982) (Connecticut, New Hampshire, and Massachusetts were last to disestablish their state churches).

32. *See* Everson v. Board of Educ., 330 U.S. 1, 11-13, 31-33 (1947) (Court's majority and dissenting opinions focused on historical analysis of framers' views to support analytical theses).

tions of James Madison and Thomas Jefferson to amplify the meaning of the word "establishment."[33] The Court's excessive reliance on Madison and Jefferson, to the exclusion of other framers, is partially responsible for the recurrent problems in contemporary establishment clause jurisprudence.[34]

As a congressional representative from Virginia, Madison was most responsible for the development of the establishment clause.[35] Thomas Jefferson, on the other hand, was in Paris during the establishment clause hearings, and thus his influence was felt only to the extent that his views shaped Madison's.[36] While Madison and Jefferson agreed on the need to limit the role of religion in Virginia's public affairs, they differed on the necessity of national religion clauses.[37]

Madison played a key role in the creation and adoption of Article 16 of Virginia's Declaration of Rights in 1776, which was initially drafted by George Mason.[38] Madison's revision of Mason's language, which provided

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33. *See id.* at 11-14. To support his "strict separationist" thesis in *Everson*, Justice Black's majority opinion relied on Madison's pamphlet on religious liberty entitled *Memorial and Remonstrance*, Jefferson's Bill for Religious Liberty, and Jefferson's 1802 letter to the Danbury Baptist Association. *Id.*

34. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 86-87 (1987) (Madison's writings are difficult source for finding meaning of establishment clause because of inconsistent stances on church and state relations); R. CORD, SEPARATION OF CHURCH AND STATE 121 (1982). In *Everson*, Justice Black selectively used the writings of Madison and Jefferson to support his thesis. *Id.* As a result, Justice Black ignored Madison's role in creating the state chaplaincy system and his Thanksgiving Day proclamations. *Id.* He also ignored Jefferson's Thanksgiving Day proclamations, his affirmation of the Northwest Ordinance, and his Treaty with the Kaskaskia Indians, all of which demonstrated Jefferson's willingness to accomodate a limited encroachment of religion into state affairs. *Id.*

35. *See* T. CURRY, THE FIRST FREEDOMS 198-200 (1986) (Madison prompted hearings on Bill of Rights and proposed initial draft of religion clauses); Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1579-80 (1989) (Madison was progenitor of process to adopt Bill of Rights).

36. Reynolds v. United States, 98 U.S. 145, 163 (1878) (Jefferson absent from 1789 Constitutional Convention because he was in France); R. CORD, SEPARATION OF CHURCH AND STATE 85-86 (1982) (Jefferson wrote Madison from Paris encouraging him to press for a Bill of Rights).

37. *See* Wallace v. Jaffree, 472 U.S. 38, 98 n.3 (1985)(Rehnquist, J., dissenting) (quoting letter Madison wrote Jefferson in France). Madison wrote Jefferson that he did not think that a national Bill of Rights was essential, but he said that he planned to support one because it was "anxiously desired by others. . .[and] it might be of use, and if properly executed could not be of disservice." *Id.* In his dissent in *Wallace*, Justice Rehnquist wrote that:

> [t]he Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights. *Id.* at 98-99.

38. *See* T. CURRY, THE FIRST FREEDOMS 135 (1986). During the debates over the Virginia Declaration of Rights, Madison and Jefferson wanted to address the establishment issue,

that "all men should enjoy the fullest toleration in the exercise of religion," was eventually passed by the Virginia Convention.[39] In 1779, Madison engineered the defeat of a Virginia bill which would have imposed a tax to support religious teaching.[40] And in 1784, he successfully opposed a second tax assessment bill for the support of religious teachers with his pamphlet on religious liberty entitled *A Memorial and Remonstrance*. The modern Supreme Court emphasized his pamphlet in *Everson v. Board of Educ.* as evidence of the framers' original understanding of the word "establishment."[41]

Thomas Jefferson believed that any alliance between church and state authorities led to the corruption of both.[42] Thus, in May of 1779, he submitted a Bill for Establishing Religious Freedom to the Virginia General Assembly.[43] With this bill, Jefferson sought to ensure that denominational organizations would confine their actions to religious spheres, and not infringe on the state's domain.[44] The bill was defeated twice.[45] However, in 1786, James Madison reintroduced the bill and it was overwhelmingly passed by the Virginia Legislature.[46] Madison and Jefferson's participation in Virginia's legislative activity regarding religion revealed their concerns for the proper relationship of church and state and set the stage for their subsequent

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but Patrick Henry, who believed religion should play a substantial role in state affairs, limited their approach. *Id.*; L. PFEFFER, RELIGIOUS FREEDOM 14-15 (1977). Article 16 of the Virginia Declaration of Rights focused on Virginia's desire for religious liberty, but did not address the issue of establishing a state religion in Virginia. *Id.*

39. T. CURRY, THE FIRST FREEDOMS 135-37 (1986) (despite Madison's and Jefferson's efforts, Virginia retained its establishment of the Anglican church).

40. *Id.* at 146 (Tax Assessment Bill would have established Christian faith as Virginia state religion).

41. 330 U.S. 1, 63-72 (1947)(Rutledge, J., dissenting) (Justice Rutledge appended entire text of *Memorial and Remonstrance* to his opinion).

42. *See* J. NOONAN, THE BELIEVERS AND THE POWERS THAT ARE 97-8 (1987) (Jefferson's anti-clericalism based on fear that ecclesiastical law would interfere with the development of American common law).

43. *See* J. NOONAN, THE BELIEVERS AND THE POWERS THAT ARE 103-04 (1987) (Bill for Establishing Religious Freedom propounded Jefferson's view that religion was matter of personal opinion not open to civil intrusion by state).

44. *Id.*

45. *See id.* at 104 (1987) (text of Jefferson's Bill for Establishing Religious Freedom). *See generally* Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93, 96 (1970) (twice-defeated bill reflected Jefferson's anticlericalism which was derived from his Enlightenment-influenced outlook).

46. *See* T. CURRY, THE FIRST FREEDOMS 146 (1986) (passage of Bill to Establish Religious Freedom in Virginia essentially disestablished the Anglican church in Virginia). *See generally* Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 318-22 (1986) (*Everson* wrongly conflated views of Madison's and Jefferson's Virginia struggle for religious freedom with the views of framers of establishment clause).

roles in shaping national policy.[47]

### B. *The Congressional Debates*

On May 4, 1789, James Madison announced that the Constitutional Convention would begin the process of amending the Constitution.[48] On June 8, he proposed a series of amendments, one of which addressed the national desire for limits on governmental action regarding religion.[49] Madison explained that the purpose of this amendment was to prevent the preeminence of any religious sect.[50]

The committee hearings on the religion clauses began on August 15.[51] The proposed amendment initially read: "[n]o religion shall be established by law, nor shall the equal rights of conscience be infringed."[52] Madison stated that the amendment was intended to prevent Congress from establishing a religion or compelling any mode of worship.[53] Elbridge Gerry of Massachusetts then suggested a clause which declared that Congress could establish no religious doctrine.[54] In response, Benjamin Huntington of Connecticut, a state where public support of religion prevailed, complained that

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47. *See* R. CORD, SEPARATION OF CHURCH AND STATE 20-47 (1982) (comparing Madison's and Jefferson's political activity regarding church and state legislation); Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 184-85 (1980) (Madison's and Jefferson's separationist view of church and state relations differed from most of their contemporaries).

48. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 85 (1987) (Madison believed amendments were required to ensure passage of Constitution by all states).

49. *See* T. CURRY, THE FIRST FREEDOMS 198-99 (1986). Madison's first submission of an amendment dealing with religious establishments 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." *Id.*; *see also* Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall - A Comment on Lynch v. Donnelly 1984*, 1984 DUKE L.J. 770, 777-79 (1984) (emphasizing Madison's key role in creating establishment clause).

50. *See* Bradley, *Dogmatomachy - A "Privatization" Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275, 329 (1986). Madison sought to prevent denominational preeminence by insuring the freedom to exercise religious faith unhindered by the state. *Id.*; G. BRADLEY CHURCH STATE RELATIONSHIPS IN AMERICA 87 (1987) (quoting 1 Annals of Congress 758 (1834)). Madison's specific intent was to prevent federal sanctioning of any religious sect. *Id.*

51. *See* T. CURRY, THE FIRST FREEDOMS 200-02 (1986). *See generally* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1579-82 (1989) (committee hearings are key source for finding what establishment of religion means).

52. T. CURRY, THE FIRST FREEDOMS 200 (1986).

53. *Id.* at 200-02.

54. *Id.* at 200. Elbridge Gerry, Representative from Massachusetts, stated that the establishment clause should prevent government preference for any religious "doctrine" over others. *Id.* His understanding of the word "establishment" is important because the establishment clause language ultimately adopted was drafted by Fisher Ames, Gerry's fellow Representative from Massachusetts. *Id.* at 206.

Madison's proposal would inhibit his state's right to support religion.[55] Madison replied with an alternative wording which began "(n)o national religion shall be established . . . ."[56] However, Madison withdrew that offering after Samuel Livermore of New Hampshire argued that the clause should require Congress to "make no laws touching religion."[57] The committee then passed Livermore's proposal by a vote of thirty-four to twenty.[58]

The debates resumed on August 20. Fisher Ames of Massachusetts immediately submitted the following proposal: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe on the rights of conscience."[59] Ames' recommendation was promptly passed by the House committee.[60]

On September 3, 1789, the Senate met to consider the religion clauses sent over by the House.[61] The Senate eliminated the clause dealing with the rights of conscience, but failed to strike the free exercise clause or to reformulate the entire amendment.[62] They met again on September 9 and adopted a substantially narrower version of the House's proposal which read: "Congress shall make no laws establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[63] The Joint House and Senate committee overcame the inherent conflict between the two versions in a compromise which yielded the language ultimately adopted as the establishment and free exercise clauses of the first amendment.[64]

The actions of the First Congress and the proclamations of the early presidents revealed the limited extent to which the framers' believed the establish-

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55. *Id.* at 201.

56. *Id.*; *see also* Everson v. Board of Educ., 330 U.S. 1, 42 n.34 (1947) (Court interpreted Huntington/Madison exchange as representative of Madison's belief that "no establishment" meant no public financial support of religion).

57. T. CURRY, THE FIRST FREEDOMS 201-02 (1986).

58. *See* T. CURRY, THE FIRST FREEDOMS 202 (1986) (committee adopted Samuel Livermore's proposal on August 15). Samuel Livermore's proposal was identical to the New Hampshire state constitutional amendment. *Id.* at 203.

59. *Id.* at 209.

60. *Id.*

61. *Id.* at 206-07 (quoting the text of the Senate hearings from September 3).

62. *See* T. CURRY,THE FIRST FREEDOMS 206-07 (1986). The Senate rejected two alternative wordings which read: "Congress shall not make any law, infringing the rights of conscience, or establishing any Religious Sect or Society;" and "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." *Id.*

63. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 93-94 (1987) (Senate's intent was to prevent preeminence of any sect); T. CURRY, THE FIRST FREEDOMS 206-07 (1986) (quoting final Senate version).

64. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 94-96 (1987) (Madison believed that six member joint committee had compromised House's language).

ment clause should restrict state action touching religion.[65] Congress' approval of a congressional chaplaincy, its enactment of the Northwest Ordinance,[66] the early presidents' issuance of national days of Thanksgiving,[67] President Jefferson's Treaty with the Kaskaskia Indians,[68] and President Madison's sanctioning of the state incorporation of churches[69] indicated that the founders recognized an acceptable federal role in encouraging religious behavior. The federal government's favorable disposition toward religion persisted in subsequent administrations which continued to make federal grants for the benefit of religious organizations.[70]

## IV. THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE: A BURDENSOME LEGACY

### A. *The Nineteenth Century*

The Nineteenth Century Supreme Court understood the Bill of Rights to restrict only federal government activity, and thus, a particular state's action affecting church and state affairs was restricted only if an establishment

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65. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 97-103 (1987) (Congressional and Presidential acts revealed no inconsistency in fostering religious growth). *See generally* Adams & Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1581-86 (1989) (framers' acts, apparently inconsistent with establishment clause, may be attributable to their broad view of federalism). For example, Jefferson's and Madison's presidential proclamations, treaties, and other acts revealed an accomodating view of the government's role in supporting religion. *Id.*

66. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 97-99 (1987) (Northwest Ordinance, passed in 1789, provided federal funds to Catholic church for ministering to newly settled lands); R. CORD, SEPARATION OF CHURCH AND STATE 53 (1982) (Madison played key role in creating chaplaincy system). *But see* Everson v. Board of Educ., 330 U.S. 1, 52 (1947)(Rutledge, J., dissenting) (Justice Rutledge believed framers' intent prohibited use of federal funds for religious training).

67. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 97-98 (1987) (George Washington issued two Thanksgiving proclamations, John Adams issued two, and Madison issued four); *see also* J. NOONAN, THE BELIEVERS AND THE POWERS THAT ARE 128-31 (1987) (quoting proclamations). Washington's and Adams' Thanksgiving proclamations each emphasized importance of faith in God to the success of the new nation. *Id.*; R. CORD, SEPARATION OF CHURCH AND STATE 251-60 (1982) (reprinting proclamations issued by Presidents Washington, Adams, and Jefferson).

68. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 100-01 (1987) (1803 Kaskaskia Indian Treaty provided federal monies for support of Catholic priests and building of a church). *See generally* R. CORD, SEPARATION OF CHURCH AND STATE 261-70 (1982) (reprinting Kaskaskia Indian Treaty).

69. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 101-02 (1987). However, Madison vetoed an attempted church incorporation in Alexandria, Virginia. *Id.*

70. *See, e.g.*, J. NOONAN, THE BELIEVERS AND THE POWERS THAT ARE 138 (1987) (Congress granted land to Ohio Company in 1833 for support of religion, granted land in 1832 to a Baptist university, and granted land in 1833 to a Jesuit university).

clause was written into the state's constitution.[71] The Court had no specific opportunity to review the scope of the establishment clause in the first half of the nineteenth century.[72] Thus, religious minorities depended on state constitutions to protect their religious liberties.[73] As a consequence, state courts proved to be the forums which forged the meaning of the word "establishment" in controversies involving the state and religion.[74]

In the latter half of the nineteenth century, the Court heard a number of cases which permitted it to comment on the meaning of the word "establishment."[75] In 1872, the Court issued an opinion involving a church property dispute which stated that "the law . . . is committed to the support of no dogma, the establishment of no sect."[76] In 1878 and 1890, the Court further

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71. *See, e.g.*, Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247-48 (1833) (Chief Justice Marshall ruled that fifth amendment restricted only federal activity, not state); Permoli v. New Orleans, 44 U.S. (3 How.) 589, 609-10 (1845) (first amendment religious clauses did not restrict state action); *cf.* Everson v. Board of Educ., 330 U.S. 1, 15 (1947) (Court first expressly applied first amendment's establishment clause to states in 1947); Cantwell v Connecticut, 310 U.S. 296, 303-04 (1940) (first application of free exercise clause to states); Gitlow v. New York, 268 U.S. 652, 666 (1925) (overturning *Barron* by applying first amendment to states through fourteenth amendment); *see also* L. LEVY, THE ESTABLISHMENT CLAUSE 122 (1986) (limitation of establishment clause to federal action permitted multiple state establishments of religion).

72. While the early Supreme Court did not engage in detailed establishment clause analysis, it did address a number of controversies involving church and state issues. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 562-63 (1832) (reversing conviction of missionary sentenced to four years imprisonment for unlicensed preaching); *see also* Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 198 (1844) (Christian based common law of Pennsylvania did not require express provision for teaching Christianity in testamentary creation of private college); Terret v. Taylor, 13 U.S. (9 Cranch) 43, 47 (1815) (Court addressed dispute over lands belonging to Virginia's Episcopal Church as property dispute, not as establishment clause case). *But see Everson*, 330 U.S. at 15 n.21 (Justice Black used *Terret* to support historical argument of Court's understanding of establishment clause).

73. *See* M. MARTY, PILGRIMS IN THEIR OWN LAND, 271-76 (1984) (religious minorities depended on state constitutions because open persecution of minorities continued through first half of the nineteenth century).

74. *See, e.g.*, Commonwealth v. Kneeland, 37 Mass. (20 Pick.) 206, 217 (1838) (blasphemy statute's implicit affirmation of Christianity was not an establishment of religion); Baker v. Fales, 16 Mass. 488, 492 (1820) (Massachusetts constitutional provision permitted local establishment of churches); Updegraph v. The Commonwealth, 26 Penn. (11 S.R.) 394, 400 (Pa. 1824) (blasphemy statute not an establishment of religion because part of historically Christian common law); The People v. Ruggles, 8 Johns. 290, 296 (N.Y. Sup. Ct. 1811) (religious sanction implicit in blasphemy statute did not constitute establishment of religion).

75. *See* R. CORD, SEPARATION OF CHURCH AND STATE 120 (1982) (cases preceding *Everson* did not provide basis for Justice Black's broad reading of establishment clause). *See generally* Comment, *Constitutional Fiction: An Analysis of the Supreme Court's Interpretation of the Religion Clauses*, 47 LA. L. REV. 169, 187-89 (1986) (Court's nineteenth century decisions did not support modern Court's approach).

76. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-29 (1871) (Court did not apply establishment clause in resolving property dispute); *cf.* Everson v. Board of Educ. 330 U.S. 1, 15

addressed the language of the religion clauses in two free exercise disputes involving the practice of polygamy by Mormons.[77] While holding in both cases that the free exercise clause did not permit polygamy, the Court, in dicta, explicated the language of the establishment clause.[78] In *Reynolds v. United States*, the Court introduced the "wall of separation" from Jefferson's letter to the Danbury Baptist Convention, a metaphor that would ultimately play a major role in shaping modern establishment clause jurisprudence.[79] In *Davis v. Beason*, Justice Field amplified the Court's interpretation of the word "establishment" when he wrote that "the First Amendment . . ., in declaring that Congress shall make no law respecting the establishment of religion, . . . is intended . . . to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect."[80] Finally, in 1899, the Court ruled that federal funding for the building of a hospital run by Catholics did not violate the establishment clause since the hospital was secularly incorporated.[81]

The nineteenth century closed without a clear understanding of the establishment clause's reach, primarily because the Court had chosen to avoid addressing the issue directly.[82] However, the Court's dicta did provide a narrow framework for establishment clause interpretation, a framework that reflected the framer's limited intentions, and one from which future Courts would drastically depart.[83]

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n.21 (1947) (Justice Black used *Watson* to support historical argument of Court's understanding of establishment clause).

77. *See* Davis v. Beason, 133 U.S. 333, 342-43 (1890) (Court provided dicta as to meaning of establishment clause); Reynolds v. United States, 98 U.S. 145, 166 (1878) (denying free exercise claim in affirming conviction for polygamy).

78. *Davis*, 133 U.S. at 342; *Reynolds*, 98 U.S. at 166.

79. *Reynolds*, 98 U.S. at 164. The Court used Jefferson's Bill for Religious Liberty, Madison's *Memorial and Remonstrance*, and Jefferson's letter to the Danbury Connecticut Baptist Association as a foundation for its interpretation. *Id.* at 162-64.

80. *Davis*, 133 U.S. at 342 (Court noted European legacy of oppression of diverse religious tenets or modes of worship provided reason for framers to create establishment clause).

81. Bradfield v. Roberts, 175 U.S. 291, 299-300 (1899) (federal grants to secular corporations run by religious orders do not violate first amendment).

82. *See* G. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 11 (1987) (Court sidestepped establishment clause issue in nineteenth century). *See generally* Comment, *Constitutional Fiction: An Analysis of the Supreme Court's Interpretation of the Religion Clauses*, 47 LA. L. REV. 169, 187-90 (1986) (reviewing nineteenth century Court decisions related to establishment clause).

83. *See, e.g.*, *Bradfield*, 175 U.S. at 298-99 (Court avoided establishment clause issue by restricting analysis to secular identity of incorporating parties); Church of the Holy Trinity v. United States, 143 U.S. 457, 470-71 (1892) (Court avoided establishment clause issue, but asserted Christian nature of America); *Davis*, 133 U.S. at 342 (free exercise issue but Court provided dicta as to meaning of establishment clause); *Reynolds*, 98 U.S. at 165-66 (denied free exercise claim and thus no need to address establishment clause); Watson v. Jones, 80 U.S. (13

### B. *Early Twentieth Century Developments*

During the first half of the Twentieth Century, the Supreme Court was confronted more often with free exercise questions than with establishment clause issues.[84] Ironically, the case which most significantly affected establishment clause interpretation did not involve religion at all.[85] In 1925, in *Gitlow v. New York*, the Supreme Court abandoned one-hundred-and-thirty-six years of applying the Bill of Rights only to federal action by holding that the first amendment applied to the states through the due process clause of the fourteenth amendment.[86] Fifteen years after *Gitlow*, the Court stated in dicta that the religion clauses of the first amendment applied to the states through the fourteenth amendment.[87] Finally, in 1947, the Court specifically held that the establishment clause restricted state action regarding religion.[88]

During this period, the Court dealt with two cases that explicitly broached establishment clause issues, but in each case the Court used other theories to achieve its result.[89] In 1908, the Court avoided establishment clause analysis by holding that federal funds held in trust to support Catholic education on

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Wall.) 679, 734 (1871) (Court avoided establishment clause issue by focusing on property dispute).

84. *See, e.g.*, Follett v. McCormick, 321 U.S. 573, 576-77 (1944) (exempting Jehovah's Witnesses from tax on sale of books); Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (interest in protecting child's safety outweighed child's right to street evangelization); Murdock v. Pennsylvania, 319 U.S. 105, 117 (1943) (exempting itinerant evangelists from state tax); Board of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (religious beliefs valid grounds for not saluting flag); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (applying free exercise clause to states through fourteenth amendment to find protection for door-to-door evangelizing by Jehovah's Witnesses); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (Compulsory Education Act of 1922 violated parents right to send children to parochial schools). *See generally* R. CORD, SEPARATION OF CHURCH AND STATE 98-99 (1982) (Compulsory Education Act required students to attend public schools from age eight to sixteen).

85. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (applying first amendment through fourteenth amendment to invalidate state restriction on speech).

86. *Id. Gitlow* created the foundation for the incorporation of the Bill of Rights to apply to the states through the due process clause of the fourteenth amendment.

87. *See Cantwell*, 310 U.S. at 303 (applying free exercise clause to states through fourteenth amendment to permit door-to-door evangelizing by Jehovah's Witnesses). *See generally* R. CORD, SEPARATION OF CHURCH AND STATE 99-101 (1982) (tracing process of applying religion clauses to states through fourteenth amendment).

88. *See* Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (establishment clause applied to state statute reimbursing students for school transportation costs). *See generally* Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 312-26 (1986) (Court's interpretation of religion clauses since *Everson* manifestly inconsistent rendering its modern establishment clause jurisprudence questionable).

89. *See* Cochran v. Board of Educ., 281 U.S. 370, 374-75 (1930) (buying books for parochial school constitutional because part of state police power to further education); Reuben

an Indian reservation did not violate the establishment clause.[90] In 1930, the Court upheld a Louisiana statute which allowed the state to purchase books for parochial schools.[91] The Court stated that the program fell within the scope of the states' police powers, and thereby avoided the implicit establishment clause controversy.[92] The Court's failure to define, prior to 1947, the precise meaning of the word establishment burdened the modern Court with the difficult task of uncovering that meaning.[93]

### C. *Everson and its Progeny*

In *Everson v. Board of Education*, the Court finally addressed the precise meaning of the words "an establishment of religion."[94] The case involved a challenge to a New Jersey program that reimbursed transportation expenses to the parents of children attending parochial schools.[95] Justice Black's majority opinion and Justice Rutledge's dissent delved into the foundations of the framers' understanding of the establishment clause's intended effect.[96] The majority paradoxically affirmed the state program while maintaining that the "wall of separation" between church and state must be "high and impregnable."[97] *Everson*'s conflicting rationale engendered a line of deci-

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Quick Bear v. Leupp, 210 U.S. 50, 82 (1908) (funds used to support Catholic education on reservation constitutional because not directly appropriated by Congress).

90. *See Reuben Quick Bear*, 210 U.S. at 82 (funds used to support Catholic education on reservation not directly appropriated by Congress for religious purposes).

91. *See* Cochran v. Board of Educ., 281 U.S. 370, 374-75 (1930) (buying books with state funds for parochial school does not violate establishment clause).

92. *Id.*

93. *See* R. CORD, SEPARATION OF CHURCH AND STATE 108 (1982) (cases prior to *Everson* ultimately of little value in determining what action establishment clause prohibited).

94. *See* Everson v. Board of Educ., 330 U.S. 1, 29 (1947)(Rutledge, J., dissenting) (Justice Rutledge acknowledged that Court could no longer avoid the issue of establishment clause's meaning).

95. *Id.* at 3 (state program reimbursed costs of transportation to parochial school through tax deduction).

96. *See id.* at 16, 33-41 (Justice Black relied ultimately on Jefferson's "wall of separation," while Justice Rutledge focused on Madison's *Memorial and Remonstrance*); *see also* Wallace v. Jaffree, 472 U.S. 38, 92 (1985)(Rehnquist, J., dissenting) (criticizing *Everson*'s historical analysis). In his dissent, Justice Rehnquist wrote:

> [t]he Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress. 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.

*Id.*

97. *See Everson*, 330 U.S. at 18 (Jackson, J., dissenting). Justice Jackson highlighted the discordant tone of the result, noting that permitting the state reimbursement program to help

sions characterized by contradictory results.[98]

The uncertain proportions of the "wall of separation" became evident in the Court's next two establishment clause decisions.[99] In the first case, the Court held that releasing students from class for religious instruction on school grounds violated the establishment clause.[100] In the second, however, it permitted released-time programs for religious instruction conducted off campus.[101] The Court again chose to accommodate religion in 1961 when it upheld the constitutionality of state Sunday closing laws.[102] However, the Court limited its accommodating approach the following year when it struck down a New York statute calling for the recitation of a nondenominational prayer at the start of the school day.[103]

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students of all private schools, including parochial schools, indicated that the "wall" had a limited reach. *Id.*

98. *See, e.g.*, Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, __, 110 S. Ct. 688, 698, 107 L. Ed. 2d 796, 811 (1990) (holding inconsistent with Follett v. McCormick, 321 U.S. 573 (1944), and Murdock v. Pennsylvania, 319 U.S. 105 (1943), which permitted exemptions from state license tax); County of Allegheny v. ACLU, __ U.S. __, __, 109 S. Ct. 3086, 3115-16, 106 L. Ed. 2d 472, 510-11 (holding inconsistent with Lynch v. Donnelly, 465 U.S. 668 (1984), which permitted the display of a creche); Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 905, 105 L. Ed. 2d 1, 25 (1989) (holding inconsistent with Walz v. Tax Comm'n, 397 U.S. 664 (1970), which permitted property tax exemptions for religious organizations); Wallace v. Jaffree, 472 U.S. 38, 68-9 (1985) (holding inconsistent with Marsh v. Chambers, 463 U.S. 783 (1983), which permitted state sanctioned prayer in legislature); Wolman v. Walter, 433 U.S. 229, 254-55 (1977) (holding inconsistent with Meek v. Pittenger, 421 U.S. 349 (1975), which denied any state support for counseling of private school students); School District v. Ball, 473 U.S. 373, 391-92 (1985) (holding inconsistent with Mueller v. Allen, 463 U.S. 388 (1983), which permitted tax exemptions to private school students).

99. *Compare* McCollum v Board of Educ., 333 U.S. 203, 210-11 (1948) (released time for religious instruction in school classrooms unconstitutionally breached "wall of separation") *with* Zorach v. Clauson, 343 U.S. 306, 315 (1952) (statute allowing students released time from school for religious education not violative of establishment clause). In *Zorach*, Justice Douglas, writing for the majority, affirmed the *Everson* and *McCollum* constitutional standard of separation between church and state, but recognized rational limits defined by the religious nature of American culture. *Zorach*, 343 U.S. at 312-15. Justices Black and Frankfurter dissented stating that *Zorach* overturned *McCollum*. *Id.* at 315-23.

100. *See McCollum*, 333 U.S. at 212 (Court affirmed *Everson*'s "wall of separation" noting that program permitting student released time for religious education on school property impermissibly aided religion).

101. *See Zorach*, 343 U.S. at 315 (Court limited "wall" by saying that separation between church and state did not prohibit released time for religious education off campus). Justice Douglas' majority opinion in *Zorach* more accurately reflected the framers' intent because it focused on the government's responsibility not to favor one particular sect over others. *Id.* at 313-14.

102. *See* McGowan v. Maryland, 366 U.S. 420, 449 (1961) (Court broadened interpretation of establishment clause to permit ostensibly religious legislation on issues secularized by historical tradition). Chief Justice Earl Warren noted that state Sunday closing laws did not violate the establishment clause, because the statutes had lost their religious nature. *Id.*

103. *See* Engel v. Vitale, 370 U.S. 421, 430 (1962) (if law appears to implicitly establish

The Court adopted its first elemental test for use in establishment clause analysis in 1963, a test that proved to be the precursor of the now operative *Lemon* test.[104] According to this test, a law could withstand constitutional scrutiny only if it had a secular purpose and had the effect of neither advancing nor inhibiting religion.[105] By adopting this "purpose/effect test," the Court abandoned the view that the establishment clause was intended merely to restrict state preference of one religion over others.[106] The Court subsequently applied the "purpose/effect test" to strike down a statute prohibiting public schools from teaching evolution,[107] and to uphold a statute requiring public schools to lend secular textbooks to private schools.[108]

In 1970, the Court reformulated the "purpose/effect test" by replacing the effects prong with a requirement that state action avoid excessive entanglements with religion.[109] In applying the "purpose/entanglements test" to uphold tax exemptions for church-owned real property, the Court adopted a more accommodating stance toward religion characterized by a "benevolent neutrality."[110] This new test permitted the Court more flexibility in applying the establishment clause because questions of church and state entangle-

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religion, then establishment clause violated). Even though students were not required to participate, law requiring recitation of prayer did not survive establishment clause scrutiny. *Id.*

104. School Dist. of Abington v. Schempp, 374 U.S. 203, 221-22 (1963). The Court applied this test to find that Bible reading as part of a public school exercise violated the estabishment clause. *Id.* at 226-27. *See generally* R. CORD, SEPARATION OF CHURCH AND STATE 147-48 (1982) (government violates establishment clause when it conducts religious ceremonies).

105. *See Abington*, 374 U.S. at 221-22 (Court used historical analysis to justify adoption of two part "purpose/effect test" which Court believed would accurately ensure government neutrality).

106. *See id.* at 309 (Stewart, J., dissenting) (Justice Stewart criticized "wall of separation" analysis as doctrinaire and antithetical to framers' intent).

107. *See* Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968) (government must be neutral toward religion and not be hostile to religion or irreligion). The Court held that the statute clearly violated the purpose prong of the "purpose/effect test." *Id.* at 107.

108. *See* Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (legislative purpose to provide educational benefits to students was secular and effect did not advance religion); *cf.* Cochran v. Board of Educ., 281 U.S. 370, 374-375 (1930) (buying books for parochial school part of state police power to further education). *But see* Wolman v. Walter, 433 U.S. 229, 250-54 (1977) (upholding loan of books and provision of services to parochial schools, but invalidating loans of other educational materials); Meek v. Pittenger, 421 U.S. 349, 366-67 (1975) (provision of instructional materials, such as maps, to parochial schools unconstitutional).

109. *See* Walz v. Tax Comm'n., 397 U.S. 664, 674-675 (1970) (Court created excessive governmental entanglements prong).

110. *See Walz*, 397 U.S. at 669 (taxing religious organizations would excessively entangle church and state activity). In *Walz*, the Court emphasized the importance of government neutrality toward religion regarding taxation. *Id.* at 669-70. *But see* Texas Monthly, Inc. v. Bullock __ U.S. __, __, 109 S. Ct. 890, 905, 103 L. Ed. 2d 7, 20 (1989) (Court held tax exemptions for religious publications violated establishment clause).

ments inherently hinge on questions of degree.[111] The Court's newly refined approach predisposed it to an establishment clause analysis designed to ensure that no religion would be favored, commanded, or inhibited.[112]

The Court's flexible predisposition was short-lived. For in *Lemon v. Kurtzman*,[113] the Court synthesized the "purpose/effect" and the "purpose/entanglements" tests to create a new three-pronged test which ultimately would serve as the touchstone for resolving all subsequent establishment clause controversies.[114] In *Lemon*, the Court reintroduced the effects prong to balance the subjectivity inherent in the entanglements prong.[115] The Court applied this new test to invalidate state programs which provided salary supplements to all private school teachers, including those at parochial schools, reasoning that such programs, while secular in purpose, ultimately created excessive church and state entanglements.[116] The Court argued that this entanglement could cause the kind of political divisiveness which the framers' intended to obviate with the establishment clause.[117]

The Court subsequently used the *Lemon* test to strike down programs which provided tuition reimbursement to private school students,[118] and programs which required public schools to loan instructional materials to private schools.[119] Additionally, the Court applied *Lemon* to uphold federal grants to religiously affiliated institutions of higher learning.[120] However,

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111. *See Walz*, 397 U.S. at 674 (Court stated entanglements test must be necessarily flexible). *See generally*, Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 2, 18 (1978-79) (criticizing *Walz*'s upholding of tax exemption as fundamentally contradicting purpose prong).

112. *Walz*, 397 U.S. at 669.

113. 403 U.S. 602 (1971).

114. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (Court's problem with ambiguity of word "respecting" in establishment clause created need for concrete test).

115. *See id.* at 614-15 (examining entanglements test). The entanglements test is inherently subjective because it involves examining the "relationship between government and religious authority" on a case-by-case basis. *Id.*

116. *Id.* at 624-25 (using entanglements prong to invalidate school funding program). The Court distinguished *Lemon* from *Walz* by holding that the establishment clause question in *Lemon* was based on an innovative school funding program, while the tax exemptions in *Walz* were based on an historically accepted policy of granting such exemptions to religious organizations. *Id.*

117. *Id.* at 622 (Court believed it politically necessary to ensure that religion clauses do not cause divisiveness).

118. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783 (1973) (invalidation of tuition tax grants and credits to parents of private school children). *But see* Mueller v. Allen, 463 U.S. 388, 403-04 (1983) (upholding tax deductions for private education).

119. *See* Wolman v. Walter, 433 U.S. 229, 248 (1977) (invalidating program of loaning instructional materials to parochial schools); Meek v. Pittenger, 421 U.S. 349, 372-73 (1975) (providing materials such as maps to parochial schools ruled unconstitutional).

120. *See* Roemer v. Board of Pub. Works of Md., 426 U.S. 736, 745 (1976) (Court upheld

problems in applying the *Lemon* test began to appear when the Court handed down conflicting opinions regarding the reimbursement of private schools for administering state-mandated tests,[121] and the public funding of counseling services at private schools.[122]

The 1980's brought the Supreme Court an ever increasing number of establishment clause cases, many of which questioned the effectiveness of the *Lemon* test as an analytical tool.[123] In its first establishment clause case of the new decade, the Court affirmed and expanded the right of private schools to be reimbursed for state-mandated testing.[124] The Court noted that the unpredictability of establishment clause decisions resulted from persistent difficulties in effectively applying the clause through the *Lemon* test.[125] That same year the Court struck down a statute requiring the display of the Ten Commandments in public school classrooms by ruling that the statute did not have a secular purpose.[126] Two years later, the Court affirmed the vitality of the *Lemon* test by using it to strike down a state law that permitted churches to veto pending liquor licenses if the applying business was within 500 feet of the church.[127] However, commitment to the *Lemon* test faltered

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grant program to private colleges where money used for secular purposes); *see also* Hunt v. McNair, 413 U.S. 734, 741-43 (1973) (Court upheld state bond program for private college construction as long as school not pervasively sectarian); Tilton v. Richardson, 403 U.S. 672, 679-81 (1971) (grants to universities upheld as long as religion did not permeate schools).

121. *Compare* Wolman v. Walter, 433 U.S. 229, 239-41 (1977) (allowing state counseling of private school students away from parochial school) *with* Meek v. Pittenger, 421 U.S. 349, 371-73 (1975) (denying state funded guidance counseling for students on parochial school grounds). In *Meek*, the Court upheld *Allen*'s legacy of permitting the loan of textbooks to parochial schools, but denied the constitutionality of loaning instructional materials such as maps. *Meek*, 421 U.S. at 373.

122. *Compare* Wolman v. Walter, 433 U.S. 229, 247-48 (1977) (upholding reimbursement for state-mandated testing) *with* Levitt v. Committee for Pub. Educ., 413 U.S. 472, 482 (1973) (denying reimbursement for administering of both state-mandated and teacher-created tests).

123. *See, e.g.*, Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 909, 103 L. Ed. 2d 1, 25-32 (1989)(Scalia, J., dissenting) (use of *Lemon* to deny tax exemption not founded on Constitution, precedent, or history); Edwards v. Aguillard, 482 U.S. 578, 639-40 (1987) (Scalia, J. dissenting) (criticizing inconsistent application of *Lemon* test); Aguilar v. Felton, 473 U.S. 402, 419 (1985) (*Lemon* criteria too formalistic); Wallace v. Jaffree, 472 U.S. 38, 112 (1985)(Rehnquist, C.J., dissenting) (*Lemon* test blurred and indistinct); Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (*Lemon* test not overriding criteria); Mueller v. Allen, 463 U.S. 388, 394 (1983) (*Lemon* test nothing but helpful signpost); Marsh v. Chambers, 463 U.S. 783, 792-95 (1983) (ignored *Lemon* in favor of historical argument).

124. *See* Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980). Justice White's majority opinion stated that until the Court developed an encompassing construction of the establishment clause, flexibility was preferable to strict predictability. *Id.*

125. *Id.*

126. Stone v. Graham, 449 U.S. 39, 56 (1980).

127. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-27 (1982) (permitting churches veto power over civil licensing created excessive church and state entanglements).

over the next two years. The Court ignored the *Lemon* test in permitting a state legislature to open each day with prayer,[128] questioned the test in upholding tuition tax credits for private school students,[129] and loosely applied the test in finding that a publicly displayed nativity scene did not violate the establishment clause.[130]

Despite its inconsistent application, the Court revived its faith in the *Lemon* test in 1985, when it used the test to invalidate a state "moment-of-silence" statute,[131] and to strike down two programs funding state teachers who gave remedial instruction in parochial schools.[132] In 1987, the Court reaffirmed *Lemon*'s viability by applying it to invalidate a state statute which called for the balanced treatment of evolution and creation science in schools.[133]

## V. RECENT DEVELOPMENTS: A DIVISION OF FAITH

Since 1987, the Supreme Court has applied the *Lemon* test to uphold programs that funded religious organizations offering adolescent counseling,[134] to invalidate religious-based tax exemptions,[135] to enjoin the display of a

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128. *See* Marsh v. Chambers, 463 U.S. 783, 792 (1983) (historical tradition permitted practice of opening state legislature with prayer to pass constitutional muster); *cf.* McGowan v. Maryland, 366 U.S. 420, 441-45 (1961) (Court broadened interpretation of establishment clause to permit ostensibly religious legislation on issues that have become secularized by historical tradition).

129. Mueller v. Allen, 463 U.S. 388, 403 n.11 (1983). The Court noted that the test provides "no more than a helpful signpost in dealing with establishment clause challenges." *Id.* at 394.

130. *See* Lynch v. Donnelly, 465 U.S. 668, 685-86 (1984) (historical tradition of creche display enabled it to survive constitutional scrutiny). The Court weakened the *Lemon* test emphasizing that it refused to be confined by any overriding criteria. *Id.* at 679.

131. Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985). The Court used *Lemon*'s purpose prong to strike down a school prayer statute which endorsed religion. *Id.* However, four Justices found the *Lemon* test inadequate and formalistically restrictive. *Id.* at 89-105.

132. Aguilar v. Felton, 473 U.S. 402, 413-14 (1985) (financial subsidy to public school teachers teaching in parochial schools violative of excessive entanglements prong). Four Justices in *Aguilar* dissented, objecting to the formalistic analysis compelled by *Lemon*. *Id.* at 419-22; *see also* School Dist. v. Ball, 473 U.S. 373, 397-98 (1985) (held program granting subsidy to state teachers for teaching in parochial school unconstitutional because it endorsed religion and violated effects prong).

133. *See* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (invalidated "balanced treatment" statute as violative of purpose prong because the statute endorsed religion); *cf.* County of Allegheny v. ACLU, __ U.S. __, __, 109 S. Ct. 3086, 3100, 106 L. Ed. 2d 472, 494 (1989) (Court noted that whether state action endorsed religion was essential to resolving constitutional issue).

134. Bowen v. Kendrick, 487 U.S. 589, 622 (1988) (grants to religious organizations providing adolescent counseling not violative of establishment clause).

135. *See* Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, __, 110 S. Ct. 688, 698, 107 L. Ed. 2d 796, 815 (1990) (religious organization not exempt from state sales and

nativity scene in a county courthouse,[136] and to allow extracurricular bible clubs to meet in public schools.[137] While putatively adhering to the *Lemon* test, the Court instead has emphasized state neutrality towards religion by expanding the test's "effects prong."[138] This has led the Court to use *Lemon* as a means to discern whether suspect government action caused an "endorsement of religion."[139]

### A. *Bowen v. Kendrick: The Establishment Clause and Counseling Services*

In *Bowen v. Kendrick*,[140] the Court applied the *Lemon* test to find that the Adolescent Family Life Act (AFLA)[141] did not violate the establishment clause.[142] Although the Act provided funding for religiously affiliated counseling organizations, the Court held that the overall program had a valid secular purpose.[143] The Court also concluded that the program did not ad-

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use taxes); Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 905, 103 L. Ed. 2d 1, 20 (1989) (state tax exemptions for religious publications violated establishment clause).

136. *See County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3115, 106 L. Ed. 2d at 511-12 (display of creche violated establishment clause, but menorah and Christmas tree display did not).

137. *See* Board of Education v. Mergens, __ U.S. __, __, 110 S. Ct. 2356, 2373, 110 L. Ed. 2d 191, 218 (1990) (Equal Access Act grants religious clubs access to public school extracurricular program).

138. *See, e.g., Mergens*, __ U.S. at __, 110 S. Ct. at 2373, 110 L. Ed. 2d at 218 (neutrality of Equal Access Act permitted Bible clubs to meet at public school); *County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3115, 106 L. Ed. 2d at 511-12 (creche display not neutral because had effect of advancing Christianity); *Bowen*, 487 U.S. at 622 (Adolescent Family Life Act facially neutral, thus no effect of advancing religion).

139. *See, e.g., County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3121, 106 L. Ed. 2d at 516-17 (O'Connor, J., concurring) (using "endorsement test" to find creche display violative of establishment clause); *Texas Monthly, Inc.*, __ U.S. at __, 109 S. Ct. at 896, 103 L. Ed. 2d at 9 (establishment clause at least prevents governmental "endorsement" of one religion over others); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (purpose of creationism statute was "endorsement" of religion); Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 348-49 (1987) (O'Connor, concurring) (free exercise benefits to religion do not operate as "endorsement of religion"); School Dist. v. Ball, 473 U.S. 373, 391-92 (1985) (educational program providing private school students benefits at public expense constituted "endorsement of religion"); Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (Court should objectively examine legislative history and text, as well as statute's implementation to find "endorsement"). *But see County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3141, 106 L. Ed.2d at 544-45 (Kennedy, J., dissenting) ("endorsement test" unworkable refinement of *Lemon*).

140. Bowen v. Kendrick, 487 U.S. 589 (1988). The Court found that grants to religious organizations which provide adolescent counseling did not violate the establishment clause. *Id.*

141. *See* 42 U.S.C.A. § 300z (West Supp. 1988) (codifying the Adolescent Family Life Act). Adolescent Family Life Act provided for counseling on adolescent sexual behavior. *Id.*

142. *Bowen*, 487 U.S. at 617-18.

143. *Id.*

vance religion, because the challenged recipients were not pervasively sectarian nor did they use the funds to promote religious activities.[144] The Court weakened *Lemon* by strongly criticizing the continued use of the "excessive entanglements prong" as unworkable.[145]

### B. *Texas Monthly, Inc. v. Bullock: Religious Based Tax Exemptions Questioned*

While nominally invoking the *Lemon* test in *Texas Monthly, Inc. v. Bullock*,[146] a plurality of the Court found that state-mandated tax exemptions for religious publications violated the establishment clause.[147] The Court rejected the claim that the exemption was merely a benefit incidental to free exercise rights.[148] Instead, the Court ruled that the statute's purpose effected an endorsement of religion over non-religion because the exemption only applied to religious publications.[149] The dissent argued that the majority had ignored the substantial precedent which supported religious tax exemptions as essential to protecting free exercise rights.[150]

### C. *County of Allegheny v. ACLU: The State and Religious Displays*

In *County of Allegheny v. ACLU*,[151] a deeply divided Court enjoined the display of a nativity scene on public property by ruling that the display effected an endorsement of Christian doctrine.[152] However, the Court also

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144. *See id.* at 616 (mere religious affiliation of recipient does not disqualify organization from federal grant program).

145. *See id.* at 615-16 (cited history of problems excessive entanglement prong had presented). The subjective nature of the entanglements prong creates inherent problems in its application. *Id. But see id.* at 649-51 (Blackmun, J., dissenting) (entanglements prong necessary to find whether impermissible governmental monitoring would be required).

146. __ U.S. __, 109 S. Ct. 890, 103 L. Ed. 2d 1 (1989).

147. *See* Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 905, 103 L. Ed. 2d 1, 20 (1989) (tax exemption for religious publications violative of establishment clause).

148. *Id.* at __, 109 S. Ct. at 901, 103 L. Ed. 2d at 15.

149. *See id.* at __, 109 S. Ct. at 900-01, 103 L. Ed. 2d at 14 (taxing religious publications does not hinder free exercise rights); *cf.* United States v. Lee, 455 U.S. 252, 258-59 (1982) (overriding governmental interest permitted taxing of Amish employer for social security). *But see* Walz v. Tax Comm'n., 397 U.S. 664, 673 (1970) (taxing church property would burden free exercise rights); Follett v. McCormick, 321 U.S. 573, 581-82 (1944) (license tax on religious booksellers burdened free exercise); Murdock v. Pennsylvania, 319 U.S. 105, 112-13 (1943) (license tax on door-to-door evangelists burdened free exercise).

150. *See Texas Monthly, Inc.*, __ U.S. at __, 109 S. Ct. at 909, 103 L. Ed. 2d at 25 (Scalia, J., dissenting) (denying tax exemption not founded on Constitution, precedent, or history).

151. __ U.S. __, 109 S. Ct. 3086, 106 L. Ed. 2d 472 (1989).

152. *See* County of Allegheny v. ACLU, __ U.S. __, __, 109 S. Ct. 3086, 3100-01, 106 L. Ed. 2d 472, 494-95 (1989) (endorsement means favoring or promoting religion). *But see* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (display of creche scene on public property not impermissible endorsement of religion). The Court distinguished the *Lynch* and the *County of Alle-*

ruled that the display of an eighteen-foot menorah next to a Christmas tree was constitutionally acceptable as an acknowledgment of the diversity of holiday traditions.[153] In separate opinions, Justices Brennan and Stevens concurred with the majority regarding the nativity scene, but dissented as to the Menorah and Christmas tree display, because they believed that it impermissibly favored religion over non-religion.[154]

In his dissent, Justice Kennedy asserted that proper application of the *Lemon* test supported the constitutionality of both the nativity scene and the Menorah and Christmas tree display.[155] He argued that the contradictory result reached by the Court in *County of Allegheny* indicated that the *Lemon* test needed thorough revision.[156] Justice Kennedy believed that *Lemon* had created an unjustifiable hostility towards religion which produced a decision that ignored both legal precedent and the Court's historical acceptance of religiously oriented holiday displays.[157]

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*gheny* displays by their respective physical composition. *See County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3103-04, 106 L. Ed. 2d at 497-99. The *Lynch* display had a creche, a Santa, and a talking wishing well, while the *County of Allegheny* display had only a creche scene prominently displayed. *Id.*

153. *See County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3114, 106 L. Ed. 2d at 510 (combination display of Christmas tree and menorah simply symbolized alternative traditions). Justice Stevens, writing for the majority, stated that the test was whether a reasonable observer was sufficiently likely to find the menorah and Christmas tree display significantly religious. *Id.* at __, 109 S. Ct. at 3114-15, 106 L. Ed.2d at 543-44. *See generally* Note, *Leading Cases*, 103 HARV. L. REV. 137, 234-37 (1989) (attacking "reasonable observer" test as inconsistent with constitutional analysis and flawed because it permits Justices to inject own values). The Court's adoption of the "endorsement" test will cause unpredictability in future establishment clause cases. *Id.* at 239.; Marshall, *'We Know It When We See It': The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 537 (1986) ("reasonable observer" test unworkable).

154. *See County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3124, 106 L. Ed. 2d at 523 (Brennan, J., concurring in part and dissenting in part) (menorah and Christmas tree display conveyed religious message). The Court voted six-to-three to uphold the display of the menorah, and voted five-to-four to enjoin the creche display. *Id.*

155. *See County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3134, 106 L. Ed. 2d at 550 (Kennedy, J., concurring in part and dissenting in part) (display of creche did not have primary effect of advancing religion). Justice Kennedy lamented the ascendancy of the endorsement test, and criticized it as unworkable in practice. *Id.* at __, 109 S. Ct. at 3134, 106 L. Ed. 2d at 544. Justice Kennedy advocated a coercion test that would enjoin displays only if they compelled the establishment of a particular religion. *Id.* at __, 109 S. Ct. at 3136-37, 106 L. Ed. 2d at 538-39 (Kennedy, J., dissenting). *See* Note, *Leading Cases*, 103 HARV. L. REV. 137, 234-37 (1989) (endorsement test flawed because of inherent subjectivity yielding inconsistent decisions).

156. *County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3134, 106 L.Ed. 2d at 535 (Justice Kennedy stated that *Lemon* test needed complete revision).

157. *See id.* at __, 109 S. Ct. at 3134, 106 L. Ed. 2d at 535 (precedent and history support toleration of traditional religious displays); *see also* Lynch v. Donnelly, 465 U.S. 668, 675-77 (1984) (recognizing historical validity of religious content in many state activities); Marsh v.

### D. *Jimmy Swaggart Ministries v. Board of Equalization: More on Religion and Taxes*

In *Jimmy Swaggart Ministries v. Board of Equalization*,[158] a surprisingly unanimous Court uncritically applied the standard *Lemon* three-pronged analysis to find that a religious organization was not exempt from paying state sales and use taxes.[159] The majority focused its *Lemon* analysis on the entanglements prong, and noted that the statute requiring religious organizations to comply with state accounting procedures did not cause an excessive enmeshing of religious and governmental affairs.[160] In applying the establishment clause, the Court factually distinguished *Swaggart* from *Texas Monthly*, stating that the statute addressed in *Texas Monthly* qualitatively differed from the one at issue in *Swaggart*.[161]

### E. *Board of Education v. Mergens: Status Quo Ante*

In its most recent establishment clause decision, the Supreme Court, by a vote of eight to one, found that the Equal Access Act constitutionally permitted extracurricular religious clubs to meet at public schools.[162] Writing for the majority, Justice O'Connor parenthetically invoked *Lemon* to uphold the constitutionality of public school bible clubs as long as they were part of a broader extracurricular program.[163] While implicitly affirming the continued viability of *Lemon* as a decision-making tool, Justice O'Connor avoided extended analysis of the test, choosing instead to scrutinize the facial validity

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Chambers, 463 U.S. 783, 795 (1983) (historical tradition permitted prayer in legislature to survive establishment clause scrutiny).

158. __ U.S. __, 110 S. Ct. 688, 107 L. Ed. 2d 796 (1990).

159. *See* Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, __, 110 S. Ct. 688, 699, 107 L. Ed. 2d 796, 814 (1990) (state tax statute had secular purpose, did not advance or inhibit religion, and created no excessive entanglements). The Court concluded there was not an excessive burden on free exercise rights caused by the sales and use tax. *Id.* at __, 110 S. Ct. at 692-97, 107 L. Ed. 2d at 811. *See* Hernandez v. Commissioner, __, U.S. __, __, 109 S. Ct. 2136, 2149, 104 L. Ed. 2d 766, 785 (1989) (disallowing tax deduction for training and auditing costs claimed as burdensome to free exercise by religious organization). *But see* Follett v. McCormick, 321 U.S. 573, 582-83 (1944) (license tax on religious booksellers burdened free exercise); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (license tax on door-to-door evangelists burdened free exercise).

160. *Jimmy Swaggart Ministries*, __ U.S. at __, 110 S. Ct. at 699, 107 L. Ed. 2d at 812 (more government invasion required before excessive entanglements occur).

161. *Id.* at __, 110 S. Ct. at 695, 107 L. Ed. 2d at 809 (Court explicitly refused to revisit particular establishment clause issues raised in *Texas Monthly*). Justice O'Connor briefly noted that the facts in *Swaggart* so differed from those in *Texas Monthly* that the Court did not have to rely on *Texas Monthly* in striking down the Swaggart Ministries tax exemption. *Id.*

162. *See* Board of Educ. v. Mergens, __ U.S. __, 110 S. Ct. 2356, 2373, 110 L. Ed. 2d 191, 218 (1990) (Court recognized that permitting such clubs did not cause unconstitutional entanglement of religion and state).

163. *Id.*

of the Equal Access Act.[164]

## VI. A PROPOSED REFORMULATION: PURPOSE AS SUBSTANCE

The United States Supreme Court's recent decisions indicate that modern establishment clause jurisprudence is in disarray.[165] The inherent weaknesses of the *Lemon* test became apparent in the inconsistent results the test produced in cases with relatively similar facts and issues.[166] The Court's judicial refinements of *Lemon*, most notably the "endorsement test," have served only to accentuate *Lemon*'s weaknesses.[167] Despite the analytical

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164. *See id.* at __, 110 S. Ct. at 2370-71, 110 L. Ed. 2d at 214-15 (use of *Lemon*, while cursory, helped validate test's continuing viability).

165. *See* County of Allegheny v. ACLU, __ U.S. __, __, 109 S. Ct. 3086, 3134, 106 L. Ed. 2d 472, 535 (1989)(Kennedy, J., concurring in part and dissenting in part) (Justice Kennedy recognized need for substantial revision of establishment clause jurisprudence); Wallace v. Jaffree, 472 U.S. 38, 92 (1985)(Rehnquist, C.J., dissenting) (Justice Rehnquist criticized *Everson*'s faulty historical analysis). *See generally* Tushnet, *The Constitution of Religion*, 18 CONN. L. REV. 701, 701-12 (1986) (examining various reasons for confusion in establishment clause jurisprudence); Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 817, 839 (1984) (modern establishment clause jurisprudence is a doctrinal mess).

166. The Court has encountered conflict in the area of taxation of religious organizations. *Compare* Jimmy Swaggart Ministries v. Board of Equalization, __ U.S. __, __, 110 S. Ct. 688, 695-96, 699, 107 L. Ed. 2d 796, 814 (1990) (state tax statute had secular purpose, did not advance or inhibit religion, and created no excessive entanglements) *with* Follett v. McCormick, 321 U.S. 573, 582-83 (1944) (license tax on religious booksellers burdened free exercise) *and* Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (license tax on door-to-door evangelists burdened free exercise). *Compare* Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 905, 103 L. Ed. 2d 1, 20 (1989) (tax exemption for religious publications violative of establishment clause) *with* Walz v. Tax Comm'n., 397 U.S. 664, 673 (1970) (taxing church property does not burden right to free exercise of religion). The Court has also handed down contradictory decisons regarding religious displays on public property. *Compare County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3115-16, 106 L. Ed. 2d at 512 (display of creche violated establishment clause, but menorah and Christmas tree display did not) *with* Lynch v. Donnelly, 465 U.S. 668, 683 (1984) (display of creche scene on public property not impermissible endorsement of religion). The problem of public prayer has also caused conflict. *Compare Wallace*, 472 U.S. at 68-69 (invalidating prayer in public schools) *with* Marsh v. Chambers, 463 U.S. 783, 795 (1983) (permitted statute requiring legislative prayer). The use of school facilities within a "religious" context has presented contradictions in Court decisions. *Compare* Wolman v. Walter, 433 U.S. 229, 248 (1977) (allowing state counseling of private school students away from parochial school) *with* Meek v. Pittenger, 421 U.S. 349, 372 (1975) (denying state guidance counseling for students on parochial school grounds).

167. *See* Edwards v. Aguillard, 482 U.S. 578, 639 n.7 (1987)(Scalia, J., dissenting) (criticizing inconsistencies *Lemon* and progeny have yielded); Aguilar v. Felton, 473 U.S. 402, 429-30 (1985)(O'Connor, J., dissenting) (criticizing "entanglements prong"); *Wallace*, 472 U.S. at 107 (Rehnquist, C.J., dissenting) (*Lemon* provides blurred and indistinct test); Roemer v. Maryland Pub. Works, 426 U.S. 736, 768-69 (1976) (White, J. concurring) (*Lemon* "entanglements prong" creates unworkable paradox); *Meek*, 421 U.S. at 359 (*Lemon* provides only general guidelines); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 799 (1973) (Burger, C.J.,

quandary created by the *Lemon* test, the Court has refused to engage in any wholesale reformulation of the test's elemental framework.[168] The Court has not revised its approach probably because of the substantial precedent that supports the application of the *Lemon* test to establishment clause controversies.[169] However, the Court's cautious adherence to *Lemon* ignores the contradictory results the test has produced.[170]

The Court has built its modern establishment clause jurisprudence upon an interpretation of the framer's original understanding of the words "Congress shall make no law respecting an establishment of religion."[171] Beginning with *Everson*, the Court believed that proper application of the establishment clause depended on accurately discovering this original understanding.[172] Thus, from the start, the modern Court took a distinctively originalist approach to resolving contemporary establishment clause contro-

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concurring in part and dissenting in part) (*Lemon* test is merely useful signpost). *See generally* Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049, 1051 (1986) (endorsement test focuses on impact of religiously related state action on non-believer).

168. *See, e.g., Jimmy Swaggart Ministries*, __ U.S. at __, 110 S. Ct. at 697-98, 107 L. Ed. 2d at 811-12 (applied standard three-pronged *Lemon* test); Bowen v. Kendrick, 487 U.S. 589, 615-18 (1988) (Court applied *Lemon* to uphold grants to religious organizations providing adolescent counseling); School Dist. v. Ball, 473 U.S. 373, 382-83 (1985) (*Lemon* should guide establishment clause inquiries); *Wallace*, 472 U.S. at 61 (applied *Lemon* to strike school prayer statute); *Lynch*, 465 U.S. at 684-85 (applied *Lemon* to uphold creche display); Mueller v. Allen, 463 U.S. 388, 394 (*Lemon* test must be starting point for all establishment clause analysis); Widmar v. Vincent, 454 U.S. 263, 271 (1981) (used *Lemon* to permit equal access to school for religious speakers).

169. *See County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3145-46, 106 L. Ed. 2d at 543 (Kennedy, J., dissenting) (Justice Kennedy believed proper application of *Lemon* test should have permitted display of creche scene). Justice Kennedy paradoxically criticized *Lemon*, then accepted its use in this case, and then used an historically based argument to support display of the creche. *Id.* at __, 109 S.Ct. at 3134-40, 106 L. Ed. 2d at 535-43.

170. *See, e.g., Jimmy Swaggart Ministries*, __ U.S. at __, 110 S. Ct. at 698, 107 L. Ed. 2d at 811 (holding inconsistent with *Follett* and *Murdock* which permitted exemptions from state license tax); *County of Allegheny*, __ U.S. at __, 109 S. Ct. at 3115-16, 106 L. Ed. 2d at 510-11 (holding inconsistent with *Lynch* which permitted display of creche); Texas Monthly, Inc. v. Bullock, __ U.S. __, __, 109 S. Ct. 890, 905, 105 L. Ed. 2d 1, 25 (1989) (holding inconsistent with *Walz* which permitted property tax exemptions for religious organizations); *Wallace*, 472 U.S. at 68-69 (holding inconsistent with *Marsh* which permitted state sanctioned prayer in legislature); Wolman v. Walter, 433 U.S. 229, 250-55 (1977) (holding inconsistent with *Meek* which denied any state support for counseling of private school students); *Ball*, 473 U.S. at 389-92 (holding inconsistent with *Mueller* which permitted tax exemptions to private school students).

171. U.S. CONST. amend. I, cl. 1.

172. *See* Everson v. Board of Educ., 330 U.S. 1, 8-15 (1947) (Court recounted series of historical events, documents, and personalities to support meaning of establishment clause). In his dissent, Justice Rutledge closely examined Madison's writings in an attempt to discover the meaning of the establishment clause. *Id.* at 31-41.

versies.[173] However, the *Everson* Court's desire to implement a specific policy resulted in a narrow historical analysis wherein the Court appropriated only those sources that supported its policy.[174] The Court's adoption of Thomas Jefferson's metaphorical "wall of separation" as the guiding symbol for proper church and state relations set the tone for subsequent establishment clause decisions.[175] If the Court had expanded its historical analyses to include the views of the other framers, it would have found them distinctly non-Jeffersonian, and a substantially different approach may have resulted.[176]

Any evaluation of the establishment clause should begin with a scrupulous review of the House and Senate committee debates that led to the clause's creation.[177] Those debates provide the most persuasive evidence regarding

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173. *See id.* at 12-13 (Court focused only on Madison's and Jefferson's writings to derive establishment clause's original meaning). *See generally* Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 201 (1980) (Court implicitly incorporated Jeffersonian notion that state needed protection from contamination of religion).

174. *See Everson*, 330 U.S. at 15-16 (Justice Black sought to use the limited available precedent to support his strict separationist approach). *See generally* Bradley, *Dogmatomachy - A "Privatization" Theory of the Religion Cases*, 30 ST. LOUIS U.L.J. 275, 287-88 (1986) (propagation of policy goals, not historical reliance, basis for Court's establishment clause rulings). The Court's policy has resulted in removal of religious consciousness from the public sphere. *Id.* at 280; *cf.* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 514-15 (1968) (Court's separationist policy has frustrated original purpose of establishment clause).

175. *See* Bradley, *Church Autonomy in the Constitutional Order: The End of Church and State?*, 49 LA. L. REV. 1057, 1057-59 (*Everson* made the "wall of separation" part of our cultural fabric). Professor Bradley quoted candidate George Bush from a speech he made in 1988:

> Was I scared floating around in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well you go back to fundamental values. I thought about Mother and Dad and the strength I got from them—and God and faith and *the separation of Church and State.*

*Id.* at 1057 (emphasis added); Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805, 810 (1978) (Court has focused on separating church and state, while objective of religion clauses is to promote religious liberty).

176. *See* J. EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 339-42 (1987) (majority of framers' were committed men of faith; Madison was an enigma, and Jefferson was a Deist who became a Unitarian).

177. *See* Wallace v. Jaffree, 472 U.S. 38, 98-99 (1985)(Rehnquist, J., dissenting) (establishment clause can only be understood through framers' original intentions which *Everson* misread). *See generally* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674-5 (1980) (framers intended clauses to complement one another, but Court's separate tests have caused irreconcilable tension between them).

the meaning of the words "establishment of religion."[178] The specific language used at these debates by Housemembers James Madison, Elbridge Gerry, Benjamin Huntington, Fisher Ames, and the participating Senators provides the most explicit insight into what the framers understood the establishment clause to mean.[179] Additionally, the acts of the First Congress, and the practices of the early presidents, many of whom were also framers of the Constitution, substantiate further what effect the framers' intended the establishment clause to have.[180]

A viable reformulation of the *Lemon* test, loyal to the language and actions of the framers, would provide that state action must not have as its purpose the favoring, compelling, or mandating of any article of religious faith, any mode of religious worship, or any denominational doctrine.[181] This alternative is a purpose-based test which comports with the framers' understanding of the establishment clause as revealed by the congressional debates and early federal action regarding religion. The proposed test would invalidate government action whose purpose supported the propagation of religion, but would permit such action that incidentally benefited religious organizations.[182] Specifically, the proposed test would prevent states from sponsoring public displays favoring a particular religion or from compelling

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178. *See* T. CURRY, THE FIRST FREEDOMS 200-07 (1986) (reprinting critical excerpts from House and Senate committee hearings on establishment clause).

179. *See* T. CURRY, THE FIRST FREEDOMS 200 (1986) (framers sought to restrict federal establishments of religion, not to exclude religion from state matters altogether). The framers of the establishment clause were concerned about the federal government favoring a particular denomination, doctrine, or mode of worship over others. *Id.*

180. *See* R. CORD, SEPARATION OF CHURCH AND STATE 45 (1982) (Congress and early presidents enacted numerous treaties and legislation that funded various missionary enterprises).

181. *See* T. CURRY, THE FIRST FREEDOMS 200-09 (1986) (providing alternative House and Senate committee formulations). Elbridge Gerry's proposal stated that "no religious doctrine shall be established by law." *Id.* at 200. Gerry was from Massachusetts, as was Fisher Ames, whose final formulation became the establishment clause; thus, Gerry's and Ames' common background makes the former's suggestion critically important to understanding what Ames intended with his formulation. *Id.* at 202, 209. *See id.* at 207 (Senate version read: "Congress shall make no law establishing articles of faith or a mode of worship . . . ."). The Senate debate more clearly defined what "establishment of religion" meant by identifying those religious areas that the state could not touch. *Id.*

182. *See, e.g.*, Bowen v. Kendrick, 487 U.S. 589, 622 (1988) (proposed test would uphold, as *Lemon* did here, programs that incidentally benefit religion); Roemer v. Board of Pub. Works., 426 U.S. 736, 745 (1976) (proposed test would uphold all grants to sectarian colleges, if money not used to propagate religion, as incidental benefits to religious institutions); Hunt v. McNair, 413 U.S. 734, 743 (1973) (proposed test would uphold state bond program for private college construction, even if school pervasively sectarian, as incidental benefit to religion); Tilton v. Richardson, 403 U.S. 672, 679 (1971) (proposed test would uphold university grants not used to propagate religion, even if religion permeated schools, as incidental benefit to religion). *See generally* Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1, 69

prayer in public schools, but it would permit educational aid that benefited parochial schools as long as that aid was not used to foster particular religious beliefs.[183]

## VII. CONCLUSION: CUTTING THE GORDIAN KNOT[184]

The evolution of modern establishment clause jurisprudence has produced a series of difficult burdens. States have been burdened with the requirement that they carefully avoid legislation that may benefit religion, which has limited the states capacity to render educational aid to all of its students, and has deprived them from furthering the broadly beneficial social welfare programs sponsored by religious organizations. Religious organizations have been burdened with the pejorative connotations implicated by the building of Jefferson's "wall of separation," connotations which imply that the presence of religion in civil affairs contaminates those affairs. The Court burdened itself with the task of formulating a test to support an establishment clause philosophy that had become enslaved to Jefferson's metaphor. The difficulty of this task has been plainly evident in the torturous development, refinement, rejection, and revival of the *Lemon* test. All of these substantial burdens owe their origin to a simple metaphorical phrase that Thomas Jefferson wrote in a conciliatory letter to the Danbury Baptist Association in 1802, over ten years after the the adoption of the Bill of Rights.

Religious issues in contemporary America potentially breed passionate divisiveness, which may account for the Court's diffidence in directly addressing the intractable problems which have effectively disabled its current establishment clause jurisprudence. Additionally, forty-three years of caselaw, however inconsistent, have reinforced Jefferson's "wall of separation," a fact which militates strongly against its abandonment as the guiding

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(1961) (denying funding to parochial school violates religion clause because denial based upon impermissible religious classification).

183. *See, e.g.*, County of Allegheny v. ACLU, __ U.S. __, __, 109 S. Ct. 3086, 3115-16, 106 L. Ed. 2d 472, 510-11 (1989). The proposed test would have produced a different outcome in *County of Allegheny* by holding the creche and menorah displays unconstitutional, but permitting the Christmas tree display. *Id.*; Wallace v. Jaffree, 472 U.S. 38, 68-69 (1985). The proposed test would have reached the same outcome *Wallace* produced by holding compulsory school prayer unconstitutional. *Id.*; Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968). The proposed test would support educational benefits to parochial school students, such as those at issue in *Allen*, as long as the appropriated public funds were not used to propagate religion. *Id.*

184. *See* WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY - UNABRIDGED 787 (2d ed. 1983). Greek legend relates that King Gordius of Phyrigia tied a knot which, according to an oracle, would be untied by the future ruler of Asia. *Id.* Alexander the Great, failing to untie the knot, cut it with his sword. *Id.* Webster defines a "Gordian knot" as any perplexing problem, and "cutting the Gordian knot" means finding "a quick, efficient solution for a perplexing problem." *Id.*

symbol of establishment clause jurisprudence. The Gordian Knot that contemporary establishment clause analysis has become cannot easily be undone. The Court will have to cut through its raveled jurisprudence to a solution faithful to the originalist methodology adopted by the Court in *Everson*. Thus, the Court should abandon the residual restrictions of Jefferson's ill-conceived wall, effectively embodied by the *Lemon* test, and adopt a reformulated approach derived from an objective, analytical recovery of what the framers originally intended by the words "Congress shall make no law respecting an establishment of religion."