Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis

Kevin D. Evans
BEYOND NEUTRALISM: A SUGGESTED HISTORICALLY JUSTIFIABLE APPROACH TO ESTABLISHMENT CLAUSE ANALYSIS*

Kevin D. Evans

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. . . . for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.**

I. PROPER INTERPRETATIVE ROLE

Although historically and constitutionally unsupportable, judicial interpretation of the establishment clause has tended toward "secular-sectarian neutralism" ("neutralism"). Many of those who support the "neutralist" position, if not engaging in a selective historical analysis, claim that regardless of the founders' intended meaning of the establishment clause, societal attitudes and values have changed since the time the First Congress passed the Bill of Rights. Therefore, according to neutralists, the Supreme Court was correct in liberally interpreting the establishment clause. If the Court, however, exercises its constitutional duty in a way that enables it to interpret a constitutional provision depending on the prevailing mood of the public or predilections of individual Justices, the Court ignores the significance of the Constitution, labeled by Chief Justice Marshall as the "greatest improvement on politi-

* Copyright 1990 by Kevin D. Evans, an attorney in the Chicago law firm of Schiff Hardin & Waite.
** The Declaration of Independence, para. 2 (U.S. 1776) (emphasis added). The Declaration was authored by Thomas Jefferson, whom advocates of "secular-sectarian neutralism" look to for support of their "neutralist" theory.
cal institutions." Given the paramount nature of the Constitution and the fact that the document itself prescribes the method for constitutional change, the proper interpretative role must be limited to determining the constitutionality of novel ideas and circumstances against a constant constitutional backdrop, i.e., the intended meaning of the relevant constitutional provision, rather than current societal beliefs and the "intellectual predisposition" of court members.

II. RELIGIOUS-RELATED ACTIVITIES OF THE CONTINENTAL CONGRESS

Prior to the adoption of the Constitution in 1789, the United States Government operated under the Articles of Confederation. The Articles of Confederation, adopted in 1777, provided the national government with little power; according to article II, "[e]ach State retain[ed] its sovereignty, freedom and independence, and every power, jurisdiction and right, which [was] not by [the] confederation expressly delegated to the United States, in Congress assembled." Although the Continental Congress was not expressly

---

1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 178 (1803). As Chief Justice Marshall noted in Marbury: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation." Id. at 177. Marshall also remarked:

   The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

   If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

   Id. Although Marshall was speaking in terms of the superiority of constitutional provisions over inconsistent legislative acts, the same rationale can be applied to judicial decisions, since "the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature." Id. at 179-80.

2. Edwards v. Aguillard, 482 U.S. 578, 634 (1987) (Scalia, J., dissenting). The "liberal" exercise by the Supreme Court of its interpretative duty in establishment clause cases has led one commentator to remark that the Court has repudiated the philosophy of those who wrote the Constitution, and the rationale behind the great constitutional decisions of Marshall, Story, and many others in the formative period of the United States. The words of a document like the Constitution take on a meaning only insofar as they are interpreted within the framework of a specific philosophy.


given the power to legislate on matters of religious import, it was not shy to take religious-related action.4

Evidence of pre-Constitution, religious-related governmental action can be found in The Northwest Ordinance of 1787.6 The Northwest Ordinance contains six "articles of compact, between the original States and the people and [future] States in the said territory [north and west of the Ohio River]." Article I and article III are worthy of particular notice. According to article I, "[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories." Article III provided that "[r]eligion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Although religious liberty

4 See L. PFEFFER, CHURCH, STATE, AND FREEDOM 119-20 (rev. ed. 1967). Professor Pfef-
fer, who is acknowledged as one of the foremost advocates of strict separation, a broad form of neutralism, has noted:

[T]he Congress did not hesitate to legislate on such subjects as morality, sin, repentance, humiliation, divine service, fasting, prayer, reformation, mourning, public worship, funerals, chaplains, true religion, and Thanksgiving. The Sabbath was recognized to a degree rarely exhibited in other countries; Congress adjourned and all official business was suspended, as it was on Good Friday.

As was to be expected, immediately on its assembling Congress adopted a resolution calling for prayer at the opening of each daily session, and designated [a] . . . clergyman to act as chaplain of Congress . . .

In June 1775, Congress adopted a resolution setting aside July 20, 1775 as a day of national "humiliation, fasting and prayer." In that same year it provided for chaplains in the army, with pay equivalent to that of captains. Congress in 1776 directed the employment of a minister to instruct [the Indians] in the principles of Christianity . . . Congress made extensive use of religion and the churches as instruments of propaganda for the Revolutionary War and the new nation. In 1778 it recommended to the states that they encourage religion and suppress vice. A few years later it officially endorsed an American edition of the Bible, and recommended it to people as a careful and accurate work. And in 1783 it proclaimed the peace treaty with England "[i]n the name of the Most Holy and Undivided Trinity."

Id. (footnotes omitted). In light of this activity, another author has explained:

It is clear that [the Continental] Congress rested heavily upon a religious authority and intended in every way possible to promote as a basis for a well-ordered government a dependence upon Protestant Christianity. There is no evidence that it for a moment contemplated a possible separation of the State and religion.

E. HUMPHREY, NATIONALISM AND RELIGION IN AMERICA 1774-1789, at 439 (1924 & 1966 reis-
sue) (emphasis added).
is an obvious sentiment reflected in The Northwest Ordinance, it
defies logic to suggest, especially in light of the pronouncement in
article III, that congressional leaders of the day blessed neutrality
between secular and sectarian elements of society.9

III. THE BILL OF RIGHTS

Since the Articles of Confederation "reserved" to the states
the ability to legislate with respect to personal liberties, including
religion, many states did so, either in their respective bills of rights
or other constitutional provisions. As a result, a motion to include
a bill of rights in the Constitution was vetoed by state delegates to
the constitutional convention, mainly on the ground that existing
state provisions regarding individual liberties were adequate.10 In
fact, many influential delegates felt that the inclusion of a bill of
rights in the Constitution would be harmful on the ground that it
would imply the granting of powers to the federal government that
in fact never were given.11

Perhaps cognizant of the experience under the Articles of Con-
federation, including the religious-related activities of the Conti-
nental Congress, the majority of delegates to the state ratifying
conventions objected to the absence of a bill of rights restricting
the federal government with respect to legislation regarding reli-
gion. The "omission of an express guaranty of religious freedom
and other natural rights almost prevented ratification [of the Con-
stitution]."12 Due to this "public clamor," the proponents of
the Constitution could persuade several states to ratify only after
promising to work for the addition of a bill of rights.13 As a result,
James Madison, one of the Constitution's proponents who origi-

9 Advocates of neutralism do not further their position by noting that the Constitution
succeeded The Northwest Ordinance, for the First Congress readopted The Northwest Ordi-
nance, including article III, verbatim, on August 7, 1789. See 1 Stat. 50 (1789).
10 See J. Madison, Notes of Debates in the Federal Convention of 1787, at 630 (A.
Koch ed. 1966).
11 See L. Pfeffer, supra note 4, at 125-26 (noting viewpoints of Alexander Hamilton,
James Madison, and James Wilson); R. Rutland, The Birth of the Bill of Rights 1776-
12 L. Pfeffer, supra note 4, at 125. Two prominent citizens expressed the sentiment of
many Americans. Thomas Jefferson believed "that a bill of rights should not 'rest on infer-
ences,'" while Patrick Henry, speaking before the Virginia ratifying convention, commented
that "'[t]hat sacred and lovely thing, religion,' ought not to rest on 'the ingenuity of logical
deduction.'" Id. at 126 (quoting J. Elliot, The Debates in the Several State Conven-
tions on the Adoption of the Federal Constitution 318 (2d ed. 1888)).
nally felt that the inclusion of a bill of rights was unnecessary for purposes of ratification,\textsuperscript{14} drafted a proposed bill of rights after his election to the House of Representatives in 1789. Once the House and Senate agreed on the final version, the Bill of Rights was submitted to the states for approval. The Bill of Rights, which, as passed, begins with a guaranty of religious freedom (as drafted the first amendment was the third proposed amendment to the Bill of Rights), was approved by the necessary number of states and declared in force on December 15, 1791.\textsuperscript{15}

IV. THE HISTORY OF THE ESTABLISHMENT CLAUSE

The establishment clause provides that “Congress shall make no law respecting an establishment of religion.”\textsuperscript{16} The history behind the drafting of the establishment clause lends insight into its intended purpose and meaning.

James Madison, the principal author of the Bill of Rights, originally drafted the religion clauses (i.e., the establishment and free exercise clauses) to 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.”\textsuperscript{17}

\textsuperscript{14} Regarding the need for the inclusion of a bill of rights, Madison stated:

The first of these amendments relates to what may be called a bill of rights. I will own that I have never considered this provision so essential to the Federal Constitution as to make it improper to ratify it, until such an amendment was added; at the same time, I always conceived, that in a certain form, and to a certain extent, such a provision was neither improper nor altogether useless.

Speech of James Madison to the First Congress (June 8, 1789) quoted in J. O’NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 95 (1949).


\textsuperscript{16} U.S. CONST. amend. I.

\textsuperscript{17} 1 ANNALS OF CONG. 451 (Gales & Seaton ed. 1789). Robert Cord, a noted scholar on the establishment clause, insightfully noted:

Examining the original draft of Madison’s proposed Establishment Clause is also important, if not crucial, in understanding Madison’s intent, because when Madison submitted his proposal to the First House of Representatives, he had no way of knowing whether it would be amended or adopted exactly as he wrote it. Unless it can be seriously argued that Madison introduced a proposal that did not fully prohibit what he thought should be denied to the Federal Government in the area of religion—a proposition too ludicrous to seriously entertain—Madison’s first draft of the Establishment Clause should show what he intended in the area of established religion. It is clear on the record. He did not want a national religion or religious coercion and he said so.

During the course of the debates in the House of Representatives Madison's religion clauses were altered to read: "No religion shall
be established by law, nor shall the equal rights of conscience be
infringed." With respect to this particular revision,

[Madison] apprehended the meaning of the words to be, that
Congress should not establish a religion, and enforce the legal ob-
servation of it by law, nor compel men to worship God in any
manner contrary to their conscience. Whether the words are nec-
essary or not, he did not mean to say, but they had been required
by some of the State Conventions, who seemed to entertain an
opinion that under the clause of the constitution, which gave
power to Congress to make all laws necessary and proper to carry
into execution the constitution, and the laws made under it, ena-
bled them to make laws of such a nature as might infringe the
rights of conscience, and establish a national religion; to prevent
these effects he presumed the amendment was intended, and he
thought it as well expressed as the nature of the language would
admit.  

The next revision of the religion clauses was suggested by Sa-

[Samuel Livermore], who provided that the amendment should be al-

tered to read: "Congress shall make no laws touching religion, or
infringing the rights of conscience." The House voted to adopt
Livermore's rendition without explanation. Five days later, on the
suggestion of Fisher Ames, the religion clauses were amended yet
again, this time to read: "Congress shall make no law establishing
religion, or to prevent the free exercise thereof, or to infringe the
rights of conscience." This version was ultimately sent to the
Senate.

The first proposal considered by the Senate was offered on
September 3, 1789, and read: "Congress shall make no law estab-
lishing one religious sect or society in preference to others, or to

\[1\] \textit{Annals of Cong.}, supra note 17, at 757.
\[10\] Id. at 758.
\[20\] Id. at 759.
\[21\] Id. at 796. The fourth version of the amendment (the establishment clause portion of
which is identical in substance to the second version, on which Madison opined the mean-
ing) is much closer to the final version of the first amendment than was the third
(Livermore) version. While the fourth version limited its "establishment clause" prohibition
to an establishment of religion, the Livermore version prohibited Congress from passing any
law affecting religion. The position advocated by neutralists is exactly that advanced by
Livermore. The fact remains, however, that the version of the establishment clause that was
sent to the Senate does not remotely resemble Livermore's version.
infringe on the rights of conscience.” Although the proposal initially was defeated, it subsequently was reconsidered and accepted. This version of the establishment clause plainly would have allowed for “nonpreferential” religious assistance. Subsequent to the approval of the first version, the Senate considered and rejected two other proposals: 1) “Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society”; and 2) “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.” Before it adjourned, the Senate entertained two additional motions pertaining to the religion clauses. First, the Senate rejected a motion to adopt the version proposed by the House of Representatives. The Senate then voted to adopt an amended form of the House proposal, which read: “Congress shall make no law establishing religion, or prohibiting the free exercise thereof.” On September 9, 1789, the Senate adopted its final version of the religion clauses, which read: “Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion.” This version was then sent to the House for consideration.

The House rejected the Senate version and requested that a conference composed of members of both chambers be assembled to consider the matter. The Senate agreed and a committee was convened comprised of the following members: Senator Charles Carroll of Maryland, Senator Oliver Ellsworth of Connecticut, Senator William Paterson of New Jersey, Representative James Madison of Virginia, Representative Roger Sherman of Connecticut, and Representative John Vining of Delaware. The conference committee ultimately voted to accept what was the fourth House

---

22 JOURNAL OF THE FIRST SESSION OF THE SENATE 70 (Gales & Seaton eds. 1820).
23 Id.
24 Id.
25 Id. Because the Senate had access to Madison’s thoughts regarding the meaning of the proposed House version of the establishment clause, which for all intents and purposes was identical to the meaning of the proposal initially adopted by the Senate, there can be no great change of heart attributable to the decision by the Senate to adopt the House version of the establishment clause.
26 Id. at 77.
27 Id. at 77-78.
version and the second Senate version of the establishment clause, with "respecting an establishment" replacing the word "establishing."  

A. A Federalism Compromise

Many establishment clause scholars have failed to gauge adequately the importance of federalism considerations in the adoption of the religion clauses. One scholar has stated, however, that "federalism was the overriding issue throughout the [First] Congress." Due to the strengthening of the federal government under the Constitution, "[t]he framers [in enacting the establishment clause] were mainly interested in protecting state authority in religious matters from usurpation by the federal government." This proposition is further supported by the fact that the states of Connecticut, Georgia, Massachusetts, New Hampshire, New Jersey, North Carolina, and South Carolina maintained some degree of establishment even after the enactment of the Bill of Rights, and that Massachusetts did not "disestablish" until 1833. Rarely, however, will one find an advocate of neutralism, even among the Supreme Court Justices, addressing this federalism compromise. The result is a historically and constitutionally unsound interpretation of the establishment clause.

B. "Nonpreferentialism"

The history behind the drafting of the establishment clause, as well as its interpretation by early constitutional scholars and the religious-related activities of various founding political leaders, supports the conclusion that the establishment clause does not

---

29 The insertion of the word "respecting" during the joint committee hearings should not be viewed as intending to alter the central purpose of the establishment clause. As various scholars have concluded, the word was inserted to insure that Congress did not interfere with religious establishments in the states. See M. Malbin, Religion and Politics, The Intentions of the Authors of the First Amendment 15 (1978); J. O'Neill, supra note 14, at 99. "In any event, . . . whatever 'respecting' is interpreted to mean, the central notion of 'establishment' is left undisturbed." Dunsford, Prayer in the Well: Some Heretical Reflections on the Establishment Clause, 1984 Utah L. Rev. 1, 26 n.119.

30 M. Malbin, supra note 29, at 15-16.


32 See L. Pfeffer, supra note 4, at 114-19.

mandate neutralism. This fact is suggested by the language of the establishment clause itself, which prohibits "an establishment" rather than "the establishment."

[T]he phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited "the establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.34

Justice Story, Associate Justice of the United States Supreme Court from 1811 to 1845, expressed a similar opinion. According to Justice Story:

An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

... The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.35

---

34 M. Malbin, supra note 29, at 14 (emphasis in original).

[While thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the great Governor of the Universe, and of acknowledging with thanksgiving His boundless favors, or bowing in contrition when visited with the penalties of His broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the constitution will require in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse.
The actions of early political leaders also support “nonpreferentialism.” “Neutralists” often ignore those actions by engaging in a selective historical examination of the establishment clause. The historical facts overlooked are telling.

The Continental Congress, the First Congress, and each congressional session since have started with a daily prayer led by a chaplain. This resulted from the recommendation of the congressional committee appointed by the First Congress, of which James Madison was a member, to study the possibility of a congressional chaplain.

One also cannot overlook the significance of the resolution adopted by the House and Senate within days after their acceptance of the religion clauses, requesting President Washington to issue a Thanksgiving Day Proclamation “recommend[ing] to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts the many signal favors of Almighty God.” Washington subsequently approved the resolution. Some neutralists attempt to gloss over the importance of this resolution by suggesting that such proclamations were merely a carry-over from the days of the Continental Congress. The facts indicate, however, that congressional members in 1789 had a very different view from that of the neutralists with regard to what the establishment clause forbids. Unless one accepts this proposition, one must admit that the members of the First Congress “proceeded to violate an important principle which, only a day earlier, they had voted to recommend to the States as part of a constitutional amendment.”

Moreover, Washington, Adams, and Madison issued various religious proclamations. In fact, at least four such proclamations have been attributed to Madison, one of which, issued on March 4, 1815, provided:

The Senate and House of Representatives of the United States have by a joint resolution signified their desire that a day may be recommended to be observed by the people of the United

---

Id. (emphasis added).

37 See R. Cord, supra note 17, at 51.
38 See, e.g., L. Pfeffer, supra note 4, at 265-66.
39 See R. Cord, supra note 17, at 28-29.
40 Id. at 29.
41 L. Pfeffer, supra note 4, at 266.
States with religious solemnity as a day of thanksgiving and of devout acknowledgements of Almighty God for His great goodness manifested in restoring to them the blessing of peace.

No people ought to feel greater obligations to celebrate the goodness of the Great Disposer of Events and of the Destiny of Nations than the people of the United States. His kind providence originally conducted them to one of the best portions of the dwelling place allotted for the great family of the human race. He protected and cherished them under all the difficulties and trials to which they were exposed in their early days. Under His fostering care their habits, their sentiments, and their pursuits prepared them for a transition in due time to a state of independence and self-government. In the arduous struggle by which it was attained they were distinguished by multiplied tokens of His benign interposition. During the interval which succeeded He reared them into the strength and endowed them with the resources which have enabled them to assert their national rights and to enhance their national character in another arduous conflict, which is now so happily terminated by a peace and reconciliation with those who have been our enemies. And to the same Divine Author of Every Good and Perfect Gift we are indebted for all those privileges and advantages, religious as well as civil, which are so richly enjoyed in this favored land.

It is for blessings such as these, and more especially for the restoration of the blessing of peace, that I now recommend that the second Thursday in April next be set apart as a day on which the people of every religious denomination may in their solemn assemblies unite their hearts and their voices in a freewill offering to their Heavenly Benefactor of their homage of thanksgiving and of their songs of praise.\(^2\)

The thoughts expressed in Madison’s proclamations are particularly persuasive because Madison, as the principal author of the

\(^2\) R. Cord, supra note 17, at 34-35 (emphasis in original). For the three other religious proclamations issued by Madison, see id. at 257-60. As for his thoughts on the issuance of such proclamations, Madison had the following to say in a July 10, 1822, letter:

Whilst I was honored with the Executive Trust I found it necessary on more than one occasion to follow the example of predecessors. But I was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms. In this sense, I presume you reserve to the Government a right to appoint particular days for religious worship throughout the State, without any penal sanction enforcing the worship.

establishment clause, must have had a fair idea of the boundaries of the clause.

Other actions taken by early political leaders that serve to disprove the neutralism thesis include the appointment of a military chaplain, and the fact that during the years following the ratification of the Constitution and Bill of Rights, the United States government spent large sums of federal tax dollars, pursuant to various Indian treaties and certain congressional acts, to finance the construction of churches and to support religious instructors and activities.\(^4\) If one were to agree that the establishment clause mandates neutralism, one must be prepared to argue that those early Presidents and sessions of Congress that engaged in activities of religious import were, although privy in time to the adoption and ratification of the establishment clause, acting in violation of the Constitution. Such a suggestion is a hard pill to swallow.

C. Advocates of Neutralism Misinterpret Madison and Jefferson

Advocates of the position that government may not take any action that promotes or assists religion, even if taken in a way that promotes and assists all religions equally, often look for support to selective words and deeds of James Madison and Thomas Jefferson.

1. James Madison

When neutralists invoke the name of James Madison, they point to the *Memorial and Remonstrance Against Religious Assessments, 1785* (the "*Memorial and Remonstrance*") and the *Detached Memoranda*.

Madison's *Memorial and Remonstrance* was a fifteen point attack on Patrick Henry's effort in the Virginia legislature to pass a "Bill Establishing a Provision for Teachers of the Christian Religion."\(^44\) After reading the *Memorial and Remonstrance*, however, one is left feeling that Madison's real concern was the preferentialist nature of the legislation. In other words, by subsidizing Christian teachers, Madison believed the legislation placed Christianity in a preferred religious position.

In his third argument against the legislation, Madison asked: "Who does not see that the same authority which can establish

\(^43\) See R. Cord, supra note 17, at 54, 57-80.

\(^44\) L. Pfeffer, *supra* note 4, at 109.
Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? In his fourth argument, Madison remarked: "the Bill violates equality by subjecting some to peculiar burdens; so it violates the same principle, by granting to others peculiar exemptions." Madison's seventh, ninth, eleventh, and twelfth arguments, which addressed the intolerance, bigotry, unenlightenment, and persecution that had resulted from previous religious establishments, also reflect the view that he opposed the legislation due to its preferentialist nature.

Madison's activity contemporaneous with the *Memorial and Remonstrance* also is inconsistent with a neutralist label. For instance, in 1785, the same year he authored the *Memorial and Remonstrance*, Madison joined Thomas Jefferson "in introducing a bill in the Virginia House of Burgesses appointing an official day of fasting and thanksgiving."

Unlike the *Memorial and Remonstrance*, Madison authored the *Detached Memoranda* after his departure from public life. The *Detached Memoranda* is in Madison's handwriting and was discovered in the spring of 1946.

In the *Detached Memoranda*, Madison condemned the congressional chaplain system:

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?

In strictness the answer on both points must be in the negative. *The Constitution of the U.S. forbids everything like an establishment of a national religion*. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well

---

45 S. Padover, *supra* note 42, at 301.
46 Id.
47 See id. at 302-04.
48 See Cornelius, *Church and State, supra* note 31, at 25-26 (citing 1 THE PAPERS OF THOMAS JEFFERSON 556 (J. Boyd ed. 1950)). Even if the *Memorial and Remonstrance* could be said to advocate neutralism, to argue from this premise that the establishment clause mandates neutrality between religion and irreligion is to ignore the federalism compromise behind the establishment clause, and Madison's interpretation of the establishment clause as drafted.
as of the representative Body, approved by the majority, and con-
ducted by Ministers of religion paid by the entire nation.\textsuperscript{49}

Madison believed that such a chaplain system would improperly
and unconstitutionally impose the religious beliefs of the majority
on those in the minority.\textsuperscript{50} In addition, Madison questioned the
constitutionality of religious proclamations by stating, \textit{\"[r\]eligious
proclamations by the Executive recommending thanksgiving &
fasts . . . are shoots from the same root. . . . Altho' recommendations
only, they imply a religious agency, making no part of the
trust delegated to political rulers.\textsuperscript{51}}

Madison's comments in the \textit{Detached Memoranda} are inconsis-
tent with his actions during both the First Congress and as Presi-
dent. As a member of a congressional committee he recommended
the appointment of a congressional chaplain system and failed to
object to the Thanksgiving Day Proclamation recommended by the
House. As President, Madison issued four similar religious procla-
mations. Moreover, the portion of the \textit{Detached Memoranda} deal-
ing with religious proclamations is directly at odds with a letter
Madison wrote on the subject five years after he left the Presi-
dency.\textsuperscript{52} If the meaning of the establishment clause is to be inter-
preted using the words and actions of Madison, it is far more logi-
cal to utilize the statements and behavior of Madison while he was
a Congressman and President, when he made policy for which he
was accountable, rather than to rely on the words of one document
written in Madison's retirement years.\textsuperscript{53}

\textsuperscript{49} R. Cord, \textit{supra} note 17, at 30 (quoting 3 \textit{William and Mary Quarterly} 535, 558 (E.
Fleet ed. 1946) (emphasis added by R. Cord)).

\textsuperscript{50} \textit{Id.} Madison stated:

\begin{quote}
The establishment of the chaplainship to Congress is a palpable violation of
equal rights, as well as of Constitutional principles: The tenets of the chaplains
elected [by the majority] shut the door of worship [against] the members whose
creeds & consciences forbid a participation in that of the majority. To say nothing
of other sects, this is the case with that of Roman Catholics & Quakers who have
always had members in one or both the Legislative branches. Could a Catholic
clergyman ever hope to be appointed a Chaplain? To say that his religious princi-
plcs are obnoxious or that his sect is small, is to lift the evil at once and exhibit in
its naked deformity the doctrine that religious truth is to be tested by numbers, or
that the major sects have a right to govern the minor.
\end{quote}

\textit{Id.} (emphasis in original).

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{See supra} note 42 and accompanying text.

\textsuperscript{53} During his Presidency, Madison did strike down legislation that he believed crossed
the border into the realm prohibited by the establishment clause. For example, he vetoed a
bill on February 21, 1811, that sought to incorporate the Protestant Episcopal Church in the
2. Thomas Jefferson

Thomas Jefferson's name and infamous "wall of separation" metaphor are frequently cited by neutralists. As with Madison, however, Jefferson's words and conduct both before and during his tenure as President reflect a misplaced reliance on him as an advocate of neutralism.

The infamous "wall of separation" metaphor, which has spawned doctrinal havoc and constitutionally unsound decisions, comes from the second paragraph of a letter dated January 1, 1802, from Jefferson to the Danbury Connecticut Baptist Association. That paragraph reads as follows:

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 reverence 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. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural right in opposition to his social duties.\(^4\)

It would be grossly misleading, however, to examine a single paragraph from the voluminous pages of Jefferson's writings to ascertain his thinking on the subject. Jefferson's conduct as a public
servant is a much better source of evidence.

One of Jefferson’s first public acts in Virginia on the topic of religion was his drafting, in 1776, of the “Resolution[] for Disestablishing the Church of England and for Repealing Laws Interfering with Freedom of Worship.” In the resolution, Jefferson proposed that “no pre-eminence may be allowed to any one Religious sect over another” and advocated the abolition of coercive levies to support the Church of England. Jefferson noted that the purpose of the resolution was to establish equality among all religious sects.

Jefferson also authored “A Bill for Establishing Religious Freedom.” This bill, which disestablished the Episcopal Church in Virginia, was designed to prohibit taxation that would both support a preferred religion and “pay ministerial salaries and build sectarian edifices for all religions.” The bill, it could be argued, prohibited preferentialism as well as impracticable nonpreferential assistance (i.e., nonpreferential assistance that is impracticable due to monetary or other considerations which would make it impossible to treat all religions fairly).

While a public servant in Virginia, Jefferson also authored the following bills having religious significance: the “Bill for Saving the Property of the Church Heretofore by Law Established;” the “Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers;” the “Bill for Appointing Days of Public Fasting and Thanksgiving” and the “Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage.” If Jefferson was the neutralist that some suggest,

---

56 1 Jefferson Papers, supra note 55 at 530.
57 See id. at 531 n.1.
58 2 The Papers of Thomas Jefferson 545 (J. Boyd ed. 1950) [hereinafter 2 Jefferson Papers].
59 Id. at 545-47; see R. Cord, supra note 17, at 36-37.
60 See infra notes 245-53 and accompanying text (advocating practicable nonpreferentialism and proper establishment clause analysis).
61 2 Jefferson Papers, supra note 58, at 553 (designed to protect property of disestablished Anglican Church).
62 Id. at 555.
63 Id. at 556 (set aside official days for fasting and worship and compelled ministers to perform religious services on prescribed days or suffer potential fines for violations).
64 Id.
he violated his own concept of church/state relations when he authored these bills.

In addition to his legislation, Jefferson went to great lengths to ensure religious training and worship at the University of Virginia, and took pride in knowing that the four religious denominations in his hometown of Charlottesville utilized the tax-supported county courthouse on alternate Sundays as their place of worship. Thus it should be clear that Jefferson "believed government interaction and cooperation with religious institutions was both permissible and necessary.".

Jefferson's activities as President also indicate that he was not an advocate of neutralism. For example, in 1803 Jefferson asked the Senate to ratify a treaty with the Kaskaskia Indians that provided, inter alia, for the use of federal money to support a Catholic priest and to construct a church. Had Jefferson thought that such a treaty violated the establishment clause, he could have simply recommended the payment of a lump sum and annual stipend from which the Indians could have built their church and paid their priest.

While President, Jefferson also signed extensions of "An Act regulating the grants of land appropriated for Military Services and for the Society of the United Brethren, for propagating the Gospel among the Heathen." That act provided for the placement, in trust, without cost, of federal land in the name of an ev-

See infra notes 117-19 and accompanying text.

See Works of Thomas Jefferson 346 (P. Ford ed. 1905).

Cornelius, supra note 31, at 29-30 (footnote omitted).

See R. Cord, supra note 17, at 38. The third article of that treaty provided in part: And whereas, The greater part of the said tribe have been baptized and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church. The stipulations made in this and the preceding article, together with the sum of five hundred and eighty dollars, which is now paid or assured to be paid for the said tribe for the purpose of procuring some necessary articles, and to relieve them from debts which they have heretofore contracted, is considered as a full and ample compensation for the relinquishment made to the United States in the first article.


Id. at 42-43 (quoting Acts of Fourth Congress, ch. 46, I Stat. at Large 491) (emphasis in original).
angelical religious order the purpose of which was to encourage members of that order to settle in western parts of the country and assist Christian Indians.\footnote{Id. (footnotes omitted).} Jefferson’s conduct in this regard “was tantamount to underwriting the maintenance and spreading of Christianity among the Indians.”\footnote{Id. at 43. As Cord noted, neither of the above acts which were signed by Jefferson violated the establishment clause since neither religious sect “was favored because of a national religious policy to put any religion or sect into a preferred position.” Id. at 47. The same can be said for the other bills supported by Jefferson that involved interaction and cooperation between government and religion. See supra notes 54-69 and accompanying text.}

Unlike Washington and Adams before him, Jefferson did refuse to issue religious proclamations. Neutralists place great weight on this fact when invoking Jefferson’s name. An 1808 letter from Jefferson to a Presbyterian clergyman sheds light on Jefferson’s thinking in this regard.\footnote{See L. PFEFFER, supra note 4, at 266. In the letter, Jefferson stated: I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority. But it is only proposed that I should recommend not prescribe a day of fasting and prayer. That is, that I should indirectly assume to the United States an authority over religious exercises, which the Constitution has directly precluded them from. . . . I do not believe it is for the interest of religion to invite the civil magistrate to direct its exercises, its discipline, or its doctrines; nor of the religious societies, that the General Government should be invested with the power of effecting any uniformity of time or matter among them. Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and the right can never be safer than in their hands, where the Constitution has deposited it. Id. (quoting JEFFERSON’S WRITINGS 428-30 (Monticello ed. 1905)).} In his letter, Jefferson explained that federalism concerns “forbade” him to issue religious proclamations. Jefferson indicated that he perceived the power to prescribe religious exercise as being vested in the states, and the establishment clause was intended to prevent the usurpation of state sovereignty. What is clear, however, is that Jefferson did not refuse to declare national days of thanksgiving because he believed in neutralism. In fact, Jefferson urged the celebration of such a day at the state level.
in Virginia.73

V. THE ESTABLISHMENT CLAUSE WAS NOT INTENDED TO LIMIT STATE ACTION

Prior to the enactment of the fourteenth amendment, the specific provisions in the Bill of Rights were held not to apply to the states.74 During the period immediately following passage of the fourteenth amendment, the Supreme Court continued to hold that the Bill of Rights acted as a restraint only upon the federal government.75 Through the doctrine of selective incorporation, however, the Supreme Court has incorporated most of the Bill of Rights into the fourteenth amendment, thereby making the selected provisions applicable to the states.76 In Everson v. Board of Education,77 the Supreme Court held that the establishment clause applied to the states.78 One year later, in Illinois ex rel. McCollum v. Board of Education,79 the Court reaffirmed the incorporation of the establishment clause and the majority's interpretation of it in Everson.80 These two decisions continue to cloud the true meaning of the establishment clause, and, therefore, its applicability as a restraint upon government.

---

73 See 1 Jefferson Papers, supra note 55, at 556.
74 See, e.g., Perlmutter v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589, 609-10 (1845) (religious guarantees of first amendment inapplicable to states); Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243, 247-48 (1833) (fifth amendment not applicable to states, implying that Bill of Rights applies only to federal government).
76 See L. Tribe, American Constitutional Law 772-74 (2d ed. 1988). Under the theory of selective incorporation, only those provisions of the Bill of Rights which have been found to be fundamental to the American legal system are included under the fourteenth amendment. See Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968); R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance and Procedure § 14.2 (1986). The Court has refused to incorporate the second amendment's guarantee of the right to keep and bear arms, see Presser v. Illinois, 116 U.S. 252, 265 (1886); the fifth amendment guarantee of criminal prosecution only on grand jury indictment, see Hurtado, 110 U.S. at 534-35; and the seventh amendment guarantee of a jury trial in a civil case, see Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916). In addition, the question of the incorporation of the third amendment's prohibition against quartering troops and the eighth amendment's excessive fines provisions has never been directly addressed. See R. Rotunda, J. Nowak & J. Young, supra, § 14.2.
77 330 U.S. 1 (1947) (5-4 decision).
78 Id. at 18.
80 Id. at 211-12.
A. Everson v. Board of Education

Everson involved a taxpayer's challenge to a New Jersey statute that authorized "school districts to make rules and contracts [providing] for the transportation of children to and from schools." Pursuant to this statutory authorization, the Board of Education of the Township of Ewing, New Jersey "authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular buses operated by the public transportation system. Part of this money was for the payment of transportation to Catholic parochial schools." The taxpayer claimed that the New Jersey statute, and the subsequent resolution adopted by the Ewing Board of Education pursuant to that statute, violated both the due process clause and the establishment clause of the United States Constitution.

After disposing of the taxpayer's due process argument, the Court addressed the alleged first amendment establishment clause violation. In order to determine whether the New Jersey statute was a "law respecting an establishment of religion," Justice Black felt it was necessary to engage in a "historical examination": "Whether this New Jersey law is one respecting an 'establishment of religion' requires an understanding of the meaning of that language . . . . [I]t is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted." Justice Black placed great emphasis on the fact that during the colonization of the Atlantic Coast states, government-established churches and governments' religious intolerance were prevalent. It was to remedy such evils, Justice Black reasoned, that the first amendment was drafted and

---

81 Everson, 330 U.S. at 3 (footnote omitted).
82 Id.
83 Id. at 4-5. The argument in support of a first amendment violation was that: The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This [was] alleged to be a use of state power to support church schools contrary to the prohibition of the first amendment which the fourteenth amendment made applicable to the states.
84 Id. at 5.
85 Id. at 5-7.
86 Id. at 7-18.
87 Id. at 8 (emphasis added).
88 Id. at 8-10.
ratified.\textsuperscript{88}

It is suggested, however, that the primary purpose of the establishment clause was not the federal protection of individual freedoms. Rather, the establishment clause, like the free exercise clause, was primarily the result of federalism concerns. According to Madison, the religion clauses of the first amendment were inserted to calm the fears of various states that Congress, under its "necessary and proper powers," could intrude upon the states' power to legislate respecting religious affairs.\textsuperscript{89} In particular, the establishment clause "was designed to satisfy people from states, such as Massachusetts, that did have established churches."\textsuperscript{90}

In support of the Court's position that the establishment clause mandates neutralism, Justice Black examined the views of Madison and Jefferson.\textsuperscript{91} While it is questionable whether Jefferson played a determinative role in the drafting and adoption of the religion clauses, Justice Black's argument may be challenged on other grounds. Justice Black attempted to extrapolate Madison's views on the subject from the \textit{Memorial and Remonstrance}, while inferring Jefferson's interpretation from the \textit{Virginia Bill for Religious Liberty}.\textsuperscript{92} For reasons to be further discussed, reliance upon these two documents to infer Madison's and Jefferson's interpretation of the establishment clause produces an incorrect result.

The \textit{Memorial and Remonstrance} and \textit{Virginia Bill for Religious Liberty} were written prior to the adoption or the drafting of the first amendment. Also, while Justice Black interpreted the \textit{Memorial and Remonstrance} as proof of Madison's support of an overly expansive reading of the establishment clause, a good argument can be made that Justice Black overreaches in his interpretation of that document.\textsuperscript{93} Finally, and most importantly, Justice Black overlooked a few details of major significance. No mention was made of the fact that Madison served on the committee that recommended the establishment of a congressional chaplain system, or of the fact that Madison did not object to the request by

\textsuperscript{88} Id. at 11. "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." Id. (footnotes omitted).

\textsuperscript{89} See 1 \textit{Annals of Cong.}, supra note 17, at 757.

\textsuperscript{90} M. Malbin, supra note 29, at 15.

\textsuperscript{91} Everson, 330 U.S. at 13.

\textsuperscript{92} Id. at 11-13; see supra notes 44-47, 58-60 and accompanying text.

\textsuperscript{93} See supra notes 44-47 and accompanying text.
the First Congress for the issuance of a religious proclamation. Nor did Justice Black refer to the original version of the establishment clause as drafted by Madison, the changes made to Madison's draft during the debates, or the fact that Madison himself, while serving as President, issued at least four religious proclamations. As for Jefferson, Justice Black failed to note that he, as President, recommended and signed various treaties and extensions of acts providing for the use of federal funds to construct and maintain churches and to support religious activities and instructors. All of these facts tend to show that Madison and Jefferson were not the neutralists that Justice Black considered them to be.

Writing in favor of incorporation, Justice Black noted that the establishment clause was to be interpreted quite broadly:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State." Justice Black further commented that the wall erected by the establishment clause between church and state "must be kept high and impregnable. We could not approve the slightest breach."

Justice Black, in defining the meaning and scope of the establishment clause, paraphrased from the letter sent by President Jefferson to the Danbury Connecticut Baptist Association on January
However, Justice Black erred in taking one clause of Jefferson's letter out of context and misinterpreting it, an error that continues to plague the Supreme Court to this day.

From the letter, it is clear that Jefferson considered the establishment clause to be a restraint upon the federal government, not the states. Jefferson refers to the first amendment as "the act of the whole American people" and as placing a restraint on "their legislature" (i.e., Congress). Thus, the "wall of separation" was erected between church and the federal government, not between church and the individual states. In Jefferson's mind, the authority of the states over all religious matters was not affected by the first amendment. Also, in light of Jefferson's activities as President, it seems that Jefferson did not consider the wall to be "impregnable."

The Court's interpretation of the establishment clause in *Everson* is at odds with the historical underpinnings of that provision. The clause was designed to prevent preferential treatment by the federal government of one religion over another, not preferential treatment of religion over irreligion.

B. McCollum v. Board of Education

In *Illinois ex rel. McCollum v. Board of Education* decided approximately one year after *Everson*, the Court reaffirmed the incorporation of the establishment clause and its broad interpretation. *McCollum* was a "released time program" case. The case arose after various members of the Roman Catholic, Jewish, and certain Protestant faiths organized the Champaign Council on Religious Education and obtained permission from the Champaign

---

100 See supra note 54 and accompanying text (text of letter).
101 See 19 THE WRITINGS OF THOMAS JEFFERSON 281-82 (A. Lipscomb & A. Bergh eds. 1905).
102 Id.
103 See supra notes 54-71 and accompanying text.
104 It should be noted that the Court in *Everson* found that "tax-raised funds [could be used] to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." *Everson*, 330 U.S. at 17. The Court approved the plan because the state was "neutral in its relations with groups of religious believers and non-believers." Id. at 18. However, this reasoning, insofar as it is based on a neutrality of treatment of secular and sectarian interests, is historically and constitutionally faulty.
106 Id. at 211-12.
107 Id. at 205.
Board of Education to offer religion classes in public school classrooms for students in the fourth through ninth grades. Only students whose parents had signed request cards were allowed to attend the religion classes; these students were released temporarily from their regular classes. The religion teachers, even though not paid by the Champaign Board of Education, were subject to the approval and supervision of the school superintendent.

The Champaign Board of Education urged the Court to reconsider the Everson interpretation of the establishment clause, arguing that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions." The Board also requested that the Court distinguish or overrule the holding in Everson which incorporated the establishment clause into the fourteenth amendment thereby making it applicable as a prohibition against the states. Justice Black, who again authored the Court's opinion, refused to comply with either request.

Justice Black quoted the Everson definition of the establishment clause and invoked Jefferson's "wall of separation" language. Once again Justice Black asserted that the wall "must be kept high and impregnable."

Justice Black's opinion in McCollum, inasmuch as it relied on the Everson decision, is just as historically and constitutionally inaccurate and unjustifiable. In addition, as in Everson, Justice Black ignored relevant historical facts. It is obvious that he again relied on Jefferson as support for an overly broad interpretation of

---

108 Id. at 207.
109 Id. at 207-08.
110 Id. at 208 (footnote omitted).
111 Id. at 211.
112 Id.
113 Id. at 212.
114 Id. at 210-11; see supra text accompanying note 98.
115 McCollum, 333 U.S. at 211.
116 Id. at 212. In light of the facts of the case, Justice Black concluded:
This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted in Everson v. Board of Education...

Id. at 210. Justice Black further reasoned that not only were "the State's tax-supported public school buildings used for the dissemination of religious doctrines," but the state also afforded sectarian groups an invaluable aid in helping to provide "pupils for their religious classes through use of the State's compulsory public school machinery." Id. at 212. According to Justice Black: "[t]his is not separation of Church and State." Id.
the establishment clause. Ironically, as evident from Jefferson's activities as rector to the University of Virginia, Jefferson in all likelihood would have approved, at least in theory, of the program at issue in *McCollum.*

117 See 19 THE WRITINGS OF THOMAS JEFFERSON, supra note 101, at 413-16. Jefferson, as rector to the University of Virginia, a public institution, stated his views on a similar issue, and it seems he would have approved of the *McCollum* program:

In the same report of the commissioners of 1818 it was stated by them that "in conformity with the principles of constitution, which place all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment or surprise, and with the sentiments of the legislature in freedom of religion, manifested on former occasions, they had not proposed that any professorship of divinity should be established in the University; that provision, however, was made for giving instruction in the Hebrew, Greek and Latin languages, the depositories of the originals, and of the earliest and most respected authorities of the faith of every sect, and for courses of ethical lectures, developing those moral obligations in which all sects agree. That, proceeding thus far, without offence to the constitution, they had left, at this point, to every sect to take into their own hands the office of further instruction in the peculiar tenet of each."

It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. But it was thought that this want, and the entrustment to each society of instruction in its own doctrine, were evils of less danger than a permission to the public authorities to dictate modes or principles of religious instruction, or than opportunities furnished them by giving countenance or ascendency to any one sect over another. A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit the public provisions made for instruction in the other branches of science. These branches are equally necessary to the divine as to the other professional or civil characters, to enable them to fulfill the duties of their calling with understanding and usefulness. It has, therefore, been in contemplation, and suggested by some pious individuals, who perceive the advantages of associating other studies with those of religion, to establish their religious schools on the confines of the University, so as to give to their students ready and convenient access and attendance on the scientific lectures of the University; and to maintain, by that means, those destined for the religious professions on as high a standing of science, and of personal weight and respectability, as may be obtained by others from the benefits of the University. Such establishments would offer the further and greater advantage of enabling the students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the building still to be erected, and destined to that purpose under impartial regulations, as proposed in the same report of the commissioners, or in the lecturing room of such professor. To such propositions the Visitors are disposed to lend a willing ear, and would think it their duty to give every encouragement, by assuring to those who might choose such a location for their schools, that the regulations of
Furthermore, Jefferson, while promulgating various regulations for the University of Virginia on October 4, 1824, stated:

Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour.

The students of such religious school, if they attend any school of the University, shall be considered as students of the University, subject to the same regulations, and entitled to the same rights and privileges.\(^\text{118}\)

Jefferson stressed that public schools were to be independent entities from the schools of religion held on their campuses.\(^\text{119}\) Thus, Jefferson probably would have disapproved of the fact that religious instructors were subject to the approval and supervision of the superintendent of the Champaign public school system. This fact, however, apparently was not the reason why the McCollum Court struck down the program. The program was held to be unconstitutional mainly because religion classes were being held in public schools and because the program was administered through the compulsory school system.\(^\text{120}\) To Justice Black, this was an attempt to scale the wall of separation between church and state, and as such was a violation of the establishment clause.\(^\text{121}\) Jefferson, however, on whose metaphor the Court so emphatically relied,

\(^{118}\) Id. at 449.

\(^{119}\) Id. at 413-16.

\(^{120}\) See McCollum, 333 U.S. at 212.

\(^{121}\) See id. at 210-12.
would not, as evidenced by his writings, consider religion classes held in public schools or compulsory attendance of such classes to be an establishment clause violation; rather, Jefferson encouraged such activity.\footnote{See supra notes 117-18 and accompanying text.}

C. The Irony of Incorporation

In *Everson*, the Court engaged in a "selective historical analysis" in order to support the incorporation of the establishment clause and its overly broad interpretation.\footnote{See supra notes 81-104 and accompanying text. One commentator has stated that "the choice offered in contemporary church-state jurisprudence is between the intentions of the framers and those of the temporary incumbents on the Supreme Court." Dunsford, *supra* note 29, at 9.} Justice Black incorporated the establishment clause without even referring to the debates in the First House of Representatives, or to the fact that the religion clauses were a federalism compromise designed to protect the rights of the states to legislate regarding matters of religious import.\footnote{G. Gunther, *Constitutional Law*, 1476 n.2 (11th ed. 1985) (citing Howe, *Religion and the Free Society: The Constitutional Question* (1960))} Applying the establishment clause applies to the states produced an ironic result: an amendment supported by the states as a means to protect their sovereignty was applied to the states as a means to limit their power.\footnote{See R. Cord, *supra* note 17, at 4-15.}

The irony is carried one step further if the establishment clause is interpreted as mandating neutralism. If one interprets the establishment clause as barring all governmental religious assistance—both preferential and nonpreferential—states are not only limited in their efforts to support religion, they are precluded from doing so. Such an interpretation turns the establishment clause on its head; it has gone from a protector of state sovereignty to a prohibition on state action.

Even the generation which adopted the fourteenth amendment did not believe that the establishment clause prohibited state aid of religion:\footnote{See id. at 14.} a specific amendment was felt to be necessary to accomplish that purpose. Accordingly, the Blaine amendment was proposed.\footnote{The proposed amendment read as follows: No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the}
narrowly missed receiving the necessary two-thirds vote in the Senate. The fact that the Blaine amendment failed, even by the slightest of margins, as well as the fact that it was introduced in the first place, is evidence that the drafters of the fourteenth amendment did not believe that the establishment clause should apply to the states.

VI. Modern Supreme Court Approach in Establishment Clause Cases

A. The Lemon Test

While the *Everson* and *McCollum* decisions have been refined somewhat, their neutralism rationales continue to haunt the Court. In *McGowan v. Maryland*, the Court set forth the first portion of the three-pronged test currently used to decide establishment clause cases; for state action arguably having religious import to be upheld, it must have a secular purpose.

Two years after *McGowan*, the Court decided *School District v. Schempp*. After quoting prior cases advocating the broad interpretation of the establishment clause, thereby suggesting the continued vitality of *Everson* and *McCollum*, the Court reiterated the *McGowan* prong of the test and added a second element: “to
withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." The third prong of the test currently employed in establishment clause cases was set forth in *Walz v. Tax Commission.* The *Walz* Court noted that the end result must not be "an excessive government entanglement with religion." In *Lemon v. Kurtzman,* the Court delineated what has come to be known as the "Lemon test" by incorporating the elements of previous decisions regarding the establishment clause:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose [the "purpose" prong]; second, its principal or primary effect must be one that neither advances not inhibits religion [the "effects" prong]. . . ; finally, the statute must not foster "an excessive government entanglement with religion [the "entanglement" prong]."

Although the Court in *Lemon* recognized that complete separation of church and state is not possible and that "[s]ome rela-

---

131 Id. at 222 (emphasis added) (citing *Everson* and *McGowan*).
132 397 U.S. 664 (1970). The Court in *Walz* held that property tax exemptions granted to religious organizations for property used exclusively for religious purposes did not violate the establishment clause. *Id.* at 672-80.
133 *Id.* at 674.
134 403 U.S. 602 (1971). In *Lemon,* the Court found that Rhode Island and Pennsylvania statutes which provided for the payment of salary supplements to teachers in nonpublic schools and for the reimbursement of nonpublic schools for various "secular" textbooks and instructional materials violated the establishment clause because the statutes resulted in excessive entanglement between government and religion. *See id.* at 619-20. The Court so held even though the statutes prohibited teachers who received such supplements from teaching religion courses, and proscribed the use of such textbooks and materials in religion classes. *See id.* at 608, 610.

The one exception in which the Court has not applied Lemon to determine an establishment clause case is *Marsh v. Chambers,* 463 U.S. 783 (1983). *See Edwards v. Aguillard,* 482 U.S. 578, 583 n.4, 107 S. Ct. 2573, 2577 n.4 (1987). In *Marsh,* the Court in a 6-to-3 decision found that the Nebraska legislature's practice of opening the legislative session with a prayer led by a chaplain paid by the state did not violate the establishment clause. The Court based its decision on historical considerations; namely, that the First Congress instituted the chaplain system, and, therefore, intended the establishment clause to authorize the practice. *See Marsh,* 463 U.S. at 787-92.
tionship between government and religious organizations is inevi-
table," the Court did not repudiate the Everson and McCollum
call for neutralism. In fact, the influence of those decisions is evident in the Lemon test, particularly in the first two prongs. In stating that a "statute must have a secular legislative purpose" and that "its principal or primary effect must be one that neither advances nor inhibits religion," the Lemon Court implicitly acknowledged Justice Black's statement in Everson that "[n]either [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another." Thus, the flawed historical rationale propounded by the Court in Everson and McCollum is alive in the current establishment clause test.

In addition to being flawed from a complete historical perspec-
tive, the Lemon test, from a practical standpoint, is nearly impossible to apply with any measure of consistency and thus lends itself to "judgments based on the Court's perceived notions of public policy and the exigencies of the moment." For example, the results of the Court's decisions are that:

-the government may not supplement parochial school teachers' salaries, but it may employ and pay with public tax money chaplains in legislative bodies, the armed services, and in public prisons and hospitals, and it may pay for veterans' sectarian training for the ministry;

-the states may not allow noncompulsory prayer, Bible reading, or meditation in the public schools, but it is permissible to have opening prayers in Congress and the Supreme Court, as well as "In God We Trust" on our currency, and "Under God" in the Pledge of Allegiance and the National Anthem;

-high schools may not allow religious groups to use school property even after school hours, but colleges may not refuse to

---

136 Lemon, 403 U.S. at 614 (citations omitted).
137 Id. at 612.
139 See Cornelius, supra note 31, at 8-9 (footnote omitted).
140 Id. at 6 (citing Lemon v. Kurtzman, 403 U.S. 607, 607(1971)).
141 Id. (citing Marsh v. Chambers, 463 U.S. 783, 792 (1983); McCollum v. Board of Educ., 333 U.S. 203, 253-54 (1948) (Reed, J., dissenting)).
142 Id. (citing School Dist. v. Schempp, 374 U.S. 203, 223 (1963); Engel v. Vitale, 370 U.S. 421, 436 (1962)).
143 Id. at 6-7 (citing School Dist. v. Schempp, 374 U.S. 203, 299-304 (1963)).
144 Id. at 7 (citing, inter alia, McCollum v. Board of Educ., 333 U.S. 203, 212 (1948)).
do so;\textsuperscript{145}

- states may furnish bus transportation to parochial school children,\textsuperscript{146} but may not pay the expenses of their field trips for instructional purposes;\textsuperscript{147}

- the state may loan textbooks to parochial schools\textsuperscript{148} but not other teaching and testing materials;\textsuperscript{149}

- a state may exempt church property and schools from taxation,\textsuperscript{150} but may not reimburse church schools for expenses of tests and examinations;\textsuperscript{151}

- a state may not give financial aid to repair a church supported secondary school,\textsuperscript{152} but may build academic buildings for sectarian colleges\textsuperscript{153} and lease state land to a church school for the purposes of working a tax exemption;\textsuperscript{154}

- a state may compel a business to close on Sunday\textsuperscript{155} . . . but may not allow schools to display the Ten Commandments in their hallways;\textsuperscript{156}

- public schools may not allow released time for religious services on school property,\textsuperscript{157} but may do so for services held off the premises;\textsuperscript{158}

- states may not give tax relief only for tuition paid to parochial schools,\textsuperscript{159} but may allow tax deductions for such tuition if the program also allows a similar deduction for public school

\textsuperscript{145} Id. (citing Widmar v. Vincent, 454 U.S. 263, 267-69 (1981)).

\textsuperscript{146} Id. (citing Everson v. Board of Educ., 330 U.S. 1, 17 (1947)).

\textsuperscript{147} Id. (citing Wolman v. Walter, 433 U.S. 229, 254 (1977)).

\textsuperscript{148} Id. (citing Meek v. Pittenger, 421 U.S. 349, 362 (1975); Board of Educ. v. Allen, 392 U.S. 236, 245-48 (1968); Cochran v. Louisiana State Board of Educ., 281 U.S. 370, 375 (1930)).

\textsuperscript{149} Id. (citing Meek v. Pittenger, 421 U.S. 349, 372-73 (1975)).


\textsuperscript{151} Id. (citing Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973)).

\textsuperscript{152} Id. (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774-75 (1973)).

\textsuperscript{153} Id. (citing Tilton v. Richardson, 403 U.S. 672, 678-80 (1971)).

\textsuperscript{154} Id. (citing Hunt v. McNair, 413 U.S. 734, 749 (1973)).

\textsuperscript{155} Id. (citing McGowan v. Maryland, 366 U.S. 420, 426 (1961)).

\textsuperscript{156} Id. at 8 (citing Stone v. Graham, 449 U.S. 39, 41 (1980)).

\textsuperscript{157} Id. (citing McCollum v. Board of Educ., 333 U.S. 203, 210 (1948)).

\textsuperscript{158} Id. (citing Zorach v. Clauson, 343 U.S. 306, 314 (1952)).

\textsuperscript{159} Id. (citing Sloan v. Lemon, 413 U.S. 825, 832 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783-86 (1973)).
expenses;\(^{160}\)

-and the state may provide therapeutic and diagnostic health services to a church school in a mobile unit parked next to the school,\(^{161}\) but not in the school itself.\(^{162}\)

Unfortunately, in its most recent opinions on the subject, the Supreme Court has shown an unwillingness to retreat from Lemon or its unsupportable underpinnings.\(^{163}\)

B. Recent Pre-1989 Supreme Court Decisions

Before its latest pronouncements on the issue,\(^{164}\) the Court faced establishment clause issues in a number of different contexts.\(^{165}\) In five of those cases, a clear majority of the Justices applied the Lemon rationale to strike down the state statutes challenged on establishment clause principles.\(^{166}\) Lemon also was

\(^{160}\) Id. (citing Mueller v. Allen, 463 U.S. 388, 394-96 (1983)).

\(^{161}\) Id. (citing Wolman v. Walter, 433 U.S. 229, 248 (1977)).

\(^{162}\) Id. (citing Meek v. Pittenger, 421 U.S. 349, 368-69 (1975)); see also Choper, The Religion Clauses of the First Amendment: Reconciling the Conflict, 41 U. Prr. L. Rev. 673, 690-81 (1980) (Court decisions reflect doctrinal inconsistency concerning governmental assistance).

\(^{163}\) See, e.g., County of Allegheny v. ACLU, 109 S. Ct. 3086 (1989) (display of crèche in county courthouse held violative of establishment clause).


\(^{166}\) Edwards, 482 U.S. at 585-86. Seven members of the Court, applied Lemon, although Justice White did so somewhat reluctantly, and struck down a Louisiana statute requiring the teaching in public schools of creation science if evolution was being taught. Id. Justice Brennan, joined by Justices Marshall, Blackmun, Powell, Stevens, and O’Connor, found that the statute violated the “purpose” prong, which is to determine “‘whether government’s actual purpose is to endorse or disapprove of religion.’” Id. at 585 (quoting Justice O’Connor’s concurring opinion in Lynch v. Donnelly, 465 U.S. at 668, 690 (1984)). Even with Justice Powell now gone, this signals an express adoption by a majority of the Court of Justice O’Connor’s endorsement test. See infra notes 184-202 and accompanying text. Justice White rejected the majority’s reasoning, but concurred on the ground that “‘the district courts and courts of appeals are better schooled and more able to interpret the [purpose of] laws of their respective states.’” Edwards, 482 U.S. at 609 (White, J. concurring) (quoting Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500 (1985). Justice Scalia, joined by Chief Justice Rehnquist in dissent, expressed a desire to abandon the Lemon “purpose” prong, on which the majority relied to invalidate the statute. See id. at 612-19 (Scalia, J., dissenting).
applied in three cases where the statute in issue was upheld against an establishment clause challenge. Most of the opinions

In School Dist. v. Ball, 473 U.S. 373 (1985), six members of the Court applied the Lemon test and struck down two municipal programs, one which provided classes in nonpublic school classrooms to nonpublic school students at public expense and one which provided community education programs taught by public school employees in facilities leased from nonpublic schools. Id. at 385-400. Two members of the Court applied Lemon and found that the latter program violated the establishment clause while the former did not. Each of the eight justices either expressly or implicitly applied the endorsement test to analyze the programs under the “effects” prong. Id. at 385-400. Justice Rehnquist dissented on the ground that the Court’s reasoning was based on the “faulty ‘wall’ premise.” Id. at 401. (Rehnquist, J., dissenting).

In Aguilar, five members of the Court applied the Lemon test and struck down, on the ground of excessive entanglement, the use by New York City of federal funds to finance programs that sent public school teachers and other professionals into religious and other nonpublic schools to provide remedial instruction and clinical and guidance services. 473 U.S. at 410-19. In her dissent, joined by Justice Rehnquist, Justice O’Connor “question[ed] the utility of entanglement as a separate Establishment Clause standard in most cases.” Id. at 422 (O’Connor, J., dissenting). In Estate of Thornton, eight members of the Court applied the Lemon test and struck down a Connecticut statute providing employees with the absolute right not to work on their chosen Sabbath. 472 U.S. at 711. Six of the Justices struck down the law as violative of the “effects” prong without mentioning endorsement. Id. Justice O’Connor, joined by Justice Marshall, filed a concurring opinion, stating that “the Connecticut Sabbath law has an impermissible effect because it conveys a message of endorsement of the Sabbath observance.” Id. at 711 (O’Connor, J., concurring). Justice Rehnquist dissented without opinion. In Wallace v. Jaffree, 472 U.S. 38 (1985), six members of the Court, after applying the Lemon test, struck down an Alabama statute authorizing a period of silence for “meditation or voluntary prayer.” Id. at 61. In finding that the statute violated the “purpose” prong, Justice Stevens, joined by Justices Brennan, Marshall, and Blackmun, applied O’Connor’s endorsement test, stating that “[i]n applying the purpose test, it is appropriate to ask ‘whether government’s actual purpose is to endorse or disapprove of religion.’” Id. at 56 (quoting Lynch v. Donnelly, 465 U.S. at 680 (O’Connor, J., concurring)). Justice Powell implicitly, and Justice O’Connor expressly, in their concurring opinions, also advocated use of the endorsement analysis. Id. at 62-63 (Powell, J., concurring), 69-70 (O’Connor, J., concurring).

See Bowen v. Kendrick, 487 U.S. 589 (1988). Chief Justice Rehnquist, writing for the Court and joined by Justices White, O’Connor, Scalia, and Kennedy, Justice O’Connor in her concurrence, and Justice Kennedy, whom Justice Scalia joined, in his concurrence, all looked to the Lemon rationale to uphold a federal statute authorizing federal grants to public or nonpublic (including religious) organizations for the provision of family counseling services. Id. All four dissenting Justices also applied Lemon, agreeing with the majority’s analysis under the “purpose” prong, but referring to Justice O’Connor’s endorsement test in finding the challenged activity violative of the “effects” prong. Id. In Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987), Justice White, who authored the majority opinion, and the concurring Justices, in the face of a request not to apply Lemon on the ground that it is unsuited for judging the constitutionality of exemption statutes, utilized Lemon to uphold the exemption of religious organizations with respect to their secular non-profit activities from the Civil Rights Act’s prohibition against religious discrimination in employment. Id. Justice O’Connor, joined by Justice Blackmun, filed a concurring opinion which analyzed the exemption under the “effects” prong by use of the endorsement test, and stated that “endorsement” was the proper manner in which to analyze the “inquiry
in those cases failed even to mention, let alone analyze, the historical basis underlying the establishment clause.\textsuperscript{168} In keeping with the historical and constitutional flaw that permeates \textit{Lemon}, the majority of Justices continued to assert that the establishment clause not only prohibits preferential treatment of one religion over others, but also mandates neutralism.\textsuperscript{169}

\textsuperscript{168} In \textit{Edwards v. Aguillard}, 482 U.S. 578 (1987), Justice Brennan, joined by Justices Marshall, Blackmun, Powell, and Stevens stated that “a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.” \textit{Id.} at 583 n.4. In his concurring opinion, however, Justice Powell, joined by Justice O'Connor, engaged in a brief historical examination surrounding the establishment clause. The examination was not extensive, focused on the issue of religious tolerance, and made no mention of the federalism compromise that resulted in the establishment clause. \textit{Id.} at 597-608. A passing historical reference was made by Justice White in his opinion for the Court in \textit{Amos} and by Justice Brennan in his concurrence. Justice White observed that “‘for the men who wrote the Religion Clauses of the First Amendment the ‘establishment’ of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity,’” 483 U.S. at 337 (quoting \textit{Walz v. Tax Comm'n}, 397 U.S. 664, 668 (1970)), an overly broad intimation of the drafter’s intent. In a footnote, Brennan quoted from Madison’s \textit{Memorial and Remonstrance} to the effect that religion must be left to the conviction and conscience of every individual to exercise as he or she sees fit. 483 U.S. at 341 n.2. And Justice Brennan, writing for the majority in \textit{School District of Grand Rapids v. Ball}, made the bald statement, without any historical examination, that the framers of the establishment clause intended the government to maintain a course of neutrality among religions and between religion and irreligion. \textit{Ball}, 473 U.S. at 382. This simply is at odds with historical reality.

\textsuperscript{169} E.g., \textit{Ball}, 478 U.S. at 389; \textit{Wallace v. Jafree}, 472 U.S. 38, 52-53 (1985). In keeping with the many inconsistencies that plague this area of the law, Chief Justice Rehnquist wrote, in \textit{Bowen v. Kendrick}, that “[t]he Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion.” \textit{Wallace}, 472 U.S. at 106 (Rehnquist, J., dissenting). Furthermore, Justice Stevens, who authored the opinion of the Court in Wal-
Only Chief Justice Rehnquist has engaged in anything close to a thorough historical analysis into the true meaning of the establishment clause.\footnote{Wallace, 472 U.S. at 91-114 (Rehnquist, J., dissenting). In Lynch, then Chief Justice Burger engaged in a limited historical analysis, citing numerous examples in which the government has engaged in activity having religious significance. 465 U.S. at 673-78. Justice Burger, however, failed, \textit{inter alia}, to consider the history surrounding the drafting of the establishment clause. Justice White also has indicated his appreciation of an examination into the historical foundation of the establishment clause: “I appreciate Justice Rehnquist’s explication of the history of the Religion Clauses of the First Amendment. Against that history, it would be quite understandable if we undertook to reassess our cases dealing with these Clauses, particularly those dealing with the Establishment Clause.” Wallace, 472 U.S. at 91 (White, J., dissenting). Justice White, however, never engaged in a detailed historical examination of the establishment clause.} He concluded, based upon his historical examination, that the establishment clause was intended to do no more than prohibit preferentialism.\footnote{See Wallace, 472 U.S. at 92-106 (Rehnquist, J., dissenting).} \footnote{See \textit{id}. at 106-07 (Rehnquist, J., dissenting). Rehnquist stated: It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. . . . The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the “wall of separation” that was constitutionalized in \textit{Everson}.}
Justice Rehnquist also noted that the *Lemon* test, which is but an effort to apply the “wall of separation” metaphor, is equally devoid of a historical foundation:

>[T]he *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service.173

In the concluding remarks of his *Wallace v. Jaffree* dissent, Justice Rehnquist provided food for the thought of abandoning the *Lemon* test in favor of an analysis rooted in the intended meaning of the establishment clause:

The Court strikes down the Alabama statute [in *Wallace v. Jaffree*] because the State wished to “characterize prayer as a favored practice.” It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from “endorsing” prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of “public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.” History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.174

well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

*Id.* at 113.

173 *Id.* at 110 (Rehnquist, J., dissenting).

174 *Id.* at 113 (Rehnquist, J., dissenting) (emphasis added) (citation omitted). It is interesting to note that Justice Rehnquist joined in the concurring opinion of Justice Powell in *Witters v. Washington Dept. of Servs. for the Blind*, 474 U.S. 481, 490-92 (1988). In his concurrence, Justice Powell agreed that the central question was whether the Washington provision had the “principal or primary effect” of advancing religion under *Lemon*. *Id.* at 490. *Witters*, though, is not determinative of Justice Rehnquist’s thinking on establishment clause issues, as it was a case in which the Court could apply *Lemon* and uphold the validity of the challenged statute. Moreover, in his first opinion for the Court on the issue after being named Chief Justice, Justice Rehnquist, in *Bowen v. Kendrick*, applied the *Lemon* test to uphold a federal statute against an establishment clause challenge. Nowhere in the opinion did Justice Rehnquist explore the history surrounding the drafting or ratification of the clause in an effort to explicate the true purpose and meaning of the provision. Subsequent cases, however, suggest that the Chief Justice analyzed the statute under *Lemon* be-
C. County of Allegheny v. ACLU—The Case of Dual Symbols

At issue in *County of Allegheny v. ACLU* was whether the placement of a crèche within the Allegheny County courthouse, and the display of a menorah on the steps of the adjoining city-county government building jointly owned and operated by the County of Allegheny and City of Pittsburgh, violated the establishment clause. Once again, the doctrinal havoc of *Lemon* reared its sour head.

1. Lower court decisions

The district court, which indicated that the Supreme Court’s opinion in *Lynch v. Donnelly* was controlling, concluded that the display of the crèche and menorah did not violate constitutional principles. A divided panel of the Third Circuit reversed and found the displays violative of the establishment clause.

The facts with respect to the displays were significant to the Third Circuit’s analysis. The court described the displays as follows:

Annually since 1981 the county has permitted the display of a crèche enclosed by a fence on the grand staircase of the first floor of the county courthouse. The crèche consists of traditional...
figures ranging in height from three to 15 inches, including a wooden stable with the infant Jesus, the Virgin Mary, Joseph, the Three Wise Men, shepherds, various animals and an angel holding a banner reading “Gloria in Excelsis Deo” (“Glory to God in the Highest”), The crèche, though stored in the basement of the courthouse, is the property of the Holy Name Society of the Diocese of Pittsburgh, a Catholic men’s organization and thus a sign in front of it recites: “This display donated by the Holy Name Society.” Though it is erected, arranged and disassembled each year by the moderator of the Holy Name Society, the county supplies a dolly and minimal aid to transport it to and from the courthouse basement. While the county provides no special security or illumination for the display, its Bureau of Cultural Programs decorates the crèche with red and white poinsettia plants and evergreen trees purchased at public expense. The county also displays wreaths purchased through county funds. Other decorations such as trees, Santa Clauses and additional wreaths are displayed by various departments and offices throughout the courthouse building.

The crèche is displayed for about six weeks from late November to early January. During the weeks prior to Christmas the county sponsors Christmas carol programs on the first floor of the courthouse with the chorale groups using the crèche for a foreground. The choirs, typically high school students, sing popular songs and religious and secular Christmas carols. The caroling is broadcast by loudspeakers to the public in the courthouse. The programs are dedicated to the universal themes of world peace and brotherhood and to the memory of persons missing in action in the Vietnam War. The grand staircase and the surrounding area are used throughout the year for art displays and other civic and cultural events and programs.

The courthouse houses the principal offices of the county, including those of its governing officers, the county commissioners, and the treasurer and controller, as well as the criminal and some civil courts of Allegheny County. In view of the crèche’s location, it is probably seen by many visitors to the courthouse including taxpayers, lawyers trying cases or serving as arbitrators, litigants, persons desiring to search certain court records and people with business at the sheriff’s office.

The City-County Building, the site of the menorah, is one block from the courthouse. The various public offices in the building include those of the city treasurer, county prothonotary, marriage license bureau and the register of wills. In addition, certain courts sit in the building. Although the building bears the name of both political subdivisions, the menorah is placed in an area
maintained solely by the city. For a number of years during the Christmas season the city has installed a 45 foot Christmas tree on a platform on the front steps of the main entrance of the building and next to the tree on the steps of the main entrance to the building since 1982 the city has annually erected an approximately 18 foot high menorah. The menorah, which was purchased by Chabad [a Jewish organization], is put in place at the time of the Jewish celebration of Chanukah.\textsuperscript{179}

The Third Circuit agreed with the district court "that the starting point of [the] analysis should be Lynch v. Donnelly,"\textsuperscript{180} and noted:

\begin{quote}
[T]he second prong of the \textit{Lemon} test is that most readily violated as a public entity usually is able to articulate some secular purpose for a display (first prong) and the mere placement and storage of a display will involve little entanglement (third prong) of government and religion. \ldots On the other hand the use of a religious symbol in a display on public property or by a public entity may well be deemed an endorsement of religion regardless of an entity's stated reasons for its placement and thereby implicate the second \textit{Lemon} prong as the impact of the display must be judged objectively. The variables that a court should consider in determining whether a display has the effect of advancing or endorsing religion include: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.\textsuperscript{181}
\end{quote}

Applying the facts before it to the variables it said should be considered for the purpose of determining whether the effects prong of \textit{Lemon} has been crossed, the Third Circuit ruled:

Each display was located at or in a public building devoted to core functions of government and each was placed at a prominent site at the public building where visitors would see it. Further, while the menorah was placed near a Christmas tree, neither the crèche nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items. In addition,

\textsuperscript{179} Id. at 657.
\textsuperscript{180} Id. at 659.
\textsuperscript{181} Id. at 661-62 (citation omitted).
both the crèche and the menorah are associated with religious holidays and would be viewed as pertaining to a particular religion. Further, the menorah, unlike the crèche, is not associated with a holiday with secular aspects. There is public participation, albeit minimal, in both the storage and placement of the displays. Overall, when the record is evaluated in light of these considerations, the only reasonable conclusion is that by permitting the crèche and the menorah to be placed at the buildings the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion. While we do not doubt that some persons find this laudable, it is impermissible under the second prong of the Lemon test and thus violates the Establishment Clause of the First Amendment.

We recognize, of course, that there is a sign near the crèche indicating that the display is a donation of the Holy Name Society. That factor, however, cannot possibly outweigh the considerations which lead us to find that placement of the crèche violated the second prong of the Lemon test.182

182 Allegheny, 842 F.2d at 662 (footnote omitted). The court also explained that “we do not imply that if only a crèche or only a menorah had been involved our result would have been different. Quite to the contrary we would have reached the same result if only one of the displays had been placed by defendants or either of them.” Id. at 662 n.1.

A strong dissent was voiced to the Third Circuit’s opinion in Allegheny. After labeling the position adopted by the other two members of the panel as “aggressive ‘neutrality’.” Judge Weis stated that such an approach is “contrary to the spirit of religious liberty embodied in the First Amendment and will lead not to accommodation but to anomosity, not to tolerance of, but hostility toward, religion.” Id. at 663 (Weis, J., dissenting). Judge Weis then considered many of the same historical points raised in this article, id. at 663-65 (Weis, J., dissenting), and concluded that “the historical evidence is clear that the Framers did not intend the Establishment Clause to erect between religion and state a ‘wall of separation.’” Id. at 665 (Weis, J., dissenting).

Judge Weis then took issue with the court’s analysis in Lynch v. Donnelly:

[T]he court of appeals’ preoccupation with the Christmas display location in City Hall is especially perplexing in light of the Supreme Court’s decision in Marsh v. Chambers. In that case, the challenged prayer service was conducted in the legislative chamber itself — not a public area of the capitol building. If the Supreme Court did not consider that practice a prohibited endorsement of the sectarian beliefs espoused by the legislatively-paid chaplain, it is difficult to understand why a crèche displayed in a government building during the Christmas season cannot pass constitutional muster. . . .

Equally unpersuasive is the . . . adorned/unadorned distinction. Lynch simply does not support applying such a “Two Plastic Reindeer” rule. As Justice O’Connor noted, the secular decorations surrounding the Pawtucket crèche did not nullify its sectarian religious significance. Rather, the December holiday setting was the element that altered “what viewers may fairly understand to be the purpose of the display — as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.” Lynch, 465 U.S. at 692, 104 S. Ct. at 1369 (O’Connor, J.,
2. The Supreme Court Approaches in *Allegheny*

True to form, one needs a road map to determine the Supreme Court's ruling in this establishment clause case.\(^{183}\)

This "unadorned" distinction, even if valid, is irrelevant here. The Pittsburgh crèche was surrounded by traditional Christmas symbols, including wreaths, evergreen trees, and poinsettia plants, and served as a thematic backdrop for the County's traditional holiday choral program. The appellants' contention that these obviously secular symbols are not secular enough calls to mind Judge Nelson's admonition: "I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations." *City of Birmingham*, 791 F.2d at 1569 (Nelson, J., dissenting).

The tone of *Lynch* is unmistakable. I have found no indication that the Pawtucket display survived constitutional scrutiny because it was situated in a private park rather than a county courthouse, or because it closely resembled a miniature golf course with candy-striped poles, talking wishing wells, and cut-out elephants. The civil government's recognition of the origins of Christmas during the holiday season simply was not perceived by the Supreme Court as a threat to the aims of the Establishment Clause. The Court all but dismissed the appellant's claim as much ado about nothing and, reading the opinion, one can imagine the Court steadfastly resisting the temptation of chiding, "Bah humbug!"

... Viewed from the average citizen's perspective, the crèche and the Christmas tree in the Courthouse together with the menorah affixed to the front of the City-County Building constitute but one large display commemorating the holiday season.

... Viewing these displays as a whole, I find that the "message" conveys no more government endorsement of religion than if the crèche alone were exhibited. Including a reference to Chanukah did no more than broaden the commemoration of the holiday season and stress the notion of sharing in its joy. By marking the Judeo-Christian aspects of the holiday season, the local governments appropriately called attention to the great pluralism that is the hallmark of religious tolerance in this country.

*Id.* at 668-71 (Weis, J., dissenting) (footnotes omitted).

\(^{183}\) The directions look like this:

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, J.J., joined, an opinion with respect to Parts I and II, in which O'CONNOR and STEVENS, J.J., joined, an opinion with respect to Part III-B, in which STEVENS, J., joined, [an opinion with respect to Part VII, in which O'CONNOR, J., joined] and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, J.J., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, J.J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, J.J., joined. KENNEDY, J., filed an opinion concurring in the judgment in part
The bottom line is that six Justices found in favor of the constitutionality of the menorah display, while only four voted in favor of the crèche; therefore the menorah stands but the crèche falls.

a. The "Majority" Analysis

Justice Blackmun began his analysis by quoting at length the infamous Everson passage, and concluded once again (along with the other Justices who joined in the majority opinion) that the establishment clause demands neutralism. In reaching this unsupported but not surprising conclusion, the majority of Justices expressly rejected the concept of nonpreferentialism.

and dissenting in part, in which REHNQUIST, C.J., and WHITE and SCALIA, J.J., joined.


Justice Blackmun wrote:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbelief, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."

Id. at 3100 (quoting Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947)). Blackmun stopped his homage to Everson one sentence short of the famous "wall of separation" metaphor.

For instance, Justice Blackmun stated that "we have held [the establishment clause] to mean no official preference even for religion over nonreligion." Id. at 3107 (citation omitted); see also id. at 3119 ("government is to be neutral in matters of religion") (O'Connor, J., concurring), at 3128 ("[w]e have . . . interpreted that Clause to require neutrality, not just among religions, but between religion and nonreligion") (Brennan, J., concurring in part, dissenting in part), at 3130 (establishment clause "forbids even a partial establishment, . . . not only of a particular sect in favor of others, but also of religion in preference to nonreligion") (Stevens, J., concurring in part, dissenting in part) (citations omitted).

This same sentiment was expressed in Texas Monthly, Inc. v. Bullock, 109 S. Ct. 890 (1989), an establishment clause case decided earlier in the term. In that case Justice Brennan said: "In proscribing all laws 'respecting an establishment of religion', the Constitution prohibits, at the very least, legislation that constitutes an endorsement of one or another set of religious beliefs or of religion generally." Id. at 896. Not to be outdone, Justice Blackmun noted "that government may not favor religious belief over disbelief." Id. at 906 (Blackmun, J., concurring).

In tearing down the crèche, Blackmun explained: "Even if the Grand Staircase [where the crèche was placed] occasionally was used for displays other than the crèche . . . it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government." Allegheny, 109 S. Ct. at 3104 n.50. Justice Brennan joined: "I know of no principle under the Establishment Clause . . .
Justice Blackmun then invoked Lemon as the alpha of establishment clause analysis. In the next breath, he noted that recent decisions have added a gloss to that analysis by looking to the endorsement test, advocated by Justice O'Connor in Lynch, for guidance in determining whether a violation of the first two Lemon prongs has occurred. As Justice Blackmun explained:

Since Lynch, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." Accordingly, our present task is to determine whether the display of the crèche and the menorah, in their respective "particular physical settings," has the effect of endorsing or disapproving religious beliefs.

Much like the Third Circuit opinion below, Justice Blackmun turned to the "setting determinative analysis" required by the endorsement inquiry. In so doing, Justice Blackmun perceived a result affecting differences between the crèche displays in Allegheny and Lynch:

Here, unlike in Lynch, nothing in the context of the display detracts from the crèche's religious message. The Lynch display...
comprised a series of figures and objects, each group of which had its own focal point. Santa’s house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a “talking” wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.

Furthermore, the crèche sits on the Grand Staircase, the “main” and “most beautiful part” of the building that is the seat of county government. No viewer could reasonably think that it occupies this location without the support and approval of government. Thus, by permitting the “display of the crèche in this particular physical setting,” the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche’s religious message.190

Accordingly, Justice Blackmun ruled that “[t]he display of the crèche in this context . . . must be permanently enjoined.”191

Although the city undoubtedly advanced as much, if not more, public funding in support of the menorah as it did for the crèche, Justice Blackmun distinguished the menorah display. Noting that the eighteen foot menorah stood next to both a forty-five foot tall Christmas tree and a sign bearing “Salute to Liberty,” Justice Blackmun, in a portion of his opinion in which no other Justice joined, found this setting sufficient to insulate the menorah from constitutional offensiveness.193

190 Id. at 3103-04 (citations & footnotes omitted). Justice Blackmun continued in a footnote:

The presence of Santas or other Christmas decorations elsewhere in the County Courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the crèche. The record demonstrates clearly that the crèche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Id. at 3103 n.48.
191 Id. at 3105.
192 The City of Pittsburgh stored the crèche in the basement of the county courthouse, supplied a dolly and minimal aid to transport it to and from the basement, and decorated it with plants and evergreens. See id. at 3097; see also supra text accompanying note 179.
193 See id. at 3112-15. According to Justice Blackmun:

The tree . . . is clearly the predominant element in the city’s display. The 45-foot tree occupies the central position beneath the middle archway in front of the Grant Street entrance to the City-County Building; the 18-foot menorah is positioned to one side. Given this configuration, it is much more sensible to interpret the meaning of the menorah in light of the tree, rather than vice versa. In the shadow of the tree, the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season.
Coupled with this “as refined by endorsement Lemon” analysis, Justice Blackmun introduced a novel, but equally historically and constitutionally unsupportable, consideration to establishment clause jurisprudence: the “less religious in nature alternative” test. Justice Blackmun suggested that under this test he might find what he feels to be an otherwise unencroaching display violative of establishment principles if there was, in his opinion, a “less religious” symbol that could have been used. In addition to the constitutional frailty of this consideration, it is fraught with practical concerns rivaling those raised by Lemon that could, if adopted, throw establishment clause analysis into an even more chaotic state.

Justice Blackmun, in a portion of his opinion joined by a majority of the Court, wrote a scathing response to Justice Kennedy’s opinion. Justice Kennedy expressly rejected an endorsement analysis and urged that the establishment clause be interpreted in light of historical practices. In particular, Justice Blackmun took issue with the suggestion that Marsh [v. Chambers] legitimates all “practices with no greater potential for an establishment of religion” than those “accepted

In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both Christian and Jewish faith, but instead, a secular celebration of Christmas coupled with an acknowledgement of Chanukah as a contemporaneous alternative tradition.

The Mayor’s sign further diminishes the possibility that the tree and the menorah will be interpreted as a dual endorsement of Christianity and Judaism. The sign states that during the holiday season the city salutes liberty. Moreover, the sign draws upon the theme of light, common to both Chanukah and Christmas as winter festivals, and links that theme with this Nation’s legacy of freedom, which allows an American to celebrate the holiday season in whatever way he wishes, religiously or otherwise. While no sign can disclaim an overwhelming message of endorsement, an “explanatory plaque” may confirm that in particular contexts the government’s association with a religious symbol does not represent the government’s sponsorship of religious beliefs. Here, the Mayor’s sign serves to confirm what the context already reveals: that the display of the menorah is not an endorsement of religious faith but simply a recognition of cultural diversity.

Given all these considerations, it is not “sufficiently likely” that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an “endorsement,” or “disapproval... of their individual religious choices.”


See id. at 3114.

See id.

Id. at 3105-09.

Id. at 3134-46 (Kennedy, J., concurring in part, dissenting in part).
traditions dating back to the Founding.” Otherwise, . . . Justice [Kennedy] asserts, such practices as our national motto (“In God We Trust”) and our Pledge of Allegiance (with the phrase “under God,” added in 1954) are in danger of invalidity.\textsuperscript{188}

Justice Blackmun’s reply was that throughout history there have been “numerous examples of official acts that endorsed Christianity specifically,”\textsuperscript{189} and that simply because the establishment clause’s command for neutralism has been breached in the past does not serve to diminish that command.\textsuperscript{200}

Justice Blackmun’s “concern” is unfounded. The establishment clause, as evidenced by its incorporation, will never be interpreted in the exact manner that was intended. Thus, there is no reason that the policy underlying the establishment clause cannot be read to require that all religions be treated nonpreferentially.

Justice Blackmun’s effort to distinguish \textit{Marsh} is also unpersuasive. According to Justice Blackmun, “[w]e need not return to the subject of ‘ceremonial deism’ because there is an obvious distinction between crèche displays and references to God in the motto and the pledge.”\textsuperscript{201} The distinction, however, is that the motto and the pledge are seen or heard by millions of people every day, while the view of the crèche display is limited to perhaps thousands over a several week period. If anything, this distinction would require, under Justice Blackmun’s analysis, a finding of unconstitutionality on both fronts.\textsuperscript{202} Moreover, one cannot ignore the fact that the references to God in the motto and the pledge are, like the crèche, references to Christianity in general. Justice Blackmun’s effort to distinguish \textit{Marsh} is irreconcilable with the concept of neutralism that he and the rest of the \textit{Allegheny} majority advocate.

\textit{b. Justice O’Connor on the Menorah}

Justice O’Connor concurred in the fall of the crèche for the same reasons enunciated by Justice Blackmun.\textsuperscript{203} Her analysis of the constitutionality of the menorah, however, was somewhat different.

\begin{itemize}
\item \textsuperscript{188} \textit{Allegheny}, 109 S. Ct. at 3106 (citations omitted).
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{200} \textit{Id.} at 3107.
\item \textsuperscript{201} \textit{Id.} at 3106 (citation omitted).
\item \textsuperscript{202} See \textit{id.} at 3139 n.4 (Kennedy, J., concurring in part, dissenting in part).
\item \textsuperscript{203} See \textit{Allegheny}, 109 S. Ct. at 3117-19 (O’Connor, J., concurring).
\end{itemize}
In a portion of her opinion in which no other Justice joined, Justice O'Connor expressly rejected Justice Blackmun's concern over the secularizing of a religious holiday and his less religious alternative analysis, and focused solely on the question of whether the menorah display, "next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs." Applying her context determinative test, as she has done fairly consistently since Lynch, and invoking the same museum analogy from Lynch, Justice O'Connor found the menorah display to be constitutional.

Like Justice Blackmun, Justice O'Connor also felt compelled to address Justice Kennedy's comments that if the endorsement test "were applied without artificial exceptions for historical practice, it would invalidate many traditional practices recognizing the role of religion in our society." Justice O'Connor specifically mentioned the existence of legislative prayers and the opening of Court sessions with "God save the United States and this honor-

---

204 Id. at 3122 (O'Connor, J., concurring).
205 Id. at 3124 (O'Connor, J., concurring).
206 Id. at 3122 (O'Connor, J., concurring). Justice O'Connor, as she did in Lynch, downplayed the significance of the first Lemon prong:

Regardless of the plausibility of a putative governmental purpose, the more important inquiry here is whether the governmental display of a minority faith's religious symbol could ever reasonably be understood to convey a message of endorsement of that faith. A menorah standing alone at city hall may well send such a message to nonadherents, just as in this case the crèche standing alone at the Allegheny County Courthouse sends a message of governmental endorsement of Christianity, whatever the county's purpose in authorizing the display may have been. Thus, the question here is whether Pittsburgh's holiday display conveys a message of endorsement of Judaism, when the menorah is the only religious symbol in the combined display and when the opinion acknowledges that the tree cannot reasonably be understood to convey an endorsement of Christianity.

Id. at 3123 (O'Connor, J., concurring).

207 Allegheny, 109 S. Ct. at 3123 (O'Connor, J., concurring). Justice O'Connor stated that the combination of the tree, menorah, and sign conveyed a "distinct" message of pluralism and freedom. Id. (O'Connor, J., concurring). The sign stated, "[d]uring this holiday season, the City of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." Id. at 3095. Justice O'Connor then added that this particular physical setting "changes what viewers may fairly understand to be the purpose of the display—as a typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." Id. (O'Connor, J., concurring).

208 Id. at 3120 (O'Connor, J., concurring); see also id. at 3142 (Kennedy, J., concurring in part, dissenting in part).
able Court.” Referring to her concurring opinion in *Lynch*, she stated:

These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone....

Under the endorsement test, the “history and ubiquity” of a practice is relevant not because it creates an “artificial exception” from that test. On the contrary, the “history and ubiquity” of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion. It is the combination of the longstanding existence of practices such as opening legislative sessions with legislative prayers or opening Court sessions with “God save the United States and this honorable Court,” as well as their nonsectarian nature, that lead me to the conclusion that those particular practices, despite their religious roots, do not convey a message of endorsement of particular religious beliefs.

As was Justice Blackmun’s explanation, Justice O’Connor’s efforts to secularize such practices is disingenuous. It is difficult to understand how “God” can be given a secular meaning; when such or similar reference is made, it is ridiculous to suggest that the speaker did not intend religious significance or that the listener perceived the reference to be to a favorite pet.

c. The “Near Absolutists”

Justice Brennan (joined by Justices Marshall and Stevens) and Justice Stevens (joined by Justices Brennan and Marshall) wrote separate opinions concurring in the fall of the crèche and dissenting from the stand of the menorah. While Justices Brennan and Stevens joined Justice O’Connor’s concurrence in which she attempted to justify the use of the endorsement test, their opin-

---

209 *Id.* (O’Connor, J., concurring) (quoting her opinion in *Lynch* v. Donnelly, 465 U.S. 668, 693 (1984)).

210 *Id.* at 3121.

211 In part II of her opinion, Justice O’Connor responded to Justice Kennedy’s assertion “that the endorsement test ‘is flawed in its fundamentals and unworkable in practice’” by suggesting that “[a]s a theoretical matter, the endorsement test captures the essential command of the Establishment Clause, namely, that government must not make a person’s religious beliefs relevant to their standing in the political community by conveying a message ‘that religion or a particular religious belief is favored or preferred.’” *Id.* at 3119 (O’Connor, J., concurring) (citations omitted). As for the practical considerations, Justice O’Connor re-
ions made it clear that they were much more willing to strike down a government activity if any part of it had religious significance. In a case such as *Allegheny*, for instance, they would be more apt to find that the symbols having religious significance corrupt the secular aspects of the display rather than to find that the secular aspects of the display sanitize the religious symbols.

In finding against the menorah, Justice Brennan explained that “the display of an object that ‘retains a specifically Christian [or other] religious meaning,’ is incompatible with the separation of church and state demanded by our Constitution.” Justice Brennan concluded that the menorah retained its religious significance next to the tree; in fact, he concluded that the menorah “dominate[d] the tree.” Justice Stevens noted that, in his opinion, “the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property.” Justice Stevens, however, carefully added that this did not mean that he was retreating from his position that the wall between public funding and religion should be kept “high and impregnable.” Similar to Justice Brennan, Justice Stevens concluded that “the presence of the Chanukah menorah, unquestionably a religious symbol, gives religious significance to the Christmas tree.” Justice Stevens also cited bits and pieces of legislative history in an effort to support his belief that the establishment clause mandates neutralism, and added the following novel comment:

---


213 *Id.* at 3127 (Brennan, J., concurring in part, dissenting in part).

214 *Id.* at 3131 (Stevens, J., concurring in part, dissenting in part).

215 *Id.* at 3131 n.7 (Stevens, J., concurring in part, dissenting in part).

216 *Id.* at 3133 (Stevens, J., concurring in part, dissenting in part) (footnote omitted).

This provoked Justice Stevens to find:

The overall display thus manifests governmental approval of the Jewish and Christian religions. Although it conceivably might be interpreted as sending “a message of pluralism and freedom to choose one's own beliefs," the message is not sufficiently clear to overcome the strong presumption that the display, respecting two religions to the exclusion of all others, is the very kind of double establishment that the First Amendment was designed to outlaw.

*Allegheny*, 109 S. Ct. at 3133-34 (Stevens, J., concurring in part, dissenting in part) (citations omitted).
It is also significant that the final draft [of the establishment clause] contains the word “respecting.” Like “touching,” “respecting” means concerning, or with reference to. But it also means with respect—that is, “reverence,” “goodwill,” “regard”—to. Taking into account this richer meaning, the Establishment Clause, in banning laws that concern religion, especially prohibits those that pay homage to religion.\(^{217}\)

A complete historical examination surrounding the establishment clause reveals the errors in Justice Stevens’ logic.\(^{218}\)

d. A United Four

Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, authored a stinging dissent expressing dissatisfaction with *Lemon* in general\(^{219}\) and the endorsement test in particular.\(^{220}\) Justice Kennedy stated that it was not necessary to reach that decision because even under *Lemon* both the crèche and menorah were constitutionally permissible.\(^{221}\)

Justice Kennedy clearly expressed the belief that when analyzing challenged activity under the establishment clause, “the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion.”\(^{222}\) According to Justice Kennedy, the endorsement test, like *Lemon*, received a failing score:

If the endorsement test, applied without artificial exceptions for historical practice, reached results consistent with history, my

\(^{217}\) *Id.* at 3130-31 (Stevens, J., concurring in part, dissenting in part).

\(^{218}\) *Id.* at 3140-46 (Kennedy, J., concurring in part, dissenting in part).

\(^{219}\) *Id.* at 3134 (Kennedy, J., concurring in part, dissenting in part).

\(^{220}\) *Id.* at 3140-46 (Kennedy, J., concurring in part, dissenting in part).

\(^{221}\) According to Justice Kennedy:

Substantial revision of our Establishment Clause doctrine may be in order; but it is unnecessary to undertake that task today, for even the *Lemon* test, when applied with proper sensitivity to our traditions and our caselaw, supports the conclusion that both the crèche and the menorah are permissible displays in the context of the holiday season.

*Id.* at 3134 (Kennedy, J., concurring in part, dissenting in part).

\(^{222}\) *Id.* at 3142 (Kennedy, J., concurring in part, dissenting in part).
objections to it would have less force. But, as I understand that
test, the touchstone of an Establishment Clause violation is
whether nonadherents would be made to feel like “outsiders” by
government recognition or accommodation of religion. Few of our
traditional practices recognizing the part religion plays in our so-
ciety can withstand scrutiny under a faithful application of this
formula.

Some examples suffice to make plain my concerns. Since the
Founding of our Republic, American Presidents have issued
Thanksgiving Proclamations establishing a national day of cele-
bration and prayer. The first such proclamation was issued by
President Washington at the request of the First Congress, and
“recommend[ed] and assign[ed]” a day “to be devoted by the
people of these States to the service of that great and glorious
Being who is the beneficent author of all the good that was, that
is, or that will be,” so that “we may then unite in most humbly
offering our prayers and supplications to the great Lord and
Ruler of Nations, and beseech Him to . . . promote the knowledge
and practice of true religion and virtue. . . .” Most of President
Washington’s successors have followed suit, and the forthrightly
religious nature of these proclamations has not waned with the
years. President Franklin D. Roosevelt went so far as to “suggest
a nationwide reading of the Holy Scriptures during the period
from Thanksgiving Day to Christmas” so that “we may bear more
earnest witness to our gratitude to Almighty God.” It requires lit-
tle imagination to conclude that these proclamations would cause
nonadherents to feel excluded, yet they have been a part of our
national heritage from the beginning.

The Executive has not been the only Branch of our Govern-
ment to recognize the central role of religion in our society. The
fact that this Court opens its sessions with the request that “God
save the United States and this honorable Court” has been noted
elsewhere. The Legislature has gone much further, not only em-
ploying legislative chaplains, but also setting aside a special
prayer room in the Capitol for use by Members of the House and
Senate. The room is decorated with a large stained glass panel
that depicts President Washington kneeling in prayer; around
him is etched the first verse of the 16th Psalm: “Preserve me, O
God, for in Thee do I put my trust.” Beneath the panel is a ros-
trum on which a Bible is placed; next to the rostrum is an Ameri-
can Flag. Some endorsement is inherent in these reasonable ac-
ccommodations, yet the Establishment Clause does not forbid
them.

The United States Code itself contains religious references
that would be suspect under the endorsement test. Congress has
directed the President to "set aside and proclaim a suitable day each year... as a National Day of Prayer, on which the people of the United States may turn to God in prayer and meditation at churches, in groups, and as individuals." This statute does not require anyone to pray, of course, but is a straightforward endorsement of the concept of "turn[ing] to God in prayer." Also by statute, the Pledge of Allegiance to the Flag describes the United States as "one Nation under God." To be sure, no one is obligated to recite this phrase, but it borders on sophistry to suggest that the "'reasonable'" atheist would not feel less than a "'full membe[r] of the political community'" every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false. Likewise, our national motto, "In God we Trust," which is prominently engraved in the wall above the Speaker's dias in the Chamber of the House of Representatives and is reproduced on every coin minted and every dollar printed by the Federal Government, must have the same effect.\(^{223}\)

Justice Kennedy also rejected a literal application of the language in past cases that suggests the establishment clause mandates "neutralism."\(^{224}\)

Justice Kennedy then suggested an appropriate approach for

\(^{223}\) Id. at 3142-43 (Kennedy, J., concurring in part, dissenting in part) (footnotes & citations omitted).

\(^{224}\) Id. at 3135 (Kennedy, J., concurring in part, dissenting in part). As Justice Kennedy explained:

"Taken to its logical extreme, some of the language [in prior cases] would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause. Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage."

Id. (Kennedy, J., concurring in part, dissenting in part). Justice Kennedy continued:

If government is to participate in its citizens' celebration of a holiday that contains both a secular and a religious component, enforced recognition of only the secular aspect would signify the callous indifference toward religious faith that our cases and traditions do not require; for by commemorating the holiday only as it is celebrated by nonadherents, the government would be refusing to acknowledge the plain fact, and the historical reality, that many of its citizens celebrate its religious aspects as well. Judicial invalidation of government's attempts to recognize the religious underpinnings of the holiday would signal not neutrality but a pervasive intent to insulate government from all things religious. The Religion Clauses do not require government to acknowledge these holidays or their religious component; but our strong tradition of government accommodation and acknowledgment permits government to do so.

Id. at 3138 (Kennedy, J., concurring in part, dissenting in part).
addressing the second *Lemon* prong.\textsuperscript{225} He would find the principal or primary effect of challenged governmental activity to be the advancement or inhibition of religion if it "coerce[s] anyone to support or participate in any religion or its exercise; [or] in the guise of avoiding hostility or callous indifference, give[s] direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' "\textsuperscript{226} On the facts before him, Justice Kennedy found that neither the crèche nor the menorah displays were an exercise by the government of its power of coercion, nor did they directly benefit religion to an impermissible degree.\textsuperscript{227}

\textsuperscript{225} Like Justice Blackmun, Justice Kennedy found "[t]he only *Lemon* factor implicated in this case [to be] whether the 'principal or primary effect' of the challenged government practice is 'one that neither advances nor inhibits religion.' " Id. at 3134 (Kennedy, J., concurring in part, dissenting in part) (quoting *Lemon*, 403 U.S. at 612).

\textsuperscript{226} Id. at 3136 (Kennedy, J., concurring in part, dissenting in part) (quoting *Lynch*, 465 U.S. at 678). Justice Kennedy suggested various forms of impermissible coercion: "taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing." Id. (Kennedy, J., concurring in part, dissenting in part).

\textsuperscript{227} Id. at 3139 (Kennedy, J., concurring in part, dissenting in part). According to Justice Kennedy:

There is no suggestion here that the government's power to coerce has been used to further the interests of Christianity or Judaism in any way. No one was compelled to observe or participate in any religious ceremony or activity. Neither the city nor the county contributed significant amounts of tax money to serve the cause of one religious faith. The crèche and the menorah are purely passive symbols of religious holidays. Passersby who disagree with the message conveyed by these displays are free to ignore them, or even to turn their backs, just as they are free to do when they disagree with any other form of government speech.

There is no realistic risk that the crèche or the menorah represent an effort to proselytize or are otherwise the first step down the road to an establishment of religion. *Lynch* is dispositive of this claim with respect to the crèche, and I find no reason for reaching a different result with respect to the menorah. Both are the traditional symbols of religious holidays that over time have acquired a secular component. Without ambiguity, *Lynch* instructs that the "focus of our inquiry must be on the [religious symbol] in the context of the [holiday] season." In that context, religious displays that serve "to celebrate the Holiday and to depict the origins of that Holiday" give rise to no Establishment Clause concern. If Congress and the state legislatures do not run afoul of the Establishment Clause when they begin each day with a state-sponsored prayer for divine guidance offered by a chaplain whose salary is paid at government expense, I cannot comprehend how a menorah or a crèche, displayed in the limited context of the holiday season, can be invalid.

Id. (citations omitted).

Justice Kennedy also took issue with what he believed to be the majority's failure to recognize *Lynch* as being dispositive on the outcome of the case. Kennedy rejected the attempt to distinguish *Lynch* on the ground that the display in *Lynch* was not located on
While Justice Kennedy’s rejection of the endorsement and government property and was surrounded by secular ornaments such as candy canes and reindeer. As Justice Kennedy explained:

Nothing in Chief Justice Burger’s opinion for the Court in Lynch provides support for these purported distinctions. After describing the facts, the Lynch opinion makes no mention of either of these factors. It concentrates instead on the significance of the crèche as part of the entire holiday season. Indeed, it is clear that the Court did not view the secular aspects of the display as somehow subduing the religious message conveyed by the crèche, for the majority expressly rejected the dissenters’ suggestion that it sought “to explain away the clear religious import of the crèche” or had “equated the crèche with a Santa’s house or reindeer.”

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

The fact that the crèche and menorah are both located on government property, even at the very seat of government, is likewise inconsequential. In the first place, the Lynch Court did not rely on the fact that the setting for Pawtucket’s display was a privately owned park, and it is difficult to suggest that anyone could have failed to receive a message of government sponsorship after observing Santa Clause ride the city fire engine to the park to join with the Mayor of Pawtucket in inaugurating the holiday season by turning on the lights of the city-owned display. Indeed, the District Court in Lynch found that “people might reasonably mistake the Park for public property,” and rejected as “frivolous” the suggestion that the display was not directly associated with the city.

Our cases do not suggest, moreover, that the use of public property necessarily converts otherwise permissible government conduct into an Establishment Clause violation. To the contrary, in some circumstances the First Amendment may require that government property be available for use by religious groups, and even where not required, such use has long been permitted. The prayer approved in Marsh v. Chambers, for example, was conducted in the legislative chamber of the State of Nebraska, surely the single place most likely to be thought the center of state authority.

Nor can I comprehend why it should be that placement of a government-owned crèche on private land is lawful while placement of a privately owned crèche on public land is not. If anything, I should have thought government ownership of a religious symbol presented the more difficult question under the Establishment Clause, but as Lynch resolved that question to sustain the government action, the sponsorship here ought to be all the easier to sustain. In short, nothing about the religious displays here distinguishes them in any meaningful way from the crèche we permitted in Lynch.

If Lynch is still good law—and until today it was—the judgment below cannot stand. I accept and indeed approve both the holding and the reasoning of Chief Justice Burger’s opinion in Lynch, and so I must dissent from the judgment that the crèche display is unconstitutional. On the same reasoning, I agree that the menorah display is constitutional. Id. at 3139-40 (Kennedy, J., concurring in part, dissenting in part) (footnote & citations omitted).
Lemon rationales is founded on sound historical and constitutional reasoning, his coercion test confuses establishment clause jurisprudence. As Justice O'Connor suggested, coercion should be left as part of a free exercise analysis. The key to establishment clause scrutiny is nonpreferentialism; introducing coercion into that determination only serves to further muddy the waters in this already polluted area of the law.

D. Where They Sit

While the Court's most recent establishment clause decisions have done little to alleviate the chaotic state of the law in this area, they provide some insight into the attitudes of the individual Court members. Justice O'Connor has expressed concern over the inconsistencies resulting from the application of Lemon. Although Justice O'Connor does not appear "ready to abandon all aspects of the Lemon test," she has indicated "that the standards announced in Lemon should be reexamined and refined in order to make them more useful in achieving the underlying purposes of the First Amendment." However, Justice O'Connor's suggested analysis is historically and constitutionally unsound. She advocates an approach that would focus on "whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement." Under O'Connor's "endorsement" analysis, "nonpreferential" governmental action could be held unconstitutional.

Similarly, while Justices Blackmun, Brennan, Marshall, and Stevens seem content with invoking Lemon in all establishment clause cases, they will utilize Justice O'Connor's endorsement test to analyze governmental activity under the "purpose" and "effects" prongs. Justices Brennan, Marshall, and Stevens are more

222 Id. at 3119 (O'Connor, J., concurring); see School Dist. v. Schempp, 374 U.S. 203, 223 (1963).
223 Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 346 (1987) (O'Connor, J., concurring) ("this action ... illustrates certain difficulties inherent in ... Lemon"); Wallace v. Jaffree, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring) ("Despite its initial promise, the Lemon test has proved problematic").
230 Wallace, 472 U.S. at 68 (O'Connor, J., concurring).
231 Id. at 68-69 (O'Connor, J., concurring).
232 Id. at 69 (O'Connor, J., concurring); see Amos, 483 U.S. at 348 (O'Connor, J., concurring) (restatement of endorsement analysis).
apt to find an establishment clause violation utilizing the *Lemon* and endorsement rationales than are Justices Blackmun and O'Connor.  

While Justice White has joined and concurred in applying the *Lemon* test, and has written for the Court applying *Lemon*,

---

nan, joined by Justices Marshall and Stevens, cited a prior O'Connor opinion describing the endorsement test).

Although Justice Blackmun applied Justice O'Connor's endorsement analysis in *Allegheny* to determine whether the crèche and menorah displays violated constitutional principles, he did not disregard *Lemon*. This was clear when he stated that although "[a] display [might] not have [the] effect of endorsing religious faith, [this] does not foreclose the possibility that the display . . . might violate either the 'purpose' or 'entanglement' prong of the *Lemon* analysis." *Allegheny*, 109 S. Ct. at 3115. Justice Blackmun also indicated that he would apply the endorsement test to determine whether the challenged activity violated the first *Lemon* prong by asserting that "[i]n recent years, [the Court has] paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." *Id.* at 3100 (emphasis added). Likewise, Justice Brennan, joined by Justices Marshall and Stevens, alluded to Justice O'Connor's endorsement analysis while confirming their belief in the *Lemon* test in *Bullock*. Justice Brennan cited with approval Justice O'Connor's concurrence in *Wallace* in which O'Connor stated that "'Lemon's inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys the message of endorsement.'" *Bullock*, 109 S. Ct. at 897 n.1 (plurality opinion); see *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring).

In *Bullock*, the state action at issue was a statute that exempted religious publications from a Texas sales tax on publications. *Bullock*, 109 S. Ct. at 890 (plurality opinion); see Tex. Tax Code Ann. § 151.312 (Vernon 1982 & Supp. 1988). Justice Brennan, in striking down the statute, stated that the state action was "a blatant endorsement of religion [which appeared] to produce greater state entanglement with religion than the denial of an exemption." *Bullock*, 109 S. Ct. at 902 (plurality opinion). Without any traditional analysis, Justice Blackmun, joined by Justice O'Connor, concurred in the *Bullock* opinion on the ground that "Texas engaged in preferential support for the communication of religious messages." *Id.* at 907. (Blackmun, J., concurring). Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, dissented, finding that the statute was a permissible accommodation of religion and did not violate *Lemon*. *Id.* at 907-16 (Scalia, J., dissenting).

---

234 See supra notes 229-33 and accompanying text (discussion of views expressed by Justices O'Connor, Brennan, Marshall and Stevens).

235 See *Bowen v. Kendrick*, 108 S. Ct. 2562, 2565-81 (1988). In *Bowen*, the federal Adolescent Family Life Act, which provided federal funding to agencies dealing with premarital adolescent sexual relations, was challenged as being a violation of the establishment clause. 487 U.S. at 589. This issue arose because several recipients were "organizations with institutional ties to religious denominations." 108 S. Ct. at 2564. The *Bowen* majority applied the three-part *Lemon* test and concluded that while the statute was constitutional on its face, a further factfinding was necessary to determine if it was constitutional "as applied." 108 S. Ct. at 2562, 2579-81.


he has indicated that he is ready and willing to reconsider the Court's decisions interpreting the establishment clause. Chief Justice Rehnquist has gone even further and indicated that he is willing to scrap the Lemon test in favor of a historically justified approach to such issues. As for the newer Court members, Justice Kennedy has indicated that at the very least he is not willing to read Lemon as broadly as the Allegheny majority and has suggested that he too is ready to relegate Lemon to the archives of constitutional jurisprudence. Likewise, Justice Scalia, citing the historical analysis of Chief Justice Rehnquist in Wallace v. Jaffree, has indicated that at a minimum the "purpose" prong of Lemon should be abandoned, and, by joining in Justice Kennedy's opinion in Allegheny, has suggested that Lemon should be abandoned altogether.

Presently, there are not enough votes on the Court to relegate Lemon to the mantel of misbegotten constitutional doctrine. However, one more vote apparently is all that is needed to stock the shelf.

---

238 See Wallace, 472 U.S. at 90-91 (White, J., dissenting). In his dissenting opinion in Wallace, Justice White stated: "I have been out of step with many of the Court's decisions dealing with this subject matter, and it is thus not surprising that I would support a basic reconsideration of our precedents." Id. at 91 (White, J., dissenting).

239 See id. at 91-114 (Rehnquist, J., dissenting). After stating that the Lemon test "represents a determined effort to craft a workable rule from a historically faulty doctrine," id. at 110 (Rehnquist, J., dissenting), Justice Rehnquist concluded that "[t]he true meaning of the Establishment Clause can only be seen in its history." Id. at 113 (Rehnquist, J., dissenting). This view is supported by the fact that Rehnquist joined Justice O'Connor's dissent in Aguilar and Justice Kennedy's opinion in Allegheny. See County of Allegheny v. ACLU, 109 S. Ct. 3086, 3134-35 (1989) (Kennedy, J., concurring in part, dissenting in part); Aguilar v. Felton, 473 U.S. 402, 421-31 (1985) (O'Connor, J., dissenting) (criticizing Lemon).

240 See Allegheny, 109 S. Ct. at 3134-46 (Kennedy, J., concurring in part, dissenting in part). In Allegheny, Justice Kennedy made it clear that he did not want "to be seen as advocating, let alone adopting, [the Lemon] test as [the] primary guide in this difficult area." Id. at 3134 (Kennedy, J., concurring in part, dissenting in part)

241 Id. at 3134 (Kennedy, J., concurring in part, dissenting in part) ("Substantial revision of . . . Establishment Clause doctrine may be in order").


243 See Allegheny, 109 S. Ct. at 3134-46 (Kennedy, J., concurring in part, dissenting in part); see also supra notes 219-27 and accompanying text (discussion of Justice Kennedy's position).

244 The Supreme Court's most recent pronouncement on the establishment clause was in Jimmy Swaggart Ministries v. Board of Equalization, 110 S. Ct. 688 (1990). In that case, Jimmy Swaggart Ministries, a religious organization incorporated as a Louisiana nonprofit corporation conducted evangelic crusades across the country (including California), sold religious and nonreligious merchandise at the crusades, and published nationwide a monthly
VII. A SUGGESTED HISTORICALLY JUSTIFIABLE APPROACH TO ESTABLISHMENT CLAUSE ANALYSIS

The doctrine of stare decisis mandates that once incorporated into the fourteenth amendment, the establishment clause will re-

magazine called “The Evangelist.” *Id.* The California Board of Equalization informed the Ministries that religious materials were not exempt from California sales tax and requested the Ministries to register as a seller to facilitate the reporting and payment of the tax; the Board also found that the Ministries had a sufficient nexus with California to require the Ministries to collect and report use tax on its mail order sales to California purchasers. *Id.* When the Ministries failed to follow the Board’s instructions, the Board notified the Ministries of the dollar amounts of sales and use tax owed and the assessed penalty. *Id.* While it did not dispute the amounts owed respecting the nonreligious items, the Ministries filed a petition to redetermine the tax on the religious materials—claiming that the tax violated the free exercise and establishment clauses. *Id.* The Board denied the Ministries’ argument (although it deleted the penalty and increased the interest charges) and the California Court of Appeals affirmed (the California Supreme Court denied discretionary review). *Id.* The Supreme Court, in a unanimous opinion by Justice O’Connor, affirmed. *Id.*

After rejecting the Ministries’ free exercise challenge, *id.* at 693-97, the Court turned to the establishment clause challenge that the application of the sales and use tax to the Ministries’ religious materials fostered an excessive government entanglement with religion. *Id.* at 697. The Ministries’ establishment clause argument was that applying the tax resulted in on-site inspections of the Ministries’ crusades, lengthy on site audits, examinations of the Ministries’ books and records, and threats of criminal prosecution and other legal problems. *Id.* After noting “it is undeniable that a generally applicable tax has a secular purpose and neither advances nor inhibits religion, for the very essence of such a tax is that it is neutral and nondiscriminatory on questions of religious belief,” *id.* at 698, and that the *Lemon* entanglement prong had drawn recent criticism from the Court, Justice O’Connor rejected the Ministries’ contention. *Id.* at 698-99. According to Justice O’Connor: “From the State’s point of view, the critical question is not whether the materials are religious, but whether there is a sale or a use, a question which involves only a secular determination.” *Id.* at 699. Justice O’Connor also noted that the Court has held that while “[c]ollection and payment of the tax will of course require some contact [with] . . . the State . . . [the Court has] held that generally applicable administrative and record-keeping regulations may be imposed on religious organization[s] without running afoul of the Establishment Clause.” *Id.* at 698 (citation omitted).

The most that can be gleaned from this case is that all of the Justices are dissatisfied with the *Lemon* entanglement prong. One should not read this case, however, as meaning that Chief Justice Rehnquist and Justices Kennedy, Scalia, and to a lesser extent Justice White have changed their tunes on this issue. As Justice Kennedy has said, “[t]he Religion Clauses do not require government to acknowledge [religious activities]; but our strong tradition of government accommodation and acknowledgment permits government to do so.” *Allegheny,* 109 S. Ct. at 3138 (footnote omitted) (Kennedy, J., concurring in part, dissenting in part). In *Jimmy Swaggart Ministries,* there was no government accommodation of religion at issue. In fact, at issue was whether government could treat a religious organization like nonreligious organizations for tax purposes. Thus, as Justice O’Connor noted, “whatever the precise contours of the Establishment Clause, . . . its undisputed core values are not even remotely called into question by the generally applicable tax in this case.” *Jimmy Swaggart Ministries,* 110 S. Ct. at 698 (citations omitted). There is little doubt, given their prior opinions, however, that the “core values” of the establishment clause mean different things to the different Justices.
main forever incorporated. Notwithstanding the irony of incorpor-
ating the establishment clause into the fourteenth amendment
and making it applicable to the states,\textsuperscript{245} the issue of incorporation
is a moot point. The focus must then turn to how to apply the estab-
ishment clause in a way least offensive to its intended
purpose.

A detailed historical review into the purpose and meaning of
the establishment clause reveals that it was a federalism compro-
mise designed to ensure the rights of the states to legislate on mat-
ters of religious import.\textsuperscript{246} In terms of a limitation, the estab-
ishment clause was intended to prevent the creation of a national
church and the federal preference of one or more religious sects
over others;\textsuperscript{247} there was no intent to prohibit the encouragement
or furtherance by the federal government of religion by nonprefer-
entialist means.\textsuperscript{248} It follows, then, that even though incorporated,
the establishment clause prohibits only the establishment of a na-
tional church or religion, or the preference by government of one
or more religious sects.

A proper analysis of establishment clause issues is one that
can embody these historically sound precepts while at the same
time bring a degree of consistency to an area of constitutional law
plagued by inconsistency.\textsuperscript{249} These requirements would be met by
an analysis founded on the recognition that the establishment
clause allows for "practicable nonpreferential" assistance of reli-
gion.\textsuperscript{250} Such an analysis would necessarily involve two steps. The

\begin{itemize}
\item \textsuperscript{245} See supra notes 123-27 and accompanying text (establishment clause originally
designed to protect states rights has become a restraint on such rights).
\item \textsuperscript{246} See supra notes 10-33 and accompanying text (detailed discussion of the historical
context surrounding the establishment clause).
\item \textsuperscript{247} See supra notes 10-29, 34-42 and accompanying text (historical analysis delineating
intent of establishment clause).
\item \textsuperscript{248} See supra notes 34-42 and accompanying text (discussion of nonpreferentialism).
\item \textsuperscript{249} See Wallace v. Jaffree, 472 U.S. 38, 112-13 (1985) (Rehnquist, J., dissenting) (discus-
sion of inconsistencies in this area of law and need for historical analysis as basis of any
approach).
\item \textsuperscript{250} Even this analysis is a "stricter" limitation on federal action than that originally
intended. This is best illustrated by an examination of historically ingrained practices such
as: the opening legislative days with a prayer led by a chaplain compensated with public
funds; the compensation of military chaplains using public funds; the issuance of procla-
mations of days of thanksgiving and of national prayer; and the invocation of God at the begin-
nning of Court sessions, in our Pledge of Allegiance, and on our currency. These practices
would withstand challenge under the true meaning of the establishment clause, but might
not under the suggested approach. Thus, any practice "blessed" under the "true spirit" of
the establishment clause should be upheld as constitutional.
\end{itemize}
first consideration would be whether the challenged action is non-preferential on its face. Conceivably, most actions would survive such scrutiny. The second consideration would be whether all religions necessarily can be treated similarly. This part of the test would require the party challenging the activity to present a factual showing that similar treatment is not possible. Absent such a showing, the challenged governmental action would be deemed constitutional. The requirement that nonpreferential assistance be practicable should allay any fears that such assistance might have preferentialist effects. For example, assume a city council passed an ordinance providing that the city, upon request and on a first-come, first-served basis, would repair churches within city limits. If it could be shown that, given fiscal realities, the effects of the ordinance would be that the city could not realistically honor all such requests, the ordinance would tend to have a preferentialist effect, thus violating the establishment clause. Consequently, an

It seems apparent that in Allegheny, a majority of Supreme Court Justices would disagree with this reasoning. For example, Justice Blackmun, joined by Justices Brennan, Marshall, Stevens, and O'Connor, stated:

The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically . . . . Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.

Allegheny, 109 S. Ct. at 3106-07 (footnote & citation omitted). The explanation the Allegheny majority offers for the constitutionality of the above-mentioned governmental practices is that there is a difference "between a specifically Christian symbol, like a creche, and more general religious references, like the legislative prayers in Marsh." Id. at 3106; see Marsh v. Chambers, 463 U.S. 783, 786 (1983) (Court upheld prayer by state-funded chaplain). This suggestion was criticized by Justice Kennedy, who noted that the "purported distinction is utterly inconsistent with the majority's belief that the Establishment Clause 'mean[s] no official preference even for religion over nonreligion.'" Id. at 3139 n.4 (Kennedy, J., concurring in part, dissenting in part) (citation omitted). Likewise, Justice O'Connor, joined by Justices Brennan and Stevens, has remarked:

Practices such as legislative prayers or opening Court sessions with "God save the United States and this honorable Court," serve the secular purposes of "solemnizing public occasions," and "expressing confidence in the future" . . . . These examples of ceremonial deism do not survive Establishment Clause scrutiny simply by virtue of their historical longevity alone.

Id. at 3120-21 (O'Connor, J., concurring) (citation omitted). However, Justice O'Connor's "rational basis" justification of such governmental practices does not comport with the statement made by the Allegheny majority's statement (in which she joined) that "we have expressly required 'strict scrutiny' of practices suggesting 'a denominational preference.'" Id. at 3109 (citation omitted).

The proposed remedy in instances in which all religions can be treated similarly, but are not, would be either positive or negative injunctive relief.
Everson-type statute\textsuperscript{252} would not withstand challenge under the suggested analysis if it could be shown that the government could not afford to reimburse all parents of every religious denomination for transporting their children to parochial schools by public means.\textsuperscript{253}

Under the suggested analysis, incongruous results stemming from applying Lemon would be avoided, at least microgeographically.\textsuperscript{254} Accordingly, by way of example, in the absence of a showing that the apparent nonpreferential governmental action has a preferentialist effect due to impracticability, the following programs, which have been held violative of the establishment clause under Lemon, would withstand constitutional challenge: 1) supplementing parochial school teacher salaries; 2) a moment of silence during the school day for meditation or voluntary prayer; 3) the use of public school property by religious groups; 4) paying expenses incurred by parochial school children on field trips; 5) lending teaching and testing materials by the state to parochial schools; 6) reimbursing church schools for expenses of state-required tests and examinations; 7) allocating financial aid to repair church-supported schools; 8) displaying religious symbols on school property; 9) permitting public schools to provide released-time for religious classes and services on school property; 10) providing tax relief for tuition paid to parochial schools; and 11) state provided therapeutic and diagnostic health services inside a church school.\textsuperscript{255}

\textsuperscript{252} See Everson v. Board of Educ., 330 U.S. 1, 3 (1947); see also supra notes 77-103 and accompanying text (discussion of Everson statute that permitted public funding to reimburse parents for money expended in busing children to parochial schools).

\textsuperscript{253} Some might argue that, instead of lending consistency to this area of the law, this analysis could result in different outcomes under similar facts depending upon the geographical location of the constitutional challenge. This argument, however, ignores the consistency of the analysis itself, as opposed to Lemon which is consistent in theory but not in application. See supra text accompanying notes 136-62 (discussion of inconsistency in application of Lemon and examples). Moreover, there are numerous examples in which different results might occur depending on the location of the dispute. For instance, what may be a reasonable time, place, and manner restriction for a rally and march in downtown New York City might be unreasonable for a similar demonstration in downtown Salisbury, North Carolina. See Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648-54 (1981) (state has interest in avoiding congestion and maintaining orderly movement). Essentially, where the facts of different cases are truly "similar," the results under the suggested approach will be consistent.

\textsuperscript{254} Different results on a macro level do not raise constitutional concerns because such results would be based on geographic and societal factors rather than the underlying constitutional interpretation. See supra note 249 and accompanying text (suggested analysis would provide consistency in application).

\textsuperscript{255} See supra notes 136-62 and accompanying text (listing of inconsistent treatment of
Use of the suggested analysis also would avoid resort to the "variables" most recently applied by the Third Circuit and the Supreme Court majority (in Allegheny) in analyzing Lemon's "effects" prong. It appears certain that the variables approach would produce even more irreconcilable results than those already produced by Lemon. Under the variable approach in a case such as Allegheny, the following questions would precede a constitutional determination: If a display can be placed on government land but not inside a government building, how far away from a government building must the display be and where must it be located? Must it be placed out of view of passersby? Must it be five, ten, one hundred yards from the building? If the display cannot be placed on government property, how far away from government property must the display be: ten feet, ten yards, ten miles? If the display must be "part of a larger configuration including nonreligious items," how large must the secular aspects of the configuration be, what types of nonreligious items must be included, and how close to the religious symbols must they be? Must the nonreligious items be two, three, four times as large as the religious symbols? Must the nonreligious portion of the display be two, three, four times as expansive as the religious portion? If the "religious intensity of the display" is a factor, when does the intensity become constitutionally impermissible? Can the crèche display contain figures of the baby Jesus as well as the Virgin Mary and Joseph? What about angels? If secular items are needed to diminish the intensity of the display, is Frosty the Snowman sufficient or is Santa Claus also required? Is one reindeer sufficient or is a herd essential? If "the degree of public participation in the ownership and maintenance of the display" is important, how much is too much? Does it take $100, $200, or $300 to cross the line? What about "disclaimers of public sponsorship"? Must the disclaimers be in writing or can they be oral? If oral disclaimers are permissible, how many times must they run? If written disclaimers are necessary, what types, how big, how many are required and where must they be placed?256

---

256 Justice Kennedy recognized this problem in his opinion in Allegheny. 109 S. Ct. 3144-45 (Kennedy, J., concurring in part, dissenting in part). He believed that the test articulated by the majority could "provide workable guidance to the lower courts . . . only after [the] Court had decided a long series of holiday display cases, using little more than intuition and a tape measure." Id. at 3144-45 (Kennedy, J., concurring in part, dissenting in part).
Under the suggested approach in a case such as Allegheny, courts must first determine whether it is government policy to allow all religious groups to place displays on government property during periods of religious significance. If not, the program is facially preferential and violates the establishment clause. Even if this first hurdle is cleared, those challenging the program can present evidence that it is not "practically nonpreferential." In an Allegheny-type case, such proof may be that there is insufficient space at the given locale for all religious groups to place their displays at a particular time and allow the locale to maintain its functionality. Absent any showing, however, the religious displays (or other governmental action) would stand.

**VIII. CONCLUSION**

A historical misinterpretation of the intent of the establishment clause has fundamentally flawed the current Supreme Court analysis of establishment clause issues. The establishment clause was not intended to mandate neutralism. In fact, the primary purpose of the establishment clause was to protect state sovereignty over religious matters from usurpation by the federal government. The issue now is how to apply the clause in a way least offensive to its intended purpose. The answer is the "practically nonpreferential" analysis suggested in this Article. Besides being as historically justifiable as possible, the suggested analysis will go far toward yielding "unified and principled results in Establishment Clause cases," which alone makes the suggested analysis an attractive alternative to the "Lemon" currently utilized.

---

257 It would be insufficient to argue that there is not enough space for each church to erect a display of its choice. Rather, it would suffice that each religious sect have an opportunity to participate.
