THE SUPREME COURT, RELIGION, AND THE INTENT OF THE FRAMERS: AN ANALYSIS OF THE SITTING JUSTICES' ESTABLISHMENT CLAUSE PHILOSOPHIES

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(ABSTRACT)

The purpose of this study was to determine the philosophical orientation of each sitting Justice on matters pertaining to the Establishment Clause of the First Amendment to the United States Constitution. A second purpose is to determine whether their philosophies change based on the issues involved.

The research questions that drove this analysis are:

1) What theories of original intent can be derived from the literature?
2) To which variation of original intent, separationism or nonpreferentialism, do the individual Justices subscribe?
3) What are the various Establishment Clause issues that have been heard by the Court?
4) Do the individual Justices' philosophies change depending on the issue?

By studying the text of the First Amendment, events surrounding its passage and other writings of the Framers of the Constitution, scholars have posited two theories of the original intent of the Framers to explain the meaning of "an establishment of religion." The

first theory is termed nonpreferentialism. Nonpreferentialists argue that government may support religion so long as that support is nondiscriminatory among religious sects. The second theory, separationism, states that government may not support one, any or all religions. Separationists argue that a "wall of separation" should exist between church and state while nonpreferentialists opine that no such wall was intended by the Framers.

The United States Supreme Court has jurisdiction over issues involving the establishment of religion. The individual Justices have certain predilections with regard to governmental support of religion and have written opinions in cases and scholarly articles in which they articulate their philosophies.

Using traditional legal research methods, this study has demonstrated that of the seven sitting Justices that have written opinions or scholarly articles pertaining the Establishment Clause, Rehnquist, Scalia and Thomas, are consistently nonpreferentialist in their philosophical orientation. One justice, Stevens, is consistently separationist. Souter has written consistently separationist opinions, yet joined O'Connor's nonpreferentialist concurrence in one case. Kennedy, and O'Connor are neither consistently separationist nor nonpreferentialist. The philosophical orientation of those Justices changes based on the nature of the Establishment Clause issue.

To Laura

Dad once told me that I was lucky
to have a wife who would sacrifice so much
in order that I might realize my dream.

Dad was right.

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CHAPTER I
INTRODUCTION

The first freedoms guaranteed in the Bill of Rights[1] have been the subject of a great deal of controversy and a number of legal challenges over the past twenty five years. Strossen, writing in 1995 about the conflicted relationship between religion and government in the context of public schools, stated that "[o]f all the contentious issues concerning religious liberty in our society, none is more so than the role of religion in the schools."[2] Today, there is a division among Americans who believe that government should sponsor religion in a nonpreferential manner (nonpreferentialists) and those who believe that government should support neither one sect exclusively nor all sects equally (separationists).

Evidence of the chasm between the factions can be demonstrated by a debate that was reported in the *William and Mary Bill of Rights Journal*.[3] In this debate, M. G. "Pat" Robertson wrote that Americans "have lost faith in ultimate goodness because they have lost faith in God."[4] He attributed this loss of faith in God, in pertinent part,

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[1]Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.

[2]Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 Wm. and Mary Bill Rts. J. 227, 607 (1995).

[3]4 Wm. and Mary Bill Rts. J. 227, 595 (1995).

[4]*Id.* at 596.

to a protracted "assault" on religion by the schools and other public institutions.[5]

Taking issue with Robertson, Nadine Strossen asserted that many religious people do not want government promoting religious exercises. In her view, religious beliefs and practices are best left within the confines of the church, family or individual conscience.[6]

The issues involved in this controversy began early in this nation's history. Many of our Founding Fathers were wary of the dangers of government and religion becoming too closely aligned. In addressing the issue, John Adams stated that Congress should not "meddle" in religion.[7] Thomas Jefferson, in a letter to the Danbury Baptist Association in 1802, wrote that a "wall of separation" should exist between church and state.[8] Patrick Henry presented and championed a bill in the Virginia Legislature entitled a "*Bill Establishing a Provision for Teachers of the Christian Religion.*" Henry's legislation would have provided that "the Christian religion shall at all times coming be deemed and held to be the established Religion of

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[5]*Id.*

[6]Strossen, *supra* note 2 at 611.

[7]KERN ALEXANDER & M. DAVID ALEXANDER, THE LAW OF SCHOOLS, STUDENTS AND TEACHERS (2nd ed. 1995).

[8]Letter from Thomas Jefferson to the Danbury Baptist Congregation (Jan. 1, 1802), *reprinted in* ROBERT M. HEALY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION, 131-32 (1970).

the Commonwealth."[9] The bill was refuted by James Madison's "*Memorial and Remonstrance Against Religious Assessments*" stating that such a bill would be "a dangerous abuse of power."[10]

The controversy continues today. Even Jefferson's "wall" which, to many, symbolizes the concept of the separation of government and religion, has come under assault by some contemporary scholars and jurists. It has been alternately described as a useful signpost,[11] a useful figure of speech,[12] a misleading metaphor,[13] and a blurred and indistinct barrier.[14]

Background (Statement of the Problem)

The United States Supreme Court has addressed the issue of the relationship of religion and government many times in the past fifty years. In the American system of government, courts of law perform three functions. They 1) apply principles of law, or precedence, to factual situations, 2) interpret statutes, and 3) determine the

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[9]KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 117 (3rd ed. 1992).

[10]James Madison, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, *reprinted in* ENCYCLOPEDIA BRITANNICA, 4 THE ANNALS OF AMERICA 16-20 (1976).

[11]Larkin v. Grendel's Den, 459 U.S. 116, 124 (1982).

[12]Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

[13]Wallace v. Jaffree, 105 S.Ct. 2479 (1985).

[14]Lemon v. Kurtzman, 403 U.S. 602 (1971).

constitutionality of particular acts.[15] The United States Supreme Court has the authority to review all cases heard in lower federal courts and cases heard in state courts in which the dispute involves a federal statute or constitutional question.[16] Since free exercise and the prohibition against establishment of religion are First Amendment guarantees, legal questions involving them fall within the jurisdiction of the United States Supreme Court.

Lemon v. Kurtzman

In 1971, a unitary standard for deciding Establishment Clause disputes was first articulated in the Supreme Court case, *Lemon v. Kurtzman.*[17] The *Lemon* standard dominated Establishment Clause jurisprudence throughout the decades of the 1970's and 80's and although it has lost a considerable amount of its vitality in recent years, it has not been abandoned as yet. The reason for *Lemon's* demise can be traced, in part, to detractor admonitions of its unfaithfulness to original intent.[18] In order to gain an

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[15]ALEXANDER & ALEXANDER, *supra* note 9 at 5.

[16]H. C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, 1 (4th ed. 1995).

[17]Lemon, *supra* note 14.

[18]*See, e.g.,* Wallace v. Jaffree, *supra* note 13 at 2518 (1985) ". . .difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." (Rehnquist, W., dissenting) "Our religion-clause jurisprudence has been bedeviled (so to speak) by reliance on formulative abstractions that are not derived from, but positively conflict with, our long accepted constitutional traditions. Foremost among these has been the so-called *Lemon* test." Lee v. Weisman, 112 S.Ct. 2649, 2685 (1992) (Scalia, A., dissenting).

understanding of the *Lemon* test and of why some jurists and commentators deride it as a constitutional standard, it is necessary to explore its genesis and application, the problems surrounding it, and its likely demise.

The tripartite *Lemon* test was a synthesis of tests articulated in earlier Establishment Clause cases heard by the High Court.[19] In determining the constitutionality of a proposed statute or activity, courts must ask three questions in applying the *Lemon* test, which must be answered before the proposed statute or activity passes constitutional muster. The three questions are: does the proposed statute or activity 1) have a secular purpose? 2) have a primary effect that either advances or inhibits religion? or 3) foster excessive entanglement between government and religion?[20] If the activity is found to have a sectarian purpose, if it advances or inhibits religion, or if it fosters excessive entanglement, then it is violative of the *Lemon* test and is, therefore, unconstitutional.[21]

At issue in *Lemon v. Kurtzman* were two legislative schemes, one in Rhode Island and the other in Pennsylvania, that were designed to assist those states' parochial schools meet the rising cost of education. The Rhode Island statute allowed for the

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[19]An earlier application of the purpose and effect tests are discussed in School District of Abington Township v. Schempp, 374 U.S. 844, 858 (1963). The excessive entanglement prong is discussed in Walz v. Tax Commission, 397 U.S. 664 (1970).

[20]Lemon, *supra* note 14 at 755.

[21]*Id.*

payment of a salary supplement, not to exceed 15 per cent of base pay, to teachers in nonpublic schools who were engaged in the teaching of secular courses, as mandated by the state. It was stipulated that teachers may not teach religion courses while receiving the supplement.[22] All schools whose teachers were eligible for the supplement must have qualified by spending less per pupil than the state average. If a school's per pupil expenditures were above the state average, then the school was required to submit financial data in order that the state might disaggregate the school expenditures to determine how much of those expenditures were accounted for by secular instruction and how much by religious instruction.[23]

The Pennsylvania case centered on a statute that allowed the state school superintendent to "purchase" from all nonpublic, including sectarian, schools the cost of teachers salaries, textbooks and instructional materials in specified courses.[24] It was believed that the state's education goals could be served by such an arrangement.[25] For a school to become eligible, the nonpublic school was required to maintain audit data.[26]

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[22] *Id.* at 607.

[23] *Id.* at 607-608.

[24] *Id.* at 609.

[25] *Id.*

[26] *Id.* at 610.

The *Lemon* Test

Secular purpose. The most fundamental requirement necessary to ensure that the spheres of government and religion do not encroach upon one another is the requirement of secular purpose.[27] In *Lemon*, the Justices saw no secular purpose violation. Indeed, the stated legislative purpose, that of enhancing the quality of education for a significant portion of those states' school children, was a proper secular purpose.[28]

A different conclusion was reached by the Court in a 1980 case which involved the constitutionality of a Kentucky statute requiring the posting of the Ten Commandments in every public classroom in the Commonwealth.[29] The statute required the posting of the Decalogue with a statement in small print at the bottom stating a secular purpose for its posting. The stated purpose was that the principles found in the Ten Commandments are those upon which the laws of western civilization are based.[30] The Court, in a *per curiam* decision, rejected the claim that the posting of the Ten Commandments was a secular exercise, despite the avowed secular purpose. The Court offered, "the pre-eminent purpose for posting the Ten Commandments on

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[27]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 835 (1978).

[28]Lemon, *supra* note 14 at 755.

[29]Stone v. Graham, 449 U.S. 39 (1980).

[30]*Id.* at 42.

schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths and no legislative recitation of a supposed secular purpose can blind us to that fact."[31]

Secular effect. Even if it can be demonstrated that a statute or activity has a secular purpose, if the essential effect of the action is governmental influence into the traditions or expression of religious beliefs, then the statute or activity will be violative of the effect prong of the *Lemon* test.[32]

In *Committee for Public Education and Religious Liberty v. Nyquist*, a New York law allowing for varying forms of financial assistance to nonpublic schools was held to be unconstitutional.[33] The law in question in *Nyquist* allowed for direct money payments to nonpublic religious-affiliated schools for facilities maintenance and repair. Further provisions of the statute provided for a tuition reimbursement to parents whose children attended nonpublic schools and whose average yearly income was less than five thousand dollars. Another form of tax relief for those parents whose average yearly income exceeded five thousand dollars was also made available.

In striking down the first provision of the statute, Justice Powell noted that the

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[31]*Id. See also,* Wallace v. Jaffree *supra* note 13, a case involving a moment of silence in the public schools of Alabama which was found to implicate the purpose prong.

[32]TRIBE, *supra* note 27 at 839.

[33]413 U.S. 756 (1973).

effect of the provision for payments to nonpublic sectarian schools violated *Lemon*, regardless of a statutory financing scheme intended to ensure that public funds were not abused by the sectarian schools.[34] The sections of the statute that were concerned with benefits to parents of nonpublic school children were also found to violate *Lemon's* effect prong.[35] The financing arrangement in *Nyquist*, unlike those in earlier cases, [36] was found to impermissibly advance religion.

Excessive entanglement. The excessive entanglement prong of the *Lemon* test was the result of a legislative desire to minimize government intrusion into the religious realm.[37] In *Lemon*, it was determined by the Supreme Court that in order for courts to investigate whether or not excessive entanglement exists, they must "examine the character and purposes of the institution that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[38] The *Lemon* Court determined that the level of state scrutiny

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[34]*Id.* at 777.

[35]*Id.* at 780.

[36] In distinguishing the New York arrangement from previously upheld forms of aid, Justice Powell stated that all parents benefitted from a transportation reimbursement scheme in Everson v. Board of Education, 330 U.S. 1(1947). In a 1968 case, Board of Education v. Allen, 392 U.S. 236 (1968), only secular textbooks were allowed to be lent by the school district to sectarian schools. Finally, in Tilton v. Richardson, 403 U.S. 672 (1971), the buildings at a sectarian university that were funded by the state were not to be used for religious purposes.

[37]TRIBE, *supra* note 27 at 865.

[38]Lemon, *supra* note 14 at 615.

necessary to ensure that public funds were not being used for sectarian purposes in the parochial schools of Pennsylvania and Rhode Island would rise to the level of excessive entanglement.[39]

Another observation by the High Court in *Lemon* was made with regard to excessive entanglement. Chief Justice Burger wrote that entanglement might be manifested in the potential for social division resulting from state aid to religion programs in a pluralistic society. He opined that "[o]rdinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political divisions along religious lines was one of the principal evils against which the First Amendment was intended to protect."[40]

Problems surrounding *Lemon*. There are those who believe that the *Lemon* test is too restrictive and places an undue burden on citizens' Free Exercise rights, a Constitutional violation that is equally as egregious as state establishment of religion.[41]

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[39]*Id.* at 619.

[40]*Id.* at 622.

[41]*See* Justice White's dissent in Lemon *supra* note 14, at 665, stating ". . .free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice." *See also* Michael Stokes Paulsen, *Lemon is Dead*, 43 Case W. Res. Law Rev. 795, 797 (1993) stating that the then apparent successor to the *Lemon* test was a better legal counterpart to the Free Exercise Clause than was the *Lemon* test.

These individuals propose that a more accommodationist stance should be taken by the state with respect to religion. As a result of these disagreements, the *Lemon* test has become the flashpoint of the controversy between those who view the Establishment Clause as requiring separationism and those who believe nonpreferential acknowledgment and aid to religion is permissible .[42] Consequently, while *Lemon* has not been abandoned, certain Justices argue to do so[43] while still others have proposed variations or competing standards.[44] At any rate, the *Lemon* test enjoys considerably less vitality than it did in 1971.

Lemon's demise. *Lemon's* dissolution can be demonstrated in two opinions of Justice O'Connor. In wrestling with the proper application of the *Lemon* test she wrote in 1985 "[p]erhaps because I am new to the struggle, I am not ready to abandon all aspects of the *Lemon* test."[45] Nine years later, in *Board of Education of Kiryas Joel v. Grumet* she wrote that "[e]xperience proves that the Establishment Clause, like the Free Speech Clause cannot easily be reduced to a single test. There are different

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[42]*See e.g.*, Brief of Amicus Curiae of Specialty Research Associates at 10, Lee v. Weisman, 112 S.Ct. 2649 (1992) (No. 90-1014). *But see generally*, Brief of Amicus Curiae of the Council on Religious Freedom, Americans United for the Separation of Church and State at 7-12, Lee v. Weisman, 112 S.Ct. 2649 (1992) (No. 90-1014).

[43]*See, e.g.* Justice Scalia's dissent in Board of Education of Kiryas Joel v. Grumet, 114 S.Ct. 2841, 2505 (1994).

[44]*See, e.g.* Justice O'Connor's "endorsement" standard in Lynch v. Donnell, *supra* note 12 at 68 and Justice Kennedy's "coercion" standard in Lee v. Weisman, 112 S.Ct. 2649 (1992).

[45]Wallace, *supra* note 13 at 2497.

categories of Establishment Clause cases, which may call for different approaches."[46] *Lemon's* demise and the subsequent rise of competing standards, including faithfulness to original intent, can be traced to changes in societal patterns as well as the changing nature of Establishment Clause disputes.

Societal patterns. In the early part of the 20th century, Americans were less mobile and communities were more homogeneous than today. As the country moved into the 1970's and 80's mobility caused school communities to become more religiously heterogeneous. In fact, between the years of 1963 and 1982, the number of religious sects in the United States grew from 83 to 113, each with a membership from between 1000 and 50,000.[47] Another factor in *Lemon's* demise is the fact that there has been a gradual conservative shift in society. Evidence of this shift came in the 1994 congressional elections in which Republicans gained control of both houses of Congress for the first time in 40 years. This shift has been fueled in large part by conservative Christians who have begun to exert influence in the political arena bringing issues such as prayer in the schools to the political forefront.[48]

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[46]Kiryas Joel, *supra* note 43 at 2499.

[47]INFORMATION PLEASE ALMANAC 1982, 412-418 *reprinted in* H.C HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION, 421 (1995).

[48]*See generally,* Robertson, *supra* note 3 at 596-97. Robertson attempts to tie societal problems such as the rise in the number of unwed mother, teenage alcoholism and perceived shortcomings in the public schools to the lack of a public acknowledgment of God. He enumerates several instances of public school officials who, in his view, have breeched students' religious freedom.

Establishment Clause conflicts. Yet another contributor to *Lemon's* demise is the various contexts of church/state disputes.[49] In addition to problems surrounding aid to parochial schools, the Supreme Court has dealt with issues such as prayer at public school graduations,[50] moments of silence in schools,[51] prayer at the opening of legislative bodies,[52] access of religious clubs to public school facilities,[53] school districts created to serve religious enclaves[54] and the display of religious symbols in public places.[55]

In the wake of *Lemon's* decline, many commentators and certain Supreme Court Justices argue that faithfulness to the intent of the Framers of the Constitution is the

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He notes that such violations have become the norm as "ignorant or malevolent public school teachers and administrators put into effect the religious cleansing in the schools that they believe has been mandated by the courts." He concludes his remarks by asserting his belief that "God [should be] back in the public schools of America." If this cannot be accomplished by judicial means, he notes, then a prayer in the schools amendment should be adopted.

[49]A full discussion of each issue of Establishment Clause jurisprudence which the Court has heard since Justice Rehnquist's arrival on the High Bench, will be discussed in Chapter IV.

[50]Lee *supra* note 44.

[51]Wallace, *supra* note 13.

[52]Marsh v. Chambers, 463 U.S. 783 (1983).

[53]Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

[54]Grumet, *supra* note 43 at 2481.

[55]Lynch v. Donnelly, 465 U.S. 668 (1984), County of Allegheny v. American Civil Liberties Union of Greater Pittsburgh, 492, U.S. 573 (1989), Capitol Square Review Board v. Pinette, 515 U.S. ___, (1995)

proper approach for adjudicating religious issues.[56] It is their contention that the Religion Clauses of the First Amendment do not mandate intolerance or complete separation of government and religion. Many of their number also contend that the application of the *Lemon* test has demonstrated a hostility to religion on the part of the Supreme Court.[57]

A reliance on the intent of the Framers is highly problematic. There is little primary evidence of what the Framers' interpretation of the term "establishment" was when they drafted the Religion Clauses of the First Amendment.[58] Accordingly, two schools of thought have emerged as to the intent of the Framers. One theory, nonpreferentialism, states that if public policy does not prefer one denomination or sect over others, then aid or sponsorship to all sects or denominations is constitutional.[59] The second theory, separationism, states that government cannot aid or sponsor one

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[56]*See e.g.*, Justice Rehnquist's dissent in Wallace, "[i]t is impossible to build sound constitutional doctrine on a mistaken understanding of constitutional history. Wallace v. Jaffree at *supra* note 13 at 2509. *See also* Justice Scalia's dissent in Lee v. Weisman, *supra* note 49 at 2679 ". . .our interpretation of the Establishment Clause should comport with what history reveals was the contemporaneous understanding of its guarantees." *See also*, Edwin Meese, *Toward a Jurisprudence of Original Intent*, 11 Harv. J.L. & Pub. Pol'y 5 (1987).

[57]*See e.g.* Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools--An Update*, 75 Cal. L. Rev. 5 (1987). *See also*, Keith A. Fournier, *In the Wake of Weisman: The Lemon Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still*, 2 Regent L. J. 1 (1992).

[58]LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE, xxi (2nd ed. 1994).

[59]*Id.* at xvi.

sect or denomination exclusively or all sects or denominations equally.[60]

Purpose of the Study

The purpose of this study is to analyze the case opinions, scholarly writings and speeches of the individual sitting Supreme Court Justices for clues as to which theory of the original intent of the Establishment Clause is closest to each Justice's philosophical orientation. A second part of this study is to determine if their philosophical orientation changes based on the context of the challenge.

Research Questions

The questions that will drive this inquiry are:

1) What theories of original intent can be derived from the literature?

2) To which variation of original intent, separationism or nonpreferentialism, do the individual Justices subscribe?

3) What are the various Establishment Clause issues that have been heard by the Court?

4) Do the individual Justices' philosophies change change depending on the issue?

Significance of the Study

The significance of this study rests in the fact that the Justices have relied on the

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[60]THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT, vii (1986).

Framers' intent as the underpinnings, or at least as corroborating evidence, of their opinions in a number of Establishment Clause disputes.

In the Supreme Court case *Wallace v. Jaffree*,[61] in which an Alabama moment of silence statute was held as unconstitutional, Justice Rehnquist undertakes a history lesson in order to support his theory that constitutional adjudication must be founded upon the intent of the Framers of the Constitution. In so doing, he derides Thomas Jefferson's "wall of separation" metaphor as misleading[62] and "all but useless" as a constitutional guide.[63]

In *Lee v. Weisman*, Justice Souter undertook his own interpretation of the history of the Establishment Clause,[64] opining that nonpreferential aid, even in the form of a school graduation prayer, is unconstitutional. In the same case, Justice Scalia, in dissent, argued that the Framers' would have sanctioned the type of prayer at issue in *Weisman*. He offered several anecdotal reasons why he believes that, and he cited the actions and quotes the words of the Framers in order to justify his position.

It is important, therefore, since the Justices of the Supreme Court place a significant reliance on the Framers' intent that the variations of opinions with regard

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[61]Wallace, *supra* note 13.

[62]*Id.* at 2517.

[63]*Id.*

[64]Lee, *supra* note 44 at 2667-2678.

to that intent are studied. Once that has been accomplished then the individual opinions and other writings of the sitting Justices must be scrutinized to determine which interpretation of original intent is closest to the individual philosophical orientation of each. This analysis will give educational policy makers an understanding of the sitting Justices' interpretations of original intent with regard to church/state issues in the public schools thus providing them the means to make legally reasoned educational decisions.

Legal Research Design

Legal research has been described as a "systematic inquiry into the law that can be described as a form of historical-legal research that is neither qualitative or quantitative."[65] The legal researcher must locate all cases pertinent to the topic. Once the cases are identified, the researcher must use inductive analysis to analyze the law represented in the cases.[66] Once analyzed, the writings of the Justices will be subjected to a comparative analysis. Such an analysis compares similarities and differences in educational (legal) events. In performing this analysis, the researcher may glean "a consistent trend, a series of unique situations, or the beginning of a new direction."[67]

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[65]Charles J. Russo, *Legal Research: The "Traditional" Method, in,* RESEARCH THAT MAKES A DIFFERENCE: COMPLIMENTARY METHODS FOR EXAMINING LEGAL ISSUES IN EDUCATION 33 (David Schimmel, ed., 1996).

[66]MCMILLAN & SCHUMACHER, RESEARCH IN EDUCATION, 525 (2nd ed. 1989).

[67]*Id.* at 440.

Definitions

Coercion- Governmental action which forces a citizen, directly or indirectly, to attend a religious ceremony.[68] Nonconformity would cause a citizen to ". . forfeit his or her rights and benefits as the price of resisting."[69]

Endorsement- Governmental action which "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[70]

Excessive Entanglement- The requirement that government and religion should not interfere with one another's "respective spheres of choice and influence lest both government and religion be corrupted, the political system 'strained to the breaking point' and liberty of conscience ultimately be compromised."[71]

Framers- The delegates to the Constitutional Convention of 1787 who were charged with writing the Constitution of the United States.

Primary Effect- Even if a governmental action is not *aimed* at advancing or inhibiting religion, if its *effect* influences a religious tradition of belief, then it is

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[68] *See generally,* Lee v. Weisman, *supra* note 44.

[69] *Id.* at 2660.

[70] Lynch v. Donnelly, *supra* note 12 at 688.

[71] TRIBE, *supra* note 27 at 865-866.

unconstitutional under the *Lemon* test.[72]

Secular Purpose-The fundamental requirement that government action is justifiable in secular terms.[73]

Limitations of the Study

1. Analyses in this study are limited to the First Amendment Establishment Clause.

2. No cases past December 1996 will be analyzed for this study.

3. This study will not enter into discussion of the incorporation doctrine. It will be assumed that the Fourteenth Amendment will continue to allow the Supreme Court jurisdiction in religious matters.

4. The sitting Justices analyzed throughout this study are Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg and Breyer.

5. This study will not attempt to project whether one Justice's philosophical orientation, and the decisions manifested from that philosophy, is more or less nonpreferentialist or separationist than other Justices.' This study will be limited to discussion and analysis of the individual Justices' philosophies and whether they are separationist or nonpreferentialist based on the criteria gleaned from the theories presented in Chapter III.

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[72]*Id.* at 839.

[73]*Id.* at 835.

Organization of the Study

Chapter 1 provides an introduction and overview of the issues involved in contemporary Establishment Clause jurisprudence. In this chapter the purpose and research questions are presented.

Chapter 2 describes the methodology of the study. Legal research methodlogy is discussed in this chapter.

Chapter 3 describes the theoretical frameworks and related literature. This chapter consists of explanations of the varying interpretations of the intent of the Framers of the Constitution in writing the First Amendment Religion Clauses. Constitutional scholars disagree on the meaning of the Framers' words, positing the theories of nonpreferentialism and separationism to explain the Framers' intent. Both theories will be explored and discussed. From this chapter will be gleaned the criteria which will drive the chapter five analysis.

Chapter 4 is an overview of Establishment Clause jurisprudence. A thorough reading of education-related Establishment Clause jurisprudence since Justice Rehnquist's first Establishment Clause case on the High Court provides the issues for analysis in chapter five.

Chapter 5 is the report of the results of the research analysis. The philosophies of the sitting Justices of the Supreme Court are analyzed pursuant to the criteria gleaned

from the theories of original intent.

Chapter 6 is the conclusion to the study and recommendations for further research.

CHAPTER II
METHODOLOGY

Inquiry into the law involves systematic investigation of legislation and court cases in order to interpret those laws and cases and arrive at understanding.[1] In performing legal research, the researcher must investigate primary sources of law as well as secondary sources. A primary source may include the "written or oral testimony of an eyewitness, a participant . . . or the personal and public papers and the relics of his or her life."[2] Secondary sources are a record or testimony of an event by anyone who is not a witness or a participant in the event. Secondary sources often serve to interpret primary sources.[3]

Sources

Primary sources. The primary sources used in this study are such documents as constitutions, a body of precepts within which orderly government processes can operate,[4] statutes, which are acts expressing legislative will,[5] and case law which are

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[1]CHARLES J. RUSSO, *Legal Research: The "Traditional" Method, in* RESEARCH THE MAKES A DIFFERENCE: COMPLIMENTARY METHODS FOR EXAMINING LEGAL ISSUES IN EDUCATION 33, 34 (David Schimmel, ed. 1996).

[2]JAMES H. MCMILLAN & SALLY SCHUMACHER, RESEARCH IN EDUCATION, 444 (2nd ed. 1989).

[3]*Id.*

[4]KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW, 1 (3rd ed. 1992).

[5]*Id.* at 2.

judicial interpretations of the law.[6] Other primary sources include correspondences between the Framers, transcripts of the debates on the ratification of the Constitution and the writings of the sitting Justices.

Secondary sources. In a court of law, secondary sources, while not legally binding, can nevertheless have a great deal of persuasive influence on the judicial process as judges and attorneys often rely upon them in their analysis of legal questions.[7]

Search for Sources of Data

In this study, primary sources, secondary sources and computer searches were employed to identify the cases in which the Establishment Clause of the First Amendment has been argued. In reviewing those materials, a list of Establishment Clause cases commencing with the first case heard by Justice Rehnquist, the most senior member of the Court, was generated.

Secondary sources were located using the *Index of Legal Periodicals*, both in print and electronic media. The *Index to Legal Periodicals* is organized by year around case name, author name and subject. The author name method was employed in this study. This method requires the researcher to locate the author's name under

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[6]H. C. HUDGINS, JR. & RICHARD S. VACCA, LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, 50-51 (4th ed. 1995).

[7]MORRIS L COHEN & KENT C. OLSEN, LEGAL RESEARCH, 6 (5th ed. 1992).

which a citation desired articles may be found.[8] The researcher must then find the desired article in the appropriate law journal volume or on computer database.

Citations to secondary sources can frequently be found in the bodies of judicial opinions. Several of the Supreme Court cases dealing with the Establishment Clause have such citations. Many of the secondary sources employed in this study were found in those cases.[9] Other secondary sources were either cited in those works or discovered in the *Index of Legal Periodicals*.

Sources of theories of original intent. Chapter three of this study articulates various theorists' positions on the Religion Clauses of the First Amendment. This section is composed primarily of secondary material. The authors of those secondary materials make their assertion based on certain historical documents, which they cite in the text.

Sources of Establishment Clause case law. Chief Justice Rehnquist joined the Court in 1972. Searching for all of the case law generated by the Supreme Court in the

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[8]HUDGINS & VACCA, *supra* note 6 at 50-51.

[9]*See, e.g.* Lee v. Weisman, 112 S.Ct. 2649, 2669 citing LEONARD LEVY, THE ESTABLISHMENT CLAUSE; Rosenberger v. Rector and Board of Visitors of The University of Virginia, 132 L.Ed. 2d 700,732 and Lee at 2670 citing Douglas *Laycock, Nonpreferential Aid to Religion: A False Claim About Original Intent;* Lee at 2670 and Rosenberger at 742 citing THOMAS CURRY, THE FIRST FREEDOMS; Lambs Chapel v. Center Moriches School District 113 S.Ct 2141, 2150 and Rosenberger at 732 citing ROBERT L. CORD, THE SEPARATION OF CHURCH AND STATE: HISTORIC FACT AND CURRENT FICTION; Lee at 2676 citing Kurland, *The Origins of the Religion Clauses of the Constitution.*

area of religion since his appointment would be prohibitive were it not for finding tools. One of the most efficient methods of case finding is the use of legal computer database. The best known databases are WESTLAW and LEXIS, both of which were used in the case finding process.

In addition to electronic databases, traditional methods of case finding were also employed. Such methods involve the use of digests, which are compilations of cases indexed around specific legal points. Each reference to that legal point is summarized in a short paragraph called a headnote.[10] West Publishing has developed a digest system of seven major headings and over 400 topic headings.[11] Using these major headings and topic headings, researchers can narrow the search until they find the desired case and headnote.

Data Analysis

Historical framework. After the completion of the data collection phase, the researcher must begin the process of determining the meaning of that data. Analysis begins with construction of the facts.[12] In this study, this phase is initially accomplished by the review of the theories of original intent. Subsequent to that,

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[10]Russo, *supra* note 1, at 46.

[11]*Id.*

[12]MCMILLAN AND SCHUMACHER, *supra* note 2 at 186.

analysis of the Supreme Court cases will yield the various issues of Establishment Clause jurisprudence that have evolved over the years. These issues are articulated in Chapter 4.

Analysis of Justices' philosophies. Following the discussion of the Supreme Court's Establishment Clause decisions, attention is turned to the individual Justices' philosophies regarding original intent. The members of the Court are divided on the meaning of disestablishment mandated by the Constitution. That division is a manifestation of their individual philosophies on various Establishment Clause issues. Each Justice's philosophical orientation will be analyzed in the context of the issue in which it was articulated. In this way, it can be determined if the Justices' philosophies are consistently separationist or nonpreferentialist, or if their philosophies change based on the issue involved.

Inductive analysis. At the point of the study at which the theories of original intent and the Establishment Clause issues have been articulated, analysis of the philosophies of the individual sitting Justices is undertaken using inductive analysis. Inductive analysis is defined as "patterns, themes and categories of analysis that emerge from the data rather than being imposed on the data prior to data collection."[13] In performing inductive analysis, the researcher studies the data and then begins to

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[13]MCMILLAN & SCHUMACHER, *supra* note 2 at 537.

synthesize a "holistic sense of the . . . relationship of the parts to the whole" in an effort to generate conceptual themes and interpretations.[14] Inductive analysis is employed in the portion of the study that is concerned with Establishment Clause Jurisprudence.

Over their tenure on the Supreme Court, the Justices have had opportunities to discuss their interpretations of the Establishment Clause. Whether in their opinion in particular cases, in scholarly works or speeches, each Justice gives clues as to their philosophies. The author will employ inductive analysis in an effort to glean the "patterns, themes and categories" that the Justices have articulated over the years in a wide-ranging collection of cases. In so doing, the analysis closes with "conclusions logically argued from the empirical evidence."[15]

Standards of Adequacy in Legal Research

Quality legal research requires the author to cite sources in a manner that would allow other researchers to verify the analysis posited and the conclusions drawn in the study. A Uniform System Of Citation,[16] published by Harvard University Press, is the publication style most preferred by legal researchers and is the style used in this study.

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[14] *Id* at 186.

[15] MICHAEL LAGENBACH, COURTNEY VAUGHN & LOLA AAGAARD, AN INTRODUCTION TO EDUCATIONAL RESEARCH, 139 (199).

[16] THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (15th ed. 1991).

CHAPTER III
THEORETICAL FRAMEWORKS AND RELATED LITERATURE

There is a legal/historical framework surrounding the First Amendment from which each Justice draws for their philosophical base. Several Justices have espoused philosophies that flow from theories of the original intent of the Framers of the Constitution. There is a dichotomy between the interpretations of original intent. One is nonpreferentialist, the other is separationist. These theories diverge, in large part, on the meaning of the term "establishment" as employed by the Framers. Scholars and jurists differ as to their interpretation of the meaning of the term "establishment," how it was manifested at the time of the framing of the First Amendment, and therefore, what it means for Americans today. Nonpreferentialists view disestablishment to mean that the government can give aid to religion provided it is done in a nondiscriminatory manner. Separationists, on the other hand, believe that the Establishment Clause mandates the complete separation of religion and government.

This chapter will begin with a discussion of the many understandings and definitions of the word "establishment." It then will provide an overview of religion in colonial America. The chapter will conclude with a discussion of the arguments of nonpreferentialist authors followed by the arguments of separationists.

Establishment

The Framers of the Constitution and its first ten amendments undertook debate and ultimately decided that sixteen words would grant Americans their first freedoms in the Bill of Rights.

> "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . ."

Unfortunately, the Founding Fathers left few clues as to their definition of the word "establishment." In order to glean an understanding of the original meaning of the Clause, constitutional historians and legal scholars have applied various interpretive techniques. They arrive at their conclusions by studying the transcripts of the debates, identifying popular notions of establishment contemporaneous to the framing of the Constitution, searching for historical evidence in the words and deeds of the Framers, and dissecting the text of the Amendment itself.

For instance, Levy argues that the Amendment, forbidding an establishment of religion, is aimed at preventing government from supporting one, some, any, or all religions. He grounds his position, in part, on his assertion that multiple establishments for the support of ministers and churches existed in several of the colonies in pre-revolutionary America. Therefore, there existed nonpreferential establishments prior to the framing of the First Amendment and its passage subsequently forbade all

nonpreferential establishments.[1]

Another writer favoring separation, Curry, while agreeing with Levy on the intent of the clause, disagrees with him on the existence of multiple establishments in colonial America. To Curry, Americans comprehended establishment in the classic European sense, that being state support for one denomination.[2] Even though a few statutes supporting the existence of multiple establishments can be found, they were short-lived, insincere and not readily understood by most Americans.[3]

Alexander and Alexander assert that in colonial America, when establishments existed, they varied in intensity. In Massachusetts, Connecticut and New Hampshire, where the Congregational Church was established, the establishment was strong. Similarly, in Virginia, the Anglican church enjoyed a strong government establishment. However, in the State of New York, where the religious preference was unclear for a number of years, that state's toleration of many sects (including Roman Catholicism which was not universally tolerated in America either before or after the Revolution)

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[1]LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT, 77 (2nd ed., 1994).

[2]European establishments included the Anglican Church in England, the Lutheran Church in Scandinavian countries, and Roman Catholicism in Italy and Spain. 4, Encyclopedia Britannica, Micropedia, 567.

[3]THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT, 209 (1986).

became a multiple establishment.[4] Other colonies had weak establishments or none at all.

Marnell argues that establishment, in the historic sense, is defined as a church supported by the civil authority. In his view, the proscription of the Establishment Clause is not against protection, encouragement or moral or financial support. To Marnell, establishment means that the church is an integral part of the state.[5] Support of that nature is that which the Framers sought to prohibit. Therefore, protection, encouragement, financial support and moral support by government towards religion is constitutional. In a similar vein, Smith states that the Establishment Clause prohibits churches from having official representation in government and prohibits government from interfering in the internal affairs of churches.[6]

A different argument is posited by Cord who states that the Establishment Clause denies the formal and legal union of any single church, religion or sect with the Federal government. The prohibition, therefore, is on one denomination or sect rising

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[4]KERN ALEXANDER & M. DAVID ALEXANDER, AMERICAN PUBLIC SCHOOL LAW, 116-117 (3rd ed. 1992).

[5]WILLIAM H. MARNELL, THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA, x (1964).

[6]Steven D. Smith, *Separation and the "Secular:" Reconstructing the Disestablishment Decision*, 67 Tex. L. Rev. 971, (1989).

to a position of exclusive government establishment.[7]

Pfeffer, the author of an influential book on the topic, argues that establishment is a term that had much broader meaning in colonial America than it does today. He cites several examples of this, including two (non-religious) mentions of the word in the preamble to the Constitution. Pfeffer argues that since the Framers did not use the term in a precise manner, it is of little value to try and do so today. [8]

Varying interpretations of the meaning of the term "establishment" have spawned two major theories of the intent of those Framers who drafted the Constitution. Those two theories are termed nonpreferentialism and separationism. Nonpreferentialists believe that the Establishment Clause does not require the government "to be strictly neutral between religion and irreligion."[9] Separationists believe that both religion and government function better when each is independent of the other. This concept means more than the separation of the two institutions, it means that government should not intrude into religious affairs and that sectarian differences must not be allowed to "unduly fragment the body politic."[10]

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[7]ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION, 5 (1982).

[8]LEO PFEFFER, CHURCH, STATE AND FREEDOM, 156-58 (2nd. ed, 1967).

[9]Wallace v. Jaffree, 105 S.Ct. 2479, 2520 (1985) (W. Rehnquist, dissenting).

[10]LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW, 819 (1978).

Religion in Colonial America

One hundred years before the founding of Jamestown, the Christian world was fragmented by the Protestant Reformation.[11] Many sects were formed during the Reformation and often national schisms evolved from the citizens' adherence to the dogma of divergent sects. Sometimes these conflicts were resolved forcefully by the institution of religious establishments, usually of the monarch's denomination.[12] These European establishments were single sect establishments which placed the state and church in very close association.

During Queen Elizabeth's reign, the Anglican Church became the established church in England.[13] Her father, Henry VIII, although responsible for the Anglican break from Roman Catholicism, saw no reason to change the substance of the Church.[14] This caused consternation among other Protestant sects.[15] Nonetheless, edicts and proclamations from the throne carried the weight of law and the church and citizenry were subject to them.[16] Until the Act of Toleration in 1689, opposing religious

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[11]CORD, *supra* note 7 at 3.

[12]*Id.*

[13]ALEXANDER & ALEXANDER, *supra* note 4 at 115.

[14]CURRY, *supra* note 3 at 1.

[15]*Id.*

[16]ALEXANDER & ALEXANDER, *supra* note 4 at 115.

viewpoints, including Protestant ones, were not tolerated.[17]

As a consequence of widespread religious intolerance, minority and dissident sects sought refuge in the New World.[18] With few exceptions, those who came to America fleeing persecution were no more tolerant than those whom they fled.[19] Consequently, religious establishments began to spring up in the New World. The Puritans, who settled in New England, read the Bible to mean that the only divine form of civil or religious government was one in which individuals voluntarily entered into a covenant firmly grounded in the Scriptures.[20] Puritan towns were not, however, theocratic. Ministers could not hold office nor did magistrates a wield any authority over church membership.[21] The Congregational Church, which descended from Puritanism, was ultimately established, most strongly in the colonies of Connecticut, New Hampshire and Massachusetts.

The Church of England (Anglican) was established in Virginia, North Carolina and South Carolina.[22] The union of the civil government and the Anglican Church in

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[17] *Id.*

[18] CORD, *supra* note 7 at 3.

[19] *Id.*

[20] WILLIAM MARTIN, WITH GOD ON OUR SIDE, 1 (1996).

[21] *Id.* at 1-2.

[22] ALEXANDER & ALEXANDER, *supra* note 4 at 116.

early Virginia was so close as to allow laws that forbade crimes against religion.[23] Indeed, Baptist ministers in the colony were imprisoned for preaching in unlicensed houses and without Anglican ordination.[24] Citizens found guilty of blasphemy or failure to keep the Sabbath met with civil sanctions.[25]

Beginning in the 1730's, Puritan fervor began to ebb during what has come to be known as the Great Awakening.[26] During this era, itinerant preachers traveled throughout the colonies, emphasizing a "direct and individual response to the urgings of the Holy Spirit"[27] which had a profound impact on many listeners.[28] Many colonists converted to minority sects during the time of the Great Awakening. This had the dual effect of weakening the existing churches while strengthening minority sects. The end result was that minority churches increased in membership and began to enjoy a level of toleration previously unexperienced.[29] These churches, which included the Baptists, Presbyterians and Quakers, were never, however, exclusively established.

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[23]LEVY, *supra* note 1 at 3.

[24]*Id.*

[25]*Id.* at 4.

[26]MARTIN, *supra* note 20 at 2.

[27]*Id.* at 372.

[28]CURRY, *supra* note 3 at 95-6.

[29]*Id.* at 102.

The religious establishments in the colonies caused a great deal of political turmoil. Upon victory in the Revolution, the Framers sought to minimize any future political problems caused by government and religion becoming too closely aligned. Whatever their understanding of the term establishment really was, it is clear that this was their goal in drafting the First Amendment to the United States Constitution.[30]

Nonpreferentialism

Nonpreferentialists theorize that the First Amendment does not require the complete separation of church and state.[31] They often take issue with Justice Hugo Black's interpretation in *Everson v. Board of Education*[32] who stated that:

> 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. . .In the words of Jefferson, the clause against establishment of religion by law was

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[30]This argument was forcefully made by Chief Justice Burger in *Lemon* who stated "[o]rdinarily, political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

[31]J. M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 23 (1949). O'Neill refers to the complete separation of church and state as a "vague and spurious principle. . .an unreal political abstraction."

[32]330 U.S. 1 (1947).

> intended to erect "a wall of separation between church and State."[33]

From a nonpreferentialist standpoint, Black's interpretation that the Federal Government cannot ". . .pass laws which. . .aid all religions" is clearly erroneous. Nonpreferentialists view the First Amendment as denying "a formal and legal union of a single church or religion with government, giving the one church or religion an exclusive position of power and favor over all other churches or denominations."[34] While the Amendment prohibits the Federal government from giving support or preference to one sect or denomination, that prohibition does not extend to all sects or denominations treated in a nondiscriminatory manner.

Theorists who share this view of the Establishment Clause cite several reasons why theirs is the correct interpretation; 1) The early debates on the Establishment Clause indicate that the Framers did not intend to exclude all aid to religion.[35] In fact, the final wording of the Amendment and Madison's interpretation demonstrate that his was a nonpreferential understanding of the Clause;[36] 2) neither Thomas Jefferson nor

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[33]*Id.* at 15-16.

[34]O'NEILL, *supra* note 31 at 56.

[35]MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT, 2 (1978).

[36]*Id.* at 8.

James Madison believed that the complete separation of Church and State was mandated. Their words and actions, while serving as the third and fourth presidents, lend credence to this argument;[37] 3) Other documents contemporary with the Constitution and Bill of Rights demonstrate that nonpreferential aid is permissible.[38]

Nonpreferential theorists believe that the Establishment Clause forbids the government from establishing a *national* religion. If indeed the Amendment prohibits this type of preferential establishment, such as those practiced in Europe, then nothing prohibits nondoscriminatory governmental support of all religions.

Debates on the First Amendment

When the Constitution had been written and voted on by Congress, it was sent to the states for ratification. Debates in several of the state ratifying conventions serve to bolster the arguments of nonpreferentialist scholars that the Framers had in mind a ban on preferential establishment when they passed the Amendment.[39] Several of the states suggested guarantees of religious liberty.[40] The Maryland ratifying Convention proposed:

"That there shall be no national religion established by law; but that

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[37]CORD, *supra* note 7, at 16.

[38]*Id.* at 48-83.

[39]MALBIN, *supra* note 35 at 2.

[40]CORD, *supra* note 7 at 6.

> all persons be equally entitled to protection in their religious liberty."[41]

The Virginia convention proposed religious protections which were echoed by the ratifying conventions in New York, North Carolina and Rhode Island.[42]

> ". . .and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of his conscience and that no particular religious sect or society ought to be favored, by law in preference to others."[43]

James Madison took the state proposals and crafted them into a first version of the Amendment, which read:

> "The Civil rights of none shall be abridged on account of religious beliefs 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."[44]

Madison's original draft lends credence to the argument that Madison's was a preferential understanding of the term establishment. To Cord, Madison's use of the

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[41] 1 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 553 (Philadelphia, J. B. Lippincott 1787) (hereinafter *Elliot's Debates*).

[42] CORD, *supra* note 7 at 7.

[43] 3 ELLIOT'S DEBATES 659.

[44] *Reprinted in* CORD, *supra* note 7 at 25.

word "established" is "clearly synonymous with "created," "organized," or "instituted."[45] Between the time of Madison's introduction of the draft Amendment and the beginning of floor debates on the Bill of Rights, two months had elapsed, a great deal of time for early Congresses.[46] The delay was important. The Anti-Federalists were afraid that the Constitution would empower the national government at the expense of the states. They had used the lack of a bill insuring individual liberties as an argument against ratification. Even though it seemed that the Bill of Rights would be forthcoming, the delay was considered useful in weakening support for the Constitution.[47] Madison understood the ploy and acted forcefully to expedite the debate and "arrange the compromises necessary to assure passage before adjournment."[48]

The debate began on August 15 and was concerned with the First Amendment.[49] Peter Sylvester opened the debate by objecting to the select committee's rewording of Madison's draft. The select committee's draft read:

> "No religion shall be established by law, nor shall the rights of

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[45]CORD, *supra* note 7 at 25.

[46]MALBIN, *supra* note 35 at 5.

[47]*Id.* at 5-6.

[48]Letter from Madison to Edmund Randolph (August 21, 1789) *reprinted in* MALBIN, *id.* at 6.

[49]*Id.*

conscience be infringed."

Sylvester stated that the particular wording could be harmful to religion by abolishing it altogether.[50] He left no reasons why he felt that way, however Malbin posits two theories to explain Sylvester's apprehension. First, he probably was concerned that the phrase "no religion should be established by law" in the select committee's draft could be read as a prohibition of all aid, both direct and indirect, to religion. Second, Malbin surmises that Sylvester apparently thought that some form of government aid to religion was essential to religion's survival.[51] Malbin's suppositions seem to be confirmed two speakers later when Elbridge Gerry, apparently refuting John Vining who criticized Sylvester's objection, urged that the Amendment be reworded to read "no religious doctrine shall be established by law."[52] To Malbin, this would have prohibited the proclamation of an official religious credo without prohibiting all those things that might conceivably aid religion.

Two speakers later, Madison stated that he understood the meaning of the Amendment to be that Congress should not establish *a* religion. Further, he stated that several of the states had wanted the Amendment so as to preclude the government from

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[50] *Id.* at 7.

[51] *Id.*

[52] *Id.*

establishing a *national* religion.[53] This is central to Malbin's argument of the constitutionality of nonpreferential aid.

According to Malbin, if the word *a* had been in Madison's original draft, reading '. . .nor shall *a* national religion be established. . .' Sylvester would not have objected because the clause, written in that way, could not preclude indirect, nondiscriminatory aid to religion, only discriminatory aid to *a* (singular) sect or denomination. He opined that this is really what Madison wanted because that is what he understood his draft to say.[54]

In addition, Madison argued that the term *national* in front of the word religion would point to the Amendment to what it was intended to protect against, the establishment of a *national* religion.[55] Nonpreferentialists would argue that this means that as the author of the original version of the Amendment, Madison sought to preclude government from establishing one, singular religion as a national church.

The final wording of the draft shows, in the mind of nonpreferentialists, that government nonpreferential, nondiscriminatory aid to religion is constitutional. Had the Framers said, "Congress shall make no laws respecting *the* establishment of

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[53] *Id.* at 8 [emphasis added].

[54] *Id.*

[55] *Id.* at 9.

religion. . ." which would have emphasized the generic word 'religion' there might have been reason to believe that the Framers wanted to prohibit all official preferences.[56] In other words, Malbin's assertion is that *the* establishment of religion would mean that religion will not be favored over irreligion. *An* (a singular article) establishment of religion means that no religious sect or denomination may be favored over another, but that all may be favored in an equal and nonpreferential, nondiscriminatory manner.

Madison did not see the need for the Amendment as it only restated what for him was obvious, that government has no right to intermeddle in religion. To Madison, this was implicit since the authority to do so was not granted in the Constitution. Nonetheless he agreed to the Amendment and the modifications to his original draft as a means to assuage the Anti-Federalists and move the ratification process forward. Although the final wording of the Amendment was different from his original, his initial draft is the most telling as to his understanding of the meaning of the Amendment.[57] Nonpreferentialists argue that his agreeing to the change was an exercise in politics rather than evidence of separationist ideology.

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[56]*Id* at 14.

[57]*See* CORD, *supra* note 37.

James Madison and Establishment from the Nonpreferential Perspective

Nonpreferentialists view several of Madison's words and deeds during his public career as demonstrative of his nonpreferentialist understanding of disestablishment. Contrary to the arguments of separationists, Cord contends that Madison's philosophy with respects to the proper relationship between government and religion, was nonpreferential.

O'Neill argues that *Memorial and Remonstrance Against Religious Assessments* was not written against all state aid to religion. It was, rather, written in opposition to Patrick Henry's assessment bill because the bill was discriminatory and placed Christianity in a position of governmental preference.[58] In *Memorial and Remonstrance*, Madison made a claim against exclusive Christian establishment in his third argument when he stated:[59]

> "Who does not see that the same authority which can establish Christianity in exclusion to all other religions may establish with the same ease any particular sect of Christians in exclusion of all other sects?"[60]

Separationists, most notably Pfeffer, claim that the above argument is the only one in

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[58]O'NEILL, *supra* note 31 at 89.

[59]CORD, *supra* note 7 at 20.

[60]ENCYCLOPEDIA BRITANNICA, 3 ANNALS OF AMERICA 16 (*hereinafter* ANNALS OF AMERICA).

Memorial and Remonstrance that makes mention of an exclusive establishment. Cord disagrees, pointing to the fourth argument in which Madison derides Henry's bill as violating religious liberty.[61]

> ". . .we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. . .As the bill violates equality by subjecting some to particular burdens; so it violates the same principle, by granting to others particular exemptions. . ."[62]

Additionally, in Cord's analysis, arguments seven, nine, eleven and twelve all speak to "the same intolerance, bigotry, unenlightenment and persecution that had generally resulted from previous exclusive religious establishments. . ."[63] O'Neill adds that the remonstrance, being solely against Henry's bill, made no mention of religion in general, only of an exclusive establishment of Christianity.[64]

To Cord, not only are separationist arguments employing *Memorial and Remonstrance* incorrect, but it is a poor aid to understanding Madison's philosophy at the time of the framing and ratification as it had been written four years prior. In

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[61] *Id.*

[62] 3 ANNALS OF AMERICA 16.

[63] CORD, *supra* note 7 at 21.

[64] O'NEILL, *supra* note 31 at 89.

addition, far from being a paper about religion, *Memorial and Remonstrance* was, in Cord's view, a Lockean political document regarding natural laws and natural rights written to bolster a revolutionary cause.[65] Hence, Madison's actions in the first Congress and as the fourth president of the United States are more telling than his words in *Memorial and Remonstrance.*

While serving in the first Congress, Madison was a member of a committee that appointed a congressional chaplain to invoke divine guidance upon Congress. The committee voted to pay $500.00 from public funds to support this activity. The records indicate that Madison was silent on the measure. One would surmise, that if he had truly felt that appointing a Congressional chaplain was unconstitutional, then he would have voiced his objection.[66] The same Congress offered up a day of Thanksgiving, one day after the passage of the Establishment Clause, and again Madison did not object. Cord argues that since Madison and the other Framers passed legislation allowing days of Thanksgivings and the payment of chaplains, then either they were acting insincerely or they considered this manner of aid to religion to be constitutional.[67]

While serving as President of the United States, Madison was a participant in

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[65]CORD, *supra* note 7 at 22.

[66]*Id* at 23.

[67]*Id* at 28.

a nonpreferential Church-State relationship. On Congress' recommendation, he offered four Thanksgiving proclamations, clearly not required to do so. This, to Cord, is further evidence that Madison believed disestablishment precludes a single, preferential establishment, instead of the complete separation of government and religion. He also takes aim at separationists who argue that Madison's *Detached Memoranda*, which was written after his public life had ended, is an indicator of his separationist viewpoint. He contends that despite the fact that the documents apparently show a man who, in his declining years, might have regretted some of his past actions (such as making Thanksgiving proclamations), history must be written on what a person says and does while in public office.[68] To Cord, Madison's words and deeds were not those of a man who believed in strict separation. He stated that "*detached*" is an accurate way to describe these writings as they were reflections of an elderly statesman repudiating his actions while in power. As such, it is hardly a document upon which to build a sound historical argument.[69]

Thomas Jefferson and Establishment From the Nonpreferential Perspective

Separationists invoke Thomas Jefferson as their exemplar. Cord, however,

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[68]*Id* at 29-36. Cord offers the analogy that while Richard Nixon might, after he had left office, regretted some of his actions that ultimately cost him the presidency, future biographers must not rewrite history to reflect him as a man who believed in the illegality of wiretapping private conversations.

[69]*Id.* at 36.

contends that a narrow, nonpreferentialist interpretation of Thomas Jefferson is more consistent with historic fact.[70] O'Neill adds that Jefferson sought to promote three basic principles, those being democratic political decision making, freedom and equality of religion, and the authority of the states to act in the field of religion and education. [71]

Cord asserts that while Jefferson served as the third president of the United States, his actions belied a belief in separationism.[72] He uses Jefferson's actions to build this argument.

In his Third Annual Message to Congress, Jefferson, addressing a recent treaty made with the Kaskaskia Indians, asked the Senate to ratify the treaty which included a provision for the government to provide a priest for seven years at an annual cost of one hundred dollars. In addition, the treaty called for the Federal government to provide three hundred dollars for the construction of a church for the Kaskaskias.[73] While it might be argued that the expenditure served a legitimate national interest and that any benefit to religion resulting from the treaty was tangential, Cord reads Jefferson's actions differently. He asserts that if Jefferson had simply wished to further

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[70]*Id.* at 37.

[71]O'NEILL, *supra* note 31 at 66.

[72]CORD, *supra* note 7 at 38.

[73]*Id.*

a national interest, he could have made an identical lump sum grant without making any mention of churches or priests. Prior treaties with the Cherokee and Wyandot Indians included such provisions.[74] Further, he says, if the treaty provisions calling for the payment of a priest and funds to erect a church had been unconstitutional, then the entire treaty would have been immediately deemed invalid as the Constitution is the supreme law of the land and all treaties are subordinate to it.[75]

In 1787, Congress deeded the lands surrounding the towns of Gnudehhutten, Shoenburn and Salem, in the Northwest Territory, to the Indians. This land was to be held in trust for them by the Society of the United Brethren for Propagating the Gospel Among the Heathen.[76] The United Brethren allowed white migrant farmers to work the land and used the proceeds from the rent collected to carry out their Christian duties of cultivating the minds and spirits of the Indians.[77] After a period of time, the United Brethren began to lose money on the deal and subsequently allowed control of the land to revert to the government. Improvements on the land, including several churches, were sold to the Federal Government for the price of $6654.25. This transaction indicates that the United States government purchased the services of a religious entity

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[74] *Id.* at 39.

[75] *Id.*

[76] *Id.* at 41-42.

[77] *Id.* at 43.

to help settle the western lands.[78] Cord notes that it must have been clear to those responsible for contracting out to the Society of the United Brethren for Propagating the Gospel Among the Heathen, that they would be engaged in propagating the gospel among the heathen while carrying out their duties for the Federal government. The fact that the United Brethren carried out their missionary work on Federal land, using proceeds collected from rent on that land, indicates that this level of cooperation was considered constitutional. From this historical evidence, Cord concludes that Jefferson must have agreed on the constitutionality of the arrangement because of the several extensions of the deal between the government and the United Brethren; the last three were during his administration and he chose not to veto any.[79]

Other Primary Evidence of Nonpreferentialism

Washington's Thanksgiving proclamation. Nonpreferentialists note a number of sources that serve as evidence of the fact that the Framers did not believe that disestablishment was synonymous with absolute separation. George Washington, in his first public Thanksgiving proclamation made six months after his inauguration, said:

> "Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits

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[78] *Id.*

[79] *Id.* at 43-45.

> and humbly to implore His protection and favor. . .to the service of that great and glorious Being who is the beneficent author of all good that was, that is, or that will be. . .[80]

Northwest Ordinance. Malbin posits the argument that Congress could not have meant for the First Amendment to be inconsistent with the Northwest Ordinance of 1787, as it was drafted by many of the same individuals who framed the First Amendment.[81] The Northwest Ordinance stated in pertinent part that "[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of learning shall be forever encouraged."[82] The mention of religion was not single sect. Rather it meant religion, generally and nonpreferentially, is necessary for good government. This, in Malbin's opinion, is evidence that the Framers intended to promote religious values by incorporating them in the schools.[83]

Missionaries and Indians. In 1789, President Washington recommended that Congress appoint missionaries to work among the Indians.[84] He noted:

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[80]*Reprinted in id.* at 51.

[81]MALBIN, *supra* note 35 at 14.

[82]3 ANNALS OF AMERICA 191, 194.

[83]MALBIN, *supra* note 35 at 14-15.

[84]O'NEILL, *supra* note 31 at 116.

> "The object of this establishment would be the happiness of Indians teaching them the great duties of religion and morality, and to inculcate a friendship and attachment to the United States."[85]

According to O'Neill, it becomes clear that Washington knew that money was to be made available for the endeavor based on the fact that the original proposal called for an appropriation of funds. He reads this to mean that Washington's administration was neither guilty of oversight or inadvertence to constitutionality. Rather, it demonstrated an open support of religion on the part of his administration.[86]

Arrangements with missionary groups became nonpreferential in nature as time progressed. In a letter from Secretary of War John C. Calhoun to President James Monroe in 1822, Calhoun listed missionary groups of several different denominations that were responsible for schooling various tribes of Indians.[87] In it, Calhoun notes the possibility of a national interest being served by the missionary work :

> "Whether the system which has been adopted by the Government, if preserved in, will ultimately bring the Indians withing [*sic*] the

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[85] *Id.*

[86] *Id.*

[87] CORD, *supra* note 7 at 66-70. These pages list the several tribes affected and the various missionary groups responsible for schooling. Additional data such as the location of the school, the number of students served and the missionary group responsible for their schooling are also reported.

pale of civilization can only be determined by time."[88]

Madison's successor, John Quincy Adams referred to this policy of "civilizing the Indians" in his Fourth Annual Message to Congress. In it he states:

> "But in appropriating to ourselves their hunting grounds we have brought upon ourselves the obligation of providing them with subsistence; and when we have had the rare good fortune of teaching them the areas of civilization and the doctrines of Christianity. . ."[89]

Summary

Nonpreferentialists do not believe that the strict separation of religion and government is constitutionally mandated. Whether their argument centers on language, actions, proclamations or treaties, they feel that there is sufficient evidence to support their philosophy that the Framers of the Constitution and the First Amendment did not mean that government and religion should be completely separate. Instead, as people living in a time when religion was much more a part of peoples' daily lives than today, the notion of complete separation of religion and government was inconceivable. The Establishment Clause does not intend a separation of government and religion, nonpreferentialists avow. Rather, it requires an institutional separation and the

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[88] *Id.* at 64.

[89] RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 415-16, *reprinted in id.* at 71.

prohibition of discriminatory aid to one sect, denomination, society or church. Responding to Justice Black's words in *Everson*, Marnell writes that a wall of separation between church and state has never been imposed by legislative fiat. Rather, that wall has been built slowly, one brick at a time, by the actions of the judiciary.[90]

Separationism

Separationists argue that the intent of the Establishment Clause is the complete separation of government and religion. Unlike nonpreferentialists, they agree with Justice Black's interpretation of the First Amendment as banning preference to one or all religions. Pfeffer states that "the single greatest contribution made by America to contemporary civilization is the evolution and successful launching of the uniquely American experiment of religious freedom and the separation of church and state."[91]

Separationists make several arguments that the Establishment Clause mandates a complete separation of the spheres of government and religion. They argue 1) that multiple establishments existed at the time of the framing of the First Amendment and that this was the type of establishment that the Framers sought to prevent; 2) a narrow, nonpreferentialist, interpretation of the Clause and similar language regarding

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[90]Marnell, *supra* note 5 at 11.

[91]LEO PFEFFER, THE LIBERTIES OF AN AMERICAN, 32 (2nd ed. 1963).

establishment is historically inaccurate; 3) the debate surrounding the First Amendment lends credence to its being a separationist clause; 4)the Bill of Rights was written to curb government power, therefore, the First Amendment cannot grant any power to government not expressly enumerated in the Constitution.

Colonial Establishments

In early colonial times, religious establishments in America were similar to those in Europe. In Virginia, for instance, where the Anglican Church enjoyed a formal establishment, crimes against the Anglican Church such as preaching without Episcopalian ordination or in unlicensed houses were punished. Later, public tithes were collected for the maintenance of Anglican ministers.[92] Despite certain hardships, dissenters in America enjoyed a greater level of toleration than their English brethren thanks, in large measure, to England's Toleration Act of 1689.[93]

The Toleration Act was an admission that the uniformity of religious practices sought by Englishmen was unattainable.[94] Consequently, when an establishment existed, representatives of minority sects such as Baptists, Presbyterians and Quakers, fought the establishment.[95] In response to the spread of Presbyterianism in Virginia,

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[92]LEVY, *supra* note 1 at 3-4.

[93]CURRY, *supra* note 3 at 79-80.

[94]*Id.* at 83.

[95]LEVY, *supra* note 1 at 6, 11.

the colonial government passed restrictive ministerial licensing measures for dissenting sects. The Presbyterians appealed to the Lords of Council who wrote back to the Virginia Council stating that the toleration and free exercise of religion were a "valuable branch of liberty" and should ever be adhered to in the colonies.[96] A Connecticut statute intended to outlaw "Quakers, Ranters and Adamites" was rebuffed by English officials since the Toleration Act, by charter, extended to the colony of Connecticut. The statute was subsequently repealed and Connecticut officials enacted a more tolerant one.[97] By the late 18th century, citizens were often relieved of tax burdens for the support of another denomination, usually after fierce legislative battles.[98]

Multiple and General Establishments

At the time of the ratification of the Constitution, while most Americans considered the term "establishment" to encompass only single sect establishments, the fact was that American-style establishments had come to be more general or multiple.[99] In many states, Protestantism was established. This is different than an Anglican or

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[96]CURRY, *supra* note 3 at 100.

[97]*Id.* at 83.

[98]Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 Wm. & Mary L. Rev. 839, 853 (1986).

[99]LEVY, *supra* note 1 at 26.

Congregational establishment.[100] An establishment of Anglicanism or of Congregationalism is a single sect establishment. Protestantism denotes an aggregation of various sects or denominations; hence an establishment of Protestantism is an establishment of many or multiple denominations. Evidence of such an arrangement is found in New York where William Livingston, later a Framer, stated in 1750 that New York did not restrict establishment to only Anglicans but rather that any Protestant denomination could be established.[101]

A central argument posited by Levy is that when the Framers of the Constitution wrote that "Congress shall make no laws respecting an establishment of religion. . ." they comprehended that the proscription was against preferential as well as nonpreferential establishments. The Framers were cognizant of the fact that there existed nonpreferential establishments in seven of the states before ratification. Indeed, of the seven states that had a religious establishment, not one had statutory language preferring a single sect.[102] Nor did any of those states have a single "European style" establishment. What they had were "American style" multiple or nonpreferential establishments.[103] The Establishment Clause, therefore, was written to forbid

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[100]*Id.* at 11.

[101]*Id.* at 16.

[102]*Id.* at 76.

[103]*Id.* at 77.

nonpreferential government support for religion.[104]

New England. Further evidence of multiple establishment is found in post-revolutionary establishments in Massachusetts and Connecticut. Both of these states, while overwhelmingly Congregational, held out the statutory possibility of multiple establishments. In Massachusetts, each town could establish its own church that all citizens were compelled to support.[105] The statute provided that the government would impose a tax for the support of ministers elected in each town (termed established ministers). Given the preponderance of Congregationalists in Massachusetts, the established minister was almost always a Congregationalist.[106] While most Baptists objected to governmental support for religion, in the town of Swansea, the Baptist Church was established since Baptists comprised a majority of the population.[107] After 1780, this multiple establishment gave way to a general assessment which was extended to all denominations.[108] Proponents of Massachusetts' general assessment felt that

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[104]*Id.* at xxii.

[105]*Id.* at 17-18.

[106]Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent.* 27 Wm. & Mary L. Rev. 875, 900 (1986). Laycock reports that dissenters, usually Baptists and Quakers, could file an exemption to support their own ministers. The reality was, however, that the Quakers had no ministers and most Baptists had a sincere objection to state support for religion.

[107]LEVY, *supra* note 1 at 17-18.

[108]CURRY, *supra* note 3 at 164.

religious liberty meant the ability to practice religion according to one's own conscience without government insistence on support for a denomination not of his own.[109] This served to strengthen the nonpreferential aspect of Massachusetts' establishment.

In 1770 there existed a Connecticut statute similar to the one in Massachusetts, that allowed dissenting churches to avoid paying taxes for the support of the established ministry. Members of dissenting sects were simply obligated to produce evidence that they were paying for support of their own church, which relieved them of their obligation to the established church.[110] While Connecticut remained *de facto* Congregationalist, this was a statute that theoretically allowed for multiple establishments. This law was superseded in 1784 by an even stronger nonpreferential statute entitled *An Act for Securing the Rights of Conscience in Matters of Religion to Christians of Every Denomination*. While this bill clearly favored Congregationalism, it listed qualifying dissenter churches and chipped away at Connecticut's preferential establishment.[111] According to Laycock, the nonpreferential establishments in Connecticut and Massachusetts caused bitter strife and did not work well.[112]

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[109]LEVY, *supra* note 1 at 10.

[110]CURRY, *supra* note 3 at 180.

[111]*Id.*

[112]Laycock, *supra* note 106 at 902.

Separationists would argue that the framers, knowing this, sought to avoid the religious strife that was manifested in the states of Connecticut and Massachusetts resulting from their nonpreferential establishment. The First Amendment accomplished this by forbidding government support to any or all religions. The analysis of establishments in the southern states yields similar findings as those in New England.

The South. Both Georgia and South Carolina had multiple establishments at the time of the framing of the First Amendment. South Carolina's grew out of Charles Pinkney's proposal that replaced the former exclusively Anglican establishment with a general establishment. Pinkney's general establishment stated that no particular sect or denomination would enjoy superiority over others.[113] Evidence of Georgia's multiple establishment is based on the fact that the citizens of that state were required to support the denomination of their choosing.[114]

Perhaps the most telling evidence of the existence of multiple establishments is the fight over religious establishment in Virginia. In 1776, the Anglican church was the established church of the Commonwealth. By 1779, the statute allowing for the levying of taxes for the support of that establishment was repealed, severely

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[113]LEVY, *supra* note 1 at 56-57.

[114]*Id.* at 56.

compromising Anglicanism's establishment in that state.[115] Shortly thereafter, Patrick Henry offered *A Bill Establishing a Provision for Teachers of the Christian Religion.* Henry's bill allowed for taxes or contributions to be collected and distributed for the support of the taxpayer's denomination[116] and held that all denominations were equal before the law.[117] Citizens were required to designate the Christian denomination that he intended to support. The county clerk then determined the assessment rate for each denomination whereupon the local sheriff would return funds to the appropriate church.[118] The bill was an improvement over Massachusetts' and Connecticut's superficial general assessment in that it included Catholics and tried to accommodate Quaker and Mennonite objections to assessment.[119] Supporters of the bill argued that it imposed "not the smallest coercion" to contribute to the support of religion.[120]

Madison and Jefferson as Separationists

Madison. Of those opposed to Henry's bill, the most outspoken were Thomas Jefferson and James Madison. Madison wrote *Memorial and Remonstrance Against*

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[115]LEVY, *supra* note 1 at 59-61.

[116]CURRY, *supra* note 3 at 140-141.

[117]LEVY, *supra* note 1 at 61.

[118]ALEXANDER & ALEXANDER, *supra* note 4 at 117.

[119]Laycock, *supra* note 106 at 896-897.

[120]*Id.* at 897.

Religious Assessments to counter Henry's bill. *Memorial and Remonstrance* has come to have a great deal of significance in the area of church/state relations in America as it, along with Jefferson's "wall of separation" metaphor, conveys a philosophy of separation between government and religion.[121] In *Memorial and Remonstrance*, Madison stated that religion is a private affair, not the province of government. He, along with the Hanover Presbytery, argued that a general assessment constituted an establishment which violated individuals' free exercise of religion.[122] To Madison, guarantees of not "the smallest coercion," or that all denominations would be equal before the law, did not make Henry's bill palatable. In Kurland's words, Madison had "too often seen pious words of state constitutions and statutes perverted by their application with the majority overriding the parchment guarantees given to minorities."[123] Madison's work, along with local county remonstrances, led the opposition to the bill.

Jefferson. Subsequently, Henry was elected governor and his successors remaining in the General Assembly were unable to maintain the momentum for the assessment bill and it eventually died. Virginia then enacted Thomas Jefferson's

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[121]ALEXANDER & ALEXANDER, *supra* note 4 at 118.

[122]LEVY, *supra* note 1 at 62-3.

[123]Kurland *supra* note 98 at 857.

Virginia Statute for Religious Freedoms [124] which stated:

> ". . .that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; that even forcing him to support this or that teacher of his own religious persuasion is depriving him of his comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern. . . that no man shall be compelled to frequent of support any religious worship, place or ministry whatsoever nor shall he be enforced, restrained, molested or burdened in his body or goods nor shall otherwise suffer on account of his religious opinions or beliefs. . ."[125]

The language in Jefferson's statute was sufficiently comprehensive to forbid both preferential and nonpreferential establishments.[126] Laycock asserts that Virginians voted against Henry's bill as a rejection of any form of financial aid to religion. None thought that only preferential aid was being banned, and no one offered any counter bills allowing for the maintenance of nonpreferential aid while banning preferential

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[124]LEVY, *supra* note 1 at 68. This work is alternately referred to as the VIRGINIA STATUTE OF RELIGIOUS FREEDOMS, and AN ACT FOR ESTABLISHING RELIGIOUS FREEDOM, *see e.g.*, ALEXANDER AND ALEXANDER, *supra* note 4 at 118-119. Pfeffer refers to the document as Jefferson's great STATUTE FOR RELIGIOUS LIBERTY in PFEFFER, *supra* note 83 at 33.

[125]3 ANNALS OF AMERICA 53-54.

[126]Laycock, *supra* note 106 at 899.

aid.[127]

Jefferson and religious liberty. Thomas Jefferson's public life includes numerous examples of his separationist philosophy, which was consistent with his belief that individual liberties were the natural right of every man. After two years as minister to France, he wrote to George Wythe:

> "If anybody thinks that kings, nobles, or priests are good conservators of the public happiness, send him here. It is the best school in the universe to cure him of that folly. . .where such a people, I say, surrounded by so many blessings from nature, are loaded with misery by kings, nobles and priests."[128]

One of Jefferson's chief concerns was the assurance of individuals' freedom of religious worship. He viewed religion as a wholly private affair, much like marriage and domestic life[129] and as such beyond the purview of the State to tamper with or control. Malone notes that to Jefferson:

> "The care of every man's soul belongs to himself; no one can prescribe the faith of another; God himself cannot save a man against his will and any form of spiritual compulsion is doomed to

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[127]*Id.*

[128]Letter from Thomas Jefferson to George Wythe, *reprinted in* DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN, 154 (1951).

[129]DUMAS MALONE, JEFFERSON THE VIRGINIAN, 275 (1948).

> inevitable failure. State religion, therefore was to him a contradiction in terms. The State should neither support nor oppose any particular form of church but should leave all of them alone."[130]

By 1776, Jefferson had become one of the foremost advocates of the complete separation of Church and State.[131] In his *Notes on Religion*, Jefferson paralleled man's soul with his health and property as beyond State control. He wrote"

> "The care of every man's soul belongs to himself. But what if he neglect the care of it? Well, what if he neglect the care of his health or estate, which more clearly relate to the state. Will the magistrate make a law that he shall not be poor or sick?[132]

Jefferson had a healthy respect for the opinions of all men which made him tolerant of all religions, including non-Christian ones.[133] In his *Notes on the State of Virginia*, he wrote:

> "But it does me no injury for my neighbor to say that there are twenty gods, or no god. It neither picks my pocket or breaks my

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[130]*Id.* at 275-76.

[131]*Id.* at 257.

[132]*Reprinted in*, PFEFFER, *supra* note 8 at 105-106.

[133]MALONE, *supra* note 129 at 275.

leg."[134]

Separationists point to Jefferson's founding of the University of Virginia as a telling indicator of Jefferson's belief in absolute separation. When founded, that state institution was truly secular, having no religious instruction, except as a branch of ethics nor was there a professor of divinity.[135]

Jefferson directed that three inscriptions were to be made on his tombstone, which dealt with events in his life that he felt was most significant. Jefferson insisted that note be made of his authorship of the *Declaration of Independence*, and of the *Virginia Statute of Religious Freedoms* along with his founding of the University of Virginia.[136] These particular inscriptions, one of which directly addressed his religious liberty convictions and another indirectly supporting them, were obviously important to Jefferson, so important that he elevated their significance over his presidency. There is no mention on his tombstone of his having served as the third President of the United States.

Language of the Framers

Curry states that 18th century Americans, regardless of their stance on the relationship between church and state, used the term establishment as an inherited

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[134]THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 119 (William Peden, ed., 1955).

[135]ISAAC KRAMNICK & R. C. MOORE, THE GODLESS CONSTITUTION, 97-98 (1996).

[136]MALONE, *supra* note 129.

terminology rather than as a particular philosophical viewpoint. The history of the day offers numerous examples of writers using the concept of preference when they were actually referring to a ban on all government assistance to religion.[137] For example, Isaac Backus, an opponent of any government aid to religion, stated "that the civil power has [no] right to set up one religious sect up above others."[138] Thomas Jefferson, proposing to strip all powers in religious matters from civil authority, wrote in favor of "discontinuing the establishment of the English Church by law taking away all privileges and preeminence of one religion over another."[139] Both Backus and Jefferson supported separation, yet if one were to read their words out of all historical context, they then would look remarkably nonpreferentialist.

Separationists believe that nonpreferentialists incorrectly interpret the First Amendment because they take a narrow view of the Establishment Clause. They argue that reading the Clause literally, as nonpreferentialists do, leads only to confusion.[140] Two examples of the incongruity of literal reading and historical evidence follows. At the Virginia Ratifying Convention, James Madison stated:

> "Would the bill of rights, in this state, exempt the people

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[137]CURRY, *supra* note 3 at 211.

[138]*Id.* at 212.

[139]*Id.*

[140]*Id.* at 213.

> from paying for the support of one particular sect, if such sect were exclusively established by law?. . . Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment."[141]

Similarly, Patrick Henry declared that "no particular sect or society ought to be favored or established by law in preference to others."[142]

One cannot ascribe a literal meaning to phrases such as "exclusive establishment" and the prohibition of aid to any "particular sects." To do so would mean that Madison and Henry opposed preferential aid but had no objection to nonpreferential aid, which would place them in curious historical contexts. Therefore, one cannot take literally all that was stated by the Framers. Doing so would lead the reader to believe that both were arguing in favor of a nonpreferential establishment. Separationists would argue, however, that such an interpretation would be inconsistent with historic evidence. To read Madison's warning against an "exclusive establishment" to mean that he would only object to a single sect establishment and not a nonpreferential one, would mean that he would grant the federal government more power than he would his own state.[143] Henry and the other Anti-Federalists feared the

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[141] *Reprinted in id.* at 197.

[142] *Id.*

[143] *Id.* at 208-209.

power of the Federal government over the states, especially its taxing power. Interpreting Henry's demand that "no particular sect or society ought to be favored" as a nonpreferentialist philosophy means that he would not have objected to taxes levied by the federal government for the support of all churches on a nondiscriminatory basis. This clearly runs counter to any historical evidence with respect to Henry and the Anti-Federalists.[144]

The Debate on the Amendment

In order to assure ratification, however, the Bill of Rights guaranteeing individuals' natural rights became necessary.[145] Madison wrote the Amendment to assuage Anti-Federalists in an effort to move the ratification process forward. He felt that the Amendment was "altogether unnecessary" inasmuch as Congress had no right whatsoever granted to it by the Constitution to forge a religious establishment.[146] Alexander Hamilton wrote in a similar vein:

> "For why declare that things shall not be done which there is no power to do? Why for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which

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[144] *Id.* at 29.

[145] PFEFFER, *supra* note 8 at 124.

[146] LEVY, *supra* note 1 at 99.

> restrictions may be imposed?"[147]

Clearly, Madison and the Federalists were not caving in to demands of the Anti-Federalists for nondiscriminatory aid to religion. They were framing amendments that, in their view, restated what the Constitution already proscribed to the federal government.

Regardless of his belief about the need for the Amendment, Madison authored the original version which read:

> "The Civil rights of none shall be abridged on account of religious beliefs 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."[148]

On September 3, three motions failed that might have bolstered the argument that the Establishment Clause should be interpreted narrowly, to prohibit an exclusive establishment only.[149] The first motion to alter Madison's original draft contained seemingly nonpreferentialist language and read "[c]ongress shall make no laws establishing one religious sect or society." That motion failed as did a second, "[c]ongress shall not make any law infringing the rights of conscience or establishing

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[147]THE FEDERALIST NO. 84, 579-580 (Alexander Hamilton).

[148]*Reprinted in* CORD, *supra* note 7 at 25.

[149]LEVY, *supra* note 1 at 102.

any religious sect or society." The final, arguably nondiscriminatory, version read "[c]ongress shall make no law establishing any particular denomination in preference to another." It too was defeated. The Senate finally adopted a version which stated that "Congress shall make no laws establishing religion."[150] Six days later, the Senate revised its version to narrowly state "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[151]

The House, whose version read "Congress shall make no law establishing religion or prohibiting the free exercise thereof, nor shall the rights of conscience be abridged" disagreed with the sect preference language of the final senate version.[152] A House and Senate joint committee was then formed and the present language , which excludes all earlier mentions of sect preference, was finally adopted by the joint committee and ultimately became the First Amendment's Religion Clauses.[153]

According to Curry, a literal interpretation of the Amendment renders the above debate inexplicable. If the several versions had been a clash of ideologies or party preferences, then why would those Senators favoring nonpreferential aid, after getting language that prohibited only sect preference, retreat without a struggle and accept the

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[150] *Id.*

[151] *Id.*

[152] *Id.* at 203-204.

[153] *Id.*

House version?[154] They would not have. Separationists would argue then that the Amendment, respecting or concerning[155] an establishment of religion, means that government will make no laws that touch on the subject.[156] Had the Framers deemed nondiscriminatory aid to be acceptable, they would have written an amendment forbidding 'a religion,' 'a national religion,' 'one religious sect or society,' or perhaps 'any particular denomination or religion.' They chose not to. Instead, they stated that religion, generically, will be disestablished.[157]

The Bill of Rights as a Document Limiting the Power of Government

Transcripts of state ratifying conventions indicate that none favored or requested an establishment of religion by Congress[158] nor did they want the powers of the national government broadened.[159] The intended direction of the First Amendment

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[154]CURRY, *supra* note 3 at 209.

[155]LEVY *supra* note 1 at xvii.

[156]*Id.* at 115.

[157]Laycock, *supra* note 106 at 881. *But see* CURRY, *supra* note 3 at 213-215 who argues that rewording the Amendment was more a matter of style than of substance. The Framers employed language of their particular state's establishment clauses or a favorite sermon dealing with the subject. "Thus" states Curry " the debate in Congress represented not a clash between parties arguing for a 'broad' or 'narrow' interpretation or between those who wished to give the federal government more or less power in religious matters. It represented rather a discussion about how to state the common agreement that the new government had no authority whatsoever in religious matters."

[158]LEVY, *supra* note 1 at 94.

[159]*Id.* at 93.

was the enhancement of the individual liberties[160] of religion, free speech, free press, peaceable assembly and the right to seek redress of grievances.[161] Therefore, the First Amendment was written to curb governmental power over the individual, not to grant more of it.[162] Indeed, the Amendment was written to "limit and qualify the powers of government" hence to argue that it allows governmental aid to all religions is inconsistent with the intended function of the Bill of Rights.[163]

The fact that the First Amendment only speaks to Congress' inability to establish a religion does not mean that the proscription is nonapplicable to the executive and judiciary. The fact is that the United States Constitution confers no power for government to make laws touching on religion.[164] Therefore, one cannot ascribe those powers to the president or courts based on Congress' proscription in the First Amendment, mindful of the fact that the Bill of Rights was not intended to give any power to government.[165] Thomas Jefferson was for passage of the Bill of Rights and a limitation of executive power. Had Jefferson agreed to the Amendment on the

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[160]Kurland, *supra* note 98 at 860.

[161]United States Constitution, Amendment I.

[162]LEVY, *supra* note 1 at 115.

[163]*Id.* at 104, 105.

[164]PFEFFER, *supra* note 8 at 128.

[165]*Id.* at 129.

basis that the President could establish religion, then by extension, the president could also abridge free speech, free press, the rights of assembly and the opportunity for redress of grievances.[166] To Pfeffer and other separationists, this proposition is unrealistic.

Summary

In his book, *The Biblical Basis for the Constitution*, Dan Gilbert notes that a familiar passage in the Bible which reads "[r]ender therefore unto Caesar the things that are Caesar's; and unto God the things that are God's"[167] mandates a separation of church and state. He asserts that things spiritual are placed by the Constitution beyond the authority of the government to seize, control or tamper with. That which is in the religious realm is constitutionally safe and secure from Caesar.[168]

Religionists such as Jonathan Edwards, Isaac Backus and George Whitfield along with rationalists such as Jefferson and Thomas Paine, came to similar conclusions regarding the separation of government and religion albeit from different perspectives. Religionists believed that the source for all temporal power was Christ and he had not delegated any power over religion to temporal government. The rationalists believed

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[166] *Id.*

[167] *Matthew* 22:21.

[168] DAN GILBERT, THE BIBLICAL BASIS FOR THE CONSTITUTION, 24 (1936).

that the source of governmental power was "people in nature" and that peoples' natural rights include religion. People had not seen fit to hand over those rights to the temporal government.[169]

At the time of the ratification, Americans believed that religion should be supported voluntarily. They wanted government and religion separated. They felt that government attempts to regulate and organize support for any or all religions infringed on their individual religious liberties and constituted an impermissible establishment of religion.[170]

Chapter Summary

Two distinct theories have emerged from interpretations of the debates, language and contemporaneous events surrounding the framing of the First Amendment. The first theory, nonpreferentialism, means that government may support religion if it is done in a nondiscriminatory manner. Those who subscribe to this theory argue that the wording of Madison's original draft and the final wording of the Amendment itself indicated that the Framers interpreted the Clause nonpreferentially. Additionally, they assert, neither Madison's or Jefferson's actions while serving as president indicate a belief in absolute separation. Cord sums up the arguments against separationism,

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[169]PFEFFER, *supra* note 91 at 34.

[170]CURRY, *supra* note 3 at 222.

which he believes has been practiced by the courts, with the following:

> "*Fiction*-when disinterested scholarly inquiry still freely flourishes-*legitimizes nothing.* Legal fiction only engenders disrespect for the legal institutions that employ it, the judges who invoke it and the law proclaimed as a consequence of adherence to it. . .the opinions of the United States Supreme Court have, for the most part, reflected the Pfeffer [separationist] thesis and thus an incorrect interpretation of the American doctrine..."[171]

Separationists argue that the Framers intended the spheres of government and religion to remain separate. Some of their number note that there were multiple establishments in existence at the time of the Framing of the First Amendment, and therefore, that is precisely the type of establishment that the Framers intended to prohibit. Also, the debate surrounding the First Amendment serves as evidence of their claim, as does the fact that the Bill of Rights is a document that was intended to limit the power of government. Curry summarizes separationism with the following:

> ". . .the people of almost every state who ratified the First Amendment believed that religion should be maintained and supported voluntarily. They saw government attempts to organize and regulate such support as a usurpation of power, as a violation of liberty of conscience and free exercise of religion, and as falling

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[171]CORD, *supra* note 7 at 82.

within the scope of what they termed an establishment of religion."[172]

It becomes clear to the student of the First Amendment that the two theories spawned by its framing diverge almost completely. The sitting Justices opinions, scholarly writings and speches will be analyzed in light of criteria gleaned from the tenets of those theories.

Tenets Derived From the Theories

In analyzing the philosophies of the sitting Justices, the criteria used are tenets derived from the theories of original intent discussed above. These criteria, are applied to the varying contextual issues of Establishment Clause jurisprudence discussed in Chapter IV and synthesized in the Chapter V analyses and Chapter VI conclusions and recommendations.

Nonpreferentialist Tenets[173]

N1. Government may favor religion over irreligion.

N2. Government may support religion if it is done in a nondiscriminatory manner.

N3. Disestablishment does not mean absolute separation.

N4. Religion is necessary for good citizenship and religion can be employed to

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[172]CURRY, *supra* note 3 at 222.

[173]The designations "N" and "S' denote nonpreferentialist and separationist, respectively. These will assist in reporting the analytical conclusions for each Justice drawn in Chapter V.

promote governmental aims. Therefore sect-neutral religious values can be promoted on the public schools.

N5. The Establishment Clause does not mandate a strict separation of religion and government, it rather requires a separation of institutions.

Separationist Tenets

S1. Government may not favor religion over irreligion.

S2. The First Amendment mandates a wall of separation between the official spheres of government and religion.

S3. The separation of church and state means that the government cannot support or promote one, any or all sects, denominations or religions.

S4. The Bill of Rights limits the power of the Federal government. Consequently, the First Amendment cannot grant any powers not expressly enumerated in the Constitution including making laws that touch on the subject of religion.

S5. Religious values cannot be inculcated in the public schools. Doing so would violate the Establishment Clause.

CHAPTER IV
ESTABLISHMENT CLAUSE ISSUES DURING THE REHNQUIST ERA

Over the course of the Supreme Court's Rehnquist era,[1] the Justices have had the opportunity to hear a number of Establishment Clause cases. While all of these cases implicate the Establishment Clause of the First Amendment, the contextual issues vary in number and complexity. Looking down the decades between 1972 and the present, those issues and the legal standards by which they were resolved, fall into a certain order. For instance, in the decade of the 1970's, cases involving Establishment Clause challenges were consistently adjudicated employing the *Lemon* test. These cases typically involved state aid to parochial schools. The 1980's saw *Lemon* continue to dominate Establishment Clause jurisprudence; however, the scope of the cases began to move beyond state aid so that by the 1990's church/state issues in public schools included not only state aid to parochial schools, which manifested itself in various forms,[2] but also prayer in school and at school activities,[3] displays of religious symbols

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[1]For the purposes of this study the Rehnquist era is defined as the time period beginning with the present Court's most senior member, William H. Rehnquist's, assumption of his seat on the Supreme Court in 1972, through the present.

[2]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973). Meek v. Pittinger, 421 U.S. 349 (1975); Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1975) Wolman v. Walters, 433 U.S. 229 (1977); Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980); Mueller v. Allen, 463 U.S. 388 (1983); Grand Rapids v. Ball, 105 S.Ct. 3216 (1985); Aguilar v.

on public property,[4] the equal access of religious groups to public fora,[5] and issues involving government empowerment of religious bodies.[6]

As a result of disagreements among the Justices engendered by the Court's application of the *Lemon* test, its use declined as new Justices took their place on the High Court, bringing with them new notions of proper methods of Establishment Clause adjudication. By the middle of the 1990's the *Lemon* test frequently came under siege by scholars and jurists who sought its abandonment.

In this chapter the various Establishment Clause issues that emerged from a review of the cases heard by the Court during the Rehnquist era will be discussed. Each Establishment Clause case during Rehnquist's tenure is treated (along with prior cases when necessary to clarify the holdings of the later cases) thematically, on the Establishment Clause issue upon which each case was decided.

Felton, 105 S.Ct. 3232 (1985); Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462 (1993).

[3]Wallace v. Jaffree, 105 S.Ct. 2479 (1985); Lee v. Weisman, 112 S.Ct. 2649 (1992).

[4]Stone v. Graham, 449 U.S. 39 (1981); Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

[5]Widmar v. Vincent, 102 S.Ct. 269 (1981); Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Lamb's Chapel v. Center Moriches School District, 113 S.Ct. 2141 (1993); Capital Square Review and Advisory Board v. Pinette, 132 L.Ed. 650 (1995); Rosenberger v. Rector and Board of Visitors of the University of Virginia, 132 L.Ed. 700 (1995).

[6]Larkin v. Grendel's Den, 103 S.Ct. 505 (1982); Board of Education of Kiryas Joel v. Grumet, 114 S.Ct. 2481 (1994).

State Aid to Parochial Schools

State enactments designed to financially assist parochial schools have taken many forms, especially in the decade of the 1970's. Beginning with the *Lemon* case, state legislatures undertook to devise schemes to assist nonpublic schools with the rising costs of education. These took various forms and met with varying degrees of success in the courts. State aid to nonpublic schools took the form of teacher supplements,[7] tax credits and reimbursements,[8] testing reimbursement,[9] lending of instructional materials, supplies and textbooks,[10] diagnostic and therapeutic services,[11] enrichment and remedial services,[12] field trip transportation costs,[13] and facilities upkeep and construction.[14] What is notable is the fact that in each case involving state aid to nonpublic schools that reached the Supreme Court, the Court did not quarrel with

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[7]Lemon v. Kurtzman (Lemon II), 411 U.S. 192 (1973); Zobrest v. Catalina Foothills School District, *supra* note 2.

[8]Committee for Public Education and Religious Liberty v. Nyquist, *supra* note 2; Sloan v. Lemon, *supra* note 2; Mueller v. Allen, *supra* note 2.

[9]Levitt v. Committee for Public Education and Religious Liberty, *supra* note 2.

[10]Meek v. Pittinger, *supra* note 2; Wolman v. Walter, *supra* note 2.

[11]Wolman v. Walter, *id.*; Meek v. Pittinger, *id.*

[12]Grand Rapids v. Ball, *supra* note 2; Aguilar v. Felton, *supra* note 2.

[13]Wolman v. Walter, *supra* note 2.

[14]Committee for Public Education and Religious Liberty v. Nyquist, *supra* note 2; Tilton v. Richardson, 403 U.S. 672 (1971); Hunt v. McNair, 413 U.S. 734 (1973); Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

the secular purpose of any of the arrangements, taking state legislatures' statements of secular purpose at face value. When statutes of this nature fell, they fell on secular effect and excessive entanglement grounds.

Teacher supplements. Subsequent to the *Lemon* decision, the issue of direct teacher reimbursements was revisited in a related case, *Lemon v. Kurtzman (Lemon II)*, in which the Court allowed monies owed nonpublic schools for services performed before *Lemon I* to be disbursed. Unlike the original *Lemon* decision, this one-time disbursement did not involve any ongoing entanglement.[15]

An issue related to governmental subsidies for teachers was brought before the Court in a 1993 case *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993). In *Zobrest*, the parents of a hearing impaired child brought suit to compel the Catalina Foothills School District to fund a sign language interpreter for their child, a parochial school student, under the Individuals with Disabilities Education Act (IDEA). Chief Justice Rehnquist noted that the benefits under IDEA are neutrally available to disabled children and that any attenuated benefit to the religious institution is constitutionally permissible.[16] Rehnquist declined to apply the *Lemon* test in that case;

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[15]Lemon v. Kurtzman, 93 S.Ct. 1463 (1973) (Lemon II).

[16]Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462, 2466 (1993).

however, Brennan, in dissent, stated that the arrangement impermissibly allowed the government to participate in the religious inculcation at the school since the interpreter's every action would be to convey a religious message.[17]

Tax credits and reimbursements. Several states devised schemes to allow tax deductions or reimbursements to parents of nonpublic school children. A 1973 New York statute provided for tuition grants and credits to parents of nonpublic school children in that state. The funds flowed from the state to the individual parent and not to the school.[18] The Court found that the statute impermissibly advanced religion. The majority reasoned that even though the monies flowed to the parent, the effect of the aid was "unmistakably" to financially support religion.[19]

The Court struck down another statute that same day in *Sloan v. Lemon.*[20] The statute in *Sloan* was enacted in response to the Court's holding in *Lemon I* and attempted to avoid its entanglement problems while allowing for a partial reimbursement for tuition expenses. The statute in question precluded any "direction, supervision or control over the policy determinations, personnel, curriculum, program of instruction or any other aspect of the administration or operation of any nonpublic

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[17]*Id.* at 2472.

[18]Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[19]*Id.* at 783.

[20]Sloan v. Lemon, 413 U.S. 825 (1973).

school or schools."[21] *Sloan*, however, also offended the Establishment Clause in the minds of the Justices because the legislation singled out a particular group, in this case parents of parochial school children, for economic benefit.[22]

Ten years later, the Supreme Court heard a challenge regarding the constitutionality of a Minnesota's statute, this time involving tax deduction for expenses related to education, to include tuition costs.[23] In ***Mueller v. Allen***, the educational deductions at issue were but a few among many available to taxpayers in Minnesota. As such, the deductions, including the educational ones, were available to all taxpayers.[24] Rehnquist, writing for the majority, saw no constitutional violation in the plan. To Rehnquist, because the economic benefit flowed to a broad class of citizens, religious and non-religious alike, the plan did not bear the imprimatur of the state,[25] unlike the arrangement in *Nyquist* in which the aid was available only to nonpublic school parents. Rehnquist noted that the fact that the money flowed to parents rather than directly to the schools lessened the Establishment Clause objection. He conceded that the economic benefit afforded to parents had an effect comparable to

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[21] *Id.* at 829.

[22] *Id.* at 832.

[23] Mueller v. Allen, 463 U.S. 388, 396 (1983).

[24] *Id.*

[25] *Id.* at 397.

giving money to the school. He defended this plan, however, stating that "public funds become available only as a result of numerous private choices of individual parents of school-aged children."[26]

The *Mueller* decision opened the door for state legislatures that wished to provide tax relief to parents of nonpublic school children by offering those benefits to all parents. The Minnesota plan allowed deductions that were part of a larger deduction package. While the education benefits, namely tuition credits, were available almost exclusively to nonpublic school parents, the fact that the purpose of the statute was facially neutral and did not single out a particular class of citizens, rendered the statute constitutional.

Testing. State legislatures have attempted to provide funds to nonpublic schools to cover the costs of standardized and teacher-made tests. The Court has consistently held that reimbursement for costs incurred in the administration, scoring and record keeping of standardized tests is constitutional. Teacher prepared tests, on the other hand, have not fared as well. The Court, in *Committee for Public Education and Religious Liberty v. Levitt,*[27] deemed reimbursement for such testing as violative of *Lemon's* effect prong since the function of such tests is to reinforce and evaluate

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[26]*Id.* at 399.

[27]Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973).

student learning. Because of the fact that the function of sectarian elementary and secondary schools is to educate children by integrating the secular and religious, there is no method for distributing the aid only to the secular side.[28]

Instructional Materials and Equipment. A part of the Pennsylvania statute in *Lemon* allowed the State Superintendent to "purchase" instructional materials thereby providing some financial relief to the nonpublic schools of that state. In *Meek v. Pittinger*, the issue was revisited, and again, was deemed unconstitutionally violative of the effect prong of the *Lemon* test. In *Meek*, the Commonwealth of Pennsylvania attempted to provide a variety of "auxiliary services," including instructional materials, to nonpublic schools in the Commonwealth.[29] The Court again noted the predominately religious character of elementary and secondary religious schools benefitting from the Act,[30] and declared the type of aid to religion at issue in *Meek* "neither indirect nor incidental,"[31] and consequently unconstitutional. Justice Stewart opined that even though maps and charts start out as ideologically neutral, given the nature of religious schooling, it is difficult to separate the secular functions of the schools, for which the state funds are intended to support, from the schools' religious

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[28] *Id* at 480.

[29] Meek v. Pittinger, 421 U.S. 349, 352-53 (1975).

[30] *Id.* at 363.

[31] *Id.* at 365.

function, for which state-support is impermissible.[32]

Diagnostic and Therapeutic Services. The statute in *Meek*, provided for diagnostic and therapeutic services for students to be provided in the student's nonpublic school. It was stipulated that the provider was not to be employed by the private school. The *Meek* Court noted that the statute suffered from the same constitutional infirmity as the statutes at issue in *Lemon*. Excessive entanglement would be manifested in the level of state surveillance necessary to insure that professionals in a pervasively religious environment would not inculcate religious values, wittingly or not, to students.[33]

The diagnostic and therapeutic service delivery problems in *Meek* were remedied by the Ohio Legislature in a 1977 case titled *Wolman v. Walters*.[34] As a part of the state aid in *Wolman*, Ohio's legislature severed diagnostic and therapeutic services from other components of the aid package. The *Wolman* Court noted that provisions for diagnostic services fell within the spectrum of general welfare services, which were invalidated in *Meek* because of their unseverability from other, more constitutionally objectionable, forms of aid provided in the statute.[35] In *Meek*, therapeutic services

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[32]*Id.*

[33]*Id.* at 369.

[34]Wolman v. Walter, 433 U.S. 229 (1977).

[35]*Id.* at 243-44.

were intended to be provided on site whereas in *Wolman*, similar services were to be provided away from the nonpublic schools in sites that were both educationally and geographically removed from the nonpublic school. It was believed that by providing those services off site, the threat of a constitutional violation of advancing religion would be lessened because the therapist would not be working with children in a sectarian environment.[36] Consequently, diagnostic services on site and therapeutic services off site have been deemed constitutionally permissible.

Enrichment and Remedial Programs. In decisions handed down the same day, *Grand Rapids v. Ball* and *Aguilar v. Felton*, the Supreme Court disallowed two programs, one in Michigan and the other in New York City, that provided for publicly funded enrichment or remedial programs in nonpublic school classrooms. The Michigan arrangement provided for two types of remedial and enrichment programs taught by teachers hired by the public schools, one during school and the other after school hours. Both were delivered in classrooms leased by the public school system in the nonpublic school building.[37] To Brennan, the programs had the effect of advancing religion because teachers might unwittingly inculcate religious values into the students despite the fact that doing so was not permitted. In addition, he opined that a practice

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[36]*Id.* at 246-48.

[37]Grand Rapids v. Ball, 105 S.Ct. 3216 (1985).

which involved the government leasing classroom space from the parochial schools would create a symbolic link between government and religion and directly promote the primary religious mission of the parochial schools.[38]

The New York City case, *Aguilar v. Felton*, 105 S.Ct. 3232 (1985), which involved the expenditure of Title I funds in nonpublic schools of the city, was deemed violative of *Lemon's* entanglement prong. Under the plan, Title I teachers in the nonpublic schools were subject to unannounced supervisory visits from employees of the City's Bureau of Nonpublic School Reimbursement to ensure that those teachers were not advancing religious values. Brennan noted two entangling aspects of the program. The first involved the direct supervision of the teachers in the parochial schools by public employees which would rise to an impermissibly high level.[39] The second entanglement would be manifested in the fact that nonpublic and public school teachers and administrators would necessarily need to work together for matters related to scheduling and the individual educational needs of the targeted students.[40]

Textbooks. A textbook reimbursement provision in *Lemon v. Kurtzman* was part of the Pennsylvania statute that was held to be excessively entangling. In *Meek*,

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[38]*Id.* at 3223.

[39]Aguilar v. Felton, 105 S.Ct. 3232, 3237 (1985).

[40]*Id.* at 3239.

and *Wolman*, however, textbook loan provisions were deemed constitutional by the High Court as the programs in those cases were similar to one upheld in *Board of Education v. Allen.*[41] The textbook loan provisions in *Meek* and *Wolman* were made available to all students in the state and therefore no aid flowed directly to the nonpublic schools.

Field trip transportation. The statute at issue in *Wolman* allowed for reimbursement for expenses incurred in transporting students to and from field trip experiences. There were no restrictions on the timing of such trips and the choice of destinations was made by the teacher.[42] The Supreme Court held that the provision violated the effect prong of the *Lemon* test. They noted a sharp contrast between the statute in *Wolman* and the transportation reimbursement deemed constitutional in *Everson.*[43] In *Everson*, the nonpublic schools had no say over decisions related to the transportation of students to and from school. The *Wolman* statute, by contrast, left a great deal of discretion to the school and teacher, including the frequency, timing and destinations of the trips. Moreover, the Court held that teachers give meaning to those trips by their pre-trip planning, pointing out various things to students during the trip,

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[41]Board of Education v. Allen, 393 U.S. 236 (1968).

[42]Wolman, *supra* note 34 at 253.

[43] Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1946). In Everson the Court upheld a New Jersey statute that provided for parental reimbursement of costs incurred in transporting their children to nonpublic schools.

and by post trip follow-up.[44] Although the destination might be secular, the teacher's actions could turn the experience into a religious one.

Facilities. A provision in *Nyquist* provided funds for facilities maintenance and repair in a section of a New York statute devoted to health and safety of students in nonpublic schools. In the statute, any qualifying nonpublic school, one that served a high concentration of low income families, would be eligible for a reimbursement not to exceed 50 per cent of similar costs in the public schools.[45] The Court held that section of the statute as violative of *Lemon's* effect prong in that the money was made available largely without stipulation as to its usage.[46] The Court distinguished the *Nyquist* arrangement from an earlier one in *Tilton v. Richardson*[47] because the aid in the latter was carefully limited, plus the fact that the government could recapture the funds if the buildings were used for sectarian purposes.[48]

Private colleges and universities fared better than elementary and secondary schools in terms of eligibility for state aid. In *Tilton v. Richardson*, a program allowing for grants and loans to institutions of higher education for construction costs for various

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[44]Wolman, *supra* note 34 at 254.

[45]Nyquist, *supra* note 18 at 762-63.

[46]*Id.* at 774.

[47]*Infra* note 49.

[48]Nyquist, *supra* note 18 at 776.

academic buildings, was held to be constitutional.[49] As part of the arrangement, the recipient institution was required to agree not to use the building for any sectarian purposes, lest the funds be surrendered to the state.[50] The Court saw no effect problem with the arrangement, in part because of the stipulation of secular use. Additionally, the funds were made available to all postsecondary schools, both sectarian and nonsectarian. The Court also noted that there was a diminished threat of entanglement as there was no need for continued surveillance since college professors ascribe to professional standards and enjoy a level of academic freedom, both of which serve to retard the opportunity for indoctrination. This, coupled with the unimpressionability of college aged students, combine to make the threat of religious indoctrination less likely than in religiously oriented elementary and secondary schools.[51]

Tilton was decided the same day as *Lemon v. Kurtzman,* and in his opinion, Chief Justice Burger warned about possible dangers inherent in the *Lemon* test. He wrote:

> "There are always risks in treating criteria discussed by the Court as 'tests' in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or

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[49]Tilton v. Richardson, 403 U.S. 672 (1971).

[50]*Id.*

[51]*Id.*

> mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired."[52]

Similar arrangements in postsecondary schools in Maryland and South Carolina were also deemed constitutional. In *Hunt*, a South Carolina statute that allowed the state and colleges to enter into a financing arrangement whereby revenue bonds were issued to colleges was upheld by the Justices.[53] In terming the *Lemon* test as "no more than helpful signposts,"[54] Justice Powell deemed the aid in *Hunt* not violative of *Lemon's* effect prong as religious indoctrination was not a substantial mission of the college in question. He offered:

> "Aid is normally thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting."[55]

Given previous rulings involving elementary and secondary nonpublic schools, it appeared that the Justices have attempted to distinguish institutions of higher

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[52]*Id.* at 678.

[53]Hunt v. McNair, 413 U.S. 734 (1973).

[54]*Id.* at 741.

[55]*Id.* at 743.

education with elementary and secondary schools in terms of religious pervasiveness. While the Justices noted that some colleges are pervasively sectarian, it seems that all elementary and secondary schools are so by virtue of the impressionability of the students, the professional standards to which nonpublic elementary and secondary teachers are held and the fact that it is difficult to separate the sectarian and secular missions of nonpublic elementary and secondary schools.

Further evidence of this distinction is found in another college case, *Roemer v. Board of Public Works of Maryland.*[56] In *Roemer*, the Court upheld Maryland legislation providing for noncategorical grants to colleges. These grants were made with the stipulations that the funds were not to be used for sectarian purposes and that eligibility would be based on the percentage of non-theological degrees offered by the school.[57] In further defining the differences between nonpublic elementary and secondary schools and colleges and universities, the Court noted that in *Roemer*, the character of the institution and not the form of the aid was controlling.[58]

Prayer

Subsequent to the *Lemon* decision, the High Court has been called upon to

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[56]Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976).

[57]*Id.* at 740, 742.

[58]*Id.* at 767.

decide cases involving prayer three times, each time in different contexts. In a nonschool case, the Court upheld prayer at the opening of legislative bodies in *Marsh v. Chambers.*[59] In deciding *Marsh* the Court did not apply the *Lemon* test. Burger, writing for the majority, noted that opening legislative bodies with a prayer has "[n]o doubt. . .become part of the fabric of our society."[60] In his dissent, Brennan opined that had the *Lemon* test been applied, the practice would have likely failed all three prongs.[61] *Marsh* represented the first time that the Court failed to apply the *Lemon* test in an Establishment Clause case since its initial iteration. It would not, however, be the last.

In 1991, the Supreme Court heard a case which challenged the constitutionality of prayer at graduation exercises, *Lee v. Weisman*, 112 S.Ct. 2649 (1992). The city of Providence, Rhode Island had in place the practice of allowing middle schools to invite local clergy to offer an invocation and benediction at their graduation ceremonies. In deeming the practice unconstitutional, Justice Kennedy opined that as students' attendance at graduation is "in a fair and real sense obligatory. . ."[62] the school was guilty of ". . .subtle coercive pressures. . .where the student had no real alternative

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[59]Marsh v. Chambers, 463 U.S. 783 (1983).

[60]*Id.* at 792.

[61]*Id.* at 800-01.

[62]Lee v. Weisman, 112 S.Ct. 2649, 2655 (1992).

which would have allowed her to avoid the fact or appearance of participation."[63]

Kennedy's application of a coercion standard, based on peer pressure, may well have been foreshadowed a decade earlier in *Marsh*, when Justice Burger noted that:

> "Here the individual [a legislator in Nebraska] claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination or peer pressure."[64]

Kennedy picked up on the theme when he stated:

> ". . .the undeniable fact is that the school district's supervision and control of a high school graduation ceremony placed public pressure as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion."[65]

Like Burger in *Marsh*, Kennedy declined to apply the *Lemon* test, neither however, did he disavow it, despite the admonitions of the petitioners and the United States as *amicus curiae*.[66] He opined that the government's involvement in religion was

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[63]*Id.* at 2656.

[64]Marsh, *supra* note 59 at 792.

[65]Lee, *supra* note 62 at 2658.

[66]Brief of the United States as amicus curiae, No. 90-1014, 8 (1990). "What we do question is the constitutional underpinnings of the so-called *Lemon* 'test,' a formula that has developed a life of its own divorced both from the context of *Lemon* itself and from the constitutional command it seeks to illuminate".

pervasive in this case, to the point of creating a state-sponsored and state-directed religious exercise.[67]

Another post-*Lemon* prayer case occurred in 1985 and involved a moment of silence statute enacted by the Alabama Legislature, *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985). In testimony before the District Court, State Senator Donald G. Holmes, the prime sponsor of the bill, explained that the Bill was an "effort to return voluntary prayer into our public schools [which was] a beginning and a step in the right direction." Moreover, Holmes testified that he had no other purpose in mind when drafting the bill.[68]

Justice Stevens, writing for the majority, deemed the statute violative of *Lemon's* purpose prong and found no reason to look at the statute's possible effect or entanglement violations.[69] His decision employed O'Connor's endorsement refinement of *Lemon's* purpose prong.[70] In applying the purpose prong with the endorsement refinement, the Court must ask "whether government's actual purpose is to endorse or

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[67]Lee, *supra* note 62 at 2655.

[68]Wallace v. Jaffree, 105 S.Ct. 2479, 2483 (1985).

[69]In separate concurrences, both Justice Powell and O'Connor stated their beliefs that moment of silence statutes could pass muster on both effect and entanglement if they were unburdened by the purpose infraction evident in *Wallace*.

[70]*See*, Lynch v. Donnelly, *infra* note 75.

disapprove of religion."[71] He argued the statute was indeed intended to demonstrate state endorsement of religion, using the bill's sponsor, Senator Holmes, own words on the subject as evidence. He also noted that a 1978 statute protecting students' rights to engage in voluntary prayer during a moment of silence was already on the books before Holmes' bill was brought before the legislature. Therefore, he deemed Holmes' bill not a statute protecting individuals' free exercise rights, rather it was one enacted to convey state endorsement of religion, in violation of the Establishment Clause.

Displays of Religious Symbols.

Several disputes involving the display of religious symbols have come before the Court; however, only one was in the context of schools. In *Stone v. Graham*,[72] despite the Kentucky Legislature's "avowed" secular purpose for posting the Ten Commandments on classroom walls in the public schools of that state, the High Court deemed the practice violative of *Lemon's* purpose prong.[73] Justice Rehnquist, in dissent, argued that the Legislature's purpose statement for posting the Decalogue should satisfy scrutiny under *Lemon*, as the Supreme Court, up until that time, had accepted legislative declarations of secular purpose at face value. Moreover, the

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[71]Wallace, *supra* note 68 at 2490.

[72]Stone v. Graham, 449 U.S. 39 (1980). For a discussion of the case, see Chapter I, notes 28-30 and accompanying text.

[73]*Id.* at 42.

purpose stated by the Legislature should suffice on its own merits, according to Rehnquist, since the secular laws of the western world are based upon the Ten Commandments, as noted by the Kentucky Legislature.[74]

The next two cases of this type to reach the High Court were nonschool cases but do much to delineate the constitutional boundaries of displays of religious symbols in public places. The first of these cases, which involved a creche in a Christmas display on public property in Pawtucket, Rhode Island was deemed acceptable by the Justices.[75] The creche in this case, while inescapably a sacred object to Christians, was included in a display featuring other winter objects, including a Santa Claus, reindeer, a banner that read "Seasons Greetings" and statues of carolers. Burger, writing for the majority, applied the *Lemon* test, but noted that ". . .we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[76] He found no breech of secular purpose. When viewed as a whole, he found that the display conveyed no subtle government advocacy of a religious message.[77] He also found no effect violation, stating that the level of endorsement in the Pawtucket display

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[74]*Id.* at 46.

[75]Lynch v. Donnelly, 465 U.S. 668 (1984).

[76]*Id.* at 679.

[77]*Id.* at 680.

was much lower than previously upheld forms of aid to religion.[78] Finally, there existed no entanglement violation as the display involved no ongoing state surveillance and was a minimal financial burden on the city.[79]

A similar case arose in Allegheny County, Pennsylvania and involved two separate displays, one involving a creche and the other a menorah, both of which were challenged as violative of the Establishment Clause.[80] The creche was located adjacent to the grand staircase of the Allegheny County Courthouse and took up a substantial amount of space. It was framed by poinsettias and a sign on the display which read "Glory to God In The Highest." Nothing else was nearby the display, nor did anything detract from the religious message.[81] For this reason, in the opinion of the Court penned by Justice Blackmun, the creche violated the Establishment Clause in that its display acknowledged Christmas as a religious holiday thereby impermissibly endorsing religion.

The display of the menorah was contextually differentiated from the creche display. The menorah stood next to a Christmas tree and a sign saluting liberty. The

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[78]*Id.* at 681-82. Burger noted that the Court had upheld transportation reimbursement in Everson, grants for college buildings in Tilton, noncategorical grants to colleges in Roemer, and tax exemptions for church property in Walz.

[79]*Id.* at 684.

[80]County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989).

[81]*Id.* at 598.

tree was the largest and the most central figure in the display.[82] Blackmun noted that the tree and the sign were secular symbols of the season, making the display constitutionally closer to the display in *Lynch* than the creche display at the courthouse. The fact that both the tree and sign were secular made the display more of a cultural celebration of the season despite the religious message of the menorah.[83]

The Court's decisions in *Stone*, *Lynch* and *Allegheny* make it clear that the constitutionality of religious displays lies in their context. Where the display is cultural and includes some sectarian references as part of an otherwise secular treatment, the practice is likely to be upheld. However, when the religious symbol appears by itself, as the Ten Commandments in *Stone*[84] or the creche in *Allegheny*,[85] with little or nothing to detract from its religious message, then it likely will not pass constitutional muster.

Access Issues

Disputes involving the access of religious groups to public facilities or fora typically involve both free speech and religion issues. The difficulty of these cases are manifested in the friction they engender between the Establishment Clause on the one hand and the Free Speech and Free Exercise Clauses on the other.

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[82] *Id.* at 614.

[83] *Id.* at 617-619.

[84] *Supra* note 72.

[85] *Supra* note 75.

An early access case involved a challenge made by students at a public university. In *Widmar v. Vincent,* 102 S.Ct. 269 (1981), students in a university registered religious group were denied permission to meet in university classrooms. There were a number of registered student groups at the university that were allowed access to the school's facilities. Indeed, even Cornerstone, the group in question, was allowed access for four years before that access was terminated. Powell, writing for the Court, opined that since the University had created a forum generally open for use by student groups, it must abide by the rules governing access to that forum including justifying its discrimination against the religious group.[86] As the school discriminated against religious worship and discussions, forms of speech and association protected by the First Amendment, the State must show that the discrimination served a compelling state interest and was narrowly drawn to achieve that end.[87] Powell was unpersuaded by the University's argument that allowing Cornerstone access to classrooms would be an effect violation under the *Lemon* analysis. He noted that allowing the club to meet conferred no imprimatur of state approval as an open forum is available to all speakers, both religious and nonreligious, on a nondiscriminatory

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[86]Widmar v. Vincent, 102 S.Ct. 269, 273 (1981).

[87]*Id.* at 274.

basis.[88]

In an effort to extend the reasoning of *Widmar* to public schools, Congress passed the Equal Access Act in 1984. The Act stipulates that where a limited open forum exists in a school that accepts federal dollars, the school may not discriminate against groups that desire access to that forum. A limited open forum is one in which noncurricular groups are allowed to meet during noninstructional time.[89]

In a case involving the Equal Access Act, *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), a challenge of denial to a public school's forum was heard by the Court. Respondent Mergens, a student at Westside High School, was denied permission to form a religious club at the school. The Supreme Court, Justice O'Connor writing for the majority, stated that the Act required that the school officials allow the group to meet. She noted that no entanglement existed with the arrangement. She did apply the endorsement refinement of the effect prong and stated that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids and *private* speech endorsing religion which the Free Speech and Free Exercise Clauses protect" (italics

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[88]*Id.* at 276-77.

[89]Equal Access Act, 20 U.S. ƒ4071-4074.

in original).[90]

Although the case did not implicate the purpose prong, O'Connor undertook to distinguish legislative purpose from legislator's motives. She stated:

> "Even if some legislators were motivated by a conviction that religious speech, in particular, was valuable and worthy of protection, that alone would not invalidate the [Equal Access] Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law."[91] (italics in original)

In 1995 the Court heard two cases involving access. The first of these was a challenge made by the Ku Klux Klan against Columbus, Ohio in response to the city's having disallowed the Klan to erect a cross on public property.[92] Justice Scalia, writing for the majority, wrote that "religious expression cannot violate the Establishment Clause where it 1) is purely private and 2) occurs in a traditional or designated public forum, publicly announced and open to all on an equal basis.[93]

The second case heard by the Justices that year reiterated the Court's stand on

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[90]Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 250 (1990).

[91]*Id.* at 249.

[92]Capital Square Review Board v. Pinette, 132 L.Ed.2d 650, 658 (1995).

[93]*Id.* at 666.

nondiscriminatory access to university fora. In *Rosenberger v. University of Virginia*, 132 L.Ed. 2d 700 (1995), the Court held as violative of the First Amendment the school's decision not to fund a religious publication based on the religious viewpoint expressed in that publication. Justice Kennedy noted that the "[g]uarantee of [religious] neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints are broad and diverse."[94]

Notable in the previous two cases, is the fact that neither Scalia nor Kennedy applied the *Lemon* test. As has been shown, earlier cases of this genre have applied the test. Even Justice White, a frequent critic of separationist decisions of the Court, in a 1993 case that turned on free speech principles, gave perfunctory attention to *Lemon.* He noted that while some may wish to do so, *Lemon,* to that point, had not been overruled and that *Lamb's Chapel* presented no occasion to do so.[95]

Government Empowerment of Religious Bodies

In a 1994 case that elicited six separate opinions, a New York statute vesting a religious community with the authority to operate its own public schools was deemed

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[94]Rosenberger v. Rector and Visitors of University of Virginia, 132 L.Ed. 700, 724 (1995).

[95]Lamb's Chapel v. Center Moriches School District, 113 S.Ct. 2141, 2148, n. 7 (1993).

unconstitutional.[96] The Village of Kiryas Joel's lines had been drawn to exclude all but Satmar Hassidics, adherents of a strict form of Judaism who eschew much of modern society.[97] Most of the village's children were instructed in Jewish academies within the village, that prepared them to take their place in that distinctively religious community. However, there were no services for handicapped children, so the neighboring Monroe-Woodbury School District provided services until the Court's decision in *Aguilar,*[98] at which time those services ceased to be offered by Monroe-Woodbury.[99] This put the parents of the handicapped Satmar children in the position of choosing to have their children educated in the public schools of Monroe-Woodbury or refusing special education altogether.

In response to the difficult situation experienced by the Satmar parents, the New York Legislature enacted legislation creating a school district with lines coterminous with those of the village of Kiryas Joel. The newly created school district served only handicapped children from Kiryas Joel and surrounding jurisdictions.[100]

In comparing the situation in *Kiryas Joel* to an earlier case in which churches

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[96]Board of Education of Kiryas Joel v. Grumet, 114 S.Ct. 2481 (1994).

[97]*Id.* at 2483.

[98]For a discussion of Aguilar, see *supra* notes 39-40 and accompanying text.

[99]*Id.* at 2484-85.

[100]*Id.* at 2486.

were given veto power over zoning requests for businesses dispensing liquor,[101] Justice Souter opined that the state may not delegate its civic authority to a purely religious group or organization.[102] The statute, he said, "crosses the line from permissible accommodation to impermissible establishment" and, therefore, is unconstitutional.[103]

Summary

At the beginning of the Rehnquist era, the Supreme Court routinely applied the *Lemon* test as the unitary standard for an ever expanding number of Establishment Clause issues. Beginning with *Marsh*, however, Justices have been less inclined to apply the criteria set forth in *Lemon* and have either posited different tests, demonstrated open hostility towards *Lemon*, or ignored it altogether. Indeed, in five recent contextually different cases in the mid-1990's there has been no application of *Lemon* in the majority opinion.[104]

It appears that a new criteria will emerge in the event that the *Lemon* test is abandoned as the unitary Establishment Clause standard. Evidence indicates that the new criteria could be adherence to intent of the Framers of the Constitution. Even if

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[101]Larkin v. Grendel's Den 103 S.Ct. 505 (1982).

[102]Kiryas Joel, *supra* note 96 at 2488.

[103]*Id.* at 2494.

[104]*See e.g.*, Zobrest v. Catalina Foothills School District, *supra* note 16, Lee v. Weisman, *supra* note 62, Capital Square Review Board v. Pinette, *supra* note 92, Rosenberger v. University of Virginia, *supra* note 94, and Kiryas Joel v. Grumet, *supra* note 96.

original intent is not the unitary standard, surely any other standard will be adjudicated in the light of the original intent of the Founding Fathers. Chief Justice Rehnquist made this point when he wrote:

> ". . . difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment that does the wall [of separation] theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from an historically faulty doctrine, but the rule can only be as sound as the doctrine it attempts to service. . .If a constitutional theory has no basis in the history of the amendment it seeks to interpret. . . I see little use in it."[105]

[105]Wallace, *supra* note 68 at 2518-19 (Rehnquist, W., dissenting).

CHAPTER V
ANALYSIS OF THE DATA

The Establishment Clause issues outlined in Chapter IV are those upon which the analysis of the Justices' written opinions, speeches and scholarly works will be analyzed. The order in which the individual Justices will be discussed is based on their seniority on the Supreme Court, with the issues serving as analytical themes. While the analysis in this chapter will be presented thematically, a sensitivity to the chronology of the cases is often necessary in order to understand the development of the Justices' philosophies. When chronology is a relevant factor, the analysis will be undertaken chronologically, within the thematic issues. Similarly, when the Justices make philosophical points in cases dealing with issues that are relevant to the analysis in another, those points are discussed where it is most appropriate to do so.

Chief Justice William H. Rehnquist

In 1985, Chief Justice William Rehnquist wrote a dissent in *Wallace v. Jaffree*[1] which was based on his interpretation of the Framers' intent and in which he concluded that the Framers did not intend for a "wall" to exist between religion and government, saying:

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[1]Wallace v. Jaffree, 105 S.Ct. 2479 (1985) (Rehnquist, W., dissenting).

> "It is impossible to build sound Constitutional doctrine upon a mistaken understanding of Constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years."[2]

The following analysis of Rehnquist's writings, from 1972 to present, on various Establishment Clause issues, is intended to provide clues as to the development of his philosophy that is so clearly articulated in his dissent in *Wallace*.

State Aid to Parochial Schools

Private Choices. A perspective that reverberates throughout Rehnquist's aid to parochial schools opinions and dissents, is that funding enabling citizens to pursue private choices is constitutional under the First Amendment, even if those funds ultimately benefit religion. In *Nyquist*, he noted that the concept of "benevolent neutrality" would render constitutional those portions of the statute that allowed individuals on the lower end of the socio-economic strata to freely exercise their conscience and send their children to parochial schools.[3] Similarly, in *Zobrest*, he argued that the Individuals with Disabilities Education Act (IDEA) provides no incentive for parents to send their children to religious schools. Rather, they send their

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[2] *Id.* at 2509.

[3] Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 810 (1973) (Rehnquist, W., concurring in part and dissenting in part).

children to those schools as a result of private choices.[4] Therefore, in Rehnquist's view, a state funded sign language interpreter should be made available to otherwise qualified students attending sectarian schools. In his 1983 majority opinion in *Mueller*, Rehnquist discussed his philosophy regarding private choices:

> "The historic purposes of the Clause simply do not encompass the sort of attenuated financial benefit ultimately controlled by the private choices of individual parents that eventually flows to parochial schools from neutrally available tax benefits at issue in this case"[5]

Further, he opined:

> ". . .Government assistance which does not have the effect of 'inducing' religious beliefs but merely 'accommodates' or implements an independent choice does not impermissibly involve the government in religious choices-therefore does not violate the Establishment Clause."[6]

Lemon and the "wall of separation". Foreshadowing of Rehnquist's attack upon the *Lemon* test which occurred in his *Wallace* dissent came through in his dissent in

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[4]Zobrest v. Catalina Foothills School District, 113 S.Ct. 2462, 2467 (1993).

[5]Mueller v. Allen, 463 U.S. 388, 400 (1983).

[6]Thomas v. Review Board of Indiana Employment Security, 450 U.S. 707, 727 (1981) (Rehnquist, W., dissenting).

Meek v. Pittinger. In that case, he argued that "[a]s a matter of constitutional law, the holding by the majority that this case is controlled by *Lemon v. Kurtzman* makes a significant sub silentio extension of that 1971 decision."[7]

In an aid to nonpublic school case that came before the High Court in 1985, the Chief Justice took aim at the "wall of separation" metaphor.[8] He noted that as the decision in *Grand Rapids v. Ball* relied on the rationale set forth in *Everson* and *McCollum*, the decision was flawed as those cases relied on the "faulty wall premise." By following the precedent articulated in those cases, he wrote that "in so doing the Court blinds itself to the first 150 years' history of the Establishment Clause."[9]

Prayer

In Rehnquist's dissent in *Wallace v. Jaffree,*[10] he challenged the constitutionality of the "wall of separation" metaphor and the *Lemon* test which, in his opinion, bolsters it. Five years before *Wallace,* Rehnquist noted in *Thomas v. Review Board* that the Court was guilty of misinterpreting the Religion Clauses of the First Amendment. He wrote:

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[7]Meek v. Pittinger, 421 U.S. 349, 392 (1975) (Rehnquist, W., concurring in part and dissenting in part).

[8]Grand Rapids v. Ball, 105 S.Ct. 3216 (1985) (Rehnquist, W., dissenting).

[9]*Id.* at 3232.

[10]Wallace, *supra* note 1.

> "I believe that the tension (between the Free Exercise Clause and the Establishment Clause) is largely of the Court's own making, and would diminish almost to the vanishing point if the Clauses were interpreted correctly."[11]

He picked up on the same theme in *Wallace*, when he stated:

> "The true meaning of the Establishment Clause can only be seen in its history (citations omitted). As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of the Charter and will only lead to the type of unprincipled decision making that has plagued our Establishment Clause cases since *Everson*."[12]

Wall of separation. In the *Wallace* dissent, Rehnquist chose to right what he perceived as the Court's continued misinterpretation of the Establishment Clause. He initiated his remarks by taking aim at Jefferson's "wall of separation" metaphor. He noted that the letter in which the phrase first appeared, from Jefferson to the Danbury Baptist Association in 1802, was but a "short note of courtesy"[13] and not deserving of the status it has attained in the adjudication of Establishment Clause cases. Regarding the metaphor, Rehnquist wrote that not only has the Establishment Clause been unduly

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[11]Thomas, *supra* note 6 at 722.

[12]Wallace, *supra* note 1 at 2520.

[13]*Id.* at 2509.

"freighted with Jefferson's misleading metaphor,"[14] but that "it should be frankly and explicitly abandoned."[15]

The Court's hostility toward religion. Rehnquist's language in cases as disparate as *Meek* in 1975, *Stone* in 1980 and *Wallace* in 1985 resonate with his philosophy that government may constitutionally give preference toward religion, and that the Court's decisions that have failed to accommodate the religious views of many citizens run counter to the dictates of the First Amendment. He wrote:

> "I am as much disturbed by the overtones of the Court's opinion as by its actual holding. The Court apparently believes that the Establishment Clause of the First Amendment not only mandates neutrality on the part of government but also requires that this Court go farther and throw its weight on the side of those who believe that our society should be a purely secular one.[16]. . .the fact is that for good or ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity-both Catholic and Protestant-and other faiths accepted by a large part of

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[14] *Id.*

[15] *Id* at 2517.

[16] Meek, *supra* note 7 at 395.

the world's peoples."[17]

His belief that "everything which gives meaning to life, . . .is derived from paganism, Judaism, Christianity. . ." underscored his philosophy of the constitutionality of nondiscriminatory aid to religion. Later, in the *Wallace* dissent, he began his discussion of the constitutionality of nondiscriminatory aid to religion by discussing Madison's role in the events surrounding the framing of the First Amendment. In an interpretation reminiscent of Malbin's,[18] Rehnquist argued that Madison's insertion of the word *national* before *religion*, in his original draft, was intended to appease those who feared the preeminence of one sect or two combining together to form a denomination to which all should conform, thereby creating an exclusive establishment.[19] The inclusion of the word *national*, he argued, "obviously does not conform to the wall of separation between Church and State idea which latter day commentators have ascribed to [Madison]."[20]

He continued his attack upon the wall of separation, by arguing that many of the

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[17]Stone v. Graham, 449 U.S. 39 (Rehnquist, W. dissenting) quoting Justice Jackson in McCollum v. Board of Education, 333 U.S. 203, 235-36 (1948).

[18]For a discussion of Malbin's interpretation of the debates on the First Amendment, *see* Chapter III *supra* notes 38- 48 and accompanying text.

[19]Wallace, *supra* note 1 at 2512.

[20]*Id.* at 2512.

actions of the Founding Fathers belied a belief in separationism.[21] He reasoned that as the First Congress reenacted the governance of the Northwest Ordinance, that same Congress could not have regarded establishment as synonymous with complete separation of government and religion. He drew this conclusion from Congress' Northwest Ordinance admonition that "[r]eligion, morality and knowledge" are "necessary for good government and the happiness of mankind."[22] Additionally, he noted that same Congress asked President Washington to offer up a day of Thanksgiving, a request to which he complied.[23]

Rehnquist concluded his argument that the Establishment Clause should be interpreted in accordance with nonpreferentialist philosophy, stating:

> "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 governmental neutrality between religion and irreligion nor did it prohibit the Federal government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the

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[21]For a discussion of these arguments, *see* Chapter III notes 72-81 and accompanying text.

[22]Wallace, *supra* note 1 at 2513.

[23]*Id.* at 2513-14.

> Framers intended to build the 'wall of separation' that was constitutionalized in Everson."[24]

Lemon. In *Thomas*, Rehnquist criticized the Court's reliance upon the *Lemon* test. The criticism in *Thomas* was an incremental step between his questioning the propriety of employing the tripartite test in his *Meek* opinion[25] to the outright condemnation of it in *Wallace*. In discussing the role that the application of the *Lemon* test would have played in *Thomas* had it been employed, he wrote:

> "It is unclear from the Court's opinion whether it has temporarily retreated from its expansive view of the Establishment Clause or wholly abandoned it. I would welcome the latter. . .I believe that Justice Stewart, dissenting in Abington School Dist. v. Schempp, accurately stated the reach of the Establishment Clause. He explained that the Establishment Clause is limited to 'government support of proselytizing activities of religion by throwing the weight of secular authorities behind dissemination of religious beliefs."[26]

It is Rehnquist's contention that *Lemon* supports separationist theory. As such, it is as constitutionally infirm as Jefferson's "wall." He underscored his belief that the *Lemon* test is an unacceptable standard in *Wallace*, when he noted that inconsistencies

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[24]*Id.* at 2516-17.

[25]Meek, *supra* note 7.

[26]Thomas, *supra* note 6 at 726.

in Lemon-based decisions. . .:

> ". . .arise because the Lemon test has no more grounding in the history of the Establishment Clause than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from an historically faulty doctrine."[27]

Rehnquist continued this assault on the *Lemon* test in *Wallace* by condemning it as a constitutional standard. He wrote that both the purpose and effect prongs suffer constitutional infirmity since they were inherited from *Everson* and *Schempp*, two decisions that, in his view, were historically deficient.[28] To illustrate his point he offered:

> "The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results. . . .For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in Geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children

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[27]Wallace, *supra* note 1 at 2518.

[28]*Id* at 2517.

> write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing 'services' conducted by the State inside the sectarian school are forbidden, but the State may conduct speech and hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of State-written tests or State-ordered reporting services, but it may not provide funds for teacher-prepared tests on secular subjects. Religious instruction may not be given in public school, but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws."[29]

Displays of Religious Symbols

The only opinion rendered by Rehnquist upon this issue was his dissent in *Stone*

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[29] *Id.* at 2518-19.

v. Graham 440 U.S. 39 (1980).[30] In *Stone*, Rehnquist chided the majority's decision to strike down the Kentucky statute requiring the posting of the Ten Commandments in all public school classrooms as violative of *Lemon's* purpose prong. He defended the Legislature's admonition that the posting of the Ten Commandments was a secular exercise, stating "[i]t is equally undeniable, however, as the elected representatives of Kentucky determined, that the Ten Commandments have had a significant impact on the development of the secular legal codes of the western world."[31] To Rehnquist this made the posting of the Ten Commandments an educational, rather than a religious, exercise. He also noted that the Establishment Clause does not require insulation between the public sector and all things which may have a religious significance.[32] Rehnquist also discussed the desirability of making students aware of the secular import of the Decalogue.[33] He opined that "[t]he document as a whole has had a significant secular impact. . ."[34]

Rehnquist, in *Stone*, noted that up to that point, the Court had looked to legislative articulations of secular purpose and have "accord[ed] such announcements

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[30]For a discussion of *Stone*, see Chapter I, footnotes 28-29 and accompanying text.

[31]Stone, *supra* note 17.

[32]*Id.* at 45-6.

[33]*Id.* at 46.

[34]*Id.* at 46, n.2.

the deference they are due."[35] He also noted that "[t]he fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional."[36] In contrasting the issues in the *Stone* and *Schempp* cases, he noted that in *Schempp*, there was no recitation of secular purpose, whereas in *Stone* there was.[37]

Governmental Empowerment of Religious Bodies

In *Bowen v. Kendrick*,[38] Rehnquist wrote that early presidents employed religious entities to promote governmental aims. The issue in *Bowen* concerned a statute that provided federal grants to public and nonprofit private, including religious, organizations for research on adolescent premarital sexual relations and problems.

In his opinion, Rehnquist noted that Congress was authorized to make religious entities grantees. . .

> ". . .these provisions of the statute reflect at most Congress' considered judgement that religious organizations can help solve the problems to which the [statute] is addressed."[39]

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[35]*Id.* at 44.

[36]*Id.*

[37]*Id.*

[38]Bowen v. Kendrick, 108 S.Ct. 2562 (1988).

[39]*Id.* at 2573.

. . . and notes the sensibility of so doing:

> "Particularly when, as Congress found, prevention of adolescent sexual activity and adolescent pregnancy depends upon developing strong family values and close family ties it seems quite sensible for Congress to recognize that religious organizations can have some influence on family life including parents' relations with their adolescent children."[40]

Summary of the Analysis of Rehnquist

Application of the Chapter III theoretical criteria to Rehnquist's written opinions and dissents, clearly demonstrate that his is a nonpreferential Establishment Clause interpretation on all issues upon which he has written. Throughout his career on the High Court, Justice Rehnquist has consistently expressed his belief that government can support religion if it is done in a nondiscriminatory manner. In so doing, he has derided Jefferson's "wall of separation" and the *Lemon* test as historically and constitutionally infirm.

John Paul Stevens

Since his arrival on the Supreme Court in 1975, Justice Stevens has written opinions and dissents on Establishment Clause issues including aid to nonpublic

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[40] *Id.*

schools, prayer, display of religious symbols on public property and government empowerment of religious bodies. In addition, Stevens has published several law review articles which serve to further illustrate his Establishment Clause philosophy.

State Aid to Parochial Schools

In the two state aid cases upon which Stevens has written, he eschews implementation of the *Lemon* test. Rather, it is his belief that the Court should follow the Establishment Clause philosophy set forth in *Everson*.

> ". . .rather than [employing] the three-part test described in Part II of the plurality's opinion, I would adhere to the test enunciated by Mr. Justice Black [in *Everson*]."[41]

Whether a State subsidy for parochial schools were to take the form of direct or indirect aid, Stevens would deem the practice to be unconstitutional based on the criteria set forth in *Everson*.[42] In *Wolman*, he noted that the line drawn by the Establishment Clause:

> ". . .should not differentiate between direct and indirect subsidies, or between instructional materials like globes and maps on the one hand and instructional materials like textbooks on the other."[43]

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[41]*See*, Chapter III, n. 33 and accompanying text.

[42]Wolman v. Walter, 433 U.S. 229, 265 (1977) (Stevens, J. Concurring in part and dissenting in part.)

[43]*Id.*

In a passage from *Regan*, Stevens lamented some of the same inconsistencies that Rehnquist was to articulate five years later in *Wallace v. Jaffree.*

> "The Court's approval of a direct subsidy to sectarian schools to reimburse them for staff time spent in taking attendance and grading standardized tests is but another in a long line of cases making largely ad hoc decisions about what may or may not be constitutionally made to nonpublic schools.[44]

Stevens, however, indicated that consistency and faithfulness to original intent would occur not from abandoning Jefferson's "wall of separation," as Rehnquist argued, but rather by strengthening it. In *Regan*, he wrote:

> "Rather than continuing the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier,' described in Lemon v. Kurtzman, I would respect the 'high and impregnable wall' between church and state constructed by the framers of the First Amendment.[45]

Prayer

In his majority opinion in *Wallace v. Jaffree,*[46] Stevens argued that the Alabama

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[44]Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646, 741 (1980) (Stevens, J. dissenting).

[45]*Id* (citations omitted).

[46]Wallace v. Jaffree, 105 S.Ct. 2479.

Legislature's passage of a moment of silence statute for the purpose of allowing voluntary prayer, violated the Establishment Clause of the First Amendment. He opined that by passing the legislation, the Legislature had abridged individuals' freedom of conscience, as the Amendment forbids statutes whose primary purpose is sectarian thereby elevating religion above irreligion.

Freedom of conscience. Stevens wrote in *Wallace* that freedom of conscience is the central liberty that unifies the various clauses in the First Amendment.[47] Consequently, the abridgement of that freedom is a violation of one or all parts of the Amendment. He opined:

> "As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe or worship in accordance with the dictates of his own conscience."[48]

He continued by noting that nonpreferential aid to religion, while arguably the original intent of the Amendment, has given way to tolerance for one's freedom of conscience, regardless of whether individuals choose one particular religious sect or none at all:

> ". . .the individual's freedom to choose his own creed is the

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[47] *Id.* at 2487.

[48] *Id.*

> counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist or the adherent of a non-Christian faith such as Mohammedeism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual's freedom of conscience protected by the First Amendment embraces the right to select any faith or none at all."[49]

Religion and irreligion. In a law review commentary, Stevens once again wrote that the intent of the Framers with respects to Christianity, has given way to a tolerance for all religions or none at all.[50]

> ". . .it is equally clear that the First Amendment also protects those individuals who profess no faith at all, the agnostic or the atheist. . .no logical dividing line can be drawn between Christian faiths and other faiths without going all the way and requiring tolerance for all kinds of personal beliefs and all kinds of matters of conscience. . ."[51]

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[49]*Id.* at 2488.

[50]John Paul Stevens, *Commentary*, 49 U. Pitt. L. Rev. 723, (1988).

[51]*Id.* at 725.

The above quotation reaffirmed the same principle that Stevens espoused in *Wallace*, when he stated that contemporary political interests go beyond forestalling intolerance among varying Christian sects, which was a concern for the Framers, to forestalling intolerance among all sects or religions and the disbeliever.[52]

Sectarian purpose and endorsement. By virtue of Senator Holmes' testimony and the fact that a moment of silence statute was already on the books in Alabama, Stevens concluded that the motivation for the statute was purely sectarian.[53] The inclusion of the phrase "or voluntary prayer" into the existing statute demonstrated that the Legislature held such a practice to be a favored activity,[54] and therefore an unconstitutional endorsement of religion.[55]

Displays of Religious Symbols.

In *Allegheny v. ACLU of Greater Pittsburgh,* Stevens undertook an analysis of the First Amendment in which he concluded that a textual interpretation of the Amendment, and the debate surrounding its passage, demonstrate that the Establishment Clause intends a separation of government and religion. Upon the issue

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[52]Wallace, *supra* note 46 at 2489. *See also*, Capital Square Review and Advisory Board v. Pinette, *infra* note 64.

[53]Wallace, *id.* at 2490.

[54]*Id.* at 2492.

[55]*Id.* at 2490.

at hand, he wrote:

> "In my opinion, the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property."[56]

The context of a particular display is an important factor as to whether it implicates the Establishment Clause. To Stevens, the context of both of the displays in *Allegheny*, gave rise to Establishment Clause objections.

Text of the Amendment. In *Allegheny*, Stevens extended his reasoning articulated in *Wallace*, in which he opined that religion and irreligion ought to be equally tolerated, to an admonition that the text of the First Amendment provides no vehicle for supporting religion in any manner. Employing strong language, he wrote:

> "Whereas earlier drafts had barred only laws 'establishing' or 'touching' religion, the final text interdicts all laws 'respecting an establishment of religion.' This phrase forbids even a partial establishment, not only of a particular sect in favor of others, but also of religion in preference to nonreligion. . .Like 'touching,' 'respecting' means concerning or with reference to. But it also means with respect--that is 'reverence,' 'good will,' 'regard'--to. Taking into account this richer meaning, the Establishment Clause,

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[56]County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (Stevens, J., concurring in part and dissenting in part).

> in banning laws that concern religion, especially prohibits those that pay homage to religion."[57]

Stevens' novel interpretation of the text of the Clause, offered above, would mean that the Framers might have written the Clause to state that "Congress shall make no laws which concern or pay homage to religion. . ." Given this understanding, the Clause would forestall any governmental interference with, or support of, religion. It would, to him, more clearly define the "wall of separation" mandate of the Establishment Clause.

Events surrounding the passage of the Amendment. In *Allegheny*, Stevens argued that the single sect establishments that had existed in several of the colonies had become multiple, or nondiscriminatory, establishments by the end of the 1780's. Therefore, he said, the framing of the Establishment Clause precluded not only colonial era single sect establishments, but the multiple ones that existed at the time of the framing of the Amendment.[58]

Stevens also stated that there would be reason to believe that the scope of the Amendment would have encompassed only single sect establishments, had Madison's

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[57] *Id.* at 649.

[58] *Id.* at 646.

first draft been adopted in its original language.[59] However, since the Amendment was changed from its originally narrow draft language to a broader final version, the Framers could only have meant for the Clause to encompass more than that which Madison included. In 1989, he again commented on the issue, when he wrote:

> "When the First Amendment was adopted, any establishment that remained was nonpreferential. The Court's quotation of Justice Story [in *Lynch v. Donnelly*] is thus incompatible because it assumes that the framers were choosing between a single established church and a policy of nondiscrimination, whereas in fact, non-preferential support of multiple establishments was another option that was available and was prohibited by the clause."[60]

Another novel argument posited by Stevens is that religion means more than a system of beliefs; it is, rather, a set of values founded upon a belief in God. Therefore, the proscription of an establishment of religion, in the Clause, means that not only are belief systems, or sects, to be disestablished, but also are all those things founded upon a belief in God. Therefore, government may not legislate on matters that are founded on such a belief:

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[59]*Id.* at 647. Madison's original draft read: "The civil rights of none shall be abridged on account of religious beliefs 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."

[60]Stevens, J. *A Judge's Use of History--Thomas E. Fairchild Inaugural Lecture*, 1989 Wis. L. Rev. 223, 223-24 (1989).

> "But even in those states [where multiple establishments existed] and even among members of the established churches, there was widespread opposition to multiple establishments because of the social divisions they caused. Perhaps in response to this opposition, subsequent drafts broadened the scope of the Establishment Clause from 'any national religion' to 'religion,' a word understood primarily to mean a virtue, as founded upon reverence to God; and expectation of future rewards and punishments, and only secondarily 'a system of divine faith and worship' as opposite to others."[61]

Context. Stevens argued that if a courtroom were to have a carving of Moses carrying the Ten Commandments, with no other carvings visible, then the display would be of a religious nature. If, however, that same display were accompanied by a carving of Napoleon Bonaparte and John Marshall, it would lose its religious character and become a display about law.[62] To Stevens, both of the *Allegheny* displays conveyed a religious message, therefore, both were unconstitutional.

> ". . .displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does

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[61]Allegheny, *supra* note 56 at 647-48.

[62]*Id.* at 652-53.

not allow public bodies to foment such disagreement."[63]

Stevens wrote upon the issue in *Capital Square Review Board v. Pinette*,[64] as a display case, rather than as an access case. In his dissent, he opined that an unattended statue placed in a park adjacent to the statehouse in Columbus, Ohio, was unconstitutional. In that case, like the hypothetical carving of Moses in *Allegheny*, the unattended cross on the statehouse lawn was unconstitutional since there was nothing to detract from its religious message.

> "At least when religious symbols are concerned, the question of whether the state is 'appearing to take a position' is best judged from the standpoint of a 'reasonable observer.' It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses. A paramount purpose of the Establishment Clause is to protect such a person from being made to feel like an outsider in matters of faith."[65]

Access Issues.

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[63] *Id.* at 651.

[64] Capital Square Review Board v. Pinette, 132 L Ed 2d 650 (1995) (Stevens, J., dissenting).

[65] *Id.* at 686.

In *Board of Education of Westside v. Mergens*,[66] Stevens made two arguments as to why the majority's holding in that case was in error. He argued that the majority incorrectly interpreted the Equal Access Act and, therefore, an Establishment Clause violation was manifested.

The Equal Access Act, legislative intent. Stevens opined that it was not Congress' intent to state that when a club which was not a part of the formal body of courses offered at the school existed, such a club would trigger the Act.

> "Can Congress really have intended to issue an order to every public high school in the Nation stating, in substance, that if you sponsor a chess club, a scuba diving club or a French club--without having formal classes in those subjects--you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be? I think not."[67]

In a subsequent article, Stevens articulated the same point when he stated that "[a]n interpretation that would produce an absurd result is to be avoided because it is unreasonable to believe that a legislature intended such a result."[68]

Taking the argument further, he noted that the majority viewed noncurricular as

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[66]Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990) (Stevens, J., dissenting).

[67]*Id.* at 271.

[68]John Paul Stevens, *The Shakespearean Canon of Statutory Construction*, 140 U. Penn. L. Rev. 1373, 1382 (1992).

meaning the opposite of curricular. In the majority's view, if curricular means 'a part of the body of courses,' then noncurricular, in the opposite, would thus mean 'not a part of the body of courses.' This, to Stevens, is an incorrect interpretation of the word noncurricular.

> ". . .neither Webster nor Congress had authorized us to assume that 'noncurriculum' is a precise antonym to 'curriculum.' 'Nonplus,' for example, does not mean 'minus,' and it would be incorrect to assume that a 'nonentity' is not an 'entity' at all."[69]

Stevens' interpretation of noncurriculum related, one that to him would have produced a more reasonable result, could be described as having as its purpose or a part of its purpose "the advocacy of partisan, theological, political or ethical views."[70]

> "Accordingly, as I would construe the Act, a high school could properly sponsor a French club, a chess club, or a scuba diving club simply because their activities are fully consistent with the school's curricular mission, it would not matter whether formal courses in any of those subjects--directly or indirectly--were being taught. . ."[71]

Such an interpretation, to Stevens, would make an Establishment Clause analysis unnecessary because religious groups would be foreclosed. The majority's

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[69]Mergens, *supra* note 66 at 291.

[70]*Id.* at 276.

[71]*Id.*

interpretation of the Act, however, gave rise to a further Establishment Clause analysis.

Nondiscriminatory access and establishment. The Court's interpretation of the Equal Access Act, in Steven's opinion, created an Establishment Clause issue, where a proper interpretation of the Act would have avoided one. Regardless, he wrote in *Mergens* that on the establishment issue that the majority "comes perilously close to an outright command to allow organized prayer, and perhaps the kind of religious ceremonies in *Widmar*, on school premises."[72]

Government Empowerment of Religious Bodies

In *Board of Education of Kiryas Joel v. Grumet*[73] Stevens derided the statute that created the special school district as violative of the Establishment Clause. The New York Legislature's decision to set up a special school district allowed Satmar parents to keep their children segregated from their non-Satmar neighbors, thereby increasing the chances that they will remain Satmars into adulthood. Such a statute, one which "pays homage"[74] to the Satmar's religious beliefs is, therefore, unconstitutional. He summed up this extension of Souter's reasoning, by stating:

> "Affirmative state action in aid of segregation of this character is unlike the evenhanded distribution of a public benefit or service, 'a

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[72]*Id.* at 287.

[73]Board of Education of Kiryas Joel v. Grumet, 114 S.Ct. 2481 (1994) (Stevens, J., concurring).

[74]*See*, Allegheny, *supra* note 56.

> release time' program for public school students involving no public premises or funds, or a decision to grant an exemption from a burdensome general rule. It is, I believe, fairly characterized as establishing, rather than, accommodating, religion."[75]

Summary of the Analysis of Stevens

An application of the theoretical criteria demonstrates Justice Steven's adherence to a philosophy of separationism on all of the Establishment Clause issues upon which he has written. He has argued that the Establishment Clause, as understood by the Framers and interpreted by the *Everson* Court, mandates the "high and impregnable wall," envisaged by Jefferson.

Sandra Day O'Connor

In order to analyze the Establishment Clause writings of Justice O'Connor, one must first study the endorsement refinement of the *Lemon* test, which she espoused in her 1984 concurrence in *Lynch v. Donnelly.*[76] The endorsement refinement, in her view, would make the three prongs "relate to the principles enshrined in the Establishment Clause."[77] Her endorsement analysis states:

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[75]Kiryas Joel, *supra* note 73 at 2495.

[76]Lynch v. Donnelly, 465 U.S. 668 (1984) (O'Connor, S. concurring).

[77]*Id.* at 688-89.

> "Endorsement [of religion] sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."[78]

She articulated her view on the propriety of employing the endorsement analysis in several of her written opinions, dissents and scholarly works.

In the *Journal of Law and Religion*, O'Connor gave an analysis of events leading up to, and contemporaneous with, the passage of the First Amendment that, in her view, lend credence to the notion that endorsement is a proper constitutional standard.

> "In late seventeenth-century England, religious dissenters were tolerated but were denied political rights. This situation persisted in the colonies, where local orthodoxy was the rule rather than the exception. Dissenters were often permitted to worship but were 'excluded from universities and disqualified for office, whether civil, religious or military.' In the Puritan colony of Massachusetts, for example voters had to be certified as 'orthodox in the fundamentals of religion,' with the result that the colony was governed by a small church oligarchy. Thomas Jefferson's original

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[78] *Id.* at 688.

> religious freedom bill for Virginia accordingly decrees that 'our *civil rights* have no dependence on our religious opinions' and that therefore opinions concerning matters of religion 'shall in no-wise diminish, enlarge or affect [our] civil capacities.' And James Madison's first proposed version of what became our Establishment Clause provided that '[t]he civil rights of none shall be abridged on account of religious belief or worship.'"[79]

While not an outright rebuff of *Lemon*, the endorsement refinement that O'Connor offered does seek to make Establishment Clause adjudication more historically sound and easily applied.

> "The endorsement test, in my view, captures the essential meaning of the Establishment Clause and provides a judicially manageable and analytically sound alternative to the more traditional 'separationist' and 'accommodationist' views." [80]

Purpose and effect. To O'Connor, the purpose prong of the *Lemon* test is best applied by asking whether government intends to "convey a message of endorsement or disapproval of religion."[81] Similarly, with respect to the effect prong, she stated that "[w]hat is crucial is that a government practice not have the effect of communicating

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[79]Sandra day O'Connor, *Foreward: The Establishment Clause and Endorsement of Religion*, 8 J. Law & Religion, 1 (1990) (Citations omitted, italics in original).

[80]*Id.* at 3.

[81]Lynch, *supra* note 76 at 691.

a message of government endorsement or disapproval of religion."[82]

Entanglement. O'Connor finds a lack of utility in the entanglement inquiry of the *Lemon* test.[83] She opined that the decisions in *Meek*, *Wolman* and *Aguilar*, which turned on entanglement, are results which are inconsistent with the meaning of the Establishment Clause.

> "I would accord these decisions [*Meek* and *Wolman*] the appropriate deference commanded by the doctrine of *stare decisis* if I could discern logical support for their analysis [84]. . .As Justice Rehnquist has pointed out, many of the inconsistencies in our Establishment Clause decisions can be ascribed to our insistence that parochial aid programs with a valid secular purpose and effect may still be invalid by virtue of undue entanglement. . .To a great extent, the anomalous results in our Establishment Clause cases are attributable to the entanglement prong."[85]

The problems with a unitary approach. O'Connor employed the endorsement refinement extensively between its initial iteration and 1994. That year, in her

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[82]*Id.* at 692.

[83]Aguilar v. Felton, 105 S.Ct. 3232, 3243 (1985) (O'Connor, S., dissenting).

[84]*Id.* at 3245-46 (italics in original).

[85]*Id.* at 3247.

concurrence in *Board of Education of Kiryas Joel v. Grumet*,[86] she came to the conclusion that no unitary approach had as yet been articulated that would suffice as an analytical aid for Establishment Clause adjudication.

> "It is always appealing to look for a Grand Unified Theory that would resolve all the cases that may arise under a particular clause. . . .[a]nd setting forth a unitary test for a broad set of cases may sometime do more harm than good. . .[a]s the Court's opinion today shows, the slip away from Lemon's unitary approach is well under way. . .I think a less unitary approach provides a better structure for analysis. . .[a]lternatives to Lemon suffer from a similar failing when they lead us to find 'coercive pressure' to pray when a school asks listeners--with no threat of legal sanctions--to stand or remain silent during a graduation prayer. . .[b]ut I think it is more useful to recognize the relevant concerns in each case on their own terms, rather than trying to squeeze them into language that does not really apply to them."[87]

While she seemed to back away from endorsement as a unitary standard in *Kiryas Joel*, she, nevertheless, continued to apply it in post-*Kiryas Joel* cases, because, in her opinion, the relevant issues in each of those cases were best adjudicated employing the

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[86]Board of Education of Kiryas Joel v. Grumet, 114 S.Ct. 2481 (1994) (O'Connor, S., concurring in part and concurring in the judgement).

[87]*Id.* at 2498-2500.

endorsement refinement.

State Aid to Parochial Schools

In *Aguilar*, O'Connor dissented because of the majority's reliance upon the entanglement inquiry in that case. She saw no purpose or effect violations and made note of the fact that in the 19 years of the Title I program, there had been no complaint about teachers proselytizing to students.[88] This, to O'Connor, was evidence that entanglement of the sort feared in that case and in its companion case *Grand Rapids v. Ball*[89] was unrealistic. To O'Connor, neither experience nor intuition could demonstrate that simply entering a parochial school would cause otherwise professional educators to break the rules and begin to proselytize their students.[90] In addition, the level of supervision necessary to ensure that proselytization did not occur, another possible entanglement noted by the majority, was no more than teachers endure as part of normal supervisory oversight.[91]

She concurred with the portion of the Court's opinion relative to the Community Education Program. The distinction between that program and the remedial education

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[88]Aguilar, *supra* note 83 at 3244-45.

[89]Grand Rapids v. Ball, 105 S.Ct. 3216 (1985) (O'Connor, S., concurring in the judgement in part and dissenting in part).

[90]Aguilar, *supra* note 83 at 3246.

[91]*Id.* at 3247.

program in *Aguilar* and the shared time program in *Grand Rapids* rested in the fact that the teachers in the Community Education Program were parochial school teachers, hired by the public schools to teach parochial school students. The former programs employed public school teachers to teach parochial school students. It was the primary employer of the teacher, not the venue of instruction that was, in her mind, the issue.

> "When full time parochial school teachers receive public funds to teach secular courses to their parochial school students under parochial school supervision, I agree that the program has the perceived and actual effect of advancing the religious aims of the church-related schools."[92]

Prayer

O'Connor agreed with the majority in *Wallace v. Jaffree* that the practice of setting aside a moment of silence for the purpose of voluntary prayer violated the Establishment Clause. In her words:

> "The Court does not hold that the Establishment Clause is so hostile to religion that it precludes the States from affording schoolchildren an opportunity for silent prayer. . .the Court holds only that Alabama has intentionally crossed the line between creating a quiet moment during which those so inclined may pray and affirmatively

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[92]Grand Rapids, *supra* note 89 at 3231.

endorsing the particular religious practice of prayer."[93]

O'Connor said that as Alabama already had a moment of silence statute on the books, to rewrite the statute to include voluntary prayer, made prayer seem a practice favored by the legislature, thereby impermissibly endorsing religion. While the endorsement test does not preclude government from acknowledging religion, or from taking religion into account in making law and policy, the Establishment Clause does not countenance the type of affirmative favoring of prayer, as was in evidence in *Wallace*.[94]

Displays of Religious Symbols

O'Connor has written on this issue in three different opinions. Each one gives clues as to the elements of the endorsement analysis that she deems essential to reaching a proper conclusion. In *Lynch*, O'Connor first stated her endorsement refinement and concluded that the creche display in that case did not send a message of government endorsement of religion as the creche was part of a larger display that included many readily identifiable scenes of the winter season.[95]

Context. In a 1989 case that saw the constitutionality of two separate displays in Pittsburgh challenged under the Establishment Clause, Justice O'Connor made

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[93]Wallace v. Jaffree, 105 S.Ct. 2479, 2505 (1985) (O'Connor, S., concurring in the judgement).

[94]*Id.* at 2497.

[95]Lynch, *supra* note 76 at 692-93.

reference to the fact that the context of such displays is central to whether or not it would pass constitutional muster.[96] The first display, a creche alongside the Grand Staircase of the Allegheny County Courthouse was deemed by O'Connor to be violative of the Establishment Clause in that there was nothing to detract from the religious context of the display.[97] The display therefore, impermissibly endorsed religion.

The second display in dispute, involved a menorah, a Christmas tree and a sign saluting liberty. In O'Connor's view, the tree was a largely secular symbol which, combined with the sign, rendered the display constitutional since the display, rather than endorsing religion, was concerned with religion in a free society.[98] She noted that "the message of pluralism conveyed by the city's combined holiday display is not a message that endorses religion over nonreligion."[99]

In articulating why the displays were adjudicated differently, she stated that government practices must be judged on their unique circumstances to make a determination of endorsement or disapproval or religion.[100]

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[96]County of Allegheny v. ACLU, 492 U.S. 573 (1989) (O'Connor, S., concurring in part and concurring in the judgement).

[97]*Id.* at 626.

[98]*Id.* at 634.

[99]*Id.* at 635.

[100]*Id.* at 625.

". . .to be sure, the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any other test that is sensitive to context, it may not always yield results with unanimous agreement at the margins."[101]

Reasonable observer. In another display case, O'Connor argued that the context of the display in question must be viewed as a reasonable observer would view the display. In her concurring opinion in *Capital Square Review Board v. Pinnette,* O'Connor opined that a cross in a public park adjacent to the state capital in Columbus, Ohio did not violate the Establishment Clause in that there was no realistic danger that a reasonable observer would view the display as governmental endorsement of religion.[102]

She argued the reasonable observer standard on two fronts. First, she disagreed with the plurality when it stated that "it has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may--*even reasonably*--confuse an incidental benefit to religion with state endorsement."[103] O'Connor refuted this argument, stating:

"On the contrary, when the reasonable observer would view a

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[101] *Id.* at 629.

[102] Capital Square Review and Advisory Board v. Pinette, 132 L.ED. 2d 650, 670 (1995) (O'Connor, S., concurring in part and concurring in the judgement).

[103] *Id.* at 665 (italics in original).

> government practice as endorsing religion, I believe, that it is our duty to hold the practice invalid. . .When the government's operation of a public forum has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages the result, the Establishment Clause is violated."[104]

The second argument, relative to the reasonable person standard, took issue with Justice Steven's dissent. To O'Connor, Steven's admonition that "[f]or a religious display to violate the Establishment Clause, I think it is enough that *some* reasonable observers would attribute a religious message to the State,"[105] takes the reasonable observer standard too far.

> "I therefore disagree [with Stevens] that the endorsement test should focus on the actual perception of individual observers who naturally have differing degrees of knowledge. Under such an approach, a religious display is necessarily precluded so long as some passerby would perceive a governmental endorsement of religion. . .A state has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable. . .It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the

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[104] *Id.* at 670-71.

[105] *Id.* at 691 (Stevens, J., dissenting) (italics in original).

religious displays appear."[106]

Given the fact that the Ku Klux Klan, in *Pinette*, offered to accompany the display with a marker denoting who was responsible for its presence, O'Connor determined that a reasonable observer would not determine that the cross carried with it a governmental endorsement of religion. The display, therefore was correctly held to be constitutional.

Access Issues

In her majority opinion in *Board of Education of Westside Community Schools v. Mergens*,[107] Justice O'Connor opined that the Equal Access Act, which was enacted to prevent discrimination against religious and other types of speech, survives scrutiny under the Establishment Clause.[108]

> "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion which the Free Speech and Free Exercise Clauses protect."[109]

With respect to effect, she noted that the broad spectrum of noncurriculum related student clubs which existed at Westside High School, counteracted any possible

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[106] *Id.* at 672-73.

[107] Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

[108] *Id.* at 249.

[109] *Id.* (italics in original).

message of endorsement of or preference for religion or a particular religious belief.[110] She reached a similar conclusion in *Rosenberger v. University of Virginia*,[111] in which she opined that there was no danger of the perception of government endorsement of a student group's religious perspective. In that case, the group, one of many that operated independently of the University of Virginia, was denied funding for its publication based on its religious nature. O'Connor made note of the fact the funds flowed directly from the university to a third party provider which served to mitigate the possibility that public money would be used for unauthorized sectarian ends. She therefore agreed with the majority that the funding disbursement was not violative of the Establishment Clause.[112]

Government Empowerment of Religious Bodies

In *Kiryas Joel*, O'Connor reached the conclusion that the legislation which allowed the Satmars to set up a special school district violated the principles of government neutrality toward religion. She offered that while there is nothing improper about a legislature attempting to accommodate the needs of a religious group through generally applicable legislation, the law in *Kiryas Joel* singled out a group for favorable

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[110]*Id.* at 252.

[111]Rosenberger v. Rector and Visitors of the University of Virginia, 132 L. Ed 2d 700 (1995) (O'Connor, S., concurring).

[112]*Id.* at 728-29.

treatment based on its religious character.[113]

> "We have time and again held that the government may not treat people differently based on the God or gods they worship or don't worship. . .Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."[114]

O'Connor backed away from endorsement as a unitary standard of adjudication of Establishment Clause disputes in *Kiryas Joel*. She acknowledged endorsement as a proper yardstick for adjudicating issues such as prayer and display of religious symbols, but she conceded that other issues may be better judged employing different standards.[115]

Summary of the Analysis of O'Connor

Justice O'Connor's Establishment Clause philosophy does not easily apply itself to the tenets of either separationism or nonpreferentialism. For instance, she has noted on various occasions that religion may not be favored over irreligion, (a tenet of separationism). Yet, in two cases in which her vote yielded a separationist result, had minor changes been made to the statute her vote might have been nonpreferentialist. For example, in *Wallace* she noted that if there was an indication that a secular purpose

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[113]Kiryas Joel, *supra* note 86 at 2497-98.

[114]*Id.* at 2497.

[115]*Id.* at 2500.

existed, one that was not a sham, the practice may have survived Establishment Clause scrutiny.[116] In *Kiryas Joel* she wrote that the case was a close one, that might have passed muster if there were a similarly situated group that would receive the same benefits as the Satmars. Since the Satmars were the only known group in New York to require the special legislation, she was compelled to make a separationist determination.[117]

Since Justice O'Connor has shied away from consistent application of her endorsement refinement as a unitary Establishment Clause standard, the nature of adjudication under the Clause becomes, for her, context-specific. In the state aid cases in which she has written, the conclusions are mixed, based on the particular context of each. Where public school teachers were hired to teach parochial school students, the practice was deemed constitutional, whereas when those same students were to be instructed by parochial school teachers hired by the public school, she deemed the practice to be unconstitutional.

It is clear that in matters of governmental endorsement of prayer, she would hold such practices as violative of the Establishment Clause. In *Wallace*, while she noted that moments of silence were constitutional, moments of silence for the purpose of

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[116]Wallace, *supra* note 93 at 2500.

[117]Kiryas Joel, *supra* note 86 at 2497-98.

voluntary prayer are not. Additionally, while she offered no written opinion in *Lee v. Weisman*, she later made note of her vote in that case and that the outcome was correctly decided.[118] Prayer is an issue upon which Justice O'Connor's philosophy is consistently separationist.

The constitutionality of displays of religious symbols are dependent upon the particular context of the display and whether a reasonable observer would deem that religion enjoyed governmental endorsement based on the context of the display. In the cases cited above, the creche that was clearly religious in context, without anything to detract from the religiosity of the message was violative of the Establishment Clause, whereas the creche that was a part of a seasonable celebration was not.

Religious groups access to public fora enjoy the support of Justice O'Connor, for to deny religious groups equal access would violate their Free Speech and Free Exercise rights. On this issue her philosophy is nonpreferentialist.

As noted above, while she agreed in *Kiryas Joel* that the government empowerment of religious bodies in that case violated the Establishment Clause, she made note of the fact that had it not been for the *Aguilar* decision, the Satmars would have not needed the special legislation.[119] Additionally, she might have determined that

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[118] *Id.* at 2499.

[119] *Id.* at 2498 "It is this Court's insistence on disfavoring religion in Aguilar that led New York to favor it here."

the legislation itself was constitutional if it were apparent that the statute could have been made neutrally applicable.

In her concurrence in *Rosenberger,* O'Connor articulated her predilection for context specificity when she wrote:

> "When bedrock principles collide, they test the limits of categorical obstinacy and expose the flaws and dangers of a Grand Unified Theory that may turn out to be neither grand nor unified. The Court today does what courts must do in many Establishment Clause cases--focus on specific features of a particular government action to ensure that it does not violate the Establishment Clause.[120]

Antonin Scalia

Justice Scalia weaves four themes throughout his opinions and scholarly writings that serve as underpinnings of his legal philosophy regarding interpretation of the Establishment Clause. They are, 1) that an abandonment of the *Lemon* test is desirable as it has no grounding in the history of the First Amendment; 2) the traditional practices of Americans should be adhered to in First Amendment jurisprudence; 3) the Establishment Clause forbids a single sect establishment and 4) the text of laws and the Constitution must guide judges in order that they do not make

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[120]Rosenberger, *supra* note 111 at 730.

law from the bench.

Scalia's Establishment Clause philosophy is demonstrated in his dissent in *Board of Education of Kiryas Joel v. Grumet*[121] in which he stated:

> "I do not think that the Establishment Clause prohibits formally established state churches and nothing more. I have always believed, and all of my opinions are consistent with this view, the Establishment Clause prohibits the favoring of one religion over another."[122]

Similarly, in his dissent in *Lee v. Weisman*[123] and his concurrence in *Lamb's Chapel v. Center Moriches School District*,[124] he again made the claim that government may prefer religion over irreligion:

> "I must make one final observation: the founders of our republic knew the fearsome political potential of sectarian religious belief to generate civil dissention and civil strife. And they also knew that nothing, absolutely nothing, is so inclined to foster among religious believers of various faiths a tolerance-no an affection-for one another than voluntarily joining in prayer together to the God whom

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[121]Board of Education of Kiryas Joel v. Grumet, 114 S.Ct. 2481 (1994) (Scalia, A., dissenting).

[122]*Id.* at 2514.

[123]Lee v. Weisman, 112 S.Ct. 2649 (1992) (Scalia, A., dissenting).

[124]Lambs Chapel v. Center Moriches School District, 115 S.Ct. 2141 (1995).

> they all worship and seek. . .To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me to be the minimal inconvenience of standing or even sitting in respectful silence, is as senseless in policy as it is unsupported by law."[125]

Further, he noted:

> "What a strange notion, that a Constitution which *itself* gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general. . ."[126]

State Aid to Parochial Schools

Justice Scalia has not treated this topic directly in an opinion. He did, however, offer some insight into the issue in his dissent in *Kiryas Joel* when he noted:

> "I heartily agree (with Kennedy) that these cases (*Grand Rapids* and *Aguilar*), so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity." [127]

Prayer

In his dissent in *Lee v. Weisman*, Scalia made a strong pitch for the constitutionality of nondiscriminatory aid to religion. In so doing, he took exception

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[125]Lee, *supra* note 123 at 2682.

[126]Lambs Chapel, *supra* note 124 at 2151 (italics in original).

[127]Kiryas Joel, *supra* note 121 at 2515.

to the majority's holding that the graduation invocation and benediction at Nathan Bishop Middle School in Providence, Rhode Island was constitutionally impermissible. He made his argument on three points that reverberate throughout his Establishment Clause opinions.

Tradition. Scalia began his argument with his oft-stated proposition that adherence to national traditions is the proper means of constitutional adjudication. To Scalia, the Court's decision in *Lee* was "conspicuously bereft of any reference to history." He wrote that the Court, in holding graduation prayers unconstitutional, "lays waste a tradition that is as old as graduation ceremonies . . .the tradition of nonsectarian prayer to God at public celebrations generally."[128]

Further, he stated:

> "Three terms ago, I joined in an opinion recognizing that the Establishment Clause must be construed in light of the '[g]overnment policies of accommodation, acknowledgment, and support of religion [that] are an accepted part of our political and cultural heritage.'"[129]

Scalia then synthesized his tradition argument with several references to constitutional history. He began this portion of his comments noting that there are a

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[128]Lambs Chapel, *supra* note 124 at 2678-79.

[129]Lee, *supra* note 123 at 2678.

number of historical examples of invocations to God in public ceremonies including George Washington's inaugural address, Thomas Jefferson's inaugural address, George Washington's day of Thanksgiving at the conclusion of the First Congress and prayer at public school graduations dating back to 1868, among others.[130]

He continued his historical analysis by observing:

> "The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty.* Typically, attendance at the state church was required; only clergy of the official church could lawfully perform sacraments; and dissenters, if tolerated, faced an array of civil disabilities."[131].

He then concluded that invocations are "characteristically American" and wrote:

> "The Framers were indeed opposed to coercion of religious worship by the National government; but, as their own sponsorship of nonsectarian prayer indicates, they understood that speech is not coercive."[132]

Lemon. Although the *Lee* decision did not employ the *Lemon* test, Scalia nonetheless, took an opportunity to make mention of his dissatisfaction with it. He

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[130] *Id.* at 2679.

[131] *Id.* at 2683 (italics in original).

[132] *Id.* at 2684.

made his point that the *Lemon* test, in his view, was not devised from longstanding constitutional practices and has received "well earned criticism from many members of this Court."[133] He concluded his remarks regarding *Lemon* by noting that the Court demonstrated *Lemon's* irrelevance by ignoring it, which was, in his view, a "happy byproduct of the Court's otherwise lamentable decision."[134]

Lawmaking from the bench. Another theme which finds its way into many of Scalia's opinions and writings is his notion that jurists should avoid making law, leaving such practices to elected representatives.

> ". . .we judges cannot create [rules] out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided."[135]

Contrasting the benefits of traditional practice with the perils of judge-made law he wrote in *Lee*:

> ". . . that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices

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[133] *Id.* at 2685.

[134] *Id.*

[135] *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1183 (1989) (*hereinafter*, Rule of Law).

> of our people."[136]

A synthesis of his theories of tradition and lawmaking from the bench occurred in the pages of the Cincinnati Law Review. In it he wrote:

> "It would be hard to count on the fingers of both hands and on the toes of both feet, yea, even on the hairs of one's youthful head, the opinions that have in fact been rendered not on the basis of what the Constitution originally meant, but on the basis of what the judges currently thought it desirable to mean."[137]

Access Issues

In his majority opinion in *Pinette*, Scalia opined that government may place content-based restrictions on speech only if doing so serves a compelling state interest.[138] In *Pinette*, no such interest was manifested and therefore the content of that speech was violative of neither the Speech nor Religion Clauses of the First Amendment.

In *Lamb's Chapel* the Supreme Court found itself wrestling with an access issue pitting the requirement of disestablishment, on the one hand, with free speech and free exercise on the other. Scalia attacked the notion that allowing nondiscriminatory access

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[136]Lee, *supra* note 123 at 2679.

[137]*Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 852 (1988) (*hereinafter* Originalism).

[138]Capital Square Review and Advisory Board v. Pinette, 132 L.Ed. 2d 650, 661 (1995).

of a religious entity to a public school's facilities was unconstitutional, even under the Establishment Clause. The crux of his argument centered on the Establishment Clause as barrier to single sect establishments. Secondarily, he chided the majority's mention of *Lemon* in the decision.

Lemon. Although the majority made only a cursory mention of the *Lemon* test in *Lamb's Chapel*, Scalia did not miss the opportunity to share his views on the tripartite test.

> "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence frightening the little children and school attorneys. . ."[139]

Further, he noted:

> "For my part, I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced."[140]

The First Amendment as a barrier to single sect establishment. Scalia made the

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[139]Lambs Chapel, *supra* note 124 at 2148. *But see*, n. 7 in which Justice White rebutted Scalia stating "[w]hile we are somewhat diverted by Justice Scalia's evening at the cinema, we return to the reality that there is a proper way to inter an established decision and *Lemon*, however frightening it may be to some, has not been overruled as yet.

[140]*Id.* At 2150.

argument that the Framers intended to preclude single sect establishment and that, consistent with the Court's finding in *Lamb's Chapel*, nondiscriminatory aid to religion is constitutionally permissible .

> "As for the asserted Establishment Clause justification I would hold, simply and clearly, that giving Lamb's Chapel nondiscriminatory access to school facilities cannot violate that provision because it does not signify state or local embrace of a particular religious sect."[141]

While *Lee* and *Kiryas Joel* were cases dealing with differing Establishment Clause issues, Scalia made the same argument in those cases, opining in *Lee* that single sect establishments is what the Establishment Clause is intended to prevent.[142] In *Kiryas Joel,* he noted that the Founding Fathers intended the Establishment Clause "to insure that no one powerful sect or combination of sects could use political or governmental power to punish dissenters."[143]

Government Empowerment of Religious Bodies

In *Board of Education of Kiryas Joel v. Grumet,* Justice Scalia articulated three themes which are consistent in all of his Establishment Clause holdings. He discussed

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[141]*Id.* at 2151.

[142]Lee, *supra* note 123 at 2683.

[143]Kiryas Joel, *supra* note 121 at 2507.

his ideas regarding traditional practices, his dissatisfaction with *Lemon* and his disagreement with judge-made law.

Lemon. Scalia again took aim at *Lemon*, noting in *Kiryas Joel*:

> ". . .the problem with (and allure of) Lemon has not been that it is 'rigid, but rather that in many applications it has been utterly meaningless, validating whatever result the Court would desire."[144]

Scalia's disenchantment with the *Lemon* test can be traced back to one of his early opinions in which he took issue with the Court's application, and subsequent finding of unconstitutionality upon, *Lemon's* purpose prong.[145] In *Aguillard*, he noted that:

> "[t]he author of *Lemon*, writing for the Court has said that invalidation under the purpose prong is appropriate when 'there [is] *no question* that the statute or activity was motivated *wholly* by religious considerations."[146]

He continued his discussion of purpose enunciating that the three tenets of purpose:

> ". . .[the Court's previous decisions] in no way imply that the Establishment Clause forbids legislators merely to act on their religious convictions. . .Similarly, we will not presume that a law's purpose is to advance religion merely because it 'happens to

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[144] *Id.* at 2515.

[145] Edwards v. Aguillard, 107 S.Ct. 2573 (1987) (Scalia, A., dissenting).

[146] *Id.* at 2593 (italics in original).

> coincide or harmonize with the tenets of some or all religions . . . Finally, our cases indicate that even certain kinds of governmental actions undertaken with the specific intention of improving the position of religion do not 'advance religion' as that term is used in *Lemon*."[147]

And. . .

> "In sum, even if one concedes for the sake of argument that a majority of the Louisiana Legislature voted for the Balanced Treatment Act partly in order to foster (rather than merely eliminate discrimination against) Christian fundamentalist beliefs, our cases establish that that alone would not suffice to invalidate the Act, so long as there was a genuine secular purpose."[148]

While he made a part of his argument around secular purpose in *Aguillard*, he concluded his discussion noting that he is "pessimistic" in his evaluation of the purpose prong,[149] and would be prepared to reevaluate the *Lemon* test as a standard, offering:

> "Abandoning *Lemon's* purpose test--a test which exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment and, as

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[147] *Id.* at 2594-95.

[148] *Id.* at 2604.

[149] *Id.* at 2605.

> today's decision shows, has wonderfully flexible consequences--would be a great place to start."[150]

It is interesting to note, in light of his previous comments regarding *Lemon* noted above, that in *Kiryas Joel* he seems to argue (although he falls short of using the precise terminology) that nonsecular purpose and effect must be present to invalidate a statute. He discussed secular basis (purpose), stating:

> "To establish the unconstitutionality of a facially neutral law, on the mere basis of its asserted religiously preferential (or discriminatory) effects--or at least to establish it in conformity with our precedents, [the Court] must be able to show the absence of a neutral secular basis." . . .There is, of course no possible doubt of a secular basis here."[151]

And continued his discussion with secular effect:

> "In order to invalidate a facially neutral law, [the Court] would have to show not only that legislators were aware that religion caused the problems addressed, but also that the legislature's proposed solution was motivated by a desire to disadvantage or benefit a religious group (i.e. to disadvantage or benefit them *because of their religion).*"[152]

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[150]*Id.* at 2607.

[151]Kiryas Joel, *supra* note 121 at 2508-09.

[152]*Id.* at 2510 (italics in original).

Tradition. Scalia derided the majority's decision in *Kiryas Joel* by noting that the history and traditions of America would support his view that the Satmar Hasidic sect should be allowed to create a special school district for the education of their handicapped children. He noted that the settling of North America is replete with stories of groups of religious people setting up towns and villages and that "it is preposterous to suggest that the civil institutions of these communities, separate from their churches, were constitutionally suspect."[153] He lamented the decision in part because he viewed the majority as guilty of nonadherence to traditional principles, and therefore, as "disfavoring" religion.[154] He argued that:

> "Once this Court had abandoned text and history as guides, nothing prevents it from calling religious toleration the establishment of religion."[155]

This is yet another indication that Scalia believes that adherence to traditional practices would not only yield principled results, but also that doing so would keep jurists from becoming lawmakers. In an article in the *University of Chicago Law Review*, he wrote:

> ". . .when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronounce-

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[153] *Id.* at 2507.

[154] *Id.* at 2508.

[155] *Id.* at 2506.

ment appears uncomfortably like legislation."[156]

Lawmaking from the bench. Scalia synthesized his philosophy regarding *Lemon* and traditional practice in referring to Justice O'Connor's concurrence in *Kiryas Joel.* He agreed that *Lemon* should be replaced and noted:

> ". . .the foremost principle I would apply is fidelity to the longstanding traditions of our people."[157]

As previously demonstrated, this theme is consistent in Scalia's opinions and writings. In the 1989 he wrote:

> "Just as that manner of textual exegesis facilitates the formulation of general rules, so does, in the constitutional field, adherence to a more or less originalist theory of construction."[158]

And, as is the case in many of his writings, he took issue with those who do not share his originalist views:

> ". . .nonoriginalist positions have almost always had the decency to lie, or at least to dissemble, about whether what they were doing--either ignoring strong evidence of original intent that contradicted the minimal recited evidence of an original intent congenial to the court's desires, or else not discuss original intent at all speaking in

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[156]Rule of Law, *supra* note 135 at 1185.

[157]Kiryas Joel, *supra* note 121 at 2515.

[158]Rule of Law, *supra* note 135 at 1184.

> terms of broad constitutional generalities with no pretense of historical support."[159]

And finally:

> "Apart from the frailty of its theoretical underpinnings, non-originalism confronts a practical difficulty reminiscent of the truism of elective politics that 'you can't beat somebody with nobody.' It is not enough to demonstrate that the other fellow's candidate (originalism) is no good; one must also agree upon another candidate to replace him. Just as it is not very meaningful for a voter to vote 'non-Reagan,' it is not very helpful to tell a judge to be a 'nonoriginalist.' If the law is to make any attempt at consistency and predictability, surely there must be a general agreement not only that judges reject one exegetical approach (originalism) but that they adopt another."[160]

Summary of the Analysis of Scalia

It is clear that Justice Scalia's Establishment Clause philosophy is consistent with nonpreferentialism. He theorizes that the Establishment Clause allows nondiscriminatory aid to religion and does not prohibit the elevation of religion over irreligion. He takes every opportunity available to him to express his dissatisfaction

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[159]Originalism, *supra* note 137 at 852.

[160]*Id.* at 855.

with the *Lemon* test, as it has in his view, yielded unprincipled results that are inconsistent with American traditions.

He made these arguments in his opinions in cases dealing with the issues of prayer, equal access and governmental empowerment of religious bodies. Additionally, he has intimated that regarding aid to parochial schools, specifically the constitutionality of delivering remedial and gifted services to sectarian school children within sectarian schools, he would favor such an arrangement.

Anthony M. Kennedy

A theme that is consistent throughout Justice Kennedy's Establishment Clause writings is his contention that absent some form of governmental coercion, a given practice, under all but the most extreme circumstances, will pass muster under the Establishment Clause. Addressing the issue in *Allegheny* he opined:

> "The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of that objective."[161]. . Absent coercion, the risk of

[161] Allegheny v. American Civil Liberties Union, 492 U.S. 573, 660 (1989) (Kennedy, A., concurring in part and dissenting in part).

> infringement of religious liberty by passive or symbolic accommodation is minimal."[162]

Consequently, for a practice to be deemed unconstitutional, some evidence of governmental coercion must be present before an Establishment Clause challenge will meet with success.

State Aid to Parochial Schools

Kennedy has not penned a separate opinion on this issue, however, some of his writings on other Establishment Clause issues give insight into his philosophy of aid to parochial schools. In two cases, *Bowen v. Kendrick*[163] and *Rosenberger v. Rector and Visitors of the University of Virginia,*[164] Kennedy argued that funding which accommodates religion or is disbursed in a neutral fashion should pass scrutiny under the Establishment Clause. In *Bowen* he wrote:

> ". . .where, as in this litigation, a statute provides that the benefits of a program are to be distributed in a neutral fashion to religious and nonreligious applicants alike, and the program withstands a facial challenge, it is not unconstitutional as applied solely by reason of the religious character of a specific recipient. The question in an

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[162]*Id.* at 662.

[163]Bowen v. Kendrick, 487 U.S. 588 (1988) (Kennedy, A., concurring)

[164]Rosenberger v. Rector and Visitors of the University of Virginia, 132 L.Ed. 2d 700 (1995) (Kennedy, A., concurring).

> as-applied challenge is not whether the entity is of a religious character, but how it spends its grant."[165]

Addressing the issue in *Rosenberger*, he noted:

> ". . .the error made by the Court of Appeals, as well as the dissent, lies in focusing on the money that is undoubtedly expended by the government, rather than on the nature of the benefit received by the recipient."[166]

Kennedy also insisted in *Rosenberger* that indirect benefit to religion must also be considered constitutional. He made note of the fact that the funds disbursed in that case flowed directly from the University of Virginia to a third party service provider. In that way, the State was not guilty of establishing religion. The funding program, therefore, was not:

> . . . "a tax levied for direct support of a church or a group of churches . . .The apprehensions of our predecessors involved the levying of taxes upon the public for the sole and exclusive purpose of establishing and supporting specific sects. . .the exaction here, by contrast, is a student activity fee designed to reflect the reality that student life in its many dimensions includes the necessity of wide-ranging speech and inquiry and that student expression is an

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[165]Bowen, *supra* note 163 at 624-25.

[166]Rosenberger, *supra* note 165 at 724.

integral part of the university's mission."[167]

Kennedy continued this line of reasoning by stating that funds flowing to a third party provider are "a far cry from a general public assessment designed and effected to provide financial support for a church."[168]

Just as Justice O'Connor had done in *Board of Education of Kiryas Joel v. Grumet,* [169] Kennedy gave an indication that he would vote to overturn the decision in *Aguilar*. Unlike O'Connor, he also indicated his dissatisfaction with *Grand Rapids v. Ball*. He wrote:

> ". . .the decision in Grand Rapids and Aguilar, may have been erroneous. In light of the case before us and in the interest of sound elaboration of constitutional doctrine, it may be necessary to reconsider them at a later date. . .But for Grand Rapids and Aguilar, the Satmars would have no need to seek special accommodations or their own school district."[170]

Prayer

Kennedy wrote the majority opinion in *Lee v. Weisman.* [171] In that case he made the

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[167]*Id.* at 722.

[168]*Id.* at 723.

[169]Board of Education of Kiryas Joel .v Grumet, 114 S.Ct. 2481 (1994) (Kennedy, A., concurring).

[170]*Id.* at 2505.

[171]Lee v. Weisman, 112 S.Ct. 2649 (1992).

dual argument that the State, in the form of the principal of the school, controlled and directed the form of prayer at the school's graduation. By doing so, students were thus coerced to attend a religious exercise.[172]

Government involvement in prayer. Kennedy argued that Deborah Weisman, a student at Nathan Bishop Middle School, was coerced to attend a State-sponsored religious exercise. He noted that the Rabbi who gave the Invocation and Benediction did so within the guidelines outlined in a pamphlet provided to him by the principal. Additionally, the principal of the school was responsible for securing the clergy to speak at the ceremony. To Kennedy, the degree of school involvement put dissenting students in the "untenable position"[173] of either eschewing their graduation or publicly dissenting. Neither option is constitutional, wrote Kennedy, as:

> "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state sponsored religious practice."[174]

Coercion. In his opinion, Kennedy argued that dissenting students at Nathan Bishop, including Deborah, had no real alternative by which they might avoid the appearance of participating in the invocation and benediction, without being subject to

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[172] *Id.* at 2655-56.

[173] *Id.* at 2657.

[174] *Id.* at 2660.

unacceptable peer pressure.[175] The peer pressure, born of the excessive government involvement in the religious activity in that case, is the coercive element that Kennedy frequently derides as the touchstone of unconstitutionality under the First Amendment.

> "The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure as well as and peer pressure on attending students. . .This pressure, though subtle and indirect, can be as real as any overt compulsion . . .[t]o recognize that the choice imposed by the State [either participating or protesting] constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means"[176]

Kennedy spoke succinctly of the perils of government interference, control, and coercion when he wrote in *Lee:*

> ". . .the Framers deemed religious establishments antithetical to the freedom of all. . .The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious values may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that

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[175] *Id.* at 2656.

[176] *Id.* at 2658, 2659.

> freedom of belief and conscience which are the sole assurances that religious faith is real, not imposed."[177]

Displays of Religious Symbols

In *Allegheny*, Kennedy opined that both the creche and menorah displays at issue in that case were constitutional. That no one was coerced to observe the displays and that they were a passive reflection of the religious nature of the season rendered both displays not violative of the Establishment Clause.[178]

> " Our role is enforcement of a written Constitution. In my view, the principles of the Establishment Clause and our nation's historic traditions of diversity and pluralism allow communities to make reasonable judgements respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's origin."[179]

In his partial concurrence in *Allegheny*, Kennedy made three arguments that give insight into his Establishment Clause philosophy. First, He opined that the types of displays in question serve to accommodate, rather than establish, religion. Secondly, he wrote extensively about coercion as a proper constitutional standard. Lastly, he

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[177] *Id.* at 2657-58.

[178] Allegheny, *supra* note 161 at 664.

[179] *Id.* at 679.

wrote at length, deriding Justice O'Connor's endorsement refinement as "flawed in its fundamentals" and "unworkable in practice."[180]

Accommodation. To Kennedy, the displays in *Allegheny* constitutionally acknowledged the religious aspects of the holiday season. The absence of all such contact would invalidate many of the Court's prior holdings which have permitted government to accommodate the religious beliefs of citizens.[181] He made two arguments which demonstrated his belief that accommodation is mandated by the Establishment Clause. In the first argument, he wrote that history mandates accommodation:

> "Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society. Any approach less sensitive to our heritage would border on hostility toward religion."[182]

He took the argument a step further when he noted that both history and precedent require governmental accommodation. He wrote that language in earlier cases, if "taken to [their] logical extremes would require a relentless extirpation of all contact

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[180] *Id.* at 669.

[181] *Id.* at 658.

[182] *Id.* at 657.

between government and religion."[183] To Kennedy, such is neither a mandate of history nor of the Establishment Clause.

Coercion. Kennedy's opinion reiterated his position that absent governmental coercion, most acts, including displays of religious symbols on public property, would pass muster under the Establishment Clause. While he did note that coercion need not be direct, he placed high the trigger of unconstitutionality of indirect aid when he wrote that "coercion need not be a direct tax in aid or religion or a test oath [as the Framers understood coercion]. Symbolic recognition or accommodation of religious faith may violate the Clause in an extreme case."[184] However, the coercion must be "more direct and more substantial than practices that are an accepted part of our cultural heritage,"[185] before a violation of the Establishment Clause exists.

Placing coercion and limits on accommodation in their proper roles in jurisprudence under the Establishment Clause, he wrote:

> ". . .our cases disclose two limiting principles, government may not coerce anyone to support or participate in any religion or its execution, and it may not, in the guise of avoiding hostility or callous indifference, give direct benefit to religion in such a degree

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[183] *Id.* at 657.

[184] *Id.* at 660.

[185] *Id.* at 662-63.

that it in fact 'establishes a religion or tends to do so.'" [186]

Endorsement as an inappropriate constitutional test. The "flawed" and "unworkable" endorsement test was, to Kennedy, a "most unwelcome addition to [the Court's] tangled Establishment Clause jurisprudence."[187] In arguing the issue, he made two points as to his reasons why the endorsement test is unacceptable. Kennedy first made note of the fact that if the endorsement test were consistently and faithfully applied, then many of the Court's previous Establishment Clause cases that accommodated American traditions, would necessarily be overturned.

> ". . .I take it as settled law that, whatever standard the Court applies to Establishment Clause claims, it must suggest results consistent with our precedents and the historical practices that, by tradition, have informed our First Amendment jurisprudence.[188]. . .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 [than earlier Supreme Court decisions]."[189]

In Kennedy's view, application of the endorsement test would invalidate practices such

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[186] *Id.* at 659 (citations omitted).

[187] *Id.* at 668.

[188] *Id.* at 669.

[189] *Id.* at 670.

as Presidential proclamations of days of Thanksgiving dating back some two hundred years. Additionally, the endorsement test would necessitate invalidation of the Pledge of Allegiance,[190] of American coins and currency,[191] and of the opening prayer at the beginning of each session of the United States Supreme Court.[192] To Kennedy, such results would be inconsistent with the Clause's mandate.

Another argument against the endorsement test resides in the facts of the *Allegheny* and *Lynch* cases. In *Lynch*[193] a holiday display in Pawtucket, Rhode Island was held to be constitutional as the display included many scenes of the holiday season. Included with the secular scenes in that display was a creche. In *Allegheny*, a creche was invalidated because it was displayed by itself, framed in such a way as to draw people's attention. As a religious symbol with nothing to detract from its religiosity, it was held to be unconstitutional. To Kennedy, the distinction between the two creches on the basis of context forces the Court to embrace a "jurisprudence of minutiae," [194] by leaving constitutional adjudication upon the issue of displays of religious symbols reliant on little more than the Justices' "intuition and a tape

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[190]". . .one nation, under God. . ."

[191]"In God We Trust"

[192]"God save the United States and this Honorable Court."

[193]Lynch v. Donnelly, 465 U.S. 668 (1984).

[194]Allegheny, *supra* note 161 at 674.

measure."[195]

Access Issues

Kennedy has submitted written opinions in three cases that are concerned with access issues. In each case, he has held that neutral access is acceptable under the Establishment Clause, and his by now familiar themes regarding coercion, endorsement, and governmental neutrality are evident in the cases.

In *Board of Education of Westside Community Schools v. Mergens*,[196] Kennedy concurred with the judgement, but as was the case in *Allegheny*, took issue with the majority's reliance upon the endorsement test in the portion of that decision that involved the Establishment Clause. Rather, to Kennedy, the case should have turned on the principle of coercion:

> "Nothing on the face of the [Equal Access] Act or in the facts of this case as here presented demonstrates that endorsement of the statute will result in the coercion of any student to participate in a religious activity.[197]. . .endorsement cannot be the test. The word 'endorsement' has insufficient content to be dispositive. . . I should think it inevitable that a public high school 'endorses' a

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[195] *Id.* at 675.

[196] Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226, 261 (1990) (Kennedy, A., concurring in part and concurring in the judgement).

[197] *Id.* at 260-61.

> religious club, in a commonsense use of the term, if the club happens to be one of the many activities that the school permits students to choose in order to further the development of their intellect and character in an extracurricular setting."[198]

In *Rosenberger*, Kennedy deemed that the case was one about free speech and not establishment. The program was neutral toward religion. In fact, the University of Virginia "t[ook] pains to disassociate itself from the speech in this case" by having groups issue a disclaimer that they operate independently from the University.[199]

Government Empowerment of Religious Bodies

While Kennedy voted that the creation of the special school district in *Board of Education of Kiryas Joel v. Grumet* violated the Establishment Clause, he made an effort to demonstrate that religious accommodations are constitutional, but the accommodation in that case went too far.

> "This is not a case in which the government has granted a benefit to a general class of recipients of which religious groups are just one part. . .It is rather a case in which the government seeks to alleviate

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[198]*Id.* at 261. *See also* Lamb's Chapel v. Center Moriches School District, 113 S.Ct. 214, 2149 (1993) 2149 (Kennedy, A., concurring in part and concurring in the judgement) ". . .the Court's use of the phrase 'endorsing religion' which I have indicated elsewhere cannot suffice as a rule of decision consistent with our precedents and our tradition in this part of our jurisprudence."

[199]Rosenberger, *supra* note 165 at 723.

a specific burden on the religious practices of a particular group."[200]

Once Kennedy laid the groundwork as to the nature of the issue in *Kiryas Joel*, he then proceeded to identify why accommodation is generally constitutional. He began by noting that governmental accommodation of religious beliefs is a traditional historical practice[201] and a traditional judicial practice.[202] Regarding the need for the accommodation and New York's response to that need, Kennedy opined:

> "New York's object in creating the Kiryas Joel Village School District--to accommodate the religious practices of the handicapped Satmar children--is validated by the principles that emerge from these precedents. First, by creating the district, New York sought to alleviate a specific and identifiable burden on the Satmar's religious practice. . .Second, by creating the district, New York did not impose or increase any burden on non-Satmars compared to the burden lifted from the Satmars. . .Third, the creation of the school district to alleviate the special burdens born by the handicapped Satmar children cannot be said, for that reason alone, to favor the

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[200]Kiryas Joel, *supra* note 169 at 2501.

[201]For example, Kennedy noted that colonial governments frequently exempted religious objectors from general laws. During the American Revolution, religious objectors were often released from military conscription.

[202]Kennedy wrote in this case "and since the framing of the Constitution, this Court has approved legislative accommodation for a variety of historical practices."

Satmar religion to the exclusion of any other."[203]

The formation of the village itself was constitutional, according to Kennedy because it was done following general rules of village incorporation. The violation occurred in the formation of the school district. And only after taking pains to defend the concept of accommodation did he venture an opinion as to why the accommodation in that particular case went too far.

In forming the school district, the New York Legislature "had a hand in accomplishing the religious segregation"[204] that was the prime reason for the school district's creation. Unlike the incorporation of the village employing a religion-neutral statute, the special act of the Legislature created an Establishment Clause violation.[205]

> "There is more than a fine line, however, between the voluntary association that leads to a political community comprised of people who share a common religion, and the forced separation that occurs when the government draws explicit political boundaries on the basis of people's faith. In creating the Kiryas Joel Village School District, New York crossed that line, so we must hold the district invalid."[206]

Summary of the Analysis of Kennedy

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[203]Kiryas Joel, *supra* note 169 at 2502.

[204]*Id.* at 2504.

[205]*Id.*

[206]*Id.* at 2505.

An application of the theoretical criteria to Justice Kennedy's opinions demonstrate that his Establishment Clause philosophy tends toward nonpreferentialism, yet in certain cases his opinions are separationist. On all issues, save prayer, Kennedy has written that government must accommodate religion in our culture, a belief consistent with nonpreferentialism. This philosophy is articulated in his concurrences in cases dealing with display of religious symbols, access issues and government empowermen of religious bodies, although the statute creating the special school district in *Kiryas Joel* went too far in accommodating the Satmars. The statute actually created a political separation based on religion, which he deemed unconstitutional. He qualified that separationist decision with a great deal of nonpreferentialist language, which left little doubt that governmental accommodation of religion is, in his view, constitutional.

Once an act or statute coerces citizens to participate in religious observances, the threshold of unconstitutionality is crossed. In *Lee v. Weisman*, that coercion, although subtle, and in the form of peer pressure, nonetheless compelled dissenting students to participate in a government controlled religious exercise. While his decision in *Lee* was clearly separationist, what is unclear is whether a graduation exercise with the absence of governmental control, such as a student run graduation, would validate religious prayer at public school graduations.

Beginning with *Allegheny*, Kennedy warned of problems associated with the endorsement refinement. It is his belief that practices which are both historical and traditional, some of which trace back to before the Nation's founding, would be imperiled

by the Court's adoption of that standard. Coercion, as an Establishment Clause standard would, in his view, provide the necessary guidance to disestablish religion, while preserving those practices and traditions that pay homage to the role that religion plays in our history and present culture.

David H. Souter

In his written opinions, Justice Souter has espoused his Establishment Clause philosophy by weaving his theory of the Framers intent, the history of the drafting of the First Amendment, and his respect for Supreme Court precedent into his arguments. In his majority opinion in *Board of Education of Kiryas Joel v. Grumet*[207] he wrote:

> "Our job, of course, would be easier if the dissent's position had prevailed with the Framers and with this Court over the years. An Establishment Clause diminished to the dimensions acceptable to Justice Scalia[208] could be enforced by a few simple rules, and our docket would never see cases requiring the application of a principle like neutrality toward religion as well as among religious sects. But that would be as blind to history as to precedent, and the difference between Justice Scalia and the Court accordingly turns on the

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[207]Board of Education of Kiryas Joel School District v. Grumet, 114 S.Ct 2481 (1994).

[208]For an analysis of Scalia's position in *Lee*, *see generally*, *supra* notes 128-137 and accompanying text.

> Court's recognition that the Establishment Clause does not comprehend such a principle and obligates courts to exercise the judgement necessary to apply it."[209]

State Aid to Parochial Schools

In his opinion in *Rosenberger*, Souter began his dissent by making it clear that, in his view, the case centered not on neutrality or forum access but on direct financial aid to a religious group.

> "The Court today, for the first time, approves direct funding of core religious activities by an arm of the State. It does so, however, only after erroneous treatment of some familiar principles of law implementing the First Amendment's Establishment and Free Speech Clauses, and by viewing the very funds in question as beyond the reach of the Establishment Clause's funding restrictions as such."[210]

History of the Amendment. Souter used a similar tack in both *Lee* and *Rosenberger* to make his argument, that of using the history of the framing of the Amendment as indicative of the Establishment Clause's mandate. In *Rosenberger*, however, he eschewed the textual history that he had earlier delineated in *Lee*.[211] In the

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[209]Kiryas Joel, *supra* note 207 at 2494.

[210]Rosenberger v. Rector and Visitors of the University of Virginia, 132 L.ED. 2d 700, 737 (1995) (Souter, D. dissenting).

[211]Lee, *infra* notes 220-223 and accompanying text.

former case he chose, instead, to discuss the Framer's intent to keep government from promoting religion using funds from public coffers. He noted that "[u]sing public funds for the direct subsidization of preaching the word is categorically forbidden under the Establishment Clause and if the Clause was meant to accomplish nothing else, it was meant to bar the use of public money."[212] As evidence of this, he made reference to *Memorial and Remonstrance* as primary evidence that Madison sought to forbid public funds from advancing sectarian ends.[213]

Souter continued his historical argument by taking issue with Thomas' assertion that the Northwest Ordinance is proof of the First Congress' intended nonpreferentialism in matters of religion. To illustrate his point, Souter discussed the Alien and Sedition Acts. Unconstitutional by today's standards, the Alien and Sedition Acts are evidence of the fact that the actions of early Congresses are not necessarily applicable to contemporary matters. If they were, then the Framer's passage of the Acts, would force the Court to reexamine its prior holdings to allow for political censorship.[214]

Souter also denounced nonpreferentialists invocation of Madison's tenure on the

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[212]Rosenberger, *supra* note 210 at 740.

[213]*Id.*

[214]Rosenberger *supra* note 210 at 743 n.2. *See also,* Lee, *infra* note 216 at 2676.

Senate committee that appointed congressional chaplains as indicative of his supposed nonpreferentialism. He made note of the fact that in his *Detached Memoranda*, Madison wrote of his opposition to such expenditures of public funds.[215] Earlier, in *Lee*, Souter had written that Madison had concluded that presidential proclamations of days of Thanksgiving and fasts are "shoots from the same root" which "imply a religious agency, making no part of the trust delegated to political rulers."[216]

To Souter, *Rosenberger* was a case about direct funding of a religious body by the State. As such, the First Amendment's proscription against such subsidies mandates against the majority's holding.

> "Because there is no warrant for distinguishing among public funding sources for purposes of applying the First Amendment's prohibition of religious establishments, I would hold that the University's refusal to support petitioners' religious activities is compelled by the Establishment Clause."[217]

Prayer

In *Lee v. Weisman*,[218] Justice Souter, while concurring in the outcome, wrote

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[215]Rosenberger, *id.*

[216]Lee v. Weisman, 112 S.Ct. 2649, 2675 (1992) (Souter, D., concurring).

[217]Rosenberger, *supra* note 210 at 737.

[218]Lee, *supra* note 216.

separately to address two issues that he deemed central to proper Establishment Clause jurisprudence. His written opinion centered on 1) whether the Clause forbids nonpreferential governmental practices, and 2) whether proof of governmental coercion is necessary to violate the Establishment Clause. In doing so, he refuted nonpreferentialism, by discussing the history of the framing of the First Amendment and his respect for precedent as relevant factors.

History of the Amendment. In *Lee*, Souter refuted the dissent's admonition that the type of prayer at issue in *Lee* would have been sanctioned by the Framers, since, in the dissent's view, the Framers were only concerned with financial aid to religion when they adopted the Amendment. That state financial aid was the sole motive for framing the Clause is a meritless argument in his view:

> ". . .virtually everyone acknowledges that the Clause bans more than formal establishments of religion in the traditional sense, that is, massive state support for religion, through, among other means, comprehensive schemes of taxation."[219]

Souter began his analysis of the framing of the First Amendment in *Lee* by noting that nonpreferentialists, most notably Rehnquist, have challenged the Court's precedent by arguing that the Framers understood that the Clause did not mandate neutrality between religion and irreligion on the part of the government. In their view,

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[219] *Id.* at 2672.

government could give nondiscriminatory aid to all religions. Souter refuted this notion by stating:

> "While a case has been made for this position it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*." [220]

He made note of the fact that the Framers rejected the narrow, nonpreferentialist language when they finally adopted the Clause in its present form.

> "The sequence of the Senate's treatment of the House proposal, and the House's response to the Senate, confirm that the Framers meant the Establishment Clause's prohibition to encompass non-preferential aid to religion. . .the record does tell us that. . . the Senate (ultimately) adopted its narrowest language yet: Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion." [221]

Souter noted that while the House accepted much of the Senate's work on the First Amendment, it did not agree with the Senate's version of the Religion Clauses whereby the Select Committee was thus formed, and the present language of the Establishment

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[220] *Id.* at 2668.

[221] *Id.* at 2669.

and Free Exercise Clauses were framed. To Souter, the prohibition of the establishment of "articles of faith or a mode of worship" may have banned only single sect establishments. The final draft language, however, banning "laws respecting an establishment of religion," clearly encompasses more than single sect establishments. Souter cited to Laycock noting that to confine the Framers to a prohibition of preferential aid:

> ". . .requires a premise that the Framers were extraordinarily bad drafters-that they believed in one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language[222]. . What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of 'a religion,' 'a national religion,' 'one religious sect,' or 'specific articles of faith.' The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for 'religion' in general."[223]

Souter's next historical argument centered around the fact that several of the

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[222]Laycock, Douglas, *Nonpreferential Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875, 882-883 (1986).

[223]Lee, *supra* note 216 at 2669-70.

colonies, and later states, imposed general assessments upon the citizenry.[224] This was understood by the Framers and they wrote the Establishment Clause to prohibit the practice. To Souter, this is what Thomas Jefferson's *Virginia Statute for Religious Freedoms*, championed by Madison, sought to prevent. Jefferson's *Virginia Statute* stated that "'no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever,'[225] including his own."[226] In a similar vein, Souter noted that Madison wrote that "religion and government exist in greater purity the less they are mixed together."[227]

Souter challenged those who argue that the actions of the Framers indicate that theirs was a nonpreferential understanding of the Clause. He noted that while Madison did indeed proclaim days of Thanksgiving, he did so only after the War of 1812 had begun, a full three years into his presidency. Further, by Madison's own admission in his *Detached Memoranda*,[228] those proclamations were unconstitutional[229] even though

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[224]*Id.* at 2670.

[225]VIRGINIA STATUTE FOR RELIGIOUS FREEDOMS, *reprinted in id.*

[226]Lee, *supra* note 216 at 2670.

[227]*Id.* (citation omitted).

[228]*Id.* at 2675.

[229]*Id.*

he made them "inconsequential enough to mitigate much of their impropriety."[230] In addition, Souter argued that "the sweep of the Clause is broad enough that Madison himself characterized congressional provisions for legislative and military chaplains as unconstitutional establishments."[231]

Precedent. A concern of Souter's is his fear that the line of Establishment Clause cases since *Everson* may be in jeopardy. He employs his historical analysis to refute those who would reexamine those cases, stating:

> "Thus, on balance, history neither contradicts nor warrants reconsideration of the settled principles that the Establishment Clause forbids support for religion in general no less than support for one religion over another."[232]

Concurring in *Lee,* Souter made note of the fact that the *Everson* decision forbade state practices that aid all religions and that the *Lee* decision served to reaffirm that principle.[233] While there is some evidence in the actions of the Framers that might lend support for a nonpreferentialist reading of the Clause, in Souter's view, that evidence

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[230]*Id.* at 2676.

[231]*Id.* at 2673.

[232]*Id.* at 2670.

[233]*Id.* at 2667.

is not sufficient to threaten the Court's precedent.[234]

Endorsement as preferable to coercion. In *Lee*, Souter embraced endorsement as a standard preferable to coercion, the standard upon which the case was decided. In his view, coercion, if accepted as an Establishment Clause standard, would serve to narrow the meaning of the Clause, rendering it unrealistic and historically and judicially inaccurate. In *Lee* he bolstered his opinion of the preferability of endorsement employing his history and precedent arguments, stating:

> "But to accept coercion would necessitate overturning precedent, a course that the text of the Establishment Clause or events surrounding its passage would not permit."[235]

And:

> "[In Wallace] we struck down a state law requiring a moment of silence in public classrooms[236] not because the statute coerced students to participate (for it did not), but because the manner of its enactment 'convey[ed] a message of state approval of prayer activities in the public schools'[237]. . . Our precedents may not always have drawn perfectly straight lines. They simply cannot,

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[234]*Id.* at 2673.

[235]*Id.* at 2671.

[236]*See*, Wallace v. Jaffree, 105 S.Ct. 2479 (1985).

[237]Lee, *supra* note 216 at 2672.

> however, support the position that a showing of coercion is necessary to a successful claim[238]. . .while petitioners insist that the prohibition extends only to the 'coercive' features and incidents of establishment they cannot easily square that claim with the constitutional text. The First Amendment forbids not just laws 'respecting an establishment of religion,'but also those prohibiting the free exercise thereof.' Yet laws that coerce nonadherents to 'support or participate in any religion or its exercise,' would virtually by definition, violate their right to free exercise. . .thus a literal application of the coercion test would render the Establishment Clause a virtual nullity as petitioners' council essentially conceded at oral argument."[239]

And a final elevation of endorsement over coercion:

> "this principle against favoritism and endorsement has become the foundation of Establishment Clause jurisprudence, assuring that religious beliefs is irrelevant to every citizen's standing in the political community and protecting religion from the demeaning effects of any governmental embrace. . .Our aspirations to religious liberty embodied in the First Amendment permit no other

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[238] *Id* at 2672.

[239] *Id.* at 2673.

standard."[240]

Religion and irreligion. Souter made the argument that the First Amendment forbids government from elevating religion over irreligion in both his *Lee* concurrence and his *Kiryas Joel* opinion. He took issue with nonpreferentialists who argue that nondiscriminatory aid to religion, in the form of a graduation prayer, promotes religious pluralism stating:

> "Concern for the position of religious individuals in the modern regulatory state cannot justify official solicitude for a religious practice unburdened by general rules; such gratuitous largesse would effectively favor religion to disbelief."[241]

He makes a similar argument against nondiscriminatory aid to religion of the type manifested in *Kiryas Joel*, when he noted that:

> ". . .a principle at the heart of the Establishment Clause, [is] that government should not prefer one religion to another, or religion to irreligion."[242]

Access Issues

Much was made of the issue of equal access by the majority decision in

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[240]*Id.* at 2676.

[241]*Id.* at 2677.

[242]Kiryas Joel, *supra* note 207 at 2491.

Rosenberger v. University of Virginia.[243] Indeed, the case turned on free speech principles of viewpoint neutrality. Souter argued that the case was not an access case, along the lines of *Widmar, Mergens* or *Lamb's Chapel*,[244] rather to him it involved funding issues and although he argued his point based on that opinion, his brief comments regarding access are instructive.

Souter noted that forum access is based on the street-corner model. The Court's access cases rest on the recognition that all speakers are entitled to use the street corner.[245] He did note that he is in agreement with those Supreme Court access cases that prohibit viewpoint or content restriction.[246] *Rosenberger,* however, was not about viewpoint restriction, content restriction nor the street-corner model. Addressing this point, he wrote:

> The Court's claim of support from these forum-access cases (*Widmar, Mergens* and *Lamb's Chapel*) is ruled out by the very scope of their holdings. While they do indeed allow a limited benefit to religious speakers, they rest on the recognition that all speakers are entitled to use the street corner. . .There is no traditional street corner printing provided by the government on

[243]Rosenberger, *supra* note 210.

[244]*Id.* at 752.

[245]*Id.* at 753.

[246]*Id.*

> equal terms to all comers, and the forum cases cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid."[247]

Government Empowerment of Religious Bodies

Souter penned the majority opinion in *Board of Education of the Village of Kiryas Joel v. Grumet*. In it, he made the case that government may not grant special privileges to groups based on the religious identity of those groups. He opined that the statute creating the special school district in that case, far from respecting neutrality, was "tantamount to an allocation of political power based on a religious criterion."[248]

Neutrality. Neutrality toward religion, to Souter, is accomplished by a proper respect for both the Establishment and Free Exercise Clauses.[249] However, the statute in *Kiryas Joel,* which created the special school district:

> "Depart[ed] from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power

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[247]*Id.* at 753-54.

[248]Kiryas Joel, *supra* note 207 at 2484.

[249]*Id.* at 2487.

> has been or will be exercised neutrally."[250]

While neutrality and accommodation are mandates of religious freedom, so too is a proper separation of the functions of government and religion. The Establishment Clause, to Souter, mandates that a state may not delegate its civil authority to a religious group[251] and even though the statute did not define the Satmars as such, the special legislative act creating the Village of Kiryas Joel identified the village's residents by their doctrinal adherence.[252]

Precedent. Souter opined that religious neutrality was commanded by the Religion Clauses and that government may not place special burdens over the right of citizens to freely exercise their particular beliefs. The statute at issue in *Kiryas Joel* went beyond the "benevolent neutrality" allowable under the Clause, and "crossed the line from permissible accommodation to impermissible establishment."[253]

> ". . .accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmar's religiously grounded preferences that our cases do not countenance. Prior decisions have allowed religious communities and institutions to

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[250] *Id.*

[251] *Id.* at 2488.

[252] *Id.* at 2489.

[253] *Id.* at 2494.

> pursue their own interests free from governmental interference but we have never hinted that an otherwise unconstitutional delegation of political power to a religious group could be saved as a religious accommodation."[254]

Summary of the Analysis of Souter

Application of the theoretical criteria to Justice Souter's writings demonstrate that upon the issues on which he has written, his Establishment Clause philosophy is consistent with separationism. He has concluded that the history of the framing of the Religion Clauses and the events surrounding the passage of the First Amendment comport with his view that government may not favor religion over irreligion. As such, the line of cases subsequent to *Everson* that bolster separationism are faithful to original intent, and in Souter's view, merit their adherence.

Clarence Thomas

The sole opinion which offers insight into Justice Thomas' Establishment Clause philosophy came in his concurrence in *Rosenberger v. University of Virginia*.[255] His concurrence was written to correct what was, in his view, the dissent's faulty historical analysis in that case. In his opinion, he made the argument that the case is

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[254]*Id.* at 2492-93.

[255]Rosenberger v. University of Virginia, 132 L.ED. 700 (1995) (Thomas, C., concurring).

concerned with the constitutionality of religious entities participating on neutral terms in evenhanded governmental programs.

> "Though our Establishment Clause jurisprudence is in hopeless disarray, this case provides an opportunity to reaffirm one basic principle that has enjoyed an uncharacteristic degree of consensus: the Clause does not compel the exclusion of religious groups from government benefits programs that are generally available to a broad class of participants."[256]

He began his argument disputing the dissent's historical analysis, stating:

> "[A] misleading application of history yields a principle that is inconsistent with our Nation's long tradition of allowing religious adherents to participate on equal terms in neutral government programs."[257]

He followed that quote by terming the dissent's separationist opinion in the case as "actively discriminat[ory] against religion."[258]

State Aid to Parochial Schools

Although *Rosenberger* involved access issues, Thomas' concurrence allows projection into his philosophy regarding financial aid to parochial schools. In his

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[256] *Id.* at 736.

[257] *Id.* at 731.

[258] *Id.*

Rosenberger concurrence, Thomas concluded that no Establishment Clause violation exists when government provides a direct money subsidy.[259] This argument runs counter to the decision in *Lemon*, in which Justice Burger warned that "a direct money subsidy would be a relationship pregnant with involvement" and would not pass constitutional muster.[260]

Thomas made his initial argument by noting that the First Congress appropriated public funds for a Congressional chaplain.[261] Further, Thomas noted that property tax exemptions, which have been in place for over 200 years, are the same as a direct money subsidy.[262] He opined that whether the benefit is "provided at the front or back end of the taxation process, the financial aid to religious groups is undeniable."[263] Stated another way, since tax exemptions, which benefit religion at the "back end" of the taxation process are constitutional, then so are direct subsidies that are afforded at the "front end" of that process.

Access Issues

Thomas made several historical arguments in his *Rosenberger* concurrence.

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[259] *Id.* at 734.

[260] Lemon v. Kurtzman, 403 U.S. 602, 621 (1971). *See also,* Chapter IV, n.28.

[261] *Id.*

[262] *Id.* at 735.

[263] *Id.*

He began his comments by noting that Patrick Henry's Assessment Bill provided for a "specific tax" solely for appropriation to ministers or teachers of the gospel.[264] To Thomas, Madison was not remonstrating against access for religious groups, rather he remonstrated because Henry's bill singled out the Christian religion for benefit.[265] Thomas wrote that Madison focused on the preferential nature of Henry's assessment bill as the funding was only afforded to Christian sects and the "Remonstrance seized on this defect."[266] Quoting from *Memorial and Remonstrance* he offered:

> "Who does not see that the same authority which can establish Christianity in exclusion of all other sects, may establish with the same ease any particular sect of Christians, in exclusion of all other sects."[267]

Thomas then quoted directly from Cord, noting that many of the arguments in *Memorial and Remonstrance* "speak in some way, to the same intolerance, bigotry, unenlightenment and persecution that had generally resulted from previous exclusive establishments."[268]

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[264] *Id.*

[265] Id. at 732.

[266] *Id.* at 732-33.

[267] Memorial and Remonstrance, *in* 3 ANNALS OF AMERICA 16.

[268] Rosenberger, *supra* note 255 at 733. *See also* Chapter III, n.63 and accompanying text.

Thomas argued that religion might constitutionally take advantage of neutral government programs.

> "The conclusion that Madison saw the principle of nonestablishment as barring governmental preferences for *particular* religious faiths seems especially clear in light of statements he made in the more relevant context of the House debates on the First Amendment."[269]

He then extended the argument, elevating religion over irreligion by quoting Rehnquist's dissent in *Wallace*,[270] noting:

> "Madison's views 'as reflected by actions on the floor of the house in 1789 [indicate] that he saw the [First] Amendment as designed to prohibit the establishment of a national religion and perhaps to prevent discrimination among sects' but not as requiring neutrality on the part of government between religion and irreligion."[271]

Summary of the Analysis of Thomas

While Justice Thomas made his only argument on any Establishment Clause issue in the context of equal access, his opinion in the case is instructive. His philosophical orientation of the Establishment Clause is clearly nonpreferentialist with

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[269] *Id.* at 733 (italics in original).

[270] Wallace, *supra* note 1.

[271] *Id.*

respect to access issues. Further analysis demonstrates that were an issue involving state aid to parochial schools to come before the Court, he would be inclined to find such an activity constitutional, even if that aid was in the form of a direct money subsidy.

Ruth Bader Ginsburg
Stephen G. Breyer

Neither Justice Ginsburg nor Breyer, the two newest members of the High Bench, have as yet penned a separate opinion or scholarly article on any issue under the Establishment Clause. It is, therefore impossible to interpret their written opinions, however, one can get a glimpse of their philosophies by looking at their votes on the various cases in which they have participated.

The issues upon which Ginsburg and Breyer have voted are state aid to parochial schools, displays of religious symbols, and government empowerment of religious bodies.

State Aid to Parochial Schools

Both Ginsburg and Breyer joined in Souter's dissent in *Rosenburger*.[272] Souter had argued that the case involved not equal access, rather it involved direct funding of a religious activity by the State. He wrote that the Framers were against direct funding

[272]Rosenberger, *supra* note 210.

of the nature of the aid at issue in the case. It can be fairly assumed that both Ginsburg and Breyer are separationists in the area of direct funding. What is not clear, however, is how either would vote if the funding was deemed by them to be less direct. Nor is it clear if the different contexts within the issue of state aid to parochial schools would impact upon their philosophies.

Displays of Religious Symbols

Breyer took part in the *Pinette* decision. He concurred with Scalia's majority decision as well as O'Connor's concurrence. Scalia had opined that the erection of a cross in a public park in Columbus, Ohio was constitutional under the Free Speech Clause and, therefore, was not violative of the Establishment Clause. Part IV of his opinion centered on the Establishment Clause aspect of the decision. Scalia had opined that endorsement, that is 'favoring' or 'promoting' religion,[273] cannot happen when a religious symbol is erected in a park in which other, non-religious objects can and have been displayed as well. Therefore, to Scalia, the endorsement test could not be employed as the speech in question was private speech.

O'Connor took issue with Part IV of Scalia's opinion, writing that the endorsement test was the correct standard to employ in this case. To O'Connor, even when the speech is private and in a public forum, there would be no reason to ignore

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[273]Pinette, *supra* note 138 at 662.

its use.[274] In *Pinette*, application of that test yielded a nonpreferentialist result.

Given Breyer's concurrence with O'Connor, it can be fairly assumed that he would favor the application of the endorsement refinement of the *Lemon* test as a constitutional standard in cases involving displays of religious symbols. As he sided with the majority in that case, it can be further assumed that his is a nonpreferentialist philosophy on that issue.

Government Empowerment of Religious Bodies

Ginsburg joined in Steven's concurrence in *Kiryas Joel.*[275] Stevens stated that the legislature had assisted the State of New York in segregating the Satmar children by reference to their religious practices. The Satmars, in Steven's view, could have been accommodated by other means, to include teaching tolerance to all of the children. As it was, the statute setting up the school district established religion, in violation of the Establishment Clause. It is clear that on this issue, Ginsburg adopted a separationist position.

Chapter Summary

In this chapter, an analysis of each Justice's writings (and voting record when necesssary) has been undertaken. A summary of the philosophical orientation of each

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[274]Pinette, *supra* note 102 at 667.

[275]Kiryas Joel, *supra* note 73 at 2495.

Justice within each issue follows, as well as a summary of each Justices' philosophical orientation using the criteria established in Chapter III.

Each issue of Establishment Clause jurisprudence addressed by the Supreme Court during the Rehnquist era demonstrates that there is a lack of consensus among the members of the Court. Figure 1 represents the philosophies of the individual Justices as they appear in their written opinions, scholarly articles or speeches. Figure 2 indicates the voting record of each individual Justice on the several issues.

Analysis of the Issues

State Aid to Parochial Schools

With the exception of *Zobrest,* no cases of this genre have been heard by the High Court in the 1990's. Consequently, only Rehnquist, Stevens and O'Connor have submitted written opinions on the issue.

Nonpreferentialists. Rehnquist has had the greatest opportunity to write on the issue of state aid to parochial schools and has noted that aid that enables individuals to pursue private choices is constitutional. His opinions on this issue are consistently nonpreferentialist. Scalia and Kennedy wrote in *Kiryas Joel* that *Grand Rapids* and *Aguilar* should be overturned. Additionally, both Kennedy and Scalia voted nonpreferentialist in *Zobrest* as did Thomas, who also opined in *Rosenberger* that even

direct aid is permissible under the Establishment Clause. O'Connor is on record as opposing the *Aguilar* decision, meaning that in her opinion, state aid for remedial services on parochial school premises, should be permitted. She also voted nonpreferentialist in *Mueller*.

Separationists. Souter, in his *Rosenberger* opinion in which Ginsburg and Breyer joined, stated that direct aid to religion is impermissible under the Establishment Clause. Stevens wrote that neither direct nor indirect aid is constitutional. O'Connor concurred in the part of the *Grand Rapids* decision that forbade public schools to hire private school teachers to teach private school students.

Prayer

Nonpreferentialists. Scalia and Rehnquist are on record as supporting prayer. Rehnquist wrote his thorough dissent in *Wallace* in opposing the Court's decision striking down prayer that took the form of a moment of silence. Scalia, joined by Thomas and Rehnquist, penned a dissent in *Lee* in which he discussed his opinion that the type of prayer in that case was based on tradition and, as such, should be upheld.

Separationists. Stevens wrote the opinion in *Wallace*, which demonstrated that he and the Chief Justice are philosophical opposites in this area. Kennedy wrote in *Lee* that as the practice of graduation prayer in that case was substantively controlled by the State, the practice was coercive and, as such, unconstitutional. Both O'Connor and

Souter, while agreeing with *Lee's* outcome, opined that coercion is not necessary to implicate the Establishment Clause. Indeed, a demonstration of endorsement would serve to violate its provisions.

Others. While the separationists on record have a numerical advantage, neither Ginsburg nor Breyer have had the opportunity to directly address the issue of prayer. In addition, the advantage held by the separationists is tenuous, for if governmental coercion were absent, Kennedy would find a prayer activity constitutional, thereby placing him with the nonpreferentialists.

Displays of Religious Symbols

Nonpreferentialists. On this issue, the nonpreferentialists hold the advantage. Once again, Rehnquist, Scalia and Thomas have shown themselves as philosophically oriented toward nonpreferentialism. Kennedy, in *Allegheny*, installed himself as a nonpreferentialist on this issue having written that individuals are not coerced to view religious displays, which may be constitutionally posted by government to acknowledge the religious aspects of holidays with a religious origin.

When confronted with this issue, O'Connor's decision will depend upon the context of the display. O'Connor took a nonpreferentialist position in *Lynch*. In that case the creche was but one part of a larger display, there was no endorsement of religion present and therefore the display was constitutional. Similarly, to O'Connor,

the menorah in *Allegheny* did not endorse religion.

Separationists. Only Stevens has consistently voted separationist upon this issue. In *Allegheny*, he extended the "reasonable observer" standard to include those "reasonable observers" who might not share the viewpoint of the one espoused in the display. O'Connor, again sensitive to context in *Allegheny*, opined that the creche display sent a message to nonadherents that they were disfavored, thus failing the endorsement refinement's test of constitutionality.

Neither Souter, Ginsburg nor Breyer has written nor voted upon this issue.

Access Issues

Nonpreferentialists. Rehnquist has not offered a separate access opinion, however, he has consistently voted nonpreferentialist upon this issue. Both Scalia and Thomas made the classic nonpreferentialist argument in *Kiryas Joel* and *Rosenberger* respectively, that the Establishment Clause is a barrier to single sect establishments only. Kennedy views access issues as falling within the realm of the Free Speech Clause. However, with respects to establishment in access issues, he continued to apply his coercion standard. In *Mergens* he wrote that allowing a religious club to meet within a school's open forum was not coercive, and therefore, was constitutional. O'Connor indicated in both *Mergens* and *Pinette* that the private speech in both cases demonstrated no governmental endorsement. Souter and Breyer joined the

nonpreferentialists in *Pinette*, noting that the cross display in that case did not implicate the Establishment Clause.

Separationists. Stevens, in *Mergens*, wrote that the Equal Access Act was misinterpreted in that case. Were it interpreted properly, then a separationist decision would have been rendered by the Court. Souter,in his *Rosenberger* dissent joined by Ginsburg and Breyer, wrote that when economic benefits are a part of the access granted, then the access is unconstitutional.

Government Empowerment of Religious Bodies

Nonpreferentialists. Rehnquist, in *Larkin*, wrote that government may constitutionally use religion to promote governmental aims. Scalia, in a dissent joined by Rehnquist and Thomas, wrote in *Kiryas Joel* that the accommodation offered in that case was consistent with traditional practices. He noted in that case, as he has in others, that where traditional practices exist, the Establishment Clause allows such practices.

Separationists. Stevens and Souter have both written on this issue. Both have asserted that legislation that favors a religious group is unconstitutional. Ginsburg joined with Stevens' concurrence in *Kiryas Joel*. O'Connor wrote that the legislation in *Kiryas Joel* that allowed for the Satmars to establish a separate school district was unconstitutional. Similarly, Kennedy stated that under most circumstances accommodation of religious beliefs is a governmental duty, but the accommodation in

Figure 1--Philosophical Orientation of the Individual Justices' Written Opinions

	R	St	O	Sc	K	So	T	G	B
State Aid to Parochial Schools	N	S	1	N	N	4	N		
Prayer	N	S	S	N	S	S			
Displays of Religious Symbols	N	S	2		N				
Access Issues		S	N	N	N	N	N		
Government Empowerment	N	S	S	N	S	S			

N=Nonpreferentialist Written Opinion--S=Separationist Written Opinion

Legend

R-Rehnquist So-Souter
St-Stevens T-Thomas
O-O'Connor G-Ginsburg
Sc-Scalia B-Breyer
K-Kennedy Open Cells-No data available

Figure 2--
Philosophical Orientation of the Individual Justices' Written Opinions and Votes

	R	St	O	Sc	K	So	T	G	B
State Aid to Parochial Schools	N	S	3	N	N	4	N	4	4
Prayer	N	S	S	N	S	S	N		
Displays of Religious Symbols	N	S	2	N	N				N
Access Issues	N	S	N	N	N	N	N		N
Government Empowerment	N	S	S	N	S	S	N	S	

N=Nonpreferentialist Written Opinion or Vote--S=Separationist Written Opinion or Vote

Numerical Designations--

1=O'Connor wrote a nonpreferentialist dissent in *Aguilar* and both a nonpreferentialist dissent and separationist concurrence in *Grand Rapids*.

2=O'Connor wrote a nonpreferentialist concurrence in *Lynch* and both a nonpreferentialist and a separationist concurrence in *Allegheny*.

3=In addition to the *Aguilar* and *Grand Rapids* cases, O'Connor voted nonpreferentialist in *Mueller*.

4=Souter's separationist written opinion in *Rosenberger* centered on the issue of funding, not access.

that case went too far.

While *Kiryas Joel* was a separationist decision, it seems that O'Connor's and Kennedy's qualifications of their separationist votes, might indicate that the Court would view this type of activity constitutional, if the statute was framed in a religion-neutral manner.

Breyer has not participated in any decision on this issue.

Analysis Based on the Theoretical Criteria

Application of the theoretical criteria to the individual Justices will demonstrate whether the philosophical orientation of each Justice is consistent between the Establishment Clause issues articulated in Chapter IV. The Criteria derived from the Chapter III analysis will be employed to analyze each Justice. The numerical designation (N1, S3, etc.) will correspond with the numerical designation of each individual philosophical tenet as they appear in Chapter III. Not all of the five tenets have been written upon by each Justice, therefore, all five may not be discussed.

The designation "N" or "S" next to each tenets number will identify whether that individual Justice's philosophy with regard to the particular tenet being discussed is nonpreferentialist or separationist. These numerical and letter designations are consistent with those in Chapter III.

Rehnquist

Chief Justice Rehnquist has written on the issues of aid to nonpublic schools, prayer, displays of religious symbols, and government empowerment of religious bodies.

N1. Rehnquist believes that government may support religion over irreligion. In his dissent in *Meek*, he opined that everything in our culture worth transmitting and which gives meaning to life is saturated with religious influences.[276] Similarly, in *Wallace* he wrote that the Clause "did not require governmental neutrality between religion and irreligion."[277]

N2. Rehnquist's dissent in *Wallace* contains references to his belief that the Framers intended for the Clause to bar only single sect favoritism. He wrote in the case that the First Amendment had acquired the well-accepted meaning that the Establishment Clause forbade preference on one sect over another and forbade the establishment of a national religion.[278]

N3. To Rehnquist, the Establishment Clause does not mandate absolute separation. He has consistently derided Jefferson's "wall of separation," referring to it as a

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[276]Meek v. Pittinger 421 U.S. 349, 395 (1975) (Rehnquist, W., dissenting).

[277]Wallace, *supra* note 1 at 2516-17.

[278]*Id.* at 2516-17.

misleading metaphor, with which the Court's Establishment Clause jurisprudence has been "freighted" since *Everson*.

N 4. In *Bowen v. Kendrick*, The Chief Justice opined that government may use religion to promote governmental aims. Specifically in that case, he voted in favor of a governmental program which disbursed funds to various community groups, including religious ones, to educate and counsel adolescents about pregnancy. Similarly, in *Stone* he opined that the Kentucky Legislature's requirement that the Ten Commandments were to be posted on classrooms walls in the Commonwealth, was constitutional as the Decalogue was that from which the laws of western civilization were based. Their posting, therefore, served a legitimate governmental interest, that of educating the youth of the Commonwealth of Kentucky.

Rehnquist's philosophy on each Establishment Clause issue is consistent with nonpreferentialism.

Stevens

Justice Stevens has written on the issues of aid to parochial schools, prayer, displays of religious symbols, access issues, and government empowerment of religious bodies.

S1. In *Wallace*, Stevens wrote that when the Establishment Clause has been litigated over the years, the Court has concluded that individuals' freedom of conscience to

choose any religion or no religion is protected.[279] He made the same argument in *Allegheny*, when he opined that the phrase "respecting an establishment of religion" means not simply single sect favoritism, but rather favoritism of religion over irreligion.[280]

S2. Stevens has consistently written that Jefferson's "wall of separation" should be adhered to in Establishment Clause jurisprudence.

S3. Stevens wrote in *Wallace* that it was at one time understood that the prohibition against establishment at one time only referred to preference among Christian sects.[281] Today, however, that is not the case as the Court has unambiguously held that disestablishment refers to all sects.

S4. Stevens wrote in *Allegheny* that "respecting" is synonymous with "reverence, good will or regard to" religion. Therefore, the Establishment Clause forbids all laws that "touch" on the subject of religion.

S5. To Stevens, the inculcation of religious values in the public schools abridges individuals freedom of conscience and is therefore, unconstitutional.

An application of the theoretical criteria to Steven's writings demonstrates that

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[279]*Id.* at 2488.

[280]Allegheny, *supra* note 56 at 649.

[281]Wallace, *supra* note 46 at 2488.

his is a separationist philosophy.

O'Connor

Justice O'Connor has written on the issues of aid to parochial schools, prayer, displays of religious symbols, access issues, and government empowerment of religious bodies.

S1. O'Connor's endorsement standard emphasizes that with respect to the political standing of individuals, government may not send a message to adherents that they are favored, nor one to non-adherents that they are disfavored.

N2. While O'Connor's concurrence in *Kiryas Joel* could be construed as separationist, her qualification of that concurrence demonstrates her belief that nondiscriminatory aid might be permissible. She wrote that if a second group like the Satmars were to require an identical accommodation, then her opinion might turn on the nondiscriminatory nature of the accommodation. She also opined in *Mergens* that as there is a difference between government speech endorsing religion and private speech endorsing religion, the government may allow such private speech if it is done in a nondiscriminatory manner.

N3. O'Connor's concurrence in *Lynch* indicated that so long as religion is not endorsed, government and religion need not remain completely separated. Where the reasonable observer would deem that no governmental endorsement exists, then a

statute or activity is constitutionally permissible.

S5. O'Connor's concurrence in *Lee*, in which she stated that a nondenominational graduation prayer endorsed religion, is indicative of her philosophy that even sect-neutral religious values cannot be inculcated in public schools.

Justice O'Connor has indicated that her philosophy varies based on the context of the issue posited. An analysis of her writings and opinions bears out this fact. Her philosophy is not easily categorized as either separationist or nonpreferentialist. In continually searching for the requisite religious accommodation in Establishment Clause jurisprudence, she has frequently applied the endorsement refinement of the *Lemon* test. The endorsement refinement tends towards separationism, as its underlying premise is that religious persons may not be politically favored over those not religiously inclined. The endorsement refinement, in certain contexts however, has yielded nonpreferentialist results.

Scalia

Justice Scalia has written opinions on the issues of prayer, access issues and government empowerment of religious bodies.

N1. In *Lee*, Scalia opined that "religion in general" was favored in the First Amendment by virtue of the Free Exercise Clause.

N2. In *Kiryas Joel*, Scalia noted that the Establishment Clause prohibits government

favoritism of one religion over another. In *Lamb's Chapel*, he again made an argument espousing his philosophy that the Clause prohibits only discriminatory aid when he opined that the aid in that case cannot violate the Establishment Clause because it "did not signify local embrace of a particular religious sect."[282]

N3. Scalia has frequently stated his belief that historical practices that involve religiosity, are constitutional. He made this argument in *Kiryas Joel* when he stated that ". . .the foremost principle I would apply is fidelity to the longstanding traditions of our people."[283]

N4. Scalia has opined that the promotion of governmental ends by religious bodies is constitutional. In *Lee* he wrote of the Founding Father's knowledge that nothing could foment an affection between people of different faiths as well as standing together and praying to God.

Scalia's philosophical orientation on all Establishment Clause issues is nonpreferentialist.

Kennedy

Justice Kennedy has written on the issues of prayer, displays of religious symbols, access issues, and government empowerment of religious bodies.

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[282]Lamb's Chapel, *supra* note 124 at 2151.

[283]Kiryas Joel, *supra* note 122 at 42.

N1. Application of Kennedy's coercion standard allows religion to be favored so long as such favoritism does not compel individuals to participate in a religious exercise.

N2. Although Kennedy's concurrence in *Kiryas Joel* supported the Court's separationist result, his lengthy opinion of the constitutionality of religious accommodation demonstrated his belief that government may support religion if it is done in a nondiscriminatory manner.

N3. In *Rosenberger*, Kennedy opined that indirect aid to religion is constitutional. Government may give money to religious groups to carry out a particular mission, leaving the funds that might have been expended for that purpose available for directly religious activities. Such indirect aid is antithetical to absolute separation. In a similar vein, he noted in *Allegheny* that government may constitutionally acknowledge the religious aspects of holidays. Again, this indicates that he does not deem that absolute separation is mandated by the Establishment Clause.

S4. Kennedy wrote the majority opinion in *Lee*, which held nondenominational prayer at public school graduations to be unconstitutional. Application of his coercion standard aided in his analysis of the activity. Contrasting two issues in an effort to define the limits of coercion, he wrote that the distinction between displays of religious symbols and governmental prayer lies in the fact that in prayers, like the one in *Lee*, the government is an active participant whereas with regards to displays, government is a

passive participant; the former is unconstitutional, the latter, constitutional. It has yet to be determined if Kennedy's opinion on the issue of prayer would become nonpreferentialist if the government's involvement in graduation exercises was either eliminated, or dramatically diminished with the preparation and execution of the ceremony performed by students.

Kennedy's philosophy is nonpreferentialist on most Establishment Clause issues. His nonpreferentialism is tempered, however, by application of his coercion standard. Although the trigger of unconstitutionality under the coercion standard is difficult to achieve, it nonetheless was triggered in *Lee* and, therefore, allows for Kennedy to come to a separationist conclusion when such compulsion exists.

Souter

Justice Souter has written opinions on the issues of state aid to parochial schools, prayer, access issues, and government empowerment of religious bodies.

S1. Souter wrote in *Lee* that government may not favor religion over irreligion. He wrote in *Lee* that governmental "gratuitous largesse" toward religion would unconstitutionally "favor religion over disbelief."[284]

S2. Souter has noted several times that the Court's jurisprudence supporting the separationist mandate of the *Everson* decision should be adhered to. In addition, in his

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[284]Lee, *supra* note 216 at 2677.

dissent in *Rosenberger*, he stated his belief that access cannot be granted if it carries with it a direct financial benefit.

S3. Souter noted in *Lee* that while there might be some evidence to indicate that the First Congress framed the Establishment Clause to ban single sect establishments, the textual development of the Establishment Clause indicates that nondiscriminatory aid was also proscribed by the First Amendment.

All of Souter's writings embrace a separationist philosophy. He did, however, join in an opinion allowing nondiscriminatory access to public school fora by outside groups in *Lamb's Chapel*. The majority focused primarily on free speech issues in that case. Souter also joined in O'Connor's concurrence in *Pinette* which applied the endorsement refinement, an Establishment Clause standard which he had defended in *Lee*. O'Connor's opinion stated that the display of a cross, accompanied by a sign denoting the owner, could not be interpreted by a reasonable observer as governmental endorsement of religion. This marks his only departure from a separationist philosophy.

Thomas

Justice Thomas' only written opinion on an Establishment Clause issue is his concurrence in *Rosenberger.*

N1. In his historical analysis in *Rosenberger* he quoted Rehnquist's dissent in *Wallace,*

in which Rehnquist argued that religion can be favored over irreligion.

N2. Thomas noted in *Rosenberger* that money subsidies, whether on the front or back end of the taxation process, are constitutional.

N3. Thomas believes that the absolute separation of religion and government is not mandated by the Constitution. His opinion in *Rosenberger*, which allowed an arm of the State to finance the printing of religious literature, was replete with references to religion participating on neutral terms in evenhanded governmental programs.

Thomas' Establishment Clause philosophy has been demonstrated as being nonpreferentialist on every issue upon which he has voted or written.

Ginsburg and Breyer

Neither has written an opinion on any Establishment Clause issue. In addition, a search through the *Index of Legal Periodicals* uncovered no scholarly writings that gave evidence of their predilections in this area. Each has participated in voting on cases. Those votes are discussed earlier in this chapter.

CHAPTER VI
SUMMARY AND RECOMMENDATIONS

The purpose of this study was to analyze the case opinions, scholarly writings and speeches of the individual sitting Supreme Court Justices for clues as to which theory of the original intent of the Establishment Clause is closest to each Justice's philosophical orientation. A second part of this study was to determine if their philosophical orientation changes based on the context of the challenge. The research questions were:

1) What theories of original intent can be derived from the literature?

2) To which theory of original intent, separationism or nonpreferentialism, do the individual Justices subscribe?

3) What are the different issues under the Establishment Clause that have been heard by the Court ?

4) Do the individual Justices' philosophies change depending on the issue?

Research Question 1: *What theories of original intent can be derived from the literature?*

A review of the literature demonstrated that there are two theories of the original intent of the Framers of the Establishment Clause of the First Amendment. Those

theories are referred to by constitutional and legal scholars as nonpreferentialism and separationism. Nonpreferentialists argue that the Framers wrote the Clause as a ban to single sect establishments only. They believe that government may support religion as long as that support is nondiscriminatory. Therefore, government may favor religion over irreligion so long as that favoritism is not toward a single sect. Separationists, on the other hand, view the Establishment Clause as banning support to any or all religious sects. In their view, religion may not be favored over irreligion. They argue that the Framers intended to ban single sect establishments as well as multiple establishments when they adopted the present language of the Amendment.

The research conducted in this study demonstrates that both theories are represented in the philosophies of the Justices of the current Supreme Court. Of the seven Justices that have written on Establishment Clause matters, each has employed an historical or textual analysis to support their philosophical orientation regardless of whether that orientation is nonpreferentialist or separationist.

Research Question 2: *To which theory of original intent, separationism or nonpreferentialism, do the individual Justices subscribe?*

Chief Justice Rehnquist, along with Justices Scalia and Thomas are philosophically oriented toward nonpreferentialism. Their philosophical orientations are demonstrated by their judicial writings, and in the case of Scalia, in scholarly

articles. Stevens and Souter have consistently taken a separationist stance in cases and scholarly articles. Souter, however, did join O'Connor in one nonpreferentialist concurrence. Both O'Connor's and Kennedy's written opinions and votes have yielded both separationist and nonpreferentialist results. Neither Justice Ginsburg nor Breyer have written on an Establishment Clause issue.

Establishment Clause jurisprudence over the past 25 years has yielded unpredictable results because several members of the Court posit different philosophies on different issues. Consequently, in order to glean an understanding of the Court, a study of the individual Justices on the various issues will yield more applicable data.

Research Question 3: *What are the different issues under the Establishment Clause that have been heard by the Court ?*

In Chapter IV, the various Establishment Clause issues that have been heard by the High Court during the Rehnquist era were discussed. While the context of the cases in which these issues arose was not always the school setting, the nonschool cases nevertheless assisted in the analysis of the individual Justices' philosophies and disclosed a variety of issues that triggered Establishment Clause litigation with implications for schools.

The first issue that was a focus of analysis for this study, aid to nonpublic schools, has been manifested in numerous ways in the courts. States have devised

various methods of relieving private and parochial schools of a portion of the rising costs of educating children. Those methods included teacher supplements, tax credits and reimbursements, reimbursement for costs associated with test administration, provision of instructional materials, delivery of diagnostic, enrichment, remedial and therapeutic services on parochial school premises, the lending of textbooks to parochial school students, provision of funding for field trip reimbursement and funding assistance for facilities maintenance.

The Court has held that direct aid to parochial schools is unconstitutional. Consequently, legislatures enacted statutes which indirectly aided private and parochial schools by granting tax relief to parents of parochial school students which were a part of religion-neutral education aid packages.

A second issue in Establishment Clause jurisprudence involves prayer at school and at school activities. In the two school cases analyzed, the government's involvement in prayer activities rendered the practice unconstitutional.

The results of this study indicate that it is highly likely that Rehnquist, Scalia and Thomas will remain nonpreferentialists, while Stevens and Souter will continue to take a separationist position on issues involving prayer. Kennedy and O'Connor, in *Lee,* both took a separationist stance on the issue of graduation prayer, however, they articulated different theories as to why the practice was unconstitutional. Kennedy

opined that as the practice was coercive, it violated the Establishment Clause. O'Connor wrote that coercion was not necessary to violate the Clause and that governmental endorsement was sufficient to prove a constitutional violation. Therefore, issues involving prayer will likely turn on whether the Court adopts the endorsement refinement or the coercion standard. If the endorsement refinement is adopted as a constitutional standard on prayer issues, then school prayer activities will be found violative of the Clause more frequently, since the threshold of unconstitutionality is much lower with endorsement than with coercion.

In the only school case involving displays of religious symbols, the Court took a separationist stance and held that the posting of the Ten Commandments on classroom walls in Kentucky violated the Establishment Clause since doing so served no legitimate secular purpose. The non-school cases, *Lynch* and *Allegheny*, are useful in defining the constitutional boundaries that are controlling on this issue. The posting of religious symbols on non-school public property has met with mixed results, the determination of which was context-specific and has spawned a great deal of friction between O'Connor's endorsement refinement and Kennedy's coercion standard.

As with prayer issues, the constitutionality of displays of religious symbols will likely be determined by whether the Court adopts the endorsement refinement or the coercion standard. If the Court adopts coercion as the appropriate standard, then issues

of religious displays that arise will almost always yield a nonpreferentialist result, as it is difficult to prove that individuals are coerced to view public displays.

Access issues involve not only the Establishment Clause, but also the Free Exercise and Free Speech Clauses of the First Amendment to the United States Constitution. The Supreme Court's holding in *Widmar* indicated that the Court deems nondiscriminatory access of student groups, including religious groups, to university fora constitutional. The issue of nondiscriminatory access to public school fora was heard by the High Court in *Mergens*, and as was the case in *Widmar*, nondiscriminatory access to student groups, including religious groups, was upheld by the Court.

At this juncture, the Court is inclined to view these types of cases as Free Exercise and Free Speech cases. As such, the Justices have held that the Establishment Clause objections that might exist in allowing nondiscriminatory access to student groups are not sufficient to burden individuals' Free Speech and Free Exercise rights.

The sole school case regarding the issue of government empowerment of religious bodies occurred in a 1994 case in which the New York Legislature enacted special legislation to set up a school district that accommodated the educational needs of a specific religious sect. A non-school case on the same issue involved a city ordinance that effectively gave veto power over liquor licenses to schools and churches. Neither practice was upheld by the Court.

Research Question 4: *Do the individual Justices philosophies change depending on the issue?*

Four Justices, Rehnquist, Scalia, Thomas (nonpreferentialists) and Stevens, (separationist) espouse philosophies that are consistent on all issues. Three, O'Connor, Souter and Kennedy, have views that change based on the issue involved. Two Justices, Ginsburg and Breyer, have not written upon any issue, but have recorded votes.

As a consequence of the inconsistency among the Justices, it is of little value to try and make policies that are sensitive to the Establishment Clause position of the current state of the Supreme Court, in the broad sense. Until consensus among the Justices is reached, or until a standard or standards of application that meets with the approval of a majority of the Justices is adopted, it is a more utilitarian approach to adopt policies based upon particular Establishment Clause issues, such as those enumerated in this study. Efforts to define the Establishment Clause philosophy of the Court will frustrate efforts of policy makers unless those policies are issue-specific.

Conclusions

The Supreme Court decisions analyzed in this study demonstrate that contemporary Establishment Clause issues have become more varied and complex as the Rehnquist era has progressed. In the 1970's, for example, state legislatures sought

ways to assist parochial schools in meeting the rising costs associated with education, which frequently ended up in litigation. The Court, in those days, typically assumed a more separationist philosophy and disallowed attempts at financial assistance as being violative of the Establishment Clause. They did so by employing the three-part *Lemon* test. As time progressed, however, state legislatures found methods of providing indirect assistance to nonpublic schools, such as by allowing religion-neutral tax exemptions to all parents or tying the funds to other governmental entitlements, such as IDEA. When aid packages with such provisions were enacted, the High Court assumed a more nonpreferentialist philosophy, often eschewing application of the *Lemon* test in favor of competing standards.

The research contained in this study shows that over the past 15 years, the Court has gradually shifted from being a separationist entity to one that seems inclined to allow a greater degree of nonpreferential religious accommodation. This swing on the Court paralleled a conservative shift in American society, a society that elected a conservative president in three successive elections beginning in 1980. Those presidents (Reagan and Bush) in turn have appointed five of the current Justices. Jurists, including some members of the Supreme Court itself, and legal scholars have questioned the utility of the *Lemon* test, the verity of Jefferson's "wall of separation" and the previous separationist holdings of the Supreme Court.

With the recent conservative shift in the United States, school officials will likely be pressured to adopt a more accommodationist view toward religion and religious groups in the schools. It is likely that efforts to keep religion out of schools and school sponsored activities will meet legal challenges, with greater frequency. Given the current makeup of the Court and the philosophical orientation of the Justices (as demonstrated in this study) those who seek judicial means to ensure nonpreferentialist religious accommodation will likely succeed in their challenges, except on the issue of prayer.

One issue that the High Court might soon face deals with the issuance of educational vouchers to allow parents more choice in the education of their children. Several voucher proposals provide for public funds to be used in educating children in church related elementary and secondary schools as well as in public and non-religious private schools. If the issue comes before the High Court, the constitutionality of the program might well turn on whether the program is one that is deemed to endorse religion. If the particular program is found to endorse religion, then five of the Justices, Stevens, O'Connor, Souter, Ginsburg and Breyer will likely vote separationist and find the program to be violative of the Establishment Clause. If no endorsement is found to exist, and if the vouchers are neutrally available to all citizens, then O'Connor likely will vote in favor of the program, giving the nonpreferentialists at least a 5-4 edge.

The Supreme Court has not had the opportunity to address the issue of either direct or indirect financial aid to nonpublic schools since *Zobrest* (1993). In *Zobrest*, the Justices upheld the appropriation IDEA funds for a sign language interpreter to assist a hearing impaired parochial school student. It is likely that the current Court will have another opportunity in the near future to revisit the issue of aid to parochial schools, as it revisits the *Aguilar* decision. In the original *Aguilar* decision, the Court held that excessive entanglement existed in a New York arrangement that allowed Title I Federal funds to flow to nonpublic schools, even though the remedial classes were to be instructed by public school employees.

If and when the Court has the opportunity to revisit *Aguilar*, that decision, which was drawn on separationist philosophy, will be in jeopardy. Rehnquist dissented in the original case, and Thomas, by virtue of his previous writings and votes will most certainly vote nonpreferentialist. Scalia, O'Connor and Kennedy have all stated in a previous, related case that they also would take a nonpreferentialist stance in a case like *Aguilar*, if given the opportunity to do so.

Implications for School Personnel

Of the five issues articulated in this study, three will likely have an impact on school personnel. Issues of prayer, displays of religious symbols and access will continue to impact on school employees, whereas funding issues and government

empowerment of religious bodies will remain primarily legislative concerns.

Regarding prayer, school officials must distinguish between private prayer which the Free Exercise Clause protects and State-sponsored prayer, which the Establishment Clause forbids. Where people, in their individual capacities, choose to bow their head in prayer, school officials need not intervene unless the activity becomes disruptive. The type of prayer prohibited by the Establishment Clause is government endorsed prayer led by a school official or an outside individual retained by the school.

Displays of religious symbols have the potential to become issues for school personnel, especially during every holiday season bearing some religious significance, (for example, Halloween, Thanksgiving and Christmas). Displays which have a religious aspect as part of a larger seasonal display (one that also celebrates the secular aspects of the season) will pass constitutional muster. The presence of religious symbols will not, by itself, render the display unconstitutional. The type of display that will offend the Establishment Clause is one in which religion is endorsed as a practice favored by the state, sending a message to nonadherents that are disfavored by government. As O'Connor indicated in *Allegheny*, the constitutionality of a display which involves religious symbols must be adjudicated on its particular context.

Finally, the Supreme Court has consistently held that when a public school creates a limited open forum by opening its facilities to noncurricular student groups,

then it must open its forum to all similarly situated groups, including religious ones. However, the Court has stated that schools have the right to close their forum to all groups that do not have a direct relationship to the body of courses offered at the school. Equal access, however, is a double-edged sword. If school officials determine that a religious group may exist at the school, then all other noncurricular groups have access to the forum created by the inclusion of the religious group, even those that are considered distasteful by school officials or the community. If school officials deem that religious groups are undesirable, they must close the forum to all such groups.

Recommendations

1. One of the research questions asked whether Justices' opinions change, depending on the context of the Establishment Clause issue involved. While this study does demonstrate some changes in the individual Justices' philosophies, continued study into their future written opinions, scholarly articles and speeches will give researchers a greater database from which to make that determination.

2. Of the sitting Justices, Ginsburg and Breyer have not written on an Establishment Clause issue. When they do so, analysis of those writings should be undertaken in an effort to determine which theory of original intent is closest to their philosophical orientation.

3. Survey research should be conducted to determine whether education policy makers,

local school boards and superintendents, are aware of the Court's stance on these various Church/State issues. Policy analysis in various school divisions would demonstrate whether the policies followed in those districts would pass constitutional muster when subjected to the standards enumerated and adhered to by the current Supreme Court.

4. Studies similar to this one should be undertaken involving other legal issues impacting public schools (for example, censorship of library materials, textbook, adoption, student speech and expression, etc.).

5. School divisions could be studied to determine the amount of threatened and real litigation they experience on these issues, and ways to defuse.

6. School divisions could be studied to determine the knowledge and understanding of building level principals of the standards applied and the attitudes of the current members of the Supreme Court and how those standards and attitudes apply in matters of religious practices in their schools.

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