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THE ESTABLISHMENT CLAUSE: AN ABSOLUTIST'S DEFENSE

LEO PFEFFER*

I. PRE-JAFFREE

What brings me here this evening is an invitation I received from Professor Robinson to participate in this Religion Clauses Conference by defending the absolutist position in respect to the first amendment's establishment clause. My adversary, he said, would be Professor Robert Cord, who would present what he called a nonpreferentialist approach to the controversy. Professor Cord is indeed a worthy adversary. I can testify to this because we crossed swords some four years ago at New York Law School. Since then the Supreme Court handed down its decision in the Jaffree case. As will later be seen, his book, Separation of Church and State: Historical Fact and Current Fiction played a significant role in Justice (now Chief Justice) William Rehnquist's dissenting opinion in that case, considerably more than is indicated by the simple note in the opinion "See generally R. Cord, Separation of Church and State 61-82 (1982)."

* Until his retirement in 1980, Leo Pfeffer was a professor of political science at Long Island University. He is now an adjunct professor there. He was for many years the special counsel for the American Jewish Congress. In that capacity he argued several landmark church-state cases before the Supreme Court. He is also the author of several books and articles in the church-state area. This paper was prepared for delivery at the Notre Dame Conference on the Religion Clauses of the First Amendment, March 31, 1989.

1. The first amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."


4. 472 U.S. at 104. The book was highly praised by, among others, William F. Buckley, Jr., Senator Daniel Patrick Moynihan, and Professor Charles E. Rice of Notre Dame Law School. The last named, in a book jacket comment on Cord's book, wrote: "This compelling study demonstrates that the prevailing view of the religion clauses of the First Amendment is not only unwise but fictional. If heeded by the Supreme Court, Professor Cord's analysis will profoundly alter our constitutional future."
Lawyers and scholars cognizant in the field of church-state separation are aware that I consistently defend a position called absolutist or extremist or doctrinaire or unrealistic. Perhaps the most charitable name is the term "strict separationist" in contrast to what is often called "accommodationist." I am, therefore, quite happy to defend the absolutist position here today. For all my adult life, though, I have been a lawyer, so I shall defend it from a lawyer's perspective, by looking to Supreme Court cases rather than to philosophy or theology.

II. ANTE JAFFREE

Every jurist, lawyer or political scientist recognizes that one hundred per cent strict separation of church and state cannot be achieved at all times and in all places. Indeed, even where strict separation seems clearly called for, it is sometimes neglected. There are many ways in which the Supreme Court can avoid (or perhaps evade) voiding action which would seem clearly to violate the establishment clause. The case of Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.\textsuperscript{5} illustrates one. That was an establishment clause suit challenging the action of the Secretary of Health, Education and Welfare in turning over to a religious college, without compensation, a land and building thereon for which the government had no further use.

There was strong precedent to support the plaintiff's suit. President James Madison (who more than anyone else must have known what the establishment clause meant) vetoed a measure "reserving a certain parcel of land of the United States for the use of said Baptist Church" because it was "contrary" to the Establishment Clause.\textsuperscript{6} In Valley Forge, however, Justice Rehnquist, speaking for himself and four other members of the Court, disposed of the matter by ruling that as mere taxpayers the plaintiffs had no standing to bring the suit. This ruling was determinative even if no non-religious college willing to bring a suit could be found. A similar device was used in the case of Karcher v. May,\textsuperscript{7} dealt with in Part II of this paper.

Strange as it may seem, you can lose a case by winning it. This is what happened in Diffenderfer v. Central Baptist Church of Miami.\textsuperscript{8} This was a taxpayer's suit that I brought to challenge a

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\textsuperscript{5} 454 U.S. 464 (1982).
\textsuperscript{6} 1 Messages and Papers of the Presidents 490 (J. Richardson ed. 1900).
\textsuperscript{7} 484 U.S. 72 (1987).
\textsuperscript{8} 404 U.S. 412 (1972).
statute granting full tax exemption to a church which used its property for religious services on Sundays but for commercial parking places the other six days of the week. In the time between the submission of all briefs and the date of the argument before the Supreme Court, the Florida legislature amended the statute to read that church property was exempt from taxation only if the property was used predominately for religious purposes and only "to the extent of the ratio that such predominant use bears to the non-exempt use." The Court dismissed the case as moot, leaving the constitutional issue up in the air, where it floats to this day.

Another way of disposing of an establishment clause issue is by ignoring it. This is what happened in *Marsh v. Chambers*, in which a member of the Nebraska legislature brought suit challenging the engagement of a chaplain to open each session with a prayer. In the beginning of the Court’s opinion by Chief Justice Warren Burger, notice was taken that both the district court and the court of appeals held the challenged rule unconstitutional under the establishment clause. Beyond this, the clause was almost completely ignored, and the lower courts’ decision ruled erroneous in view of the fact that the engagement of a chaplain was a long-time practice of the federal Congress; and if the national government can do it, why not the states? Ignored also was Justice William Brennan’s dissent which judged the practice violative of all three parts of the purpose-effect-entanglement test of constitutionality, the last third of which was Chief Justice Burger’s creation.

Reading these opinions and others like them, one would get the impression that strict separationism is so firmly entrenched in American jurisprudence that the only way the Court could refrain from striking down measures to aid parochial schools or other religious institutions was to shun reference to the establishment clause altogether. On its face this would seem to be so, in view of the no-aid principle set forth in *Everson v. Board of Education* and the purpose-effect-entanglement test set forth in *Walz v. Tax Commission*.

In *Everson* the Court said:

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

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pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."  

Notwithstanding this, the Court by a 5-4 vote upheld the constitutionality of a New Jersey statute financing transportation to both public and religious schools. This impelled dissenting Justice Robert Jackson to say: "The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent,' consented.'" This would seem hardly fair to Black's majority opinion, which justified, at least in part, the purpose of protecting pupils from the hazards of traffic, just as public funds are used to provide ordinary services such as police and fire protection. The difficulty with this defense, however, is that it has no application in respect to the loan of secular textbooks to parochial schools, a practice held constitutional, albeit over Black's dissent, in Board of Education v. Allen.  

Nor does a basic services rationale have any application to the case of McGowan v. Maryland, in which a majority of the Court, in an opinion by Chief Justice Earl Warren, upheld against an establishment clause challenge a statute forbidding the doing of store business on Sundays. It should be noted that this claim had earlier been made in a number of cases, including Friedman v. New York which I had brought to the Supreme Court and which had been dismissed for want of a substantial federal question. In retrospect, it turns out there

12. 330 U.S. at 15.  
13. Id. at 19.  
was a substantial federal question after all. In fact, the Court said in *McGowan* that in earlier times Sunday laws would have been deemed religiously motivated. But their purpose now was to assure the secular ends of rest, relaxation and family togetherness, and could not therefore be treated as laws aiding religion. Chief Justice Warren set forth a review of establishment clause cases from 1791 to 1961, including the *Everson* paragraph in full. He distinguished all these as irrelevant, and ended with the following dictum:

We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose — evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect — is to use the State's coercive power to aid religion.17

Two years after *McGowan*, the Court, in *Abington School District v. Schempp*18 (in a decision from which there was only one dissent), extracted from *McGowan*'s purpose-effect dictum a full-fledged holding and test, and did so while reaffirming the no-aid dictum of *Everson*. This is what the Court said in *Schempp*:

As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.19

In *Walz v. Tax Commission*,20 in an opinion by Chief Justice Burger, the Court added the entanglement principle. The trilogy of purpose-effect-entanglement was drawn together in the

18. 374 U.S. 203 (1963). The Court held violative of the establishment clause a Pennsylvania statute providing for Bible reading in public schools, and a Maryland rule providing for recitation of the Lord's Prayer.
19. *id.* at 222.
joint opinion of *Lemon v. Kurtzman* and *Earley v. DiCenso* (herein-after *Lemon*). Specifically, in ruling unconstitutional a law providing financial aid to parochial schools, the Court explained that, to pass constitutional muster, a statute "must have [first] a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.'" This three-part test is the standard modern formulation of the strict separationist position.

Before, however, we turn to Part II of this paper it is appropriate to note that absolutism or strict separationism between church and state in respect to the establishment clause was not the creation of the Justices who decided the *Everson* or *Lemon* cases. Aside from Jefferson and Madison and indeed more than a century before them, Roger Williams wrote his famous letter to the Town of Providence spelling out the relationship between government and religion in terms of the rightful powers and duties of a ship's commander at sea:

There goes [he said] many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination or society. It hath fallen out sometimes, that both papists [that is, Catholics] and protestants, Jews and Turks [that is, Muslims], may be embarked in one ship; upon which supposal I affirm, that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges—that none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any. I further add, that I never denied, that, notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace and sobriety, be kept and practiced, both among the seamen and all the passengers.

22. *Id.* at 612-13 (citations omitted).
23. The passage continues:
If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace or preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there
This letter merits the most careful study, for it sets forth with clarity and brevity the three basic principles upon which a religious pluralistic society can best survive and flourish according to the great American experiment of religious liberty and the separation of church and state: (1) there is a difference between the sacred and the secular; (2) compulsion may be exercised by officials of the state in the area of the secular but not of the sacred; and (3) where the safety and security of the commonwealth are concerned, religious conscience is not a valid excuse for refusing to obey the lawful commands of the state.

To be sure, there will always be disputes over the application of these principles in practice. In distinguishing between the sacred and the secular, for instance, is the claim that a Creator created the universe and all living things a secular theory of "creation-science" or is it religious? The Supreme Court held, I believe correctly, that it was the latter.° Is it improper compulsion to provide textbooks for religious schools paid for with tax moneys from individuals who do not believe in that religion? The Supreme Court held, I believe incorrectly, that it is not. 25 Finally, does the safety of the Republic demand that Air Force officers be forbidden to wear the skull caps that their religion demands? I think not, but again the Supreme Court decided otherwise. 26 Disputes over the application of principles, however, do not mean that the principles themselves should be rejected or we would have no principles left. Even nonpreferentialists sometimes disagree among themselves, as will be seen later in this paper.

The important point is that these separationist principles were restated again and again and again both before and after the establishment clause was adopted, and often by people who had no knowledge of Roger Williams or his beliefs. In 1776, a

ought to be no commanders or officers, because all are equal in Christ, therefore no masters nor officers, no laws nor orders, nor corrections nor punishments;—I say, I never denied, but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel and punish such transgressors, according to their deserts and merits.

Letter from Roger Williams to the Town of Providence, in 6 The Complete Writings of Roger Williams 278-79 (P. Miller ed. 1963).

century after Williams and before there was a first amendment, Thomas Paine wrote in *Common Sense*:

"As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith."27

After the passing of Jefferson and Madison, but prior to *Everson*, we have among protagonists for complete church-state separation Jeremiah Black, a recognized great jurist. In 1885 he said:

The manifest object of the men who framed the institutions of this country, was to have a State without religion and a Church without politics — that is to say, they meant that one should never be used as an engine for the purposes of the other . . . . For that reason they built up a wall of complete and perfect partition between the two.28

And from another great jurist, David Dudley Field, we have the following:

"The greatest achievement ever made in the cause of human progress is the total and final separation of church and state."29

What all this indicates is that strict separation of church and state is a national commitment. From a constitutional point of view, this commitment is applicable to the states only by reason of the fourteenth amendment, and some critics of strict separation have attacked this extension as unjustified. There is substantial evidence, though, to support the proposition that the citizens of the states, with few if any exceptions, are more committed to strict separation in respect to their constitutions than nonpreferentialists or accommodationists would wish. Indeed, fewer than a half dozen states omit provisions in their constitutions expressly prohibiting use of public funds to aid sectarian schools.30

Take New York for an example. Its constitution, adopted in 1894, has as Article 11, Section 3 the following:

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or

maintenance, other than for examination and inspection, of any school or institution of learning in whole or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.

There could scarcely be a more absolutist provision to a constitution than the one just quoted. I say "scarcely" because the final clause of the provision has a less than absolutist ring to it. History goes a long way toward explaining that clause. In 1938, in Judd v. Board of Education, 31 New York's highest court held invalid under Article 11, Section 3, a state statute providing transportation to and from religious schools. This decision was abrogated when the state constitution was amended to add what became its final clause. The reader will recall that in Everson the Supreme Court held state-funded transportation to be permissible under the federal establishment clause.

Not surprisingly, even as amended, Article 11, Section 3 did not satisfy anti-absolutists, and, led by Francis Cardinal Spellman, they launched a strong campaign to repeal Section 3 in its entirety. In addition to the Orthodox Jewish Community, 32 Cardinal Spellman had some influential supporters, including Governor Nelson Rockefeller and Senators Robert Kennedy and Jacob Javits. 33 Opposing them was a host of Protestant, Jewish and non-sectarian organizations. 34 The net result was a vote of almost 3 to 1 against the repeal proposition, a ratio that could not have been reached without the votes of a substantial number of Catholics.

What happened in New York is hardly unique. According to the Winter 1988 issue of Voice of Reason, fifteen referenda in addition to New York's have been held on the subject of aid to parochial schools. All but one concluded "no."

32. The May 5, 1967 issue of the Jewish Press has a cartoon showing on top the words "Yeshiva Education," on one side "Teaching Good Citizenship and Proper Moral Behavior," and on the other side "Preservation of Traditional Judaism." Between them is a sweating man holding the two apart with the name "Pfeffer" on it and beneath it is the sentence: "Might As Well Give Up, Mr. Pfeffer — A Samson You're Not!!" (copy on file in Leo Pfeffer Papers, Syracuse University).
34. The Brooklyn Tablet of June 6, 1967 declared me to be the leader of this opposition.
III. JAFFREE

We come now to the second and major part of this paper. It deals with the case of Wallace v. Jaffree, how it came about and how it was finally resolved. It should be noted that it was the case that was finally resolved, not the controversy relating to strict or absolute separationism versus accommodationism; that controversy will probably not be resolved until there be no more church or no more state.

Involved in this litigation were three independent but related Alabama statutes: one authorized a one-minute period of silence "for meditation" in public schools; the second authorized a period of silence "for meditation or voluntary prayer," and the third authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God... the Creator and Supreme Judge of the world." Initially Ishmael Jaffree, father of three public school children, challenged all three statutes under the establishment clause. During the course of the litigation, however, he decided not to question the validity of the one that authorized one-minute silence "for meditation," so that this was no longer a controverted issue for judicial determination. (I will return to this point later, but for the time being it does not require further consideration.)

In respect to the other two statutes, District Court Chief Judge William Brevard Hand ruled, on an application for a preliminary injunction, that Jaffree was likely to prevail, and accordingly granted the injunction. After a four-day trial on the merits, however, Judge Hand changed his mind. He concluded in the first place that the first amendment "prohibit[ed] the federal government only from establishing a national religion. Anything short of the outright establishment of a national religion was not seen as violative of the first amendment." In reaching this nonpreferentialist position Judge Hand relied heavily on Professor Cord, whose work, he said, was "invaluable to the Court in this opinion." Second, Judge Hand determined that the fourteenth amendment did not make the first amendment applicable to the states (noting that he was parting company with Professor Cord on this point). He

39. Id. at 1113-14 n.5.
40. Id. at 1124 n.33.
held, consequently, that "the establishment clause . . . does not bar the states from establishing a religion."41 In effect, the Judge overruled every Supreme Court decision since Everson and McCollum that enunciated the no-aid principle, and every case since Walz and Lemon that applied the purpose-effect-entanglement test.

Jaffree's counsel applied for a stay of Judge Hand's judgment to the Court of Appeals for the Eleventh Circuit, but this was denied.42 The response of Jaffree's counsel was to apply for a stay to Supreme Court Justice Powell in his capacity as a Circuit Justice for the Eleventh Circuit. There could be little doubt, said Powell, that conducting prayers as part of a school program violates the establishment clause under the Supreme Court's decisions in Engel v. Vitale43 and Abington School District v. Schempp.44 Accordingly, he said, a stay should be granted.45 The granting of the stay did not, of course, constitute a determination that the lower court's decision was erroneous. This came about when the court of appeals determined that Hand's ruling was in error in holding prayer in the public schools to be permissible and, accordingly, reversed it.46

Intervening in support of Governor George Wallace was a group consisting of Douglas T. Smith and more than 500 teachers and parents. They supported Judge Hand's position that historically the first amendment was intended only to prohibit establishment of a national religion and the fourteenth amendment was never intended to incorporate the first amendment. The court of appeals acknowledged that this view had some scholarly support, and identified Professor Cord, among others, as a proponent. It also recognized that others support a strict separationist position, referring, among others, to Professor Leonard Levy and to me.47 It concluded, though, that the Supreme Court had already addressed these historical issues, and that it had no power to overrule decisions of the Supreme Court. Accordingly, the court of appeals ruled that both the articulated prayer statute and the silent prayer statute violated the establishment clause, and overruled the decision of the district court as to both.

47. Id. at 1530.
Now it was the turn of the defendants to appeal. They first sought a rehearing by the full Eleventh Circuit *en banc*. This application was denied, with four judges dissenting as to the silent prayer law. Although the four judges (all, incidentally, appointed by President Nixon) did not say they would uphold the statute, they thought the issue sufficiently important and doubtful to merit an *en banc* hearing.\(^4\) The next step was to seek appeal to the Supreme Court. That Court, without dissent, summarily affirmed the decision of the court of appeals in respect to the articulated prayer ruling but, at the same time, noted probable jurisdiction in respect to the silent prayer holding.\(^5\)

The Supreme Court heard the argument and affirmed the decision, striking down the silent prayer statute by a six to three vote.\(^5\) I shall deal with this decision shortly, but first let me continue the story of the case. On remand, Judge Hand realigned parties and issued a sort of "tit-for-tat" ruling—if Alabama public school teachers could not lead their pupils in prayer, they would not be able to lead them in anything else either. In particular he held that forty-four textbooks used in Alabama, in subjects ranging from history to home economics, embodied what he termed the "religion of secular humanism," and therefore violated the (strict separationist) interpretation of the establishment clause which had been thrust upon him.\(^5\) The court of appeals reversed. It interpreted Judge Hand's opinion as requiring "'equal time' for religion," when the establishment clause mandates "*separation* from religion."\(^5\) I have dealt with this case and the question of secular humanism elsewhere,\(^5\) and shall not repeat myself here. Let me return instead to the Supreme Court's treatment of *Jaffree*.

In the early days of the Supreme Court, when Chief Justice John Marshall reigned supreme, dissents and dissenting opinions, particularly when he appointed himself to write the Court's opinion, were a rarity. There was a variety of reasons for this, not the least of which were his own personality and the

\(^{48}.\) 713 F.2d 614 (11th Cir. 1983).


\(^{50}.\) 472 U.S. 38 (1985).


\(^{52}.\) 827 F.2d 684, 695 (11th Cir. 1987) (emphasis in original).

general unimportance of the Court.\textsuperscript{54} Indeed John Jay, the first Chief Justice of the Court, resigned from that office to become governor of New York and refused to come back when President John Adams offered him the position.\textsuperscript{55} Hence, Marshall was appointed. In sharp contrast to decisions in the Marshall era, the \textit{Jaffree} case contains (1) a majority opinion of Justice Stevens, joined by Justices Brennan, Marshall, Blackmun and Powell; (2) a concurring opinion by Justice Powell; (3) an opinion by Justice O'Connor concurring in the judgment but not in the Stevens opinion; (4) a dissenting opinion by Chief Justice Burger; (5) a dissenting opinion by Justice White that agreed in the most part with the Chief Justice; and (6) a dissenting opinion by Justice Rehnquist that agreed with nobody.

A practicing lawyer can see many advantages in the Marshall system of one opinion per case. For present purposes, however, the variety of opinions in \textit{Jaffree} offers an opportunity to consider contrasting views on the proper nature of church-state relations. We will deal with the opinions \textit{seriatim}, beginning, naturally, with that of Justice Stevens.

\textbf{A. Justice Stevens' Opinion}

Having unanimously upheld the court of appeals' ruling in respect to articulated prayer, Justice Stevens had no obligation to comment upon the district court's remarkable conclusion that the first amendment does not apply to the states.\textsuperscript{56} Nevertheless, Justice Stevens said, he would do that anyway. "[F]irmly embedded in our constitutional jurisprudence [he said] is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United

\begin{itemize}
  \item \textsuperscript{54} See L. Pfeffer, \textit{This Honorable Court} 89-93 (1965).
  \item \textsuperscript{55} \textit{Id.} at 55, 67.
  \item \textsuperscript{56} See School District v. Schempp, 374 U.S. 203, 215-17 (1963): First, this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment \ldots. Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another \ldots. While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.
\end{itemize}
States.” He quoted from Cantwell v. Connecticut, a unanimous decision handed down seven years before Everson: “The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.”

Justice Stevens then quoted two paragraphs from Justice Joseph Story’s Commentaries on the Constitution of the United States, published in the 1830s, which, as we will see, were bound to present some difficulty to Justice Rehnquist. Justice Story wrote:

Probably at the time of the adoption of the constitution, and of the amendment to it, now under consideration [First Amendment], the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

The second paragraph read:

The real object of the amendment was, not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating christianity; but to exclude all rivalry among christian sects, and to prevent any national ecclesiastical establishment, which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution, (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age . . . .

Justice Stevens proceeded to reject this interpretation of the first amendment as one which had failed to withstand

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57. 472 U.S. at 48-49.
58. Id. at 50 (quoting Cantwell v. Connecticut, 310 U.S. 296, 303 (1940)).
59. Id. at 52 n.36 (quoting 2 Story, Commentaries § 1874) 3d ed. 1851) (Stevens’ emphasis omitted).
60. Id. (quoting 2 J. Story, Commentaries § 1877) (Stevens’ emphasis omitted).
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"examin[ation] in the crucible of litigation."61 Rather, he stated, "the First Amendment embraces the right to select any religious faith or none at all."62 This approach, he explained, was founded on three bases: respect for individual freedom, a belief that the only genuine faiths are those chosen voluntarily by the faithful, and a political interest in preventing intolerance and conflict, not only among Christian sects, as Justice Story thought, but among all religions and equally among the religious, the unbelievers, and the uncertain.63

Justice Stevens quoted from *Engel* the statement that "a union of government and religion tends to destroy government and to degrade religion."64 He quoted too from *Everson* the statement that "neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."65 Stevens also invoked the purpose-effect-entanglement trilogy, under which unconstitutionality as to any one prong results in the invalidity of the statute.66 He then held that, under the facts of the case (including assertions by sponsors of the law that it was an effort to return prayer to the public schools), the purpose of the silent prayer provision violated the establishment clause, just as did the articulated prayer provision, and was equally unconstitutional.67

Justice Stevens' opinion is not a comprehensive statement of Supreme Court establishment clause doctrine. That is itself significant. Despite the comprehensive rejection of all the Supreme Court's works by the district court, a rejection which, as we shall see, was endorsed by Justice Rehnquist, the Court majority saw no need to reevaluate or even reiterate at length its separationist position.

B. **Justice Powell Concurs**

Although Justice Powell concurred in the Stevens opinion, he also felt it necessary to express agreement with Justice O'Connor's assertion that some moment-of-silence statutes (e.g. the Alabama silent meditation law) might be constitutional,68 a suggestion already set forth in Stevens' opinion.69

61. *Id.* at 52.
62. *Id.* at 53.
63. *Id.* at 53-54.
64. *Id.* at 54-55 n.39 (quoting 370 U.S. at 431).
65. *Id.* at 53 n.37, (quoting 330 U.S. at 15) (emphasis added).
66. *Id.* at 55-56.
67. *Id.* at 56-61.
68. *Id.* at 62 (Powell, J., concurring).
Since, as has been noted, Mr. Jaffree had accepted that position, which nobody now opposed, it would seem unnecessary and inappropriate, under the principle of mootness, for the Justices to express their positions on that section. This conduct in *Jaffree* presents an interesting contrast with what later happened in the case of *Karcher v. May*. There, the United States Court of Appeals had ruled violative of the establishment clause's purpose prong a New Jersey statute which provided that principals and teachers in public elementary and high schools should “permit students to observe a one minute period of silence to be used solely at the discretion of the individual student, before the opening exercise of each school day for quiet and private contemplation or introspection.”

The New Jersey State Attorney General immediately announced that he would not defend the statute if it were challenged, as indeed it was in a suit instituted by a teacher, and some public school students and their parents. In view of that fact, Alan Karcher, the Speaker of the Assembly and Carmen Orechia, President of the Senate, were allowed by the district court to intervene on behalf of the New Jersey legislature. The district court, after trial, declared the law unconstitutional on all three aspects of the purpose-effect-entanglement test. The court of appeals affirmed the judgment but only in respect to the purpose prong of the establishment clause. What happened next was that Karcher and Orechia were displaced from their offices, but still remained members of the legislature, and sought in that capacity to appeal to the United States Supreme Court. It would seem that in this state of affairs, and given the importance of determining a significant issue that involved not only the states which have enacted the New Jersey bill but those that might do so, the Supreme Court would have proceeded to decide it. Unfortunately, it did not, but dismissed the case because Karcher and Orechia no longer represented the State of New Jersey and therefore lacked standing to pursue the appeal. The Justices scrupulously refrained from voicing any opinion on the merits of New Jersey’s moment-of-silence statute.

All this does not mean that to Justice Powell *Jaffree* was a tale full of sound and fury, signifying nothing. His concurring

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69. *Id.* at 59.
opinion served the purpose of reinforcing the purpose-effect-entanglement test against Justice O'Connor, who wished to see it revised, and against Justice Rehnquist, who wished to discard it in its entirety. Only once since Lemon was decided (namely in Marsh v. Chambers), Justice Powell, had the Court addressed an establishment clause issue without resort to the three-pronged test. "Yet," he added, "continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis."76

C. Justice O'Connor: For Judgment but Not Opinion

Justice O'Connor opened her concurring opinion by noting that all parties to the litigation conceded the validity of the enactment providing "a moment of silence" (Ala. Code Sec. 16-1-20 (Sept. 1984)); and this even though it may be presumed that one or more of the pupils will use the moment of silence for prayer. (Of this, more later.) At issue was the constitutional validity of the additional and subsequent statute (Ala. Code Sec. 16-1-20.1) which was enacted solely to officially encourage prayer during the moment of silence. For her part that statute violated the establishment clause, since there could be little doubt that the purpose and likely effect was to endorse and sponsor voluntary prayer in the public schools. In her view the inquiry in Lemon v. Kurtzman as to the purpose and effect of a statute required courts to examine whether the government's purpose was to endorse religion and whether the statute actually conveyed a message of endorsement.77

She recognized that a state-sponsored moment of silence was different from unconstitutional state-sponsored vocal prayer [as in Abington School District v. Schempp78] or Bible reading, [as in Engel v. Vitale79] continued Justice O'Connor. In the first place a moment of silence was not inherently religious and need not be associated with a religious exercise. "Second, a pupil who participates in a moment of silence need not compromise his or her beliefs. During a moment of silence, a student who objects to prayer is left to his or her own thoughts,

76. 472 U.S. at 63. Powell also said he believed the silent prayer law passed muster under the effect and entanglement tests. Id. at 66-67.
77. Id. at 67-68.
and is not compelled to listen to the prayers or thoughts of others.”

In *Lynch v. Donnelly*, Justice O’Connor, she had suggested the position that the religious liberty protected by the Establishment Clause was infringed when the government made adherence to religion relevant to a person standing in the political community. Under her view in that case, the inquiry in *Lemon* as to the purpose and effect of a statute required courts to examine whether the statute actually conveyed a message of endorsement.

However, a further consideration of *Lynch* is relevant to the present paper. There by a 5-4 vote, with Justice O’Connor presenting her own special concurring opinion, the Court upheld the presence of a crèche which was owned by the city but placed every Christmas in a park owned by a nonprofit organization and located in the heart of the shopping district. The Court pointed out that the crèche was not the only part of the display; together with it was a Santa Clause house, reindeer pulling Santa’s sleigh, carolers, candy-striped poles, a Christmas tree, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, and a large banner that read “SEASON’S GREETINGS.” All the components of the display, not only the crèche, were owned by the city, which also paid for the erection and dismantling (at a cost of $20 per year), and the nominal expenses incurred in lighting the crèche.

Justice O’Connor concurred with the Court’s decision but made a reservation to the concurrence. The display, she said, did not communicate a message that the government intended to endorse the Christian beliefs represented by the crèche, or had the effect of enforcing Christianity. As Justice O’Connor was the deciding vote in *Lynch v. Donnelly*, so was she in *County of Allegheny v. American Civil Liberties Union* only this time it was in the opposite direction.

In expressing her position in *Jaffree*, Justice O’Connor made it clear that this was probably an unusual exception to an unusual situation. Twenty-five states, she pointed out, permitted or required public school teachers to have students observe a moment of silence in their classrooms. True enough a few

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80. 472 U.S. at 72.
82. Id. at 671.
83. Id. at 694.
state laws provided that the moment of silence was for meditation alone; but the typical statute called for a moment of silence at the beginning of the school day during which students might "mediate, pray, or reflect on the activities of the day."\footnote{\textit{472 U.S.} at 70-71.}

The Court [she said in completing her concurring opinion] does not hold that the Establishment Clause is so hostile to religion that it precludes the States from prayer. To the contrary, the moment of silence statutes of many States should satisfy the Establishment Clause standard we have here applied. 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 endorsing the particular religious practice of prayer. This line may be a fine one, but our precedents and the principles of religious liberty require that we draw it.\footnote{\textit{Id.} at 84.}

It is here that I suggest the unrealism of Justice O'Connor's statement that silent prayer is an aspect of mind-action equal to (but not more or less than) meditation or reflection of the activities of the day. Any synagogue-attending Jew can tell you that a specific prayer is read by every congregant in complete silence, not once but three times each day. In Christian churches, too, as is well known, prayer in silence is a significant part of religious services, as is a prayer of thankfulness before and/or after meals at home (a practice long anticipated in the Hebrew religion).

Why in light of all this was it necessary for legislatures in twenty-five states to enact laws permitting or requiring public school teachers to have students observe a moment of silence in their classrooms during which they might meditate, pray or reflect on the activities of the day? School teachers can testify that on innumerable occasions they have called upon a talkative class to be silent for a minute or so during the school day without needing any special legislative mandate to do so. Besides this, how does the teacher explain what it means to "meditate"? It looks quite silly for a teacher to order the class every morning to meditate without telling them what that means. And what happens if she herself puts her hands together and lowers her head or even crosses herself while she meditates? Would not the pupils think that if the teacher does that, so should they? How would Jewish parents (or atheistic as in
McCollum,\textsuperscript{87} or Torcaso\textsuperscript{88} or in the case we are now considering) feel if their children crossed themselves when they sat down to the evening meal (because if the teacher did it, it must be right)?

The crux of the matter, I suggest, lies in the reality that the Supreme Court having time and again rejected an effort to bring articulate prayer into the public schools, half of the States have decided to compromise on silent prayer. In this instance, I suggest, silence is not better than nothing but the equal of it.

D. The Chief Justice Dissents

In his dissenting opinion, Chief Justice Burger wrote:

Some who trouble to read the opinions in this case will find it ironic — perhaps even bizarre — that on the very day we heard arguments in this case, the Court's session opened with an invocation for Divine protection. Across the park a few hundred yards away, the House of Representatives and the Senate regularly open each session with a prayer. These legislative prayers are not just one minute in duration, but are extended, thoughtful invocations and prayers for Divine guidance. They are given, as they have been since 1789, by clergy appointed as official Chaplains and paid from the Treasury of the United States. Congress has also provided chapels in the Capitol, at public expense, where Members and others may pause for prayer, meditation — or a moment of silence.\textsuperscript{89}

What Chief Justice Burger did in \textit{Jaffree} was to avail himself of an old and oft-used device going back to Church of Holy Trinity \textit{v. United States}.\textsuperscript{90} There the Court said:

If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words of all wills, "In the name of God, amen"; the laws respecting the observance of the

\textsuperscript{87} 333 U.S. 203 (1948).
\textsuperscript{88} 367 U.S. 488 (1961).
\textsuperscript{89} \textit{Id.} at 84-85 (Burger, C.J., dissenting).
\textsuperscript{90} 143 U.S. 457 (1892).
Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town and hamlet; the multitude of charitable organizations existing everywhere under Christian auspices, the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These, and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.91

This is basically what Justice Douglas said in Zorach v. Clauson (although he obviously could not say that we are a Christian people, so he used the word "religious," but the net result was the same).92 The following is what he said:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.93

This type of litany begs more questions than it answers. Few of these examples have actually been upheld as constitutional. Instead, lawsuits challenging them are dismissed for lack of standing, or because any constitutional violation is de minimis. They have not survived the "crucible of litigation" to which Justice Stevens referred.94 The only time the Supreme Court

91. Id. at 471.
93. Id. at 313-14.
94. See supra text accompanying note 67.
upheld a practice simply because it had a long historical tradition was the legislative chaplain case, *Marsh v. Chambers*,\(^95\) which I have already mentioned. There the Supreme Court, with scarcely a mention of the establishment clause, upheld a Nebraska practice of using tax funds to pay a minister to recite a prayer at each session of the state legislature. The *Marsh* opinion was neither separationist nor nonpreferentialist. If it expressed any doctrine at all, it was that of Alexander Pope: "whatever is, is right." That is hardly a persuasive argument.

**E. Justice White Dissenting**

Next among the dissenters was Justice White. His opinion was brief. For the most part, he said, he agreed with Burger's opinion. To him the first amendment did not proscribe a moment of silence for meditation or prayer. "[I]f a student asked whether he could pray during that moment, it is difficult to believe that the teacher could not answer in the affirmative. If that is the case, I would not invalidate a statute that at the outset provided the legislative answer to the question 'May I pray?'"\(^96\) As for the establishment clause, Justice White appreciated Justice Rehnquist's explication of it. He himself, he noted, had been out of step with many of the Court's decisions on the subject, and thus would support a basic reconsideration of its precedents.\(^97\)

**F. Justice Rehnquist's Repentance**

In reviewing Justice Rehnquist's attack on strict separation, it is worth keeping in mind that he joined in the Court's opinion in *Lemon*,\(^98\) in which the three-prong test for the establishment clause was first invoked to nullify a statute. Although he does not mention this fact in his dissent, he displays the well-known zeal of a convert.

Justice Rehnquist began his dissent in *Jaffree* by noting that thirty-eight years earlier the Court, in *Everson*, had summarized its exegesis of the establishment clause by stating: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"\(^99\) He could hardly avoid recognizing that in 1879 the Court had referred to this wall in *Reynolds v. United

\(^{95}\) 463 U.S. 783 (1983).
\(^{96}\) 472 U.S. at 91 (White, J., dissenting).
\(^{97}\) Id.
\(^{98}\) 403 U.S. 602 (1971).
\(^{99}\) 472 U.S. at 91 (quoting 330 U.S. at 16).
But that, he said, was truly inapt because *Reynolds* was a free exercise rather than an establishment clause case, and it dealt with a Mormon's challenge to a federal polygamy law.  

The "wall of separation" phrase bothered Justice Rehnquist ever so much, although it is hard to believe that any of the establishment clause cases would have been decided differently had Jefferson never used that phrase in his letter to the Danbury Baptist Association. But bother him it did. Jefferson, he pointed out, was in France at the time when the first ten amendments were adopted by Congress and the states. Besides, his letter to the Baptists was no more than "a short note of courtesy," written 14 years after the amendments were passed by Congress.

This description of the Danbury letter was not original with Justice Rehnquist. James O'Neill, whose discussion of the subject became standard reading for accommodationists, described Jefferson's "wall of separation" as a "figure of speech" in a "little address of courtesy" to the Baptists, and no more than that. Professor Edward Corwin, for his part, suggested that the letter was not improbably motivated by "an impish desire to heave a brick at the Congregationalist-Federalist hierarchy of Connecticut . . ."  

The trouble with all this is that it is simply not so. Jefferson's own testimony reveals that he submitted the Danbury letter to his Attorney General, Levi Lincoln, together with the following letter:

> Averse to receive addresses, yet unable to prevent them, I have generally endeavored to turn them to some account, by making them the occasion, by way of answer, of sowing useful truths & principles among the people, which might germinate and become rooted among their political tenets. The Baptist address, now enclosed, admits of a condemnation of the alliance between Church & State, under the authority of the Constitution. It furnishes an occasion, too, which I have long wished to find, of saying why I do not proclaim fastings and thanksgivings, as my predecessors did.

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100. 98 U.S. 145 (1879).
101. 472 U.S. at 92 n.1.
102. *Id.* at 92.
104. *Id.* at 82-83.
105. AMERICAN CONSTITUTIONAL HISTORY: ESSAYS BY EDWARD S. CORWIN 204-05 (A.T. Mason and G. Garvey eds. 1964).
The address, to be sure, does not point at this, and its introduction is awkward. But I foresee no opportunity of doing it more pertinently. . . . Will you be so good as to examine the answer, and suggest any alterations which might prevent an ill effect, or promote a good one among the people?  

Plainly, Jefferson regarded his letter as more than a "little address of courtesy."

Probably neither these considerations nor anything else could affect Justice Rehnquist's strong (almost phobic) feelings against Jefferson's letter. "The 'wall of separation between church and State,'" he said, "is metaphor based on bad history, a metaphor which proved useless as a guide to judging. It should be frankly and explicitly abandoned." This conclusion, of course, does not depend on the accuracy of Justice Rehnquist's historical analysis. Considering, however, that the thrust of his dissent was that the Supreme Court had misconstrued the history of the establishment clause, the historical error which opens his opinion should give us pause.

The major part of Justice Rehnquist's dissent dealt with his assertion that the no-aid principle of Everson, McCollum and their progeny, together with the purpose-effect-entanglement trilogy in Walz, Lemon and their progeny, were all mistaken. According to him, the Court had erred in holding that the establishment clause was intended to be anything more than an instrument "to prohibit the establishment of a national religion, and perhaps to prevent discrimination among the sects. He [Madison] did not see it as requiring neutrality between religion and irreligion." To support his position, Justice Rehnquist invoked and dealt in detail with the proceedings in Congress that led to the adoption of the establishment clause. There is, I suggest, little purpose in discussing this aspect of the Rehnquist dissenting opinion. For my own part, I first wrote on this historical question forty years ago, have returned to it many times since, and have little new to add. In any event, as has been noted, the Supreme Court has rejected Justice Rehnquist's interpretation of the establishment clause, and its rejection has been supported by reputable scholars.

106. Quoted in L. Pfeffer, Church, State, and Freedom 134 (1967).
107. 472 U.S. at 107.
108. Id. at 98.
109. Id. at 92-99.
(although disputed by Professor Cord and others)." Instead we turn now to consider his other evidence. Justice Rehnquist quoted the same two paragraphs from Justice Story's treatise that Justice Stevens had cited:

"Probably at the time of the adoption of the Constitution, and of the amendment to it, now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . .

"The real object of the [First] Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age . . . ." 112

These two paragraphs are obviously not nonpreferentialist. They explicitly call for preference of Christianity over other religions. Indeed, Justice Stevens had cited them as an outmoded interpretation of the establishment clause for precisely that reason. 113 Justice Rehnquist, by contrast, drew the conclusion that "[i]t 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." 114

With all due respect to the current Chief Justice, the quotation from Story shows nothing of the kind. Story's analysis is

111. See, e.g., T. Curry, The First Freedom: Church and State in America to the Passage of the First Amendment (1986); L. Levy, The Establishment Clause: Religion and the First Amendment (1986); L. Pfeffer, supra note 99.

112. 472 U.S. at 104-05 (quoting 2 Story, Commentaries 630-32 (5th ed. 1891)).

113. Id. at 52 n.36.

114. Id. at 106.
part and parcel of the conception of the United States as a Christian nation.115 If Justice Rehnquist truly believed that Story's position reflects a controlling original intent regarding the meaning of the establishment clause, then he would have to reject, not only strict separationism, but nonpreferentialism as well. When he said that the first amendment forbids “preference among religious sects or denominations,” he was abandoning Story, not relying on him.

Justice Rehnquist also quoted from Thomas Cooley's *Constitutional Limitations.* Cooley’s eminence as a legal authority, said Justice Rehnquist, rivaled that of Story, and like Story, Cooley recognized that it was aid to a particular religious sect that was prohibited by the Constitution.

But while thus careful to establish, protect, and defend religious freedom and equality [Cooley wrote], the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse. This public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce

the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order.116

As we have seen, some of Cooley's eminent contemporaries, such as Jeremiah Black, were less accommodationist than he was. Cooley himself noted that the "propriety of making provisions for the appointment of chaplains for the two houses of Congress and for the army and navy, has been sometimes questioned."117 What should be noted here is that none of Cooley's examples would require reversal of any current Supreme Court precedents. Thanksgiving day proclamations and military chaplains have never been challenged in the Supreme Court, and legislative prayers and tax exemption for churches have been upheld by it.118 It is therefore difficult to understand how the citation from Cooley supports Justice Rehnquist's argument that all prior Supreme Court establishment clause jurisprudence should be rejected.

Justice Rehnquist gives considerable space to George Washington's rather long proclamation of thanks to Almighty God. He notes that Washington, Adams and Madison all issued Thanksgiving Proclamations, but that Jefferson did not, and he quotes Jefferson's reason for not doing so, namely that fasting and prayer are religious exercises and the enjoining of them belongs to the people where the Constitution has deposited them.119 So much attention is paid to these proclamations that Justice O'Connor commented that "[t]he primary issue raised by Justice Rehnquist's dissent is whether the historical fact that our Presidents have long called for public prayers of thanks should be dispositive of the constitutionality of prayer in public schools."120

What Justice Rehnquist said at this point was the truth, but not the whole truth. In the first place, Jefferson was not the only President who refused to issue Thanksgiving Proclamations; Andrew Jackson also refused, and for the same reason: because (although he was a good Presbyterian) he stood for the

116. 472 U.S. at 105-06 (quoting T. Cooley, Treatise on Constitutional Limitations 470-71).
119. 472 U.S. at 100-03.
120. Id. at 81.
principle of strict separation of Church and State.\textsuperscript{121} Second, although Washington took pains to frame his proclamation in language acceptable to all faiths, his successor, John Adams, called for Christian worship.\textsuperscript{122} Reliance on Adams therefore presents the same problem as reliance on Story: if his example is to be followed, nonpreferentialism must be discarded along with strict separationism. Third, although Madison did issue Thanksgiving proclamations, that is not all there is to the story. He did indeed issue Thanksgiving proclamations, but he was hardly happy about them. This is what he said in his \textit{Detached Memoranda}:

During the administration of Mr. Jefferson no religious proclamation was issued. It being understood that his successor was disinclined to such interpositions of the Executive and by some supposed moreover that they might originate with more propriety with the Legislative Body, a resolution was passed requesting him to issue a proclamation. [See the resolution in the Journals of Congress.]

It was thought not proper to refuse a compliance altogether; but a form and language were employed, which were meant to deaden as much as possible any claim of political right to enjoin religious observances by resting these expressly on the voluntary compliance of individuals, and even by limiting the recommendation to such as wished simultaneous as well as voluntary performance of a religious act on the occasion.\textsuperscript{123}

What all this means is that it is politically unwise not to issue Thanksgiving Proclamations and it may be politically helpful if you do. In any event, what have you got to lose if you do? (George Bush was later to do very well with the Pledge of Allegiance.) This was not the only occasion when Madison as President chose for political reasons not to follow rigorously his constitutional beliefs (consider for instance, his acceptance of a national bank), and little weight should be attached to it.

Justice Rehnquist's other uses of historical examples are equally erratic. For instance, he notes that early Congresses

\begin{itemize}
\item \textsuperscript{121} A.P. Stokes & L. Pfeffer, \textit{Church and State in the United States} 504-06 (1964).
\item \textsuperscript{122} L. Pfeffer, \textit{supra} note 99, at 266.
\item \textsuperscript{123} Fleet, Madison's "\textit{Detached Memoranda}"', \textit{3 WM & MARY Q.} (3rd Series) 534, 562 (1946); see generally Pfeffer, Madison's "\textit{Detached Memoranda}": \textit{Then and Now}, in \textit{The Virginia Statute for Religious Freedom} 283 (M.D. Peterson & R.C. Vaughan eds. 1988).
\end{itemize}
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authorized granting land to religious institutions. However, he omits Madison's veto of a bill giving certain land to a Baptist church

... because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment' [sic].

Madison referred to this veto in his *Detached Memoranda*:

Strongly guarded as is the separation between Religion & Govt in the Constitution of the United States the danger of precedents already furnished in their short history. (See the cases in which negatives were put by J.M. on two bills passed by Congs. and his signature withheld from another. See also attempt in Kentucky, for example, where it was proposed to exempt Houses of Worship from taxes.

The uselessness of the no-aid and of the purpose-effect-entanglement tests to adjudge controversies, said Justice Rehnquist, is proved by their chaotic histories. "For example," he wrote,

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 write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from 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

124. 472 U.S. at 103 n.5.
hearing diagnostic testing inside the sectarian school. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school, such as in a trailer parked down the street. A State may give cash to a parochial school to pay for the administration of state-written tests and state-ordered 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 these classes with its truancy laws.\footnote{127}

Sounds terrible, does it not? But it's hardly as terrible as it seems. Add free exercise to establishment and you have 170 pages of case annotations in United States Code Annotated; free speech and press clauses gives you 620 pages, and searches and seizures gives you 1080 pages. The Supreme Court has had just as much trouble with these clauses as with the religion clauses of the first amendment.

I should add that in some respects I agree with Justice Rehnquist. I too think some of the distinctions the Court has drawn between permissible and impermissible aid to religious schools are unpersuasive; in fact, as an attorney I argued to the Court against allowing some of the types of aid the Court held to be constitutional. Thus, what Justice Rehnquist has shown is that if the Court had only always ruled in my favor, its position would have been fully consistent. I doubt that this is the lesson Justice Rehnquist would want us to draw.

Justice Rehnquist would discard the purpose-effect-entanglement test of Lemon, the no-aid principle of Everson, and Jefferson's wall of separation. He would substitute a nonpreferentialist interpretation of the establishment clause in their place. But, as we have seen, his history is at best selective and one-sided and his criticism of current Court doctrine weak. Finally, he never responds to, or even addresses, the underlying principles of strict separationism, the principles stated by Roger Williams in his image of the ship at sea, by Madison in his Memorial & Remonstrance\footnote{128} and Detached Memoranda, by Jefferson in his letter to the Danbury Baptist Association, and by so many others throughout American history.

\footnote{127. 472 U.S. at 110-11 (citations omitted).}
\footnote{128. Quoted in Everson v. Board of Educ., 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting).}
The Court has not accepted Justice Rehnquist's conclusions. One month after the Court decided *Jaffree*, it decided *School District of City of Grand Rapids v. Ball* and *Aguilar v. Felton*, both of which involved aid to religious schools. In each the Court found the aid violative of the establishment clause, and in each of them Justice Rehnquist dissented "for the reasons stated in [his] opinion" in *Jaffree*. "The Court," he said in *Grand Rapids*, "relied heavily on the principles of *Everson v. Board of Education* and *McCollum v. Board of Education*, but declines to discuss the faulty 'wall' premise upon which those cases rest. In doing so the Court blinds itself to the first 150 years' history of the Establishment Clause."*

In 1987 the Court, in *Edwards v. Aguillard*, over the dissent of new Justice Antonin Scalia and new Chief Justice Rehnquist, held violative of the establishment clause Louisiana's Balanced Treatment for Creation-Science and Evolution-Science in Public Instruction Act which provided that if evolution was taught in a public school, so also must creation science be taught. The purpose of the statute, said the Court in an opinion by Justice Brennan, was the advancement of religion, and a trial was not necessary to establish that fact. This case, along with *Aguilar, Grand Rapids*, the 1988 term's creche case indicate with reasonable clearness that for the time being at least strict separationism still lives.

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131. 473 U.S. at 400-01 (Rehnquist, J., dissenting).