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INTERPRETING THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT: A "NON-ABSOLUTE SEPARATIONIST" APPROACH

ROBERT L. CORD*

I. INTRODUCTION: ON THE USE OF ORIGINAL INTENT

Not too long ago, Justice Brennan told an assembled audience at Georgetown University that “[t]here are those who find legitimacy in fidelity to what they call ‘the intentions of the Framers.’ In its most doctrinaire incarnation, this view demands that Justices [of the Supreme Court] discern exactly what the Framers thought about the question under consideration and simply follow that intention in resolving the case before them.”¹ Justice Brennan then charged that “[i]t is a view that feigns self-effacing deference to the specific judgments of those who forged our original social compact. But in truth it is little more than arrogance cloaked as humility.”²

My first impression after reading the speech was one of disbelief. Was Justice Brennan charging that the “original intent” opinions in Everson v. Board of Education—³—the first case in which the U.S. Supreme Court comprehensively interpreted the establishment clause—reflected arrogance? Was it arrogant when Justice Black’s opinion of the Court in Everson appealed to recognized historical authority, claiming that “[i]n the words of Jefferson, the clause against establishment of religion was intended to ‘erect a wall of separation between church and State’”?⁴ And was Justice Black’s conclusion about the historical purpose of the first amendment arrogant? “The First Amendment,” Black concluded, “has erected a wall between

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² Id. (emphasis added).


⁴ Id. at 16 (emphasis added) (quoting Reynolds v. United States, 90 U.S. 145, 164 (1878)).
church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." 5

Had Justice Brennan forgotten that Justice Rutledge's Everson dissent, joined by Justices Frankfurter, Jackson and Burton, was almost entirely based on "original intent" arguments? 6 After detailing his version of the original intentions of Madison and of those in the First Congress who authored and supported what ultimately became the first amendment, Justice Rutledge without any equivocation wrote:

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. . . . 7

Could it be that Justice Brennan, who himself has appealed to history in determining the prohibitions of the establishment clause, was unthinkingly faulting others for doing likewise? Or had Justice Brennan unknowingly re-embraced the contradiction demonstrated so well in his concurring opinions in Murray v. Curlett and Abington v. Schempp? 8 There, after writing that he found futile and misdirected a too literal quest for the advice of the Founding Fathers, 9 Justice Brennan, in the same opinion, later wrote:

5. Id. at 18.
6. Id. at 28-63 (Rutledge, J., dissenting).
7. Id. at 31-32 (emphasis added).
9. A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed. While it is clear to me that the Framers meant the Establishment Clause to prohibit more than the creation of an established national church such as existed in England, I have no doubt that, in their preoccupation with the imminent question of established churches, they gave no distinct consideration to the
Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve government ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government. . . .

No, Justice Brennan needs no reminding about “original intent” arguments when it comes to establishment clause law. At Georgetown University, he was aware that the Supreme Court has almost exclusively relied upon historical and “original intent” arguments when fashioning its interpretation as to what the establishment clause constitutionally precludes and permits.11 And frankly, I am tired of Justice Brennan’s special pleading, and the intellectual double standard of all those who argue that appeals to history are unwarranted, futile, and even arrogant, unless of course, they are the ones who make them.

On this score, however, Professor Pfeffer—my eminent opponent in this dialogue and undoubtedly this nation’s most respected “absolute separationist” scholar—and I have no quarrel.12 We both have appealed to history in an honest

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particular question whether the clause also forbade devotional exercises in public institutions.

Id. at 237-38 (Brennan, J., concurring).

10. Id. at 294-95 (emphasis added).

11. For an overview of how much the members and the opinions of the Supreme Court have relied on history to justify their conclusions in establishment clause cases, see Cord & Ball, The Separation of Church and State: A Debate, 1987 Utah L. Rev. 895, 907-09 (1987).

12. Professor Leo Pfeffer has written numerous books about American constitutional law, including: Church, State, and Freedom (rev. ed. 1967); The Liberties of an American (1956); This Honorable Court (1965); with Anson Phelps Stokes, Church and State in the United States (1950); God, Caesar, and the Constitution (1975); and Religion, State, and the
search to understand that great first amendment injunction: "Congress shall make no law respecting an establishment of religion." And I hope it is not too presumptuous for me to suggest that perhaps we do so for some of the same reasons. Even though the Founding Fathers could not foresee many twentieth and twenty-first century problems—especially those growing out of advanced technology—much of the church-state concerns which they addressed in their time are similar to those we face today. Almost certainly they are variations on a common theme.

But further, one of the purposes of a written constitution was to codify certain fundamental principles, in the hope that they would constitute a precious legacy, never to be treated lightly as irrelevant trivia by those who momentarily sit in the seats of power. For at the least, constitutional government requires that political power be defined and limited by law in fact as well as in theory.

II. THE ESTABLISHMENT CLAUSE AND ORIGINAL INTENT: THE "ABSOLUTE SEPARATIONIST" INTERPRETATION

At the core of the absolute separationist approach to church-state matters is a two-fold conviction. Absolutists maintain, first, that the establishment clause was intended by its framers "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion;" and second—paraphrasing Professor Pfeffer—that the framers intended the clause to require that government seek to achieve only secular ends, and in doing so to employ only secular means. Regarding both propositions, I think the absolutists are in error; the historical evidence is simply against them.
If Jefferson and Madison were absolute separationists, why would Jefferson author a Virginia "Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers,"\textsuperscript{17} sponsored by Madison in the Virginia Assembly,\textsuperscript{18} which became Virginia

\begin{quote}
17. \textit{The Papers of Thomas Jefferson} 555-56 (J. Boyd ed. 1950), [hereinafter \textit{PAPERS}]. This volume includes the \textit{Revisal of the Laws, 1776-1786} [hereinafter \textit{Revisal}]; Jefferson's bill is number 84 of the \textit{Revisal}.

After declaring independence from Great Britain, a "Committee of Revisors" was appointed by resolution of the General Assembly (printed under the date 15 October 1776) to refashion Virginia's laws to reflect its new status as a sovereign state. Those originally named to the Committee included Thomas Jefferson, George Mason (who declined to serve), Thomas Ludwell (who died before the Committee began its work), Edmund Pendleton, and George Wythe. Jefferson, Pendleton, and Wythe did the actual revision. See \textit{PAPERS}, at 312.

18. Although Madison, acting as Jefferson's surrogate (Jefferson was U.S. Minister to France during this period), introduced Bill #84 of the \textit{Revisal} during the Virginia Assembly meeting in 1785, the most accepted theory is that Jefferson was responsible for drawing it up and revising it. Boyd, Editorial Note 4, \textit{PAPERS}, supra note 17, at 318-20. The text of Bill #84 appears below as it was introduced by Madison:

84. A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers

\begin{verbatim}
Be it enacted by the General Assembly, that no officer, for any civil cause, shall arrest any minister of the gospel, licensed according to the rules of his sect, and who shall have taken the oath of fidelity to the commonwealth, while such minister shall be publicly preaching or performing religious worship in any church, chapel, or meeting-house, on pain of imprisonment and amercement, at the discretion of a jury, and of making satisfaction to the party so arrested.

And if any person shall of purpose, maliciously, or contemptuously, disquiet or disturb any congregation assembled in any church, chapel, or meeting-house, or misuse any such minister being there, he may be put under restraint during religious worship, by any Justice present, which Justice, if present, or if none be present, then any Justice before whom proof of the offence shall be made, may cause the offender to find two sureties to be bound by recognizance in a sufficient penalty for his good behavior, and in default thereof shall commit him to prison, there to remain till the next court to be held for the same county; and upon conviction of the said offence before the said court, he shall be further punished by imprisonment and amercement at the discretion of a jury.

If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence.
\end{verbatim}

\textit{PAPERS}, supra note 17, at 555 (emphasis added).
\end{quote}
law in 1786 along with Jefferson's "Bill for Establishing Religious Freedom." 19

If Madison was an absolute separationist, why did he serve as one of six members of a joint congressional committee which, without recorded dissent, recommended the establishment of a congressional chaplain system? 20 If they were absolutists, why would the First Congress—which authored the establishment clause—adopt that joint committee's recommendation and vote a $500 annual salary each for a Senate Chaplain and a House chaplain to offer paid public prayers in Congress? 21 Did the authors of the proposed religion amendment not know what it meant? Or if they did, did they immediately proceed to violate it?

And if the establishment clause was understood to be an absolute injunction, why did Presidents George Washington, 22 John Adams 23 and James Madison 24 issue discretionary proclamations of "Thanksgiving," prayer and fasting? 25 We know that there was disagreement on this point because President Jefferson thought they did violate the first amendment and refused to issue them. 26 But Jefferson was in the decided

19. In all, the "Committee for the Revision of the Laws" prepared 126 bills for adoption. PAPERS, supra note 17, at 329-33. Among the bills contained in the Revisal was Bill #82, "A Bill for Establishing Religious Freedom," passed in 1786. Id. at 545-47.

20. ANNALS OF CONGRESS 104-05 (J. Gales ed. 1834) [hereinafter ANNALS]; 2 REPORTS OF COMMITTEES OF THE HOUSE OF REPRESENTATIVES 4 (1854). In addition to Madison, the First House of Representatives also chose Boudinot, Bland, Tucker, and Sherman to serve on this joint House-Senate committee. Oliver Ellsworth was the only member of the Senate to serve on the Committee. Id.


22. President Washington's Thanksgiving Proclamations of 1789 and 1795 are contained in their entirety in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789-1897 at 64, 179-80 (J. Richardson ed. 1899) [hereinafter Messages].

23. President Adams issued at least two such proclamations, one on March 23, 1798, id. at 268-70, and another on March 6, 1799, id. at 284-86.

24. President Madison issued at least four proclamations, one on July 9, 1812, id. at 513; one on July 23, 1813, id. at 532-33; one on November 16, 1814, id. at 558; and one on March 4, 1815, id. at 560-61.


26. In a letter to a Presbyterian clergyman in 1808, Jefferson indicated
minority as his immediate predecessors and his immediate successor did issue such proclamations. Just to give you a flavor of these proclamations, Madison's 1812 proclamation called for a day "to be set apart for the devout purposes of rendering to the Sovereign of the Universe and the Benefactor of Mankind," identified by Madison in the proclamation as Almighty God, "the public homage due to his holy attributes."

And why, if an absolutist, would President Jefferson sign a tax exemption bill for the churches in Alexandria County in 1802? And why, if an absolutist, would Jefferson—two years after he wrote his famous "wall of separation" letter to the Danbury, Connecticut Baptists—conclude a treaty with the Kaskaskia Indians which, in part, called for the United States to

that he thought Thanksgiving proclamations by the Federal government would violate the establishment clause and federalism. He wrote:

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


27. See supra notes 22-23.
29. 1 Messages, supra note 22, at 513.
30. 2 Public Statutes at Large 194, 7th Cong., 1st Sess., Chap. 52.
31. On January 1, 1802, President Jefferson sent a letter to the Danbury Connecticut Baptist Association which contained the "wall of separation" phrase noted below in the context of the entire paragraph in which it appeared:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American People which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation on behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.

build them a Roman Catholic Church and pay their priest.\textsuperscript{32} And further, why would President Jefferson urge Congress to appropriate the public funds to carry out the terms of that treaty\textsuperscript{33} if he thought that under all circumstances the first amendment precluded spending U.S. tax dollars to build a church and pay a congregation's spiritual leader?

And why, if absolutists, would Presidents George Washington, John Adams and Thomas Jefferson sign into law six Congressional bills, which in effect purchased—with controlling trusts governing enormous land grants of federal property in the Ohio Territory—the services of the "Society of the United Brethren for propagating the Gospel among the heathen"?\textsuperscript{34}

Whatever the original intention behind the establishment clause, at least two conclusions are historically certain: First, the first amendment \textit{was not intended to}, nor \textit{did it in fact erect}, a high, impregnable and absolute wall of separation between church and state; second, and let us make no mistake about it, that amendment was intended in Jefferson's \textit{unembossed} terms to erect a "wall of separation between Church and State."\textsuperscript{35} The question then obviously becomes: What is the extent of that separation?

Unlike absolute separationists, I, as a "non-absolute separationist," believe that, taken together, the resolutions passed by the New York,\textsuperscript{36} Virginia,\textsuperscript{37} Maryland,\textsuperscript{38} North Carolina,\textsuperscript{39}...

\begin{itemize}
\item \textsuperscript{32} \textit{7 Public Statutes at Large}, \textit{supra} note 30, at 78.
\item \textsuperscript{33} \textit{1 Messages}, \textit{supra} note 22, at 365.
\item \textsuperscript{34} For the complete texts of these six federal land laws, see \textit{R. Cord}, \textit{supra} note 13, at 42-45, 263-70.
\item \textsuperscript{35} \textit{Supra} note 31.
\item \textsuperscript{36} The New York Convention similarly declared:
\begin{quote}
That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that \textit{no religious sect or society ought to be favored or established by law in preference to others}.
\end{quote}
\textit{1 J. Elliot, Debates on the Federal Constitution} 328 (1901) (emphasis added) [hereinafter \textit{Elliot's Debates}].
\item \textsuperscript{37} The Virginia Ratifying Convention proposed a "Declaration or Bill of Rights" as amendments to the Constitution, Article Twenty of which (adopted on June 27, 1788) stated:
\begin{quote}
That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that \textit{no particular religious sect or society ought to be favored or established, by law, in preference to others}.
\end{quote}
\textit{3 Elliot's Debates}, \textit{supra} note 36, at 659 (emphasis added).\
\end{itemize}
and Rhode Island state ratifying conventions, the original draft of Madison's religion amendment, the debates within the First House and Senate, Madison's final statement on the floor of the First House of Representatives, and many governmental actions during the formative years of our Federal Republic indicate that the establishment clause was intended by its framers to prevent the establishment of a national church or religion, or the placing of any one religious sect, religious denomination, or religious tradition into a preferred legal status—a status that was intrinsic to the religious establishments from which many of them or their ancestors had fled.

III. NON-ABSOLUTE SEPARATIONISM AND THE "NO PREFERENCE" DOCTRINE OF THE FIRST AMENDMENT

For me, the major difference between an "absolute separationist" such as Professor Pfeffer, and a "non-absolute separationist" such as myself, has little to do with the ends of government. I do not now dispute—nor to the best of my recol-

38. The Maryland Ratifying Convention proposed an amendment stating: "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty." 2 Elliot's Debates, supra note 36, at 553 (emphasis added).

39. 4 Elliot's Debates, supra note 36, at 244.

40. 1 Elliot's Debates, supra note 36, at 334.

41. Madison's original wording of the establishment clause read as follows: "The Civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of Conscience be in any manner, or on any pretext, infringed." 1 Annals, supra note 20, at 434 (emphasis added).

42. When asked how he defined the protections of the religion clauses of the proposed amendment the record indicates that:

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

Id. at 730 (emphasis added). Further, Madison said that "he believed that the people feared that one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to Conform." Id. at 731.

43. See generally R. Cord, supra note 13, chs. 1, 2 and 3.
lection have I ever disputed—that under our amended Constitution the goals of government must be secular. On this point, I doubt that many constitutional scholars would disagree. While the first amendment initially prohibited a national religious establishment and its essential trappings, the Supreme Court’s incorporation of the first amendment into the fourteenth now similarly binds the states.44

Starting with the First Congress, I believe that the concept of separation of church and state has mainly addressed itself to the constitutionality of using sectarian institutions or activities associated with religion as means to achieve appropriate secular governmental ends. When the authors of the first amendment requested President Washington to issue his first "Thanksgiving Day" Proclamation, one day after they voted up the establishment clause,45 I do not think they saw those two acts as incongruous. Instead, I think, with a religious proclamation, they were pursuing a secular goal, hoping that Washington’s action would help unite the nation behind the new government and the new Constitution. I submit that their intent is reasonably clear from the debate in the House46 and the content of Washington’s Proclamation of 1789.47 Similarly,

44. See id. at ch. 4.
45. On Thursday, September 24, 1789, the First House of Representatives voted by 37-14 to recommend what is now the first amendment to the states for ratification. 1 ANNALS, supra note 20, at 947-48. The next day, Friday, September 25, 1789, the House asked President Washington to issue his first Thanksgiving Day Proclamation. Id. at 949.
46. Id. at 949-50.
47. The text of Washington’s first Thanksgiving Day Proclamation reads as follows:

PROCLAMATION
A NATIONAL THANKSGIVING

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, and humbly to implore His protection and favor; and

Whereas both Houses of Congress have, by their joint committee, requested me "to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety and happiness:"

Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country
I think that they voted for paid prayer in Congress because they were a religious people who thought that prayer was a means to reach the secular goal of enlightened policies and legislation yielding a prosperous nation and stable government, much desired after the "critical years" under the Articles of Confederation. They apparently saw no church-state violation there.

I would further submit that when Jefferson thought it desirable to provide tax exemption to benevolent institutions, including churches, he did so because they were viewed as legitimate means of serving the community, and the nation largely continues that practice today.

When Jefferson used the Catholic Church in the Kaskaskia Treaty to provide for friendship with those Indians and to get them to cede their lands to the United States, he no more saw

previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquility, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.

And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion and virtue, and the increase of science among them and us; and, generally, to grant unto all mankind such a degree of temporal prosperity as He alone knows to be best.

Given under my hand, at the city of New York, the 3d day of October, A.D. 1789.

Go. Washington

1 Messages, supra note 22, at 64.
48. For a concise view of the turmoil in the United States under the Articles of Confederation, see S. Morison, The Oxford History of the American People, 297-316 (1965).
49. See text accompanying note 32.
50. On October 17, 1803, in his Third Annual Message to the Congress, President Jefferson indicated that the "friendly tribe of Kaskaskia Indians," through a treaty, had chosen to transfer its "country" to the United
his acts as impermissibly aiding religion, or violating the establishment clause, than when he, Washington, and Adams used the "Society of the United Brethren for propagating the Gospel among the heathen" to aid in dealing with the Christian and other Indians in the Ohio Territory. If Jefferson had seen those acts as unconstitutional, I believe he would not have sent those treaty provisions to the Senate, just as he declined to issue Thanksgiving Day Proclamations. Instead, I think that Jefferson considered the goals of those foreign policy actions secular and thus constitutional, even if the institutions used to achieve them were sectarian. In this, I think, he saw no violation of the establishment clause.

IV. MAKING SENSE OF THE ESTABLISHMENT CLAUSE: LETTING LEMON GO

After almost a quarter century of Everson-style history and decisions, church-state law was distilled into a "three prong" test for determining alleged violations of the establishment clause. In Lemon v. Kurtzman, decided in 1971, the Court held that in order to pass constitutional muster under the establishment clause, the challenged governmental policy or activity must: (1) have a secular purpose; (2) be one that has a principal or primary effect which neither advances nor inhibits religion; and (3) not foster an excessive government entanglement with religion.

Much can be said about the Lemon test, but I have little time. Suffice it to say that few on the present Supreme Court seem happy with it: Chief Justice Rehnquist and Justice White have alternately renounced it, re-embraced it, and renounced it

States. 1 Messages, supra note 22, at 359. On October 31, 1803, Jefferson asked the Senate for their advice on and consent to the treaty: "I now lay before you the treaty mentioned in my general message at the opening of the session as having been concluded with the Kaskaskia Indians for the transfer of their country to us under certain reservations and conditions." Id. at 363.

51. See supra note 34.
52. For Jefferson's refusal to issue Thanksgiving proclamations, see supra note 26 and accompanying text.
53. 403 U.S. 602 (1971).
54. Id. at 612-13.
again,\textsuperscript{55} Justices Brennan and Marshall would like to add to it,\textsuperscript{56} and Justice O'Connor would like to reinterpret it.\textsuperscript{57}

Because I believe that \textit{Lemon} jeopardizes fundamental constitutional rights and does not reflect the original intent of the establishment clause, I would abandon it altogether. Instead in establishment clause cases, I would urge a return to the test of constitutionality developed by Chief Justice John Marshall in the celebrated case of \textit{McCulloch v. Maryland}.\textsuperscript{58}

In \textit{McCulloch}, Marshall advanced the following criteria for judging acts alleged to be unconstitutional. "Let the end be legitimate," Marshall wrote, "let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."\textsuperscript{59} How would a return to Marshall's test affect present church-state issues?

Assuming that we are well past the day when any official religion would be declared by government, if I were on the bench, as a non-absolute separationist using Marshall's criteria, I would ask three basic questions in cases where a violation of the establishment clause is alleged. First, is the governmental action within the constitutional power of the acting public body? Second, is the governmental action religiously nonpartisan in that it does not elevate any religion, religious sect or religious tradition into a preferred legal status? Third, is there a reasonable or rational ends-means relationship? An answer of "no" to any of these questions would nullify the governmental action as unconstitutional.

Application of these standards in the public schools would probably bring fewer changes than one might expect, and none that I think we need rationally fear. Recitation of the "Lord's Prayer" or readings taken solely from the \textit{New Testament} would have been prohibited, but consistent with the letter and spirit of the constitution, are constitutional."


59. \textit{Id. at} 421.
still be unconstitutional, since they place the Christian religion into a preferred position.\(^6^0\) Because they place the Judeo-Christian tradition into a favored religious status, unconstitutional also would be the posting of only the Ten Commandments or readings from the *Old Testament*.\(^6^1\) Unendorsed readings or postings from many writings considered sacred by various religions, however, would not be unconstitutional. A decision to teach only "Creationism" or *Genesis* would be unconstitutional,\(^6^2\) while a course in cosmology exploring a full range of beliefs as to the origin of life or the nature of the universe—religious, areligious, nonreligious or even irreligious—would not violate the Constitution any more than would a course on comparative religions without teacher endorsement. In sum, where the state is pursuing a valid educational goal, and is religiously nonpartisan in doing so, the professional leadership of the educational unit would decide—as with any other matter of policy—whether such an activity was educationally appropriate or desirable.

Additionally, while no criteria for deciding difficult constitutional questions provide a panacea, the substitution of the *McCulloch* standards\(^6^3\) for those of *Lemon*\(^6^4\) would also serve to reduce the current stress between the establishment clause and other equally fundamental constitutional liberties. An example of such stress can be found in the Third Circuit court decision in *Bender v. Williamsport*.\(^6^5\)

In *Williamsport*, faithful adherence to *Lemon* led the Third Circuit court to hold that it was constitutional for a school board to refuse to permit a student-initiated nondenominational prayer club to meet in a public school room during the regularly scheduled activity period. The establishment clause required this denial, the Court said, "because the presence of religious groups within the school during the curricular day has the effect of advancing religion, in that it communicates a message of government endorsement of such activity."\(^6^6\)

61. *Id.* at 205, 207, 211.
63. *See supra* note 59 and accompanying text.
66. *Id.* at 541. While the Third Circuit Court dealt with the "equal access" question, the Supreme Court did not reach that constitutional issue because one of the parties to the suit in the circuit court lacked standing, and Justice Stevens' opinion of the Court held that the circuit court should have
As I see it, the interpretation of church-state separation which the circuit court followed in *Williamsport* not only created the entire "equal access" controversy in the first place, but also made subservient to an absolute construction of the establishment clause three first amendment freedoms: those of religious free exercise, free speech, and voluntary assembly. The net result of using the *Lemon* test in the "equal access" cases has yielded nothing less than a distortion of first amendment law by which long heralded rights—thought to be so fundamental to an open and free society as to be placed into a constitutionally "preferred position"—have been subordinated to an almost absolute establishment clause. This unfortunate "'preferred position' within the 'preferred position of the First Amendment'"—established without any clear reason or compelling legal justification—has enormous negative potential for cherished constitutional rights. One wonders whether civil libertarians would have made an equally vigorous protest against the recent Supreme Court decision in *Hazelwood School District v. Kuhlmeier*, if what had been censored from the publicly funded school student newspaper were articles by students discussing the reasons for their personal religious beliefs or lack thereof? More such *Williamsport*-like first amendment "victories" can virtually leave much of that amendment's fundamental liberties undone.

If equal access would be guaranteed to *all* religious—or, for that matter, areligious and irreligious—student groups under the same conditions that apply to any other voluntary student group, I would see no violation of the establishment clause; nor do I see the need in circumstances like those in *Wil-

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The constitutionality of public schools refusing "equal access" to voluntary student religious organizations had been litigated in other federal circuits. See Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981); Lubbock Civil Liberties Union v. Lubbock Independent School Dist., 669 F.2d 1038 (5th Cir. 1982), cert. denied, 459 U.S. 1155 (1983). The lower federal courts in deciding equal access cases have used the *Lemon* test.

67. Perhaps the most eloquent defense for creating a different constitutional status for the first amendment freedoms of speech, press, worship and assembly is Justice Jackson's opinion in *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).


69. "One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school." *Id.* at 565.
Williamsport virtually to nullify other equally fundamental first amendment rights.\textsuperscript{70}

Can we not see that, if under \textit{Lemon} a court can hold today that a completely voluntary religious student group may not meet as a club in a public school room because "it has the effect of advancing religion," it can also on another day, using the same logic, deny meeting rooms requested by students who want to discuss atheism, or a book negative about religion, such as Bertrand Russell's \textit{Why I Am Not a Christian},\textsuperscript{71} because the effect there might be said to inhibit religion?

And can we not see the chilling effect that \textit{Lemon} can have on the decisions of insecure public school personnel? Books about religion or those said to be irreligious might be plucked from our public school libraries or never even purchased. Is C.S. Lewis' \textit{The Screwtape Letters} safe?\textsuperscript{72} What about \textit{Inherit the Wind}?\textsuperscript{73} The \textit{Old} and the \textit{New Testaments}? The \textit{Koran}? The \textit{Book of Mormon} or Charles Darwin's \textit{Origin of Species}?\textsuperscript{74} Is the scrutinization of ultimate issues and values in public schools to be hampered or disallowed altogether because we are so frightened of ourselves?

Finally, I want to say a few words about the constitutional-ity of what some have called "parochiaid."\textsuperscript{75} If Thomas Jefferson constitutionally was able to use sectarian means to achieve secular ends, why is it unconstitutional for the states of the Union, if they so choose, to do the same? Almost all of the "aid to church school" cases\textsuperscript{76} are merely contemporary examples of the states using sectarian institutions to reach the secular goal of educating their students—a goal, I hasten to add, that was also undertaken with a similar methodology when the fed-

\textsuperscript{70} This apparently was also the view of the 98th Congress, which passed the Equal Access Act of 1984 (Pub. L. No. 98-377). This Act makes it unlawful for any public high school receiving federal aid to deny all-voluntary student groups, including religious ones, from meeting in school facilities before and after class hours or during a club period, if other extracurricular groups are given such access. 42 Cong. Q. Weekly Report 1545, 1580; 43 Cong. Q. Weekly Report 1807.

\textsuperscript{71} B. Russell, \textit{Why I Am not a Christian} (1957).

\textsuperscript{72} C.S. Lewis, \textit{The Screwtape Letters} (1943).

\textsuperscript{73} J. Lawrence & R.E. Lee, \textit{Inherit the Wind} (1955).

\textsuperscript{74} C. Darwin, \textit{The Origin of Species} (1859).

\textsuperscript{75} The term "Parochiaid" is frequently used by Americans United for Separation of Church and State in their monthly periodical \textit{Church and State}. It appears to be a generic term to describe all public assistance to sectarian schools whether directly or indirectly. \textit{See "Index,"} 41 \textit{Church and State} 262 (1988).

\textsuperscript{76} R. Cord, \textit{supra} note 13, at 194-211.
eral government sent millions, if not billions, of dollars directly to church-affiliated schools, colleges, universities and even in some cases seminaries and yeshivas, to pay the tuition and other educational expenses of America’s veterans. Was all that a violation of the first amendment? I would submit that it was a constitutional act of a grateful nation.

Justice Brandeis once warned that “[m]en feared witches and burnt women.”\(^7\) Can it be that today we fear indoctrination and endanger learning? Can it be that our legitimate fears of past bigotry now make us indifferent to young minds burdened with learning disorders because they have exercised their constitutional right to go to a sectarian school?\(^8\) Can it be that the monstrous religious evils of many centuries are even now so debilitating that we are still their captives?

Thomas Jefferson, not indifferent to the fundamental needs of all of his native Virginians, made sure that the facilities of the public university that he founded would be available where needed to the sectarian institutions “adjacent to its precincts” and especially to their students.\(^9\) Perhaps Jefferson had a conviction that where education is truly available, one need not unduly worry about the flourishing of hatred or blind dogma.

\(^7\) Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).


\(^9\) The relevant passages of Jefferson’s Regulations for the University of Virginia read:

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

The students of such religious school, if they attend any school of the University, shall be considered as students of the University, subject to the same regulations, and entitled to the same rights and privileges.
