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# Some Observations on the Establishment Clause

WILLIAM FRENCH SMITH\*

*As evidenced by current interpretations of the establishment clause, lower federal court decisions indicate an increased tendency of hostility toward religion. In this article, Attorney General William French Smith surveys the history of the establishment clause and Supreme Court decisions regarding religious issues. Attorney General Smith then notes the recent success of the Reagan Administration's efforts, through amicus curiae briefs, to advocate an interpretation of the establishment clause which permits the states to take an attitude of benevolent neutrality toward religion. The article then concludes that such a position is both historically and judicially sound.*

Over the past few decades, the establishment clause of the first amendment has been one of the most controversial and widely-debated provisions of the Constitution. Since 1947, when the Court held in *Everson v. Board of Education*<sup>1</sup> that the establishment clause created a "wall of separation" between church and state, judges and legal scholars have taken divergent positions on the meaning of the establishment clause and the impregnability of the "wall of separation" it created.

The "wall of separation" metaphor itself has proven troublesome. While of great popularity as a short-hand description of the meaning of the establishment clause, the metaphor can hardly be said to reflect accurately the delicate interplay between government and religion under the opposing constitutional requirements that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>2</sup> Indeed, the Supreme Court itself has disavowed any such absolute separa-

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1. 330 U.S. 1, 15-16 (1947).
2. U.S. CONST. amend. I.

tion, noting in *Lynch v. Donnelly* that “[t]he concept of a ‘wall’ of separation is a useful figure of speech. . . . But the metaphor itself is not a wholly accurate description of the practical aspects of the relationships that in fact exist between church and state.”<sup>3</sup> Moreover, recent Supreme Court decisions give some indication of an encouraging trend toward a more benevolent accommodation of religion in interpretation of the establishment clause.

This article will survey briefly the Supreme Court decisions bearing on the interpretation of the clause, viewing the cases in light of the first amendment’s original intent. Based on this analysis, the article will explain how the Reagan Administration has sought to encourage an interpretation of the establishment clause which, in keeping with the purposes of the Framers, results in a more balanced treatment and accommodation of religion and religious values.

### I. THE BEGINNINGS OF THE ESTABLISHMENT CLAUSE

Many of the drafters of the Constitution, including James Madison, the Father of the Constitution<sup>4</sup> and chief architect of the establishment clause,<sup>5</sup> thought the first amendment (including the establishment clause) was unnecessary. Madison and many of his colleagues regarded the Constitution in its original and unamended form as being itself a bill of rights.<sup>6</sup> Madison reasoned that because the original Constitution created a federal government of only delegated powers,<sup>7</sup> which did not include the authority to establish a national religion, the federal government would not usurp the power to “intermeddle with religion.”<sup>8</sup>

Furthermore, in the understanding of Madison and other leading Framers, the original Constitution reflected a new science of politics that included several principles. Some were familiar: the principles of representation, separation of powers, and federalism.<sup>9</sup> Other principles were less familiar, such as the idea of creating an extended republic. For Madison, the extended republic, a nation of great size and population, would be religiously diverse. According to Madison, “[t]he United States is abound in such a variety of sects, that is a strong security against religious persecu-

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3. 52 U.S.L.W. 4317, 4318 (1984).

4. A. KELLY & W. HARBISON, *THE AMERICAN CONSTITUTION* 108 (5th ed. 1976).

5. R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 5 (1982).

6. *Id.* at 8.

7. *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304 (1816). *See also* *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1865) (all sovereign powers not specifically delegated to federal government are reserved to states).

8. *THE COMPLETE MADISON* 306 (S. Padover ed. 1953).

9. A. KELLY & W. HARBISON, *supra* note 4, at 154-56.

tion, and it is sufficient to authorize a conclusion, that no one sect will ever be able to outnumber or depress the rest."<sup>10</sup>

Nevertheless, in order to obtain ratification of the Constitution, its supporters promised during the ratification process amendments to protect both the citizens and the states against excessive federal power.<sup>11</sup> In fulfillment of this promise, Madison introduced in the First Congress several proposed amendments which eventually became the Bill of Rights.<sup>12</sup>

Religion was a prime concern of many state ratifying conventions in adopting the Constitution. For example, the Virginia Ratifying Convention proposed an amendment which stated in part: "no particular religious sect or society ought to be favored or established, by law, in preference to others."<sup>13</sup> Similar resolutions were passed in Maryland, New York, North Carolina, and Rhode Island.<sup>14</sup> Reflecting the states' concern, the House Committee of the Whole adopted a version of the establishment clause which read: "No religion shall be established by law."<sup>15</sup> Congressman Peter Sylvester of New York voiced his fear that such a version would "be thought to have a tendency to abolish religion altogether."<sup>16</sup> In response, Madison stated that the language of the establishment clause "was intended to prevent" what the people feared — "one sect [obtaining] a pre-eminence, or two [combining] together, and establishing a religion to which they would compel others to conform."<sup>17</sup>

After many additional adjustments and amendments by the House, Senate, and Conference Committee,<sup>18</sup> the establishment clause as it is known today emerged: "Congress shall make no law respecting an establishment of religion."<sup>19</sup>

The final wording of the establishment clause is critical to its intended meaning. The clause prohibited "*an* establishment of reli-

10. THE COMPLETE MADISON, *supra* note 8, at 306.

11. A. KELLY & W. HARBISON, *supra* note 4, at 164. See also *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833) (Bill of Rights held not applicable to states).

12. A. KELLY & W. HARBISON, *supra* note 4, at 164.

13. 3 J. ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 659 (1901) (emphasis added).

14. R. CORD, *supra* note 5, at 6-7.

15. 1 ANNALS OF CONG. 729 (J. Gales ed. 1789).

16. *Id.*

17. *Id.* at 731.

18. For various versions of the establishment clause which were adopted by the House and Senate, see R. CORD, *supra* note 5, at 7-9.

19. U.S. CONST. amend. I.

gion." Had the First Congress chosen to prohibit *the* establishment of religion, then the generic word "religion" would have been emphasized and the clause could have been subject to an interpretation that would prohibit all official preferences of religion over non-religion. However, the drafters' actual use of "*an* establishment" indicates their desire to prohibit only those official activities which promoted the interests of one or more sects above all others.<sup>20</sup>

In summary, Madison's belief that the establishment clause was unnecessary, the state ratifying conventions' resolutions, the framers' statements made during the drafting of the establishment clause, and the actual words of the establishment clause all point to one conclusion: the proper interpretation of the establishment clause is to prohibit those official activities which tend to promote the interests of one particular sect over all others and not to preclude all official preferences of religion over irreligion.

Nevertheless, the same historical evidence of the genesis of the establishment clause has been interpreted by some,<sup>21</sup> including the United States Supreme Court,<sup>22</sup> to support the proposition that the drafters intended the clause to prohibit all official activities which tended to aid religion. Although the historical evidence is often used to support both the nonpreferential and the absolute separation interpretations of the establishment clause, the American experience, until the Supreme Court's relatively recent involvement, supports the nonpreferential interpretation.<sup>23</sup>

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20. M. MALBIN, RELIGION AND POLITICS 14-15 (1978).

21. See, e.g., L. PFEFFER, CHURCH, STATE, AND FREEDOM *passim* (1967) (stressing different historical facts and giving short shrift to facts highlighted in this article, Pfeffer concludes that the establishment clause prohibited the establishment of a state church and precluded any government aid to religious groups or beliefs); H. PRITCHETT, THE AMERICAN CONSTITUTION 401 (3d ed. 1977) (because state aid to religious organizations at the time of the drafting of the establishment clause included every religious group with enough members to form a church, thereby excluding non-Protestants in most states, the establishment clause was designed to forbid such nonpreferential assistance to religious organizations).

22. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the Court, speaking through Justice Black, reviewed the history of the establishment clause and concluded that its purpose was to prohibit all official activities which tended to aid religion. Among the facts relied upon by Justice Black in his conclusion were: (a) many early colonial settlers came to America to escape laws compelling citizens to support and attend government favored churches; (b) early attempts to establish churches in America resulted in persecution of dissenters which shocked the colonials into an attitude of abhorrence; (c) Madison's *Memorial and Remonstrance Against Religious Assessments* which was the impetus for Virginia's disestablishment of the Anglican Church; (d) Jefferson's Virginia Bill for Religious Liberty which guaranteed Virginians freedom from being compelled to support any religion; and (e) Madison and Jefferson's leading roles in the drafting and adoption of the establishment clause. *Id.* at 8.

23. See generally R. CORD, *supra* note 5, at 49-82; R. MORGAN, THE SUPREME COURT AND RELIGION 27-55 (1972).

The same Congress which drafted the establishment clause created congressional<sup>24</sup> and military<sup>25</sup> chaplaincies, which continue to this day. Federal funds were committed for many years to construct church buildings in accordance with Indian treaties.<sup>26</sup> Similarly, until late in the nineteenth century, Congress appropriated hundreds of thousands of dollars annually to support the sectarian education of Indians by religious organizations.<sup>27</sup> Finally, Presidents Washington, Adams, and Madison issued Thanksgiving Day Proclamations setting aside a day in which all the people of the nation would join together and express their thanks to God for His benefits and protection.<sup>28</sup>

Meanwhile, in the states, which under the Constitution and Bill of Rights were left to deal with issues surrounding religion as they wished,<sup>29</sup> established churches were in the process of being abolished. In 1775, at the outbreak of the American Revolutionary War, nine of the thirteen original colonies had established

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24. *Marsh v. Chambers*, 103 S. Ct. 3330, 3333-34 (1983). Furthermore, Madison served on the committee which recommended the chaplaincy. R. CORD, *supra* note 5, at 23.

25. R. CORD, *supra* note 5, at 54.

26. *Id.* at 57-61.

27. *Id.* at 61-80.

28. *Id.* at 51-53. President Washington's first "National Thanksgiving Proclamation" read, in part:

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 impore His protection and favor. . . .

. . . . 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 united in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation.

1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897 64 (J. Richardson ed. 1901), *reprinted in* R. CORD, *supra* note 5, at 51-52.

29. The Constitution delegated certain express powers to the newly created federal government, but the new government had no power except those the Constitution granted. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816). All sovereign powers not specifically delegated to the federal government or prohibited to the states were reserved to the states. U.S. CONST. amend. X; *Gilman v. City of Philadelphia*, 70 U.S. (3 Wall.) 713 (1852). Because the Constitution did not prohibit the states from dealing with matters of religion, the ratification of the Constitution and the adoption of the establishment clause had no effect on the states' power to establish a religion. *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

churches.<sup>30</sup> By 1787 when the Constitutional Convention convened, five states retained an established religion,<sup>31</sup> and it was not until 1833 when the last state, Massachusetts, disestablished its church.<sup>32</sup> Although states disestablished their official churches, they maintained a variety of involvements in religion including legislative chaplaincies,<sup>33</sup> the teaching of religion in public schools,<sup>34</sup> and the requirement or encouragement of prayer and other devotional exercises in public schools.<sup>35</sup>

In conclusion, the history of the drafting of the establishment clause, the actions of its drafters,<sup>36</sup> and the American experience may indicate that the establishment clause was intended only to prohibit any official activity which tended to promote the interests of only one or a few sects. Into this settled state of affairs stepped the United States Supreme Court with its decision in *Everson v. Board of Education*.<sup>37</sup>

## II. A BRIEF SURVEY OF SUPREME COURT ESTABLISHMENT CLAUSE DECISIONS AND THEIR EFFECT

In 1947, the Supreme Court's landmark decision in *Everson v.*

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30. R. CORD, *supra* note 5, at 4. The Anglican Church was the established church in Virginia, New York, Maryland, North and South Carolina, and Georgia. The Congregational Church was established in Massachusetts, Connecticut, and New Hampshire. *Id.* States had established churches in that public monies were provided to support the churches and, in some states, there was a requirement of Protestantism or piety to hold public office. R. MORGAN, *supra* note 27, at 30.

31. R. CORD, *supra* note 5, at 4 (Georgia, South Carolina, Connecticut, Massachusetts, and New Hampshire).

32. *Id.*

33. *Marsh v. Chambers*, 103 S. Ct. 3330 (1983) (Court upheld against an establishment clause attack Nebraska's practice of retaining a chaplain, chosen by the legislature and paid with public funds, to offer a prayer at each legislative session).

34. R. MORGAN, *supra* note 23, at 49.

35. *School Dist. v. Schempp*, 374 U.S. 203 (1963) (Court struck down Pennsylvania statute requiring the reading of at least ten verses from the Bible without comment and recitation of the Lord's Prayer with exemption for any student upon the written request of his or her parent or guardian).

36. In answer to this evidence (which indicates that the very drafters of the establishment clause would have violated it under an absolute separation interpretation), Pfeffer, who advocates such a broad interpretation, points to a document discovered in 1946 in Madison's handwriting. L. PFEFFER, *supra* note 21, at 170. In his *Detached Memoranda*, Madison reflected that his earlier support of and participation in establishing the congressional chaplaincy system and thanksgiving proclamations violated the establishment clause. *Madison's Detached Memoranda*, 3 WM. & MARY Q. 535, 558 & 560 (E. Fleet ed. 1946). Cord counters Pfeffer's argument by asserting that Madison should be judged by "his behavior, statements, and actions while he was a public servant in the House [of Representatives] and in the Presidency making policy and accountable for it" and not the reflections of an old man retired from public service "regrett[ing] some of his past actions." R. CORD, *supra* note 5, at 35-36 (emphasis omitted).

37. 330 U.S. 1 (1947).

*Board of Education*<sup>38</sup> began the federal judiciary's deep involvement in establishment clause issues. In *Everson*, the Supreme Court, through Justice Black, extended the proscriptions of the establishment clause to the states for the first time.<sup>39</sup> Furthermore, the *Everson* Court, relying primarily on the writings of Jefferson and Madison,<sup>40</sup> interpreted the establishment clause to mean:

The "establishment" . . . clause . . . means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . 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

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38. *Id.* Pursuant to a New Jersey statute, a local school board had authorized the reimbursement of funds expended by parents to transport their children to private schools on public buses. The Court upheld the program against an establishment clause challenge by a 5 to 4 vote.

39. *Id.* at 15. "The broad meaning given the [Fourteenth] Amendment . . . has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom." *Id.* Although this rather broad statement was followed by a citation to *Cantwell v. Connecticut*, 310 U.S. 296 (1940), *Cantwell* only applied the *free exercise clause* to the states. Therefore, contrary to Justice Black's reliance on precedent, *Everson* was the first case in which the Court had made the restrictions of the *establishment clause* applicable to the states.

Some commentators have questioned the validity of Justice Black's incorporation of the establishment clause against the states. For example, Professor Gunther has stated: "[T]he 'incorporation' in *Everson* of the 'establishment' [clause] took place without considering the textual difficulty of using the 'liberty' of the 14th Amendment as the incorporation route." G. GUNTHER, *CONSTITUTIONAL LAW* 1553 n.1 (10th ed. 1980). The textual difficulty of incorporating the establishment clause has been explained as follows:

The provision in the First Amendment forbidding an establishment of religion was thus a restraint on Congress only. When, however, we come to the Fourteenth restraining the States, it is applicable only to such restraints as invade some person's "liberty". The "free exercise" of religion is a liberty, but "an establishment of religion" is not necessarily a deprivation of the liberty of individuals, but primarily a regulation of government relations. While a State might establish a church in such a way as to abridge the religious freedom of persons of other creeds, it might also establish a church in a manner which abridged no one's freedom at all. If, in fact, it does abridge religious freedom, this would violate the [free exercise] clause.

Drinker, *Some Observations on the Four Freedoms of the First Amendment*, 37 B.U.L. REV. 1, 55 (1957) (footnotes omitted). See also R. CORD, *supra* note 5, at 109-14.

40. 330 U.S. at 11-15.

intended to erect "a wall of separation between church and State."<sup>41</sup>

Thus, in *Everson*, the Court held that the establishment clause required states to be neutral in religious issues.<sup>42</sup> One year later, relying on this principle, the Court for the first time, in *McCullum v. Board of Education*,<sup>43</sup> struck down an action by a local school board as unconstitutional under the establishment clause. In *McCullum*, the offending state action was a program permitting students to receive religious instruction during the school day, on school property, taught by various religiously affiliated persons.<sup>44</sup>

In 1962 in *Engle v. Vitale*,<sup>45</sup> and in 1963 in *School District v. Schempp*,<sup>46</sup> the Court addressed a different church-state issue: whether or not the state oversteps constitutional bounds by financing or conducting religious exercises. Relying on *Everson*, the Court strove to maintain a "complete and unequivocal"<sup>47</sup> separation of church and state by striking down state composed or sponsored school prayers and devotions.

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41. *Id.* at 15-16 (citation omitted) (emphasis added).

42. The concept of governmental neutrality is, in effect, an attempt to harmonize the inherent discord between the two first amendment clauses pertaining to religion. The amendment dictates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The first clause, the establishment clause, is a mandate not to establish a religion; the latter, the free exercise clause, is a mandate not to inhibit the practice of religion. See generally P. KURLAND, RELIGION AND LAW 112 (1962). The Court's experience with the governmental neutrality concept, however, has been somewhat unsuccessful in harmonizing the inherent conflict between the religion clauses.

43. 333 U.S. 203 (1948).

44. The Court held that the "released time" program used the classrooms for religious instruction and that the force of the public school was used to promote that instruction. The practice was held to be "beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith" and, therefore, unconstitutional. *Id.* at 209-10.

Only four years later, the Court appeared to contradict itself by holding a similar program constitutional in *Zorach v. Clauson*, 343 U.S. 306 (1952). The Court, speaking through Justice Douglas, distinguished the New York City program in *Zorach* from the Illinois program in *McCullum*, because the *Zorach* program neither involved religious instruction in the public school classrooms nor the expenditure of public funds. The *Zorach* program permitted students to leave school grounds and go to religious centers for religious instruction or devotional exercises. Any costs incurred were paid by the sponsoring religious organizations. *Id.* at 312-15.

Justice Black, in his dissenting opinion, however, believed the distinction recognized by the majority was illusory. *Id.* at 315-20 (Black, J., dissenting). For a discussion on this area, see Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963).

45. 370 U.S. 421, 424 (1962) (non-denominational prayer prepared by the New York Board of Regents for use in the public schools was found to be "wholly inconsistent with the Establishment Clause").

46. 374 U.S. 203 (1963) (holding unconstitutional the Pennsylvania practice of opening the school day with a recitation of the Lord's Prayer along with the reading of Bible verses).

47. *Id.* at 220 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)).

In 1971, the Supreme Court returned to the issue first raised in *Everson*, the constitutionality of state financial aid to church-related schools. In *Lemon v. Kurtzman*,<sup>48</sup> the Court refined establishment clause jurisprudence which had developed and been applied over the previous twenty-five years. Writing for the Court, Chief Justice Burger announced a three part test: one, the challenged state activity must have a secular purpose; two, it must have as its principal or primary effect neither the advancement nor inhibition of religion; and three, it must not foster "an excessive government entanglement" with religion.<sup>49</sup> To pass constitutional muster, the challenged activity must pass all three requirements.<sup>50</sup>

The Court has since applied the *Lemon* standard to establishment clause questions for better than a decade. To some observers, the results are confusing and inconsistent.<sup>51</sup> For example, the Supreme Court has approved government aid to church-related colleges<sup>52</sup> but not to sectarian primary and secondary schools.<sup>53</sup> It has approved government funding of bus transportation to parochial schools<sup>54</sup> but struck down such funding of transportation for field trips.<sup>55</sup> It has approved state aid to parochial

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48. 403 U.S. 602 (1971).

49. *Id.* at 612. The test is generally regarded as the standard under which all establishment challenges must pass.

50. *Stone v. Graham*, 449 U.S. 39, 40-41 (1980) (Kentucky law requiring posting of a copy of the Ten Commandments on the walls of a public classroom was held unconstitutional even though purchased with private contributions).

51. See R. MORGAN, *supra* note 23, at 123-64; Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883 (1976); Seeburger, *Public Policy Against Religion: Doubting Thomas*, 11 PEPPERDINE L. REV. 311 (1984).

52. See, e.g., *Roemer v. Maryland Bd. of Pub. Works*, 426 U.S. 736 (1976) (approving annual noncategorical grants to eligible private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding a construction aid program allowing colleges to borrow funds at low interest rates); *Tilton v. Richardson*, 403 U.S. 672 (1971) (sustaining federal construction grants to church related colleges).

53. See, e.g., *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973) (striking down public funding to reimburse both church-sponsored and secular private schools for certain mandated state services as violative of the establishment clause); *Nyquist v. Committee for Pub. Educ. and Religious Liberty*, 413 U.S. 756 (1973) (public funding for repair and maintenance of church sponsored schools, tuition reimbursement to low income parents whose children attend sectarian schools, and income tax benefits to parents of children attending private schools all held unconstitutional). Apparently, the constitutionality of state aid to sectarian schools is dependant on the *age* of the students attending the school.

54. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

55. *Wolman v. Water*, 433 U.S. 229 (1977).

schools in the form of textbooks<sup>56</sup> but not in the form of other instructional materials, such as maps.<sup>57</sup>

The Court's decisions in the school prayer and devotion cases and refinement of its establishment clause *Lemon* test have been interpreted by many state and lower federal courts as precluding a wide variety of governmental accommodations of religion.<sup>58</sup> For example, courts have prohibited students' voluntary prayers before meals,<sup>59</sup> periods of meditation before class,<sup>60</sup> and student prayer meetings in school buildings outside of class hours.<sup>61</sup> Remarkably, one court has even held that a school board's decision to permit students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" on school property before or after class hours violates the establishment clause.<sup>62</sup>

Since the 1979 term, the Supreme Court itself has seemed uncomfortable with the *Lemon* test, its application in the lower courts, and even the view of separation of church and state which underlies the test.<sup>63</sup> In 1980, the Court utilized the *Lemon* stan-

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56. Board of Educ. v. Allen, 392 U.S. 236 (1968).

57. Meek v. Pittenger, 421 U.S. 349 (1975).

58. E.g., Marsh v. Chambers, 103 S. Ct. 3330 (1983). "The District Court held that the Establishment Clause was not breached by the prayer but was violated by paying the chaplain from public funds, and accordingly enjoined the use of such funds to pay the chaplain." *Id.* at 3332 (citation omitted). The court of appeals, however, went much further, holding that the whole chaplaincy practice violated the establishment clause and accordingly prohibiting the state from engaging in any aspect of the practice. Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982), *rev'd*, 103 S. Ct. 3330 (1983).

59. Stein v. Oshinsky, 348 F.2d 999 (2d Cir. 1965), *cert. denied*, 382 U.S. 957 (1966).

60. Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *rev'g* Jaffree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1983), and Jaffree v. James, 554 F. Supp. 1130 (S.D. Ala. 1983), *petition for cert. filed sub nom. Jaffree v. Board of School Comm'rs*, 52 U.S.L.W. 3557 (U.S. Nov. 14, 1983) (No. 83-804), and *appeal filed sub nom. Jaffree v. James*, 52 U.S.L.W. 3557 (U.S. Nov. 14, 1983) (No. 83-812); May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983); Duffy v. Los Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983); Beck v. McElrath, 548 F. Supp. 1161 (M.D. Tenn. 1982). *But see* Gaines v. Anderson, 421 F. Supp. 337 (D. Mass. 1976) (upholding minute of silence statute).

61. Brandon v. Board of Educ., 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981).

62. Lubbock Civil Liberties Union v. Lubbock Indep. School Dist., 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 103 S. Ct. 800 (1983) (rejecting ostensive purpose to allow many organizations the opportunity to meet in light of underlying religious purpose; primary effect of the policy amounted to an impermissible advancement of religion; and schools' continuing supervision of the meetings created an impermissible governmental entanglement). *But see* Widmar v. Vincent, 454 U.S. 263 (1981) (free speech clause forbids state university from barring a student group desiring to use its facilities for religious worship and discussion purposes if it otherwise allows registered student groups to use them).

63. See Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980). Beyond a simple articulation of the three-part test, there is little the Court can agree on in this area. As noted by Justice White in his majority opinion in *Regan*:

ard to strike down a Kentucky statute requiring the posting of a privately-purchased copy of the Ten Commandments on the wall of each public classroom in the state.<sup>64</sup> But a year later, in *Thomas v. Review Board*,<sup>65</sup> another case involving a religious claim, the Court struck down, as violative of the free exercise clause, a state action which attempted to remain religiously neutral. Justice Rehnquist, in his dissent, noted that had the state statutorily provided the relief which the Court had granted to the claimant, the Court would have held such a statute to be in violation of the establishment clause under *Lemon*.<sup>66</sup> This prompted Justice Rehnquist to inquire whether the Court had "temporarily retreated from its expansive view of the Establishment Clause."<sup>67</sup> To Justice Rehnquist, the only way to resolve the irreconcilable conflict between the religion clauses is to interpret the establishment clause as prohibiting only selective beneficial treatment of

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This is not to say that this case, any more than past cases, will furnish a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools. But Establishment Clause cases are not easy; they stir deep feeling, and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

*Id.* at 662. *But see* *Meek v. Pittinger*, 421 U.S. 349 (1975) (similar statute found unconstitutional). Such distinctions, as noted by Justice Stevens in his dissenting opinion in *Regan*, force the Court to continue "with the sisyphian task of trying to patch together the 'blurred, indistinct, and variable barrier' described in *Lemon v. Kurtzman*." 444 U.S. at 671 (Stevens, J., dissenting).

64. *Stone v. Graham*, 449 U.S. 39 (1980).

65. 450 U.S. 707 (1981) (unconstitutional to deny unemployment compensation to Jehovah's Witness who, because of personal religious beliefs, left his job in a factory assembling parts for a tank). *See* Seeburger, *supra* note 51.

66. 450 U.S. at 726 (Rehnquist, J., dissenting).

67. *Id.* "It is unclear from the Court's opinion whether it has temporarily retreated from its expansive view of the Establishment Clause, or wholly abandoned it. *I would welcome the latter.*" *Id.* (emphasis added). Noting the Court's inability to harmonize the inherent tension between the free exercise and the establishment clauses, Justice Rehnquist observed: "My difficulty with today's decision is that it reads the Free Exercise Clause too broadly and it fails to squarely acknowledge that such a reading conflicts with many of our Establishment Clause cases. As such, the decision simply exacerbates the 'tension' between the two Clauses." *Id.* at 727.

religious sects.<sup>68</sup>

The Supreme Court has recently handed down several important establishment clause decisions. In *Larkin v. Grendel's Den, Inc.*,<sup>69</sup> the Court applied the *Lemon* test in striking down a Massachusetts law preventing the licensing of a liquor store within five hundred feet of a church if the church objected.<sup>70</sup> In *Mueller v. Allen*<sup>71</sup> the Court again applied the *Lemon* standard, but was noticeably more deferential to the states' interests than in previous establishment clause cases. The Court upheld a Minnesota statute permitting tax deductions for tuition and other school expenses in both public and private schools, including parochial ones.<sup>72</sup> Then, in *Marsh v. Chambers*,<sup>73</sup> the Court declined to use the *Lemon* test in approving Nebraska's practice of sponsoring a chaplain for the state legislature.<sup>74</sup> Most recently, the Court applied the *Lemon* test in *Lynch v. Donnelly*<sup>75</sup> to a city's inclusion of a nativity scene in a Christmas seasonal display; however, the Chief Justice observed that the Court had "repeatedly emphasized [its] unwillingness to be confined to any single test or crite-

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68. 450 U.S. at 726 (citing *School Dist. v. Schempp*, 374 U.S. 203, 314 (1963) (Stewart, J., dissenting)).

69. 103 S. Ct. 505 (1982).

70. *Id.* at 507 (statute unconstitutional because it delegated state's regulatory authority, in part, to churches).

71. 103 S. Ct. 3062 (1983).

72. *Id.* at 3066-71. The less than rigid application of the three-part *Lemon* test elicited a strong dissent by Justice Marshall, with whom Justices Brennan, Blackmun, and Stevens joined. *Id.* at 3071 (Marshall, J., dissenting).

73. 103 S. Ct. 3330 (1983).

74. "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.* at 3335. As stated by Chief Justice Burger:

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. As Justice Douglas observed, "[w]e are a religious people whose institutions presuppose a Supreme Being."

*Id.* at 3336 (quoting *Zorach v. Clauson*, 343 U.S. 306, 313 (1952)). Justice Brennan (joined by Justice Marshall), even though recognizing the narrowness of the Court's decision, filed a strong dissent. Notably, Justice Brennan himself had once expressed the view that "[t]he saying of invocational prayers in the legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvement of any kind prohibited by the Establishment Clause." *School Dist. v. Schempp*, 374 U.S. 203, 299-300 (1963) (Brennan, J., concurring). However, Justice Brennan changed his mind in *Marsh*: "Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today." 103 S. Ct. at 3337-38 (Brennan, J., dissenting).

75. 52 U.S.L.W. 4317 (1984).

rion in this sensitive area."<sup>76</sup>

Caution must be exercised in drawing conclusions from these recent cases. *Larkin*, and to some extent *Lynch*, indicates the Court's unwillingness to completely abandon the *Lemon* test. However, an examination of *Mueller* suggests that the Court is willing to apply *Lemon* more loosely than before, at least in the context of state aid to church-related schools.<sup>77</sup> Furthermore, the Court seems inclined to abandon the *Lemon* standard when a traditional state involvement in religion, such as the legislative chaplaincy in *Marsh*, is at issue.<sup>78</sup>

### III. THE REAGAN ADMINISTRATION'S INVOLVEMENT IN ESTABLISHMENT CLAUSE CASES

The recent movements in the Court's approach to establishment clause issues have been welcomed by the Reagan Administration. Indeed, the Administration has encouraged such movements in amicus curiae briefs in *Mueller*,<sup>79</sup> *Marsh*,<sup>80</sup> and *Lynch*,<sup>81</sup> and is continuing with amicus curiae briefs in cases

76. *Id.* at 4320.

77. 103 S. Ct. at 3066-71. Again making reference to the historic purposes of the establishment clause, the Court noted:

The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. *The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.*

*Id.* at 3069 (emphasis added).

78. *Marsh*, 103 S. Ct. 3330.

79. Amicus Curiae Brief for the United States, *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

80. Amicus Curiae Brief for the United States, *Marsh v. Chambers*, 103 S. Ct. 3330 (1983). The United States argued: "The *Lemon* test is merely a device for discerning the proper meaning of the Establishment Clause and for applying its restrictions in a modern day context. In this case, where the challenged practice is one that was actually engaged in by the Framers themselves, and where the intended meaning and scope of the Establishment Clause in this context is clear, application of the *Lemon* test would seem superfluous. Nevertheless, a review of the Nebraska chaplaincy under that test confirms that [it] is constitutionally sound." *Id.* at 3-4.

81. Amicus Curiae Brief for the United States, *Lynch v. Donnelly*, 52 U.S.L.W. 4317 (1984). As in *Marsh*, the Administration argued that the *Lemon* test need not be applied and that a consideration of the intentions of the Framers of the establishment clause, and more generally of our nation's history, is sufficient to decide the issue.

presently before the Supreme Court.<sup>82</sup> In an Alabama school prayer case,<sup>83</sup> the Administration has asked the Court to examine the constitutionality of a statute permitting a moment of silence in the public schools during which students may pray, meditate, or do as they please.<sup>84</sup> The Administration is of the belief that such a statute is consistent with the Constitution, because it accommodates in a neutral and noncoercive way the practice of an individual's religion.

The Administration hopes that the Court will reassess the consequences of its own establishment clause precedents and the lower courts' increasing tendency of hostility toward religion. Hopefully, the Court will decide that a more subtle analysis of the establishment clause is in order, one that encourages the states to take an attitude of, in the Court's own words, "benevolent neutrality" toward religion.<sup>85</sup> We are encouraged by the trend the Court began in *Mueller* and extended in *Marsh* and *Lynch*, as a break from its previous decisions.

#### IV. CONCLUSION

Religion, as Tocqueville observed, gave birth to the first colonies.<sup>86</sup> The policy of the Reagan Administration is to make certain that the hand of government does not suppress the vital freedom which brought the first colonials to America: freedom to worship and believe as one sees fit. "The first amendment was not written to protect the people and their laws from religious values; it was written to protect those values from government tyranny."<sup>87</sup> That is the essence of the establishment clause, and it

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82. Amicus Curiae Brief for the United States, *Wallace v. Jaffree*, *appeal filed sub nom. Jaffree v. James*, 52 U.S.L.W. 3557 (U.S. Nov. 14, 1983) (No. 83-812).

83. *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983), *rev'g Jaffree v. Board of School Comm'rs*, 554 F. Supp. 1104 (S.D. Ala. 1983), *and Jaffree v. James*, 554 F. Supp. 1130 (S.D. Ala. 1983), *petition for cert. filed sub nom. Jaffree v. Board of School Comm'rs*, 52 U.S.L.W. 3557 (U.S. Nov. 14, 1983) (No. 83-804), *and appeal filed sub nom. Jaffree v. James*, 52 U.S.L.W. 3557 (U.S. Nov. 14, 1983) (No. 83-812).

84. The Alabama school prayer statute states in part that:

At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each class is held may announce that a *period of silence not to exceed one minute* in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

ALA. CODE § 16-1-20.1 (1975) (emphasis added).

85. *Waltz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (upholding tax exemptions to religious organizations for properties used solely for religious worship). "[T]here is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.*

86. See A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 1835-40 (J. Mayer & M. Lerner eds. 1966).

87. Address by President Reagan, Association of National Religious Broad-

contains a challenge that is as real today as it was two hundred years ago.

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casters Annual Convention (January 31, 1983), *reprinted in* WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, volume 19, No. 5, Jan. 31, 1983, at 155-58.

