CHAPTER 3

FEDERAL FOUNDERS' INTENT: PART I: ACCOMMODATIONISM

INTRODUCTION

The use of federal founders' intent involving the meaning of separation of church and state is a relatively modern phenomenon. References to the separationist ideas of Thomas Jefferson or James Madison do not appear in majority opinions until the 1940's with the incorporation of the First Amendment to the states through the due process clause of the Fourteenth Amendment. However, the actual uses of federal founders' intent involving separation of church and state begins much earlier – in the Bible reading in the public school cases in the late 1800's, where, as **Chapter 2** examined, it was rejected -- and in the 1920's, where federal founders' intent is first seen in state majority opinions sanctioning state blasphemy and Sunday laws, and Bible reading in the public schools.

There has never been any broad agreement concerning the original intent of the First Amendment's establishment clause. Two interpretations have continued to dominate both legal and historical scholarship -- the "accommodationist," which holds the federal founders wished to aid religion and posited less than complete separation between church and state; and the "separationist," which holds the founders wished to erect a "wall of separation" between church and state in order to guarantee freedom from a state- imposed religion. Nor was there any consistency in the pattern of their appearance. Accommodationist histories can be found in cases reaching separationist conclusions (striking down the state action), and separationist histories can be found in cases reaching

accommodationists conclusions (upholding state action). There is no correlation between the type of history invoked and the legal result.

The following two chapters examine the evolution in the use of federal founders' intent involving separation of church and state. **Chapter 3** examines the *accommodationist variety* of federal founders' intent, which first appeared in counsel's arguments to support the practice of Bible reading in the public schools as necessary for good citizenship, in the famous case of *Board of Education v. Minor* (1872).[1] Its roots can be traced back to the view that America is a Christian republic, found in the distinctive religious mission of the early Puritan settlers, and in the later religious revivals during the Jacksonian era, which revived the idea that this is a Christian nation.[2] **Chapter 4 Part II** examines the evolution of the *separationist variety*, that is, references to the general history of the times, Thomas Jefferson and James Madison, as authors of the First Amendment, to support the view that a high wall of separation between church and state must be kept.

I. Accommodationist History: The "List."

Remarkably, the predominant variety of federal founders' intent is accommodationist: that the founders, both federal and colonial settlers, wished to aid religion. There are two versions of this history. One holds that the founders did not wish to separate church and state at all. Instead, America was a "Christian nation." The second, or secular, view holds that the founders did secure separation of church and state, but wished only to prevent one single state church or one national religion from establishment by the federal government. This view is called the "non preferential"

position, because it argues that government cannot make a preference for one religion, but could aid all religions equally.[3] Central to both versions is the argument that, since the founding, government has aided religion and recognized it.

The most significant feature of accommodationist history is its format -- the "listing," without supporting social or historical evidence, of positive legal enactments that either use the word "religion" or aid religious practices directly or indirectly. Judges and lawyers have invoked a "list" of past governmental aids to religion as evidence of founders' intent.[4] The "listing" is typical of legal reasoning, which dictates that past laws or legal documents be lined up to support conclusions. This "listing" has had a significant impact on how the American past was reconstructed by the judiciary.

A. Four Types of "Lists."

The content of this accommodationist "list" varies and was extended to include governmental actions *beyond* the founding era. The "list" has been characterized four ways, having its own historical evolution in legal usage. One is to present past governmental aids to religion as part of an **American culture**. This view was first put forward by Justice Reed's dissent in *McCollum v. Board of Education* (1948), where he made reference to "long established practices" aiding religion.[5] Chief Justice Burger also expressed the cultural view in upholding state property tax exemptions as evidence of "[t]wo centuries of uninterrupted freedom from taxation" and as ". . . more than a century of uninterrupted practice."[6] Justice Kennedy viewed it as governmental endorsement of religion.[7] Recently, Chief Justice Lucas of the California Supreme Court characterized public acknowledgment of a deity as part of "American Culture."[8] The traditionalists

view examples of past governmental aids to religion as evidence of an American cultural tradition. which endorses government aids to religion.

Another characterization of the accommodationist "list" is to view it as representative of **church-state involvement**, a mere zone of free exercise, which involves no allocation of tax money, nor coercion of religious belief, nor formal establishment of religion. Past aids to religion are viewed as having lost their original religious content by virtue of being secularized, and thus now tolerable under the establishment clause. Justice Brennan, in his dissent in *Lynch v. Donnelly* (1984), recognized church-state involvement and cautioned, that while some historical practices may be allowed. none could justify a violation of constitutional rights.[9]

In addition, a number of judges have gone as far as to characterize the accommodationist "list" as examples of "official acknowledgments" of religion by government, that is, the **legal recognition of religion**. Chief Justice Burger expressed this view in *Lynch v. Donnelly* (1984).[10] Burger maintained that, "Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the founding fathers and contemporary leaders. . ." and "[t]here are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage."[11]

Recently, the accommodationist "list" has been viewed as "**governmental speech**." A number of federal judges have argued that government has engaged in numerous religious "speech" acts, including putting a Madonna on a Christmas postage stamp, acts which compel no one to believe or contribute to a religion but have a religious

message.[12] These judges have dropped the language of "founders' intent" to describe the "list" of governmental aids to religion, replaced by modern doctrinal language.

II. The Evolution of the Accommodationist "List:" Early Uses.

A. The "List" as Public Policy.

The first appearance of an accommodationist "list" of past governmental aids to religion was not presented as founders' intent at all. A state court composed a "list" as evidence of existing state policy to aid religion, calling it public policy. Only later would the very same "list" be deemed founders' intent. The case involved a church that had been taxed by a city to pay for the paving of a highway; the church did not pay, and its property was to be sold for nonpayment of city taxes. The church was granted an injunction by the Georgia Supreme Court in *Trustees of the First Methodist Church v. Atlanta* (1886).[13]

The Georgia court said that while the tax assessment was lawful, it would be paradoxical to hold that the city could be authorized to tax charitable properties that were exempt from existing state taxes. Thus, the seizure of the church building could not be legally justified. The court reasoned that the state laws granting tax exemptions were just one aspect of a past state legislative history that reflected a policy of state aid "to encourage and advance religion."[14] Evidence of this encouragement of religion by the state was found in the following: the reference to God in the preamble of the state constitution; Judge Thomas Cooley's remark in his *Constitutional Limitations (1878)* on the need for public recognition of religious worship as an aid to public morals and the public peace; the state's bill of rights guarantee of liberty of conscience; state laws on charitable trusts, gifts, and bequests which recognize religion; court oaths; oaths for

political office: ministerial exemption from jury, road, and military duty: and the state's Sunday closing laws. These governmental aids to religion were cited by the court as illustrative of the intent by the state to aid religion.

The Georgia court was careful, though, not to declare that relief from state tax assessments was a monetary grant to religion. The court held that tax exemptions granted to churches were not, in fact, a grant of aid to religion prohibited by the state constitutions' clause of "no money" to sectarian institutions.[15] The court said that a tax exemption took no money from the public treasury. Although the court sustained the tax exemption against an establishment challenge, the court explicitly recognized that monetary aid to religion constituted an establishment.[16]

The Georgia court's opinion was significant in two respects. First, the court expanded the meaning of "establishment" to include more than a state church or the payment of the minister's salary. The court viewed its "no money" clause as the equivalent of an establishment clause. By accommodating one church through tax exemption, the court had expanded the definition of "no establishment." Second, this is the first state judicial reference to a "list" of governmental aids to religion, which precedes any other. It is significant to note, however, the court in 1886 did not treat such aids as founders' intent, but rather as current public policy. The very same "aids" would later be viewed as original intent by Twentieth Century jurists.

B. The "List" as Colonial Settlers Intent: "We are a Christian nation."

The first federal opinion which invoked an accommodationist "list" was in the U.S. Supreme Court's opinion in *Holy Trinity Church v. United States* (1872), where the

"list" was equated with the colonial settler's intent to aid religion.[17] The case involved a religious society that had hired an English minister to serve their parish. in violation of a federal law prohibiting labor contracts with aliens. Justice Brewer cited references to religion found in the colonial charters and documents to support the argument that this was a "Christian nation."[18] He said these references constituted the legal acknowledgment of a deity. He also cited the religious *dicta* from two state blasphemy cases, including *Updegraph v. Commonwealth* (1824) and *People v. Ruggles* (1811), and Justice Story's comments in *Vidal v. Girard's Executors* (1844).[19]

It is significant to note that Justice Brewer relied upon state blasphemy case law and its *dicta* for the religious language of the colonial charters, and offered that language as the legal tradition. The reliance on this *dictum* was misleading. As **Chapter 1** explicated, the state blasphemy laws were sanctioned as public peace measures, not as aids to Christianity. Further, the colonial charters did not grant the colonies ecclesiastical jurisdiction, only authority to administer the Oath of Supremacy to the Crown for public offices.[20] To be sure, the *dicta* of the colonial charters contained language promoting the Christian religion in the new frontier; however, that tradition was irrelevant to the Court's final determination of the legal issue in the case: Did the church's contract violate Congress' intent to prevent alien labor contracts? The Court held that a minister's labor was not "common labor" within the meaning of the statute. The use, then, of state blasphemy law *dicta* and colonial charter language was completely irrelevant to the Court's determination of the character of the minister's labor under the law.

The *dictum* of *Holy Trinity* was significant because it began the legal tradition of

citing Justice Brewer's "We are a Christian nation." This phrase would later be cited in cases upholding the practices of Bible reading and prayer in the public schools, and other state laws.[21] Here, the "list" as "We are a Christian nation" was presented as the legal tradition.

C. The "List" as State Framers Intent.

The "list" does not reappear in judicial opinions until the early Twentieth Century in a case involving a challenge to Bible reading in the public schools of Texas. In *Church v. Bullock* (1908), the Texas Supreme Court upheld the practices of Bible reading and reciting prayers in the public schools, on the ground that the Texas constitution prohibited only the union of church and state that had existed prior to the formation of the Republic of Texas.[22] The court argued that the *state framers* wished to ban the Catholic state church that existed under the Mexican Republic. The court invoked state constitutional history to narrow the definition of the *state* constitution's call for "no support" of religion or church schools.[23] The court noted the existence of several state aids to religion, including legislative chaplains and a chapel on the State University campus. These governmental aids were evidence that "Christianity is so interwoven with the web and woof of the state government . . . ."[24]

The Texas court had reasoned by analogy that, since the existence of legislative prayer and a chapel on public grounds did not make those state properties religious in character or a "place of worship," the school practices merely acknowledged a religious exercise, but did not make the public school a "place of worship" within the meaning of the state's ban on aid. The court concluded that the practices were analogous to

legislative prayer.

This case illustrates the effect of invoking constitutional history, which narrowed the definition of the state's ban on monetary aid to religious institutions to mean only "no sectarian instruction" in the public schools. Yet, at the same time, the court expanded the meaning of "no aid" to include" no sectarian instruction" in the public schools, language which is not found in the state constitution. In addition, the court's legal history was misleading, for the court neglected to mention that the very first constitution of the Republic of Texas (1827) had established Christianity as the state religion.[25] In the final analysis, it was traditional judicial argument-by-analogy to legislative prayer, (i.e., does reading the Bible make the place sectarian?), that determined whether the practices were "sectarian" under the state constitution.

The Texas opinion is significant because the court invoked two traditional practices found on accommodationist "lists:" legislative prayers and chapels on public property. The court treated such aids evidence of state framers' intent to aid religion. This is the first time a court treated such practices as framers' intent.

D. The "List" as both State and Federal Founders' Intent.

It was not until the early Twentieth Century that a court linked the "list" with federal founders' intent to aid religion. In *Herold v. Parish Board of School Directors* (1915), the Louisiana Supreme Court enjoined a school board resolution requiring daily reading of the King James Bible's New Testament and recitation of the Lord's Prayer in the public schools.[26] Counsel for the school board had argued that this was a "Christian nation." The court replied to counsel's argument, whether or not Christianity was part of

the common law."We are a religious people."[27]

Justice Somerville went on to invoke the first modern version of federal founders' intent concerning religion. He listed what he thought was evidence of America's religious character: The reference to God in the Declaration of Independence and in the Articles of Confederation; the word "religion" in the First Amendment to the federal constitution; the state of Delaware's oath for political office; the use of the Bible in the court-room for oath-taking; the invocation of God in the preamble of the Louisiana constitution; the guarantee of religious liberty in the state's constitution and its prohibition of monetary aid to religious institutions in the state's constitution; "We are a Christian nation" *dicta* from *Holy Trinity Church*; and Justice Story's assertion that the First Amendment had to be read with the understanding that this was a Christian nation and that the founders intended to encourage Christianity. For the first time, the list of aids to religion was identified as both federal and state framers' intent to aid religion.

However elegant Justice Somerville's "list" was, it was did not determine the legal outcome of the case. The invocation of the "list" would seem to justify and sanction the practice of Bible reading in the public schools. But the court held that reading the New Testament constituted a "preference" for Christianity and discriminated against those of the Jewish faith, and struck down the practice. The court concluded that reading the Bible constituted "religious worship." The state constitution's "no preference" clause prohibited both preferences for a religion and discrimination against any sect.[28] In addition, the court found an even more fatal flaw in the school board's policy: requiring that teachers teach the "truths" of the Bible, violating the central principle of separation --

that government should not determine religious truths.

The Louisiana court's opinion is of great interest. Founders' intent seemed to justify the practices, but proved irrelevant to the legal reasoning, which was based on the strict letter of the state's constitutional prohibitions and state laws. Here, accommodationist history, in the form of a "list" of aids, which included references to federal documents and the First Amendment, appears in an opinion with a *separationist* outcome. In addition, it is the first opinion to use the phrase "We are a religious people." Why did the court invoke accommodationism, if not to support its legal conclusions? Perhaps the court wished to address counsel's extreme view that this was a "Christian nation," with a reply that, yes, in a more tolerant tone, "We are a religious people." This case illustrates that original intent is not always invoked by the judiciary solely to justify legal outcomes, but often, it is merely the court's reply to counsel's arguments.

E. The "List" as "the People's" Intent.

Two years after the Louisiana court's opinion, the Illinois Supreme Court cited the accommodationist "list"as evidence of "the people's" intent to secure religious liberty. In *Dunn v. Chicago Industrial School for Girls* (1917), the court, in reply to counsel's argument that wards of the state must be committed to institutions completely divorced from religion, argued that counsel had misunderstood the state's attitude toward religion.[29] The court went on to list those state aids to religion which protected the enjoyment of religious liberty: the invocation of God in the preamble of the state constitution; the state constitution's guarantee of religious liberty and the proscription of monetary aid to sectarian institutions and purposes; "the people's" regard for religion as a

public benefit, as expressed in the property tax exemptions for property used for religious worship; and the state's adoption of laws providing for the religious placement of adoptees. The court argued that all of these state aids reflected "the people's" desire to provide for the enjoyment of religious liberty.

The court's "list" did not, in the final analysis, justify the contract at issue. The court held that a state contract with an industrial school, for an amount less than actual cost, for the maintenance and education of Catholic girls committed by the juvenile courts did not constitute aid to a sectarian institution, prohibited by the state constitution, but was a primary benefit to the state's wards.[30] The main issue was whether the state cash grant was an aid to a sectarian institution, prohibited by article three. The court upheld the contract on the ground that paying less than actual cost of up keep did not aid the religious mission of the school. This outcome was the result of the court balancing the need to maintain juvenile wards with the state's restriction of monetary aid to religion. Again, the court's invocation of an accommodationist "list" was in reply to counsel's extreme view that church and state separation was absolute. The Illinois court thus brought back the "list" of state aids to religion, and called it "the people's" desire to aid religion.

F. Summary: The Early Developments of the "List."

Accommodationist history, the position that the founders wished to aid religion, comes in the form of a "list" of past or present governmental aids to religion or legal references to religion or a deity. Its first appearance in legal argument, as **Chapter 2** discussed, was in Nineteenth Century counsels' references to George Washington's

farewell address and the religious language of the colonial charters to justify the practice of Bible reading in the public schools. The western state judges, who substituted state framers' intent, readily rejected this accommodationist history. Nevertheless, accommodationism retreated and was reborn as a public policy-type argument in *Trustees of the First Methodist Church v. Atlanta* (1886), which "listed" various approved governmental aids to religion. At this stage, it was merely public policy, not original intent. A short "list" was later characterized as "state aids" to religion in *Church v. Bullock* (1908). The "list" was truly transformed by the Louisiana court in *Herold v. Parish Board of School Directors* (1915) where *federal* and state aids were said to reflect founders' aid to religion, in a case striking down the practice of Bible reading in the public schools as discrimination against Jews. *Dunn v. Chicago Industrial Schools for Girls* (1917) characterized the "list" as "the people's" intent to provide for religious liberty. Without comment, the Illinois court included "no monetary aid" to religion as an example of the guarantee of "liberty" in the state. Prior to modern times, the "list" is not viewed as "history." The "list" is rather primitive in conception at this stage; it would take the beginning of the Twentieth Century for judicial thought to change.

III. The Turning Point: 1920's, the "List" as Founders' Intent to Aid Religion.

As noted above, the early uses of an accommodationist "list" were primitive, at best. The early Twentieth Century marked a great change in legal thought, when judges turned from *separationist* state framers' arguments to *accommodationist* federal founders.' In the early 1920's, state judges, for the first time, invoked federal founders' intent in majority opinions sustaining state laws involving Bible reading in the public

schools. Sunday closing laws. and state blasphemy laws. Four cases are examined which illustrate this change in thought:

A. Blasphemy.

The first case to use references to the federal founders' intent in order to uphold state action was *State v. Mockus* (1921).[31] This case involved a challenge to the state's blasphemy law as a violation of both the federal and state constitutions.[32] The court held that the state's blasphemy statute was not unconstitutional under state law, and that the law was necessary, since this was a "Christian nation." To prove its point, the court cited both federal and state practices evidencing the legal recognition of religion. The court's "list" of aids to religion included: the Presidential oath; Congressional and state legislative prayer; court oaths; the invocation of God in the preamble of the Maine constitution; and the "We are a Christian people" *dicta* from three state blasphemy law cases.[33] The court also examined the debates in the Massachusetts constitutional convention of 1820, when Maine ceased to be part of the state of Massachusetts. The court inferred, from the lack of dialogue on the state's blasphemy law during the rigorous debate on religious liberty (especially over Article III, authorizing taxation in support of parish ministers), that the framers did not regard the existing blasphemy law as violative of the state's guarantee of religious liberty.

The reliance on state constitutional history in this case was significant to the extent that it was used to support the argument that, because the state framers did not consider blasphemy a type of religious liberty, the law did not contravene the state's guarantee of religious liberty. It was not the court's "list" of federal and state aids to

religion. but rather, the legislative intent of the 1820 constitutional convention which was relevant to the legal outcome. It was relevant, because it narrowed the definition of religious liberty and freedom of speech to what existed in 1820.

In short, the Maine court utilized intent to avoid legal formalism, and the traditional public-peace analysis of blasphemy case law. It is of interest to note that the court cited the *dictum* of "We are a Christian nation" from state case precedents involving blasphemy -- however, not their legal and secularization justification of state blasphemy laws. For example, both *Updegraph v. Commonwealth* and *State v. Chandler* stressed that only "fighting" words that disturbed the public peace were not protected speech. Had the court relied on a public-peace analysis, there would have been a different outcome for this case. The facts of the case suggest that Mockus, an invited speaker before a receptive audience (and speaking in a foreign language), did not threaten the public. By invoking framers' intent of 1820, the court examined the content of the offensive speech rather than the context of that speech. In sum, "history" was a substitute for traditional public peace analysis. Here, "history" had replaced legal reasoning, and the "establishment" issue got lost in a tangle of free speech.

State v. Mockus is significant because it is the first to use framers' intent, arguing intent from the *silence* of state dialogues, and to include a "list" of *federal* aids to religion in a case *upholding* a state blasphemy law. This opinion illustrates how the use of "history" has the effect of narrowing the scope of liberties -- here, the definition of religious liberty. This case is also of great interest because it was the first to start a public dialogue on the separationist ideas of Thomas Jefferson and James Madison. Although

not addressed by the court. Mockus' counsel, Theodore Schroeder, had argued before the court that a blasphemy law constituted an establishment of religion under state and federal constitutions, citing for authority the writings of James Madison and Thomas Jefferson. He is the first person to argue that Jefferson's idea of "no aid" to religion included blasphemy laws, something that Jefferson or Madison did not specifically address. Schroeder's brief was printed as *Constitutional Free Speech: Defined and Defended (1919).* The Maine court completely ignored that history.

B. Sunday Closing Laws.

Another state court invoked founders' intent in upholding state Sunday laws as aid to the Christian religion. In *Pirkey Bros. v. Commonwealth* (1922), a state court of appeals affirmed a conviction for operating an underground cave opened for tourists.[34] While the state court stressed the secular nature of Sunday laws and maintained that the law could not be enforced as a religious observance, it nevertheless restated that "we are a Christian people." For this proposition, the court cited *People v. Ruggles* (1811), *Holy Trinity Church v. United States* (1892) (citing Justice Brewer's "list"), and King James I's charter of 1606 for the colony of Virginia.[35] The court said that evidence that this was a Christian nation could be found in the fact that Thomas Jefferson's *Bill for Religious Freedom* (1786) had left intact the state's Sunday laws, which dated back to 1779.

The legal issue in this case was whether operating an underground cave or grotto on Sunday was entitled to the exemption under state statute, exempting works of "necessity" from the penalties of the state's closing laws. The court maintained that a work of "necessity" was a question of fact for a jury, to be determined in view of the

needs of modern life. While the constitutionality of the Sunday laws was not challenged, the court justified them as a valid measure of the state's police power to regulate labor, and cited numerous authorities to support a secular justification of the law.

The court's accommodationist *dicta* seems to be irrelevant to the determination whether or not operating a grotto was entitled to the exemption under the state law, the court's Blackstonian justification of Sunday laws, and to the court's rationale rejecting the relevance of applying legislative intent of the meaning of "necessity" in the 1779 statute. Where the accommodationist *dicta* was relevant, though, was in support of the court's argument that the Sunday law did not violate religious liberty as long as the law was not enforced as a religious observance, i.e., no coercion and no compelled attendance. Despite the court's assertion that this was a "Christian nation," the court narrowed the issue to whether or not the Sunday law violated the principle of religious liberty. The court thus substituted principle for historical *dicta* in reaching its final conclusion.

Pirkey Bros v. Commonwealth is of interest because it is rare for cases after the Nineteenth Century to take the view that Sunday laws aid Christianity. The opinion combines both original intent arguments, which are accommodationist, and the secular view of Sunday laws. Again, the case illustrates the misleading use of religious *dicta* from prior blasphemy case law and from *Holy Trinity Church*.

C. Bible Reading in the Public Schools: Three Cases.

The 1920's also saw the use of federal founders' intent in justifying the practice of Bible reading in the public schools. *Wilkerson v. City of Rome* (1922) reflects a change in state judicial thought concerning Bible reading.[36] As **Chapter 2** illustrates, state courts in

the 1870-90's had struck down the practice as violative of the principle of equality. In *Wilkerson*, the Georgia Supreme Court affirmed a judgment to compel a school board to implement a city ordinance requiring attendance, but not participation, in daily Bible reading and recitation of the Lord's prayer in the public schools. Justice Gilbert said that history was relevant to the issue in this case. He argued that the founders did not seek separation of church and state. Instead, the colonial period demonstrated a *preference* for religion. For authority, he selected historical facts from a law review article, which addressed discrimination against Catholics.[37] The colony of Georgia once had an Anglican state church, and taxed for the maintenance of the parish ministers. Thus, colonial history demonstrated direct aid to religion and discrimination. This history would justify a preference toward religion in this state *today*.

Without state case law on Bible reading to cite, the Georgia court cited the precedent of *Commonwealth v. Cooke* (1859), where a public school student was punished for not reciting the Ten Commandments.[38] The case was precedent for the proposition that the state should not recognize a conscientious objection to Bible reading in the public schools, because reading the Bible violated no liberty of conscience -- all that was involved was an act of reading.

The Georgia court found evidence that the founders did not wish to separate church and state at all in the writings of Roger Williams, founder of the Rhode Island Colony. The court went on to "list" how the law recognized the Christian religion: the Declaration of Independence; the statements of constitutional scholar Edward Thomas, Judge Thomas Cooley, and Justice Story; remarks made by various Presidents:

Thanksgiving Day proclamations. including Washington's Thanksgiving Day proclamation; Lincoln's Gettysburg Address; Daniel Webster's arguments before the U. S. Supreme Court in *Vidal v. Girard's Executors* involving a religious bequest; the prohibition of a religious oath for federal political office proposed by Charles Pinckney of North Carolina; Ben Franklin's proposed prayer in the Constitutional convention [not voted on]; the motto "In God We Trust" on our coins; the state constitutional provisions providing for tax exemptions; and the influence of Thomas Jefferson and James Madison on the adoption of the Virginia *Bill for Religious Freedom (1786).* The court noted that Georgia's constitution drew its inspiration from Jefferson's *Bill for Religious Freedom (1786).* Many state constitutions had copied their religious liberty and "no support" of religion clauses from Jefferson. The court read Jefferson's Bill only to "prohibit the creation of any state religion or the support of any particular Christian sect."[39] Quoting from HENRY SCHOLFIELD's CONSTITUTIONAL LAW, a law school textbook, the court further narrowed the meaning of Jefferson's "no support" to mean only the separation of the institutional church from the state, but not that the people were to be separated from their religion.

The court went on to examine Georgia's constitutional history. The court noted that it was the Confederate constitution of 1861 which put a "no establishment of religion" clause in the state constitution. Although the wording of the state constitutions had changed over time, the court said that the state's religious guarantees only protected the individual's right of conscience. The court reasoned that Bible reading in the public schools would not violate the liberty of conscience. The court narrowed the legal issue to

whether the state action violated religious liberty, not whether it violated separation of church and state. For authority, the court relied on *Trustees of the First Methodist Church v. Atlanta* (1886) (exempting church property from a tax assessment, discussed above); the preamble of the state constitution, which invoked God; HENRY SCHOLFIELD's CONSTITUTIONAL LAW (interpreting the analogous provisions in the Illinois constitution as authorizing Bible reading in the public schools) [overlooking the fact that the Illinois Supreme Court struck down the practice]; *Herold v. Parish Board of School Directors* (1915) (striking down Bible reading in the public schools) for the argument that the King James Bible was a Christian Bible which all Christians could read from without violating their consciences; *Pfeiffer v. Board of Education* (1898) (upholding readings from the Bible) for the argument that Bible reading involved no expenditure of public money; *Donahue v. Richards* (1854) (upholding Bible reading in the public schools) for the argument that no one was punished or coerced; and Judge Thomas Cooley for the argument that Bible reading was analogous to permitting chaplains in the armed forces.

The Georgia court did not rely on its accommodationist *dicta* to reach its final conclusion, but rather on the facts of the case. In reviewing the state provisions, the court upheld the practice on the grounds that it did not appropriate any public money in violation of Article 1, section 14 of the state constitution, or coerce belief, since students could be excused.[40] The ordinance involved no forced participation or compulsion to believe. In the court's view, mere reading from the Bible would not violate conscience, because it was a mere act of reading.

The Georgia court had invoked contradictory arguments. One, that the state could aid religion, evidenced by the "list" of aids, particularly to Protestant Christianity, without violating religious liberty because the state had done so in the past. On the other hand, Bible reading did not violate the state's guarantee of religious liberty since there was no coercion or tax funds use. In other words, no "establishment" existed. Here, accommodationist *dicta*, in the form of two "lists," appears in an opinion with an accommodationist outcome -- upholding the state action; however the conclusion was reached on other principles, especially pertaining to religious liberty. Also, reference to Thomas Jefferson's exhortation that no one should support religious worship, and his efforts with James Madison to proscribe tax aid to religion, was completely irrelevant to the court's reasoning. The court had narrowed the issue of separation to: Did this violate religious liberty, i.e., no coercion?

The dissenters in *Wilkerson* argued that Bible reading violated the principle of equality because the practice discriminated against non-believers and non-Christians. They noted that the practice established a system of worship where the principal of the school was authorized to designate "ministers," thus giving preference to Protestant Christianity, which violated the principle of the equal treatment of religions. They also argued that the guarantee of religious freedom included the freedom *from* religion. One dissent countered the majority quotation of Roger Williams with a "separationist" quote from Williams.[41] The dissenters concluded that morality could be taught in the public schools, but that goal must be accomplished in a manner consistent with the principles of separation of church and state.

It is of interest to note that in *Wilkerson*, both the majority and the minority utilized the ideas of Roger Williams. The dissenters were able to counter the majority's history with another history based on the very same writings. Neither history determined the legal outcome of the case.

Wilkerson is significant in two respects. One, it utilizes both federal and state aids to support the practice of Bible reading in the public schools, long after the state courts had struck the practice down. The western state judges had utilized the principle of equality to strike down the practice; the Georgia court used intent to avoid that very same principle. Second, it was the first substantial use of Roger Williams and Thomas Jefferson, not for separationism, but rather, for accommodationism. Here, the use of history had the effect of narrowing the definition of "no support" of religion to mean only the guarantee of liberty of conscience. Rather than an issue of separation, the issue became one of religious liberty.

The Supreme Court of Minnesota also invoked founders' intent in 1927 to uphold the practice of Bible reading in the public schools. In *Kaplan v Independent School District* (1927), the Minnesota Supreme Court held that Bible reading did not make public property a "place of worship" or sectarian under the state constitution.[42] As long as there was no compulsion, and no sectarian tenents taught, reading from the Old Testament would not violate religious liberty. For authority, the court cited Justice Story's remark in *Vidal v. Girard's Executors* (1844), that a Bible could be used in college without violating the state's guarantee of religious liberty.

Counsel in *Kaplan* had argued strict separationism, citing the example of

President Washington's Treaty with Tripoli.[43] The court rejected counsel's view, arguing that the *corpus* of state law recognized religion and acknowledged a God, which was evidenced by the word *God* in the state constitution and the word "religion" in the First Amendment. While the early settlers fled religious persecution, the court argued that Bible reading was analogous to the incidental aids to religion that the founders accepted, such as legislative prayers and military chaplains.

The dissent argued that Bible reading constituted a preference for Protestant Christianity and discriminated against those who did not participate, thus violating the state's guarantee of equality.[44] The Chief Justice's dissent concluded by noting that the practice, although voluntary, resulted in the humiliation of the children who did not attend the exercise. His quarrel with the majority was not with the truth of its history, but rather, it focused on the practical effect of the supposedly voluntary exercise upon the children. Again, another state utilized founders' intent to avoid legal formalism, i.e., principle and a close scrutiny of the facts of the case.

The concern whether Bible reading violated religious liberty was addressed by another court. In *People v. Stanley* (1927), the Colorado Supreme Court affirmed a lower court dismissal of a request to stop the practice of Bible reading in a public school where attendance was required. In an opinion devoid of any reference to history or framers' intent, the court held that Bible reading, without comment, did not violate the state constitution; did not make the school room a "place of worship," put the school under "sectarian control" of any sect, or give a "preference" to one religion over another, or constitute "sectarian teaching."[45]

This opinion is significant because the practice had been challenged as a violation of the "liberty" guarantee of the Fourteenth Amendment to the federal constitution. The court did grant injunctive relief to the parents who also objected to the fact that attendance was required. The court reasoned that "liberty" protected by the Fourteenth was not the liberty of conscience of the students, but rather, the right of parents to direct the education of their children recognized by the U.S. Supreme Court in *Pierce v. Society of Sisters* (1925) and *Meyers v. Nebraska* (1923).[46] Parents' substantive liberty meant that parents had a right under the U. S. Constitution to withdraw their children from the required Bible readings.

The Colorado court had upheld Bible reading as such; however, it rejected the civic-virtue argument that Bible reading was necessary for good citizenship. Should the court recognize the necessity of Bible reading, then the state could compel attendance. Compelled attendance was unthinkable: a state constitutional provision specifically addressed the issue providing that no teacher or student could be required to attend any religious activity.[47] Compelled attendance would violate both state and federal constitutions.

The *Stanley* opinion is very significant. It was the first, in this survey, to invoke the Fourteenth Amendment. At the same time, the court resorted to the plain meaning of its state's constitution prohibiting compelled attendance at religious services, not accommodationist history as the previous courts had relied upon, to determine the legal outcome. The plain text, not history, meant the defeat of the civic virtue argument advanced by the school board, an argument first put forward by counsel in the Nineteenth

Century to justify Bible reading as necessary for good citizenship. Taking accommodationism to its logical conclusion -- to accept the argument that religion was essential to good citizenship -- could require compulsion, and that would violate the principle of liberty. Thus, the arguments came full circle: Bible reading does not violate religious liberty, because mere reading is not teaching; however, to require attendance would violate liberty.

Stanley is of interest because the court upheld the practice without resort to historicism. Further, it illustrates that accommodation of religion has the effect of an activist role for the judiciary. The court had established that courts would decide any future controversies over any books read in the public schools. Here, accommodationism resulted in an enlarged role for the judiciary in determining what was "sectarian" under state law.

D. Summary: The 1920's and the "List."

Although first appearing in counsel's arguments in the challenges to the practice of Bible reading in the public schools in the late Nineteenth Century, federal founders' intent does not appear in majority opinions until the early Twentieth Century, in several state opinions of the 1920's. Regionalism seems not be a factor of its appearance: opinions came out of Maine, Georgia, Virginia, and Minnesota. In addition, it was an accommodationist variety of founders' intent, not the separationist ideas of Thomas Jefferson or James Madison. Further, it is used to support the practices of blasphemy law, Sunday law, and Bible reading in the public schools as aids to religion, long after such laws had been secularized in the Nineteenth Century with *separationist dicta* or had

been struck down by state judges.

The use of accommodationist history had the effect of narrowing the definition of "no support" and "no money" to religious institutions to mean only the guarantee of religious liberty, i.e., no coercion or compulsion. If the legal issue were one of religious liberty, then the court's accommodationist "list" was unnecessary, because the court's conclusion was not that government had directly and permissibly aided religion (which is what the "list" implies), but rather that the state practice did not coerce or grant public money. The principle of liberty (i.e., no coercion) and separation (i.e., no money), not the history of governmental aids, was revelant to the courts' legal reasoning.

Why do we see change in the 1920's? The 1920's represent an era of judicial conservatism. Legal historians describe the general era as one of property and contract, where state judges struck down progressive legislation in areas of labor law and business regulation.[48] It was the Lockner era of American jurisprudence. Returning to "We are a Christian nation" *dicta* and characterizing state practices, which had long been secularized, as religious, reflected a return to America's religious roots in the wake of Twentieth Century change and the secularization of American culture.

IV. After 1947: Modern Interpretations of the "List."

The accommodationist histories of the 1920's were eclipsed by the rise of the use of "separationist" history, especially the ideas of Thomas Jefferson, in the 1940's, when the separationist variety of federal founders' intent became the dominant history. To be sure, the "list" argument did not disappear, but soon reappeared at the very same time the U.S. Supreme Court examined the origins of the First Amendment's establishment clause.

A. The "List" as the Legal Recognition of "God:" Two Cases.

After 1927, the next reappearance of the "list" can be found in the case of *Gordon v. Board of Education of Los Angeles* (1947), where a California court of appeals upheld a school district's release-time program, which allowed students with written consent to be excused from school to participate in off-campus religious instruction provided by an Inter-faith committee.[49] The issue for the court was whether the action violated the federal and state constitutional guarantees of *religious freedom*. As long as the classes were purely voluntary, involved no public appropriation, or sectarian instruction on public school grounds, the program would not violate the state constitution. Nor would the program violate the federal constitution. The court of appeals relied on the precedent of *Terret v. Taylor* (1815) for the argument that a state designation of a religious society as a legal corporation did not constituted "support" of religion prohibited by the establishment clause; on *Everson v. Board of Education* (1947) for upholding reimbursement for transportation to parochial schools under the First Amendment; and on *Cochran v. Louisiana* (1929) for upholding secular textbook aid without charge to both public and private schools as not violating the Fourteenth Amendment.[50] *Everson v. Board of Education* was read as supporting the proposition that the state constitution's prohibitions (its Blaine-type Amendments) banning support and monetary aid to church schools did not violate the guarantee of religious liberty.[51] The court of appeals reasoned that release-time was analogous to such permissible activities as chartering a religious society, providing transportation, and secular textbooks to sectarian schools.

The accommodationist history in this case is found in Justice White's concurrence,

where he invoked "We are a religious people." Citing the *dicta* from *Holy Trinity Church*, he argued that the law recognized religion. In fact, he argued that God had been recognized in various federal and state documents. Justice White listed: the Declaration of Independence (the reference to rights endowed by a creator; and the year of our Lord in the closing date); President Lincoln's Gettysburg Address (continuing the assumption of rights endowed by a creator); court oaths; President Washington's Farewell Address; the practice of Congressional and state legislative prayer; tax exemptions for places of worship; and the closing of governmental offices, including the courts, on Sundays. This list was evidence of a legal recognition of a deity.

Both the majority and the concurrence invoked history in *Gordon*. The majority invoked state framers' intent to emphasize that the release-time program did not violate the state's guarantee of religious liberty. However, the majority depicted the state framers as separationists who provided for the accommodation of religious liberty. The concurrence invoked a different interpretation. He used history to equate the separation of church and state with no more than the guarantee of religious liberty in the California Constitution, i.e., no use of tax money, no compulsory attendance, and no religious instruction in the public schools -- clearly, only what the state constitution prohibited. The concurrence, unlike the majority, depicted the founders and state framers as accommodationists who provided for separation.

The majority's opinion is of interest because the legal result did not follow from its accommodationist history. Rather, the court's conclusion followed from a finding that the release-time program did not involve any appropriation of public funds or support of

denominational schools. This was within the ambit of *Bowker v. Baker* (1946), where a California court upheld transportation aid to sectarian schools on public school buses, and the lower court opinion in *McCollum v. Board of Education* (1947), upholding an on-campus release-time program for religious instruction.[52] Both precedents had concluded that these practices did not constitute aid to religious schools. Thus the challenged practice was upheld, not because it fulfilled the purported accommodationist intent (or the legal recognition of a deity), but rather, because it met the literal structures of the state constitutional prohibitions and was supported by precedent interpreting state constitutional text. Even Justice White's concurrence found that the aid was not an "establishment" because it did not use tax money, require attendance, or require religious instruction on public schools grounds. The principles of separation (i.e., no money, no sectarian instruction), not history, became the final determinant of this case.

Gordon's separationist history, cited by the majority, was significant because it was later cited by Chief Justice Rose Bird of the California Supreme Court as a source of the separationist intent of the state framers, in a case striking down a public display of a religious symbol.[53] The precedential use of the court's history illustrates how judicial histories are extremely important when they are cited years later as authoritative interpretations of historical intent. Yet, often, such state histories are not historically accurate or tested by any scholars.

The "list" was once again invoked as governmental recognition of God in the New Jersey Supreme Court opinion of *Doremus v. Board of Education* (1950).[54] The court upheld the practice of reading five verses from the Old Testament and the recitation of the

Lord's Prayer each day in the public schools as not violating either the federal or state constitution. The case was distinguished from the U.S. Supreme Court's opinion in *McCollum* (striking down on campus release-time programs), by arguing that this practice was voluntary and that the Old Testament, when read without comment, was not sectarian. Thus, it was not *McCollum*-type aid.

The New Jersey court asked if the historical intent of the First Amendment was to suppress the governmental recognition of God; it answered with a "list" of governmental references to God found in: the U.S. Constitution's stipulation that the President has ten days, except Sundays, to veto a bill; the historical practice of requiring oaths; the Declaration of Independence's recognition of rights endowed by a creator; actions of the First Congress, e.g., declaring a Day of Thanksgiving, engaging in legislative prayer, or providing for chaplains for the House; the requirement of court oaths and the sanctity of a judge's oath of office; the state's blasphemy law; state property tax exemptions for church property; the reference to Almighty God in the preamble of the state constitution; and *dicta* from *Holy Trinity Church* that this was a religious nation. The court went on to liken Bible reading, without comment, as analogous to a mere recognition of a God, a harmless act.

In both these cases, extreme accommodationist "lists" are found in opinions upholding state action. Both appear after the U.S. Supreme Court's pronouncement of the separationist intent of the First Amendment – perhaps as a critique of the Supreme Court's interpretation of history, illustrating that state judges did not always follow the Court's pronouncements on history found in *Everson*.

B. The "List" as American Practices: Justice Reed and the Burger Court.

The first modern U.S. Supreme Court opinion to invoke an accommodationist "list" since *Holy Trinity Church v. United States* was Justice Reed's dissenting opinion in *Illinois v. Board of Education* (1948) [otherwise known as the *McCollum* case].[55] In that case, the Illinois Supreme Court had upheld a release-time program in which voluntary sectarian instructors on public school grounds provided public school pupils religious instruction. The U.S. Supreme Court reversed, holding that the practice violated the First Amendment's establishment clause that was interpreted to mean that the use of tax-supported property for religious instruction was impermissible. The offensive feature was that the practice promoted religious education through the state's compulsory public school laws. In short, the program was aid to religion.

It is of interest to note that the majority opinion in *McCollum* did not invoke founders' intent or any type of original intent argument. However, both Justice Frankfurter (the legislative history of release-time programs) and Justice Reed's dissent did. Justice Reed was troubled by the separationist history contained in *Everson v. Board of Education* (1947), and spun out a critique of the use of history in constitutional adjudication. He also found troubling the reference to Thomas Jefferson's metaphor of a "wall of separation" between church and state as an accurate depiction of church-state relationships. He saw twin problems with founders' intent: 1) the use of Thomas Jefferson as legal history, and 2) what constitutes "no aid" to religion if government has had a long history of aiding religion? In short, what was the nature of the "list" of aids to religion?

Thomas Jefferson has posed a problem for legal scholars. While there is no dispute that Jefferson believed in strict separation of church and state as the proper interpretation of the First Amendment, it was not clear what his position was on the state governments. While President, Jefferson refused to declare a Thanksgiving Day, which later prompted his reply to the Danbury Baptists that the First Amendment had erected a "wall of separation" between church and state. However, as the founder of the University of Virginia, Jefferson provided for religious instruction by all religious sects on campus.[56] As governor of Virginia, Jefferson proclaimed a Thanksgiving Day. From these inconsistencies, Justice Reed concluded that the "wall of separation" metaphor did not apply to education. In addition, Reed pointed out that Jefferson was in France at the time of the ratification of the Bill of Rights, meaning Jefferson should not be considered an author of the First Amendment.

Justice Reed also found fault with James Madison. He argued that, as trustee of the University of Virginia, Madison was inconsistent, too. Justice Reed also concluded that Madison's famous pamphlet, *Memorial and Remonstrance (1785)*, should not be used an authoritative interpretation of the First Amendment, because it was written to defeat a proposed state tax assessment, not to discuss the "establishment" clause. In short, both Madison and Jefferson's opinions, according to Reed, should be irrelevant to the First Amendment.

Justice Reed's dispute with the majority was over what type of aid was permissible under the First Amendment. He agreed that the First Amendment prohibited tax aid to all to any religion, but questioned whether the Illinois program "fit." Some aids to religion,

he noted, did not offend the First, including: Congressional chaplains and legislative prayer; chaplains in the military; and tuition aid to veterans attending religiously-affiliated schools authorized by Congress. This "list" of governmental aids to religion was evidence of past American custom, or "practices." This conclusion is noteworthy because it is a rare example of the "list" as "custom."

Another example of viewing the "list" as long-held practices is Chief Justice Burger's opinion for the majority in *Walz v. Tax Commissioner of New York* (1970), where the Supreme Court upheld state tax exemptions for property used for religious and educational purposes.[57] As Chief Justice Burger put it: tax exemptions had not been considered an "establishment" but rather, reflected "more than a century of our history and uninterrupted practice, accepted without discussion. . . ."[58] Tax exemptions were now "fabric of our national life."

To be sure, a frequent item on accommodationist "lists" is tax exemptions. In fact, Judge Thomas Cooley had argued that tax exemptions to churches did not offend American principles of separation or religious freedom.[59] Tax exemptions had been treated as aid in two earlier cases: *Trustees of the First Methodist Church v. Atlanta* (1886) and in *Snyder v. Town of Newtown* (1960).[60] The Nineteenth Century attitude toward tax exemptions was not to view them as aid to religion, because it was not a cash grant. In *Snyder*, that attitude changed to the view that tax exemptions were direct aid to religion.

The U.S. Supreme Court in *Walz* did not solely rely on the historical argument, but on a secular rationale as well. The Court argued that tax exemptions neither advanced

nor inhibited religion, nor constituted sponsorship of religion since the state was not granting monetary aid to any group, but had abstained from requiring churches from supporting the state. This "benevolent neutrality" avoided any "entanglement," or governmental involvement, in tax foreclosures or other conflicts that may arise if such an exemption was not granted. In short, the Court argued that tax exemption had no religious purpose, and, rather than fostering entanglements, the exemption would lessen governmental interference in religious affairs. The Court thus applied the *Schempp* test for the establishment clause, and asserted those administrative entanglements, such as auditing, foreclosures, and tax liens would be avoided.[61] Thus it was the Court's application of the "effect" prong of the *Schempp* test which broadened "no establishment" to include "no excessive administrative entanglements."

Walz is a rare example of an accommodationist decision, which expanded the doctrinal test for "no establishment." The expansion of doctrine was not a result of the use of accommodationist history, however. On the contrary, it was the Court's application of traditional legal formalism (e.g., doctrine) to the facts of the case.

Walz is also of interest because earlier the Court had read the First Amendment narrowly, maintaining that "no law" only prohibited a state church and no interference with religion. This had the effect of narrowing the definition of "no law" to the non-preferential position. This is significant, because this marks the beginning of the lawyers' doctrinal debate over the meaning of the establishment clause: *Everson*'s (separationist) or *Walz*'s (accommodationist) interpretations.

In addition, *Walz* is unique for its focus on the concept of long-held practices or

traditions. The Court's appeal to the "fabric of our national life" legitimized the use of "traditions" in legal argument. However, the Court's "history" was not exactly the original intent behind the tax exemptions. Tax exemptions reflect the privileges granted by the English Crown to charities. James Madison, as Justice Brennan's opinion noted, thought that tax exemptions violated the establishment clause.[62] Here, Madison's views were rejected in favor of long-held legal "traditions." It is noteworthy that both the majority and Justice Brennan's concurrence cited secondary historical works as source books of colonial laws. The Court merely affirmed legal history, and its rationale would be the precursor to the rationale in *Marsh v. Chambers* (1983) (upholding state paid legislative chaplains).[63]

The most celebrated opinion to identify an American religious tradition was the U.S. Supreme Court's opinion in *Zorach v. Clauson* (1952).[64] There, the Court affirmed the decision of a New York state court of appeals which had upheld the constitutionality of a release-time program, which permitted students, with written consent of the parents, to be released during the school daily to attend off-campus religious courses that were taught by sectarian agents. The Court upheld the program on the grounds that the facts of this case were distinguishable from those in *McCollum* (striking down release-time programs), because the religious instruction was not on public property and all costs were paid by the religious organizations. In fact, no tax aid went to churches.

Although recognizing that the First Amendment did, indeed, mandate separation of church and state, Justice Douglas for the majority maintained that: "We are a religious people whose institutions presuppose a Supreme Being."[65] He found numerous

examples where there was no separation: property tax exemptions: police and fire protection to churches: legislative prayers: Thanksgiving Day: and the invocation of the Deity in courtroom ritual. These aids were viewed as part of an American religious tradition

Justice Douglas' *dicta* is very significant because it was later used by lawyers as a standard argument in support of state practices aiding religion, especially the practice of high school graduation prayers. Lawyers treated "We are a religious people" *dicta* as founders' intent. Justice Reed's *McCollum* dissent was now accepted. However, Justice Douglas did not argue, as other accommodationists had done, that the practice did not violate religious liberty; he applied *McCollum* doctrine.

Justice Douglas' accommodationism in *Zorach* is a great puzzlement for legal scholars, because he subsequently advocated strict separationism in *McGowan v. Maryland* (1961) (upholding state Sunday laws), *Walz v. Tax Commissioner* (1970) (upholding state property tax exemptions to churches), and in *Board of Education v. Allen* (1968) (upholding textbook aid to church schools), where he dissented.

Why did he change? As **Chapter 4** notes, his former law clerk suggested that he was more concerned with protecting individual liberties and religion *from* government, so that strict separation was therefore necessary to protect freedom of religion.[66] For whatever reason, the Court's champion of strict separationism became the accommodationists' hero.

C. Contradictory Intents Meet: Three Cases.

The most unique observation of judicial behavior occurred when judges invoked

both histories -- separationist and accommodationist -- without conflict. Three cases follow which illustrate this phenomenon.

1. The Case of Tennessee: Return to Bible Reading.

In *Carden v. Bland* (1956), the Tennessee Supreme Court upheld voluntary bible reading in the public schools.[67] Chief Justice Neil emphasized the separationist intent of the colonial founders, including Roger Williams, who sought to eliminate religious persecutions that they had experienced in Europe and in the American colonies where they had immigrated. However, Neil turned to chide the separationists for their inconsistencies, including Thomas Jefferson for favoring religious instruction at the University of Virginia.

Scolding the A.C.L.U. brief for references to separationist history (e.g., Jefferson, and Justice Jackson's dissent in *Everson*), the Tennessee court adopted its own accommodationist list as examples which "falsify" the A.C.L.U."s history: chapels at the military academies; and Justice Reed's "list" of aids in his *McCollum* dissent. This aid showed that strict separation of church and state was in fact a "false" history. Again, we see another example of where judges invoke "history" in response to counsel's written or oral briefs.

Carden v. Bland is a unique case because it accepts the separationist intent of the founders (the colonial variety) along with an accommodationist "list." There were three historical arguments: the separationist motives of the founders; a critique of separation of church and state; and a recognition of governmental accommodation of religious worship as evident in the "list." Neither of these arguments was relied upon to uphold the

practice. The separationist intent, had it been used, would have struck down the practice. Nor did the court argue that Bible reading was part of a long religious tradition, as part of the "list." Rather, it was the court's reliance on analogy to other state court precedents, upholding voluntary Bible reading on the grounds it did not violate religious liberty, that allowed the court to uphold the practice.[68]

2. The Case of Oklahoma: Private Trusts.

That this is a "Christian nation" reappeared in an opinion involving a private bequest to construct a memorial chapel on public property. In *State v. Williamson* (1959), taxpayers sued to bar the trustees of an estate from contracting for the construction of a memorial chapel at a state orphans' home.[69] Maintaining that this was a "Christian Nation," the court found reverence toward a deity in: the Declaration of Independence; Washington's Thanksgiving Day; legislative chaplains in the state and national congresses; state-paid chaplains in the state prisons; the motto "In God We Trust" on our money; the National Anthem; and the existence of chapels on public property such as at West Point, state hospitals, and an orphans' home for girls. The "list" suggested that the state had accommodated religious worship on various public properties. A chapel, then, would merely be analogous to chapels already in existence on public property.

However, the legal issue was whether the trustees of a private trust could donate monies for the building and maintenance of a chapel. This issue was addressed by an examination of the facts. The court noted that there was no expenditure of public funds in constructing the chapel. This fact allowed the court to conclude that the chapel did not contravene the state's prohibition against the "use of public money or property in support

of any sect or denomination."[70] The court also observed that the chapel, which was to be managed by the state, was to be used only for *voluntary* worship and *nondenominational* services for residents of the orphanage. This finding of no coercion and neutrality allowed the court to overcome any objections concerning free exercise or liberty of conscience.

These twin findings of fact thus allowed the court to uphold the constitutionality of the trustee's bequest. It was the facts of the case, not the "list," which was dispositive. At most, the court's "ours is a Christian nation" *dictum* was "window dressing." The bold assertion that this was a "Christian nation" was found in an opinion that found that you may not use state monies to support Christianity or state authority to promote Christianity.

3. The Case of Kansas: Aid to Church Colleges and the *Lemon* Test.

Little, if any, references to state or federal founder's intent is found in litigation involving aid to parochial schools. The exception is *Americans United for Separation of Church and State v. Bubb* (1974), where a federal district court upheld state tuition grants to private colleges, including sectarian ones.[71] Tuition grants did not finance any religious mission, but were primarily aid to the students. However, colleges which granted religious preferences in enrollment, required a pastor's evaluation for admission, mandated religious participation, or subjected students to an oral examination where students had to express a belief in Christianity, could not get the grant, because that would violate the establishment clause of the First Amendment.

Federal District Judge Hill accepted both separationist and accommodationist

dicta from U.S. Supreme Court opinions. The intent of the First Amendment was separationist; however, that intent was modified by the acceptance of accommodationist *dicta* from *Zorach*. Indeed, government had aided religion in: legislative prayers, Thanksgiving days, and various references to a god in documents. The First Amendment demanded separation, but not in all respects.

But neither view was relevant in the court's final conclusion. The court reached its conclusion by applying the three-pronged *Lemon* test.[72] *Lemon* involved a challenge to public tax aid to private schools, which the U.S. Supreme Court found violative of the establishment clause. Without a resort to founders' intent, the Court articulated a three-prong test for establishment clause violations: 1) does state action have a secular purpose? (*McGowan*), 2) state action must not advance or inhibit religion (the *Schempp* test, discussed in **Chapter 4** below) and 3) the state action must not foster excessive government entanglements (*Walz*). The *Lemon* test and its uses in separationist histories will be discussed in **Chapter 4** below.

An extensive, detailed examination of all the participating colleges' charter and requirements found that most colleges offered a secular liberal arts education Only in five of the colleges did the court find religious restrictions. Here, the court treated free exercise problems as offensive to the establishment clause, because that would foster the religious mission of the colleges. Thus, despite its' accommodationist *dicta*, the court was in practice very separationist.

Bubb is of interest because, unlike previous opinions upholding state action by treating the separation principle as equivalent to the guarantee of liberty (i.e., no

coercion), this court treated violations of liberty as offensive to the establishment clause. In addition, it is the first opinion in this survey to apply the U.S. Supreme Court's establishment clause test -- the *Lemon* test. *Bubb* illustrates that the existence of a doctrinal test making the use of original intent unnecessary; all that is needed is an examination of the facts of the case. After 1970, the use of the *Lemon* test should have meant the demise of the use of history in future cases, but that would not be the case.

D. The Impact of Zorach on Bus Aid, School Prayer, and Sunday Laws.

1. Bus Aid.

One of the first opinions to cite *Zorach*'s dictum as evidence of founders' intent was the dissenting opinion in *Squires v. Inhabitants of Augusta* (1959).[73] There, the Supreme Judicial Court of Maine held that, without any express authority from the state or from an enabling statute, a city had no authority, either under its charter or under the police power, to provide transportation aid to school children attending Catholic schools. The legislative intent of the state's school laws conferred no authority because state law had pre-empted the entire area of educational policy. Unlike *Everson*, there was no enabling statute. The court concluded that a properly worded statute, if enacted by the state, not by the city, would be constitutional.

While the majority rested its holding solely on the basis of *Everson*, the dissenters argued that no enabling statute was required. The dissenters invoked both federal and state framers' intent, arguing that the founders did not intend to separate church and state absolutely, but to encourage religion. Quoting *Zorach*'s "list" of aids to religion and the state's history of giving cash grants to sectarian colleges, the dissenters concluded that

aiding religion would not contravene framers' intent to prohibit a state church.

The use of accommodationist intent alone would seem to be consistent with the argument that bus aid would fulfill the wishes of the framers. However, this argument was not made. Rather, the dissenters argued that an enabling statute was not needed because the bus aid was not aid to religious education, but a public safety measure that primarily benefited the children. The majority had struck down the aid on a legal technically -- that there was no statutory authority to act. The dissenters argued that a statute was not needed since the ordinance was a reasonable exercise of the police power to provide for public safety. The dissenters concluded, not that bus aid was aid to religion, but rather, that bus aid was good public policy, which was neutral -- the law granted no preference, no cash payments to churches, and no sectarian instruction on the bus ride.

The dissenters' use of founders' intent is noteworthy because its use was unclear. Founders' intent to aid religion seems to validate the aid as aid to religion, but it was not used and became unnecessary, since the application of precedent led to the same result. If anything, the dissenters' use of intent appears to overcome the constraints of strict legal formalism the majority employed, which focused on the narrow issue of statutory authority.

Squires is of interest because it illustrates the tension between legal formalism and founders' intent. The dissenters did not think that what they saw as a public safety measure should be defeated on a legal technicality. The majority, in contrast, relied on a strict legal-formalistic approach, which took the classic view that a delegation without

authority should not be presumed without a specific law. Had accommodationist intent been used, it would have had the effect of avoiding legal formalism by validating the aid in absence of a prohibition. But in this case, traditional legal formalism defeated any application of the intent of the state framers or federal founders.

Another example of the tension between legal formalism and conflicting intents is the bus aid case of *Snyder v. Town of Newtown* (1960).[74] The Connecticut Supreme Court held that, under *Everson*, a state statute authorizing municipalities, by plebiscite, to provide for school transportation for all children of the district would not violate either the federal or state constitutions. However, because the money came out of the public school fund, the statute was unconstitutional. A state constitutional provision required that money taken from the school fund could only be used for the public schools.[75]

While the court relied on federal precedent to conclude the aid was a public peace and safety measure, which did not constitute an establishment, it went on to examine state constitutional history. The court relied upon several history books as sources of general historical facts concerning the colony.[76] The court centered on legislative history to give relief from taxation and from compelled church attendance to religious dissenters. The court quoted Jefferson's famous "wall of separation" metaphor.

This was followed by a detailed examination of the state's legislative history of tax exemptions to religious bodies, which began as early as 1684 with the Crown's tax exemptions to lands granted to ministers (i.e., glebe lands). That tax exemption policy was continued by the state and extended to all schools and charitable properties. The court found this "strong evidence of the meaning of the constitutional prohibition against

compulsory support of a church."[77] If the state had a long history of granting tax-exemption aid to religion, this was evidence that the state's prohibition of "support" of religion no longer meant "no."

The use of legislative history in *Snyder* is significant. The court viewed the long legislative history of tax exemptions as direct aid to religion, indeed, equivalent to an appropriation of public funds. Thus bus aid would not violate the state constitution. Citing the long practice of tax-exemption aid had the final effect of narrowing the definition of "no support" in the state constitution, the equivalent to the state's guarantee of religious liberty. Yet, the court struck down that aid, because, after examining the *legislative intent* of the state's *educational policy*, prohibitions placed in the state constitution itself, the court concluded that state law prohibited public money to be used for non-public schools.

Thus, the court's digression into the legislative history of state tax exemptions, or references to Jefferson, was irrelevant to the final conclusion. Indeed, the dissent observed that the majority's history of non-taxability was irrelevant to the case and to the meaning of the "no support" clause. The use of accommodationist history of tax exemptions would seem to uphold the aid; however, it was the legislative intent and state law governing the expenditure of public money that struck down the aid. Again, a resort to legal formalism defeated an application of accommodationist intent.

Synder is of interest because of its citation of secondary historical sources. Prior to the late 1950's, legal discourse on the meaning of "separation" is characterized by the general absence of secondary historical sources, primarily because no scholarship existed

on the subject, except when it was mentioned in general histories of America. Here, the court cited the recognized historical works of Sanford Cobb, Paul Coon, and M. Louise Greene. These historians were not cited to support the legal conclusions, but were source books for colonial facts. Paul Coons, for example, was cited for the proposition that there was union of church and state under the colonial charter. The court used these separationist historians, not for their explanations of separation of church and state, but for general recognized facts.

Both *Squires* and *Synder* illustrate the tensions between history and legal formalism. Both illustrate the importance of legal formalism to legal reasoning. Had accommodationist intent prevailed, the aid would have been upheld as permissible aids to religion, but the practices were struck down in these cases. Both illustrate judicial digressions into some type of "historical" intent, usually to sanction the aid, with the unfortunate effect of narrowing the definition of "no support" to mean the guarantee of liberty (i.e., no coercion). However, both courts turned around and found a legal technicality to strike down the aid, usually applying the strict letter of state law or state Blaine Amendments. In both opinions, when history and legal principles conflicted, the courts' always relied upon traditional legal means to resolve the dispute. *Squires* and *Synder* are no exception.

2. School Prayers and Bible Reading in the Public Schools: Two Cases.

An accommodationist "list" next appeared in two cases involving prayers in public schools. In *Engel v. Vitale* (1961), a lower state court dismissed a taxpayers' suit to discontinue the practice of reciting a prayer, composed by the school board, each

school day.[78] The court of appeals argued that the founding fathers had aided religion. evidence of their "professions of belief in God" could be found in: the reference to a Creator in the Declaration of Independence; reference to God in the National Anthem; the motto "In God We Trust;" the recitation of daily prayers in Congress; invocation of God in court oaths; references to a God in Thanksgiving proclamations; the practice of chaplains in the armed forces; the reference to God in the Pledge of Allegiance; and the "We are a religious people" *dicta* from *Zorach* and *Holy Trinity*. The court of appeals concluded that school prayer was merely analogous to past governmental acknowledgements of a God. Not historical intent, but rather, traditional analogy to existing practices which justified the practice.

The minority was not impressed with the "list" of acknowledgments to a god. The dissenters argued that it was intent of the school board to teach religion in the public schools, which would violate both state and federal constitutions, because the intent of the founders was to *separate* church and state, as was reflected in the language of the First Amendment itself. The Regents' prayer clearly was religious, occurred in a public classroom during school hours, and was led by the public teacher; thus, it constituted *McCollum* aid.

On appeal, the U.S. Supreme Court reversed the New York decision. The Supreme Court held that the prayer, which had been composed by a state agency, violated the principle that governments or its agents could not determine religious truths. A composed prayer amounted to an official religion, in violation of the establishment clause of the First Amendment.

Justice Stewart's dissent in *Engel v. Vitale* is of interest for addressing the majority's separationist history. Stewart was highly critical of the majority's reference to the European and legislative history of the English Book of Common Prayer. He argued that American traditions exhibited "countless practices" that had acknowledged a god, agreeing with the lower court's assessment. He "listed" the following: opening ritual of the U.S. Supreme Court; legislative prayer; Presidential proclamations and Thanksgiving Days; the Star Spangled Banner; the Pledge of Allegiance; a National Day of Prayer (1952); the motto "In God We Trust." Stewart's "list" was used to argue, by analogy, that acknowledgments of a deity in ceremonies would not contradict founders' intent.

Not all courts have accepted *Everson*'s separationist history. In fact, two state courts in 1962 invoked accommodationist history to validate the practice of Bible reading in the public schools. In *Chamberlain v. Dade County Board of Public Instruction* (1962), the Florida Supreme Court held that neither the recitation of the Lord's prayer nor Bible reading violated the First Amendment, or the state constitution's guarantee of free exercise of religion nor the ban on union of church and state.[79] Justice Caldwell used the opportunity to assault *Everson*'s separationist interpretation of the First Amendment. Like Justice Reed, he found fault with Thomas Jefferson, noting Jefferson's inconsistencies. He contended that the proper history was not to be found in *Everson*, but rather, in the opinions in *Engel v. Vitale*, *Doremus*, *Wilkerson v. City of Rome* and in *Holy Trinity*. Justice Caldwell went further, arguing that the founders did not intend to separate Christianity from the state, but rather, to encourage Christianity. Indeed,

Christianity was part of the law, evidenced in the following: the reference to a "Creator" in the Declaration of Independence; the reference to the Trinity in the Treaty of Peace signed with Britain in 1783;[80] and finally, Judge Thomas Cooley's "list" of permissible aids to religion allowed under state and federal constitutions (e.g., chaplains, legislative prayer, oaths, mottoes, and tax exemptions).

The Florida Supreme Court read "state church" to mean "no compulsion." Bible reading was, in short, permissible *Zorach*-type aid, not impermissible *McCollum*-type aid, in the light of a threat of communism, said the court. In the final analysis, the basis for the decision was not intent or the "list," but accepted legal doctrine (that Bible reading did not constitute a "state church" or make the public school a "place of worship" under state law). However, Justice Caldwell's opinion ended with a quote from *Everson*, accepting the separationist intent of the early settlers and founders.

The use of intent in *Chamberlain* is a puzzle. The court began by citing an accommodationist "list" of accepted ceremonial deism; engages in a critique of *Everson*'s use of the separationist ideas of Thomas Jefferson; and then approvingly quoted from *Everson*'s separationist historical narrative. The relevant history appears to be *Everson*'s separationist narrative, because its use narrowed the legal issue of what constitutes an "establishment" to mean only, "no compulsion." Here, we find the use of separationist history as well as an accommodationist "list" (as evidence that Christianity was part of the law) in an opinion reaching an accommodationist outcome -- upholding Bible reading in the public schools. To be sure, neither history argued that the settlers intended to permit Bible reading in the public schools. Intent was used to argue that without compulsion,

such a practice would not be at odds with colonial intent to prevent religious coercion. Bible reading did not violate religious liberty because students could be excused from it. Again, intent had the effect of treating the establishment clause as the equivalent of free exercise.

A year after *Chamberlain*, a Maryland court of appeals upheld the practice of Bible reading because the practice was analogous to legislative prayer. In *Murray v. Curlett* (1962), the court held that no public funds were used and there was no compulsion to attend.[81] In short, Bible reading was *Zorach*-type aid.

The dissent was critical of the majority's reliance on *Zorach dicta* and argued that *Zorach* did not retreat from the doctrine of separation established in *McCollum*. Indeed, the facts of this case did not correspond to those in *Zorach*, which involved an off-campus instruction program. Bible reading was different: it occurred on school grounds and during school hours. Furthermore, it was a Christian exercise led by the public school teacher. In addition, requiring a written excuse violated the doctrine of *Torcaso v. Watkins* (1961) (government cannot require a profession of belief or non-belief in a god).[82]

The significant dispute between majority and minority was whether or not the practice of Bible reading was *Zorach* or *McCollum*-type aid. The majority applied *Zorach dictum*. The minority, in contrast, argued the practice of Bible reading was *McCollum*-type aid, even more so since it was coercive in requiring a written excuse. Indeed, the minority found *Zorach dicta* useless and unnecessary to the analysis of the facts of this case.

The *Murray* opinion is significant, not because it invoked founders' intent, which it did not, but because, without discussing accommodationist intent it reached the same result as in *Chamberlain*. Furthermore, both illustrate how a *dictum* becomes legal tradition. Both *Chamberlain* and *Murray* treated *Zorach*'s "We are a religious people" accommodationist *dicta* as if it were legal precedent. Other state judges would do the same.[83] Again, *dicta* replaced the need for rigorous analysis of the facts of the case. In any event, the U.S. Supreme Court later overturned both opinions.[84]

3. A Return to Sunday Laws: Judge McCarthey's Dissent.

In the 1960's, there was a major flurry of rewriting of the state Sunday closing laws, in which the old penalties were stricken and a vast array of exemptions were allowed. One state judge remarked that the new revisions resembled a "comic opera" of "open" Sunday laws.

The *dictum* in the modern Sunday law opinions also changed. Whereas Nineteenth Century opinions relied upon English common law authorities and often argued that "Christianity was not part of the common law," Twentieth Century opinions turned to American historical experience. Thus, the Blackstonian principle that Sunday laws were the state's power to regulate labor did not change; what changed was the *dictum*.

This change from English authorities to American experiences is best seen in *Crown Kosher Super Market v. Gallagher* (1959).[85] There, a federal district court said that the Massachusett's Lord's Day statute was not merely a day of rest, but a law respecting an establishment of religion and denial of equal protection of the laws. Federal

Judge Magruder noted that the laws dated from 1653, where they were motivated by religious concerns. However, over the years, so many amendments and exemptions had been made to the law that it was an "unbelievable hodgepodge of exemptions."

The court went on to strike down the state's Sunday laws on the grounds that they had furnished special protection to Christianity without protecting those who observed Saturday as their Sabbath, thus imposing an economic penalty. The vice in the law was that it did not forbid the opening of a store on Sunday, but only limited what could be sold -- prohibiting the sale of kosher meat and milk, but not non-kosher foods. This discriminatory exception was a denial of the equal protection of the laws.

While both majority and minority acknowledged the religious origins of the state's Sunday laws, the dissent of Judge McCarthey invoked a "list" as evidence of the state's recognition of a deity. He included: Chaplains in the armed services; legislative chaplains; the motto "In God We Trust;" draft exemptions for the clergy and conscientious objectors; the reference to God in the preamble of the state constitution; *dicta* from *Reynolds v. United States* (1878) and *Zorach*; and tax exemptions for churches. As long as Sunday laws appropriated no monies, nor compelled attendance at a church, they would not violate the principle of religious liberty. Judge McCarthey argued that Sunday laws exhibited a positive attempt by the state framers to aid religion. Again, *Zorach dicta* were part of an argument that a permissible aid to religion (the "list") was the legal recognition of a deity.

E. When the "List" is Challenged: The National Anthem, Good Friday and Chaplains.

1. The National Anthem.

One item that frequently appears on "lists" is the National Anthem. In *Sheldon v. Fannin* (1963), a federal district court held that the anthem was merely a patriotic ceremony and did not constitute an "establishment."[86] Jehovah's Witnesses had refused to stand and remain silent for the singing of the anthem as part of a music program in a public school. The court held that the requirement to stand, even if the students were allowed to remain silent, offended the students' free exercise rights.

The court, however, secularized the anthem. The court said that any religious references were incidental and simply of historical fact. The founders' intent the court cited was one of free speech-freedom of ideas protections of the First Amendment.[87] Since the students posed no discipline problem, the court issued an injunction to prevent their expulsion, noting that a free exercise right to dissent would be a "fine lesson in American Government for the entire class."

Sheldon illustrates that, when practices on the "list" are judicially tested, they have been secularized in order to find them inoffensive to establishment clause concerns. Moreover, this case also illustrates that so-called religious traditions on the "list" are not constitutional *per se*, but must meet the standard of *no coercion*. Here, the judiciary invoked a freedom of ideas analysis of founders' intent to illustrate that the practices must not be compulsory or penalize those who refuse to participate. However, the free exercise intent does not secularize the "list;" rather, it serves as support for granting the free exercise right not to participate. In sum, the "list" is sanitized: first, the practice is secularized (to accommodate the establishment clause), and second, its observance is

made non-compulsory (to accommodate the free exercise clause).

2. Good Friday.

Another item frequently on the "list" is Thanksgiving Day. Would Good Friday constitute another American holiday? In *Cammack v. Waihee* (1987), Hawaii's statute making Good Friday a legal holiday was challenged.[88] A federal district court found that the purpose and primary effect of the holiday were secular, and held that the designation of the entire day as a legal holiday, where no one was told to go to church, constituted another recreational day of rest.

In examining the legislative history of Good Friday in Hawaii, the court noted that the original purpose was to provide another three-day holiday during springtime. This was secular, not religious in motive, said the court. The facts were also distinguished from those of *Mandel v. Hodges* (1976), where the California Supreme Court had struck down a three-hour paid Good Friday holiday for state employees.[89] The fatal feature in *Mandel* was in the governor's decree that provided the three hours were to be used for "worship." In Hawaii, there was no express religious purpose, and state employees were given the entire day off with no instructions on how to spend their time. Evidence presented at trial indicated that Good Friday in Hawaii had become a traditional shopping day since state figures showed that retail sales were up.

Not only relying on a secular justification, the court also analogized Good Friday to George Washington's Thanksgiving Day. Designating Good Friday as a state holiday did not require any government involvement in church affairs. It was just another day of rest and recreation. The court ended up adopting the rationale of the Sunday closing