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

laws. Again, when items on the "list" are tested, they are secularized and rendered harmless to the establishment clause.

3. Chaplains.

While the practice of legislative prayer has been part of every judge's accommodationist "list" of governmental aids to religion, such practices have only recently been challenged. In *Marsa v. Wernike* (1978), for example, the practice of opening a city council meeting with the invocation of a moment of silence was challenged.[90] A state superior court upheld the practice on the grounds that aid to religion was minimal, that there was no compulsion, and that unlike the U.S. Supreme Court's holding in *Schempp*, youth were not involved. Quoting the accommodationist dicta of *Schempp* and *Zorach*, the court upheld the practice.

The practice of unpaid clergy in legislative session was challenged in *Bogen v. Doty* (1978), where a federal court found no guidance in any U.S. Supreme Court decision to resolve the issues.[91] In upholding the practice, the court found: no tax funds were expended; it was not codified in law; presence was voluntary; and adults, not children, were involved. Thus, the court found no difficulty in upholding the practice on the grounds that it involved no coercion and no expenditure of state monies. However, the *Bogen* court thought that "history" was useful when there was no precedent. The court quoted both separationist intent of the founders and the accommodationist *dicta* of *Zorach*, to support the argument that state legislative prayer was analogous to legislative prayer in the U.S. Congress.

While *Wernick* and *Doty* dealt with unpaid clergy, *Colo v. Treasurer and Receiver*

General (1979) involved a challenge to the payment of the salaries of the Massachusetts legislative chaplains, two Roman Catholic priests who had conducted prayers in the state legislature since the 1950's.[92] The state court, finding "history" was needful since there was no precedent, cited two histories: federal founders' and state framers' intent.

Concerning federal founders' intent, the Massachusetts court looked to the separationist histories recounted in Justice Rutledge's dissent in *Everson v. Board of Education* (1947), Chief Justice Warren's majority opinion in *McGowan v. Maryland* (1961), and in Justice Douglas' dissent in *Walz v. Tax Commissioner* (1970). The court also turned to James Madison's thoughts on the very issue, namely, the *Detached Memoranda*, a document which had been discovered in 1947, which outlined Madison's views on violations of the establishment clause.[93] It was Madison's position that legislative chaplains "established" religious worship in violation of the First Amendment, and had the effect of violating the guarantee of equality of all religions, since he doubted that Catholics or Quakers were to be treated "equally" in qualifying for the position. The *Colo* court was the very first judicial court to examine Madison's views contained in the "Detached Memoranda." However, Madison's views did not prevail in this case.

The court turned next to state framers' intent. Legislative chaplains were specifically characterized as not constituting "aid" to religion prohibited by the state's Blaine amendment in the state constitutional convention of 1917-18. In short, the court found that the state framers' did not think of legislative chaplains as an "establishment."

The Massachusetts court then applied the *Lemon* test. The court argued that the chaplains served a *secular purpose* by allowing the legislature "to reflect on the gravity

and solemnity of their responsibility." In short, legislative prayer could be justified as a means to keep the peace in legislative halls. The court accommodated the practice by secularizing it. The practice was voluntary; it did not create controversy, and was analogous to the references to "God" in the motto on the coins and in the Pledge of Allegiance.

Colo illustrates that, when there is evidence of James Madison's views, Madison is irrelevant – in fact, replaced by legal formalism. Indeed, the court did not uphold the payment as permissible aid to religion or as necessary for free exercise, but rather, as serving a secular purpose. After consulting two histories, the court secularized the practice in modern terms. Again, when historical intent and legal formalism yield different answers, legalism prevails. It of interest to note, that the court ended its discussion with a mini "list" -- analogizing legislative prayers to the motto on coins and the Pledge of Allegiance -- not a full "list," but rather, an attempt.

The issue of the constitutionality of the expenditure of public funds for the legislative chaplain's salary was fully addressed in *Chambers v. Marsh* (1980).[94] There, a federal court upheld the practice of legislative chaplaincy, but struck down any payment of salary and printing a collection of prayers on the grounds that it entailed excessive government entanglement. The court of appeals, however, struck down the chaplaincy, the prayer, and the expenditure of public funds as a violation of the *Lemon* test. The U.S. Supreme Court would reverse in *Marsh v. Chambers* (1983).[95]

Chief Justice Burger began the majority opinion by calling attention to the tradition of legislative prayer. Chaplains had been provided for -- and paid -- in the

Continental Congress in 1774. The First Congress paid for a chaplain. From this history the court concluded that the practice did not violate founders' intent. But can "history" of the practice justify the practice today? The court said that the practice had become "part of the fabric of our society . . . ."[96]

The majority ignored the *Lemon* test. To rest the fears of the minority, the court, however, examined the facts of the case. The court found neither proselytizing nor an "official" seal on a particular religion. Although the state of Nebraska had retained the same clergyman for the last sixteen years, his performance did not advance religion. The fact that the state paid his salary was consistent with the actions of the First Congress, which voted to pay theirs (James Madison was a member of the House committee that initiated the practice three days before the First Congress passed the Bill of Rights). The clergyman had discontinued any reference to Christ, so there was no objection that he was advancing Judeo-Christianity. In short, the majority concluded that the overwhelming historical tradition outweighed the harmless practice.

In dissent, Justice Brennan, joined by Marshall and Stevens, argued that the issue was not the historical tradition of legislative prayer, but the propriety of using history to justify a practice which clearly violated the *Lemon* standard. The dissenters argued that the legal holding should be narrowed to this case, so that lower courts would not think that the Supreme Court was creating new doctrine (e.g., abandoning the *Lemon* test). The dissenters were concerned to limit the Court's holding.

Second, Justice Brennan noted he had previously suggested in *Schempp* that he thought legislative chaplains were constitutional. He recanted this earlier position and

unequivocally stated that, whatever the tradition of legislative prayer had been, history could not validate a violation of the Constitution.

Third, Justice Brennan noted the Court erred in not applying the *Lemon* test; the very establishment clause test created by Chief Justice Burger. Clearly, the Nebraska arrangement violated all three prongs of the test: the purpose was religious; its primary effect was religious; and excessive entanglement existed in the selection of the chaplain or in the designation of which prayers would be "suitable" (thus permitting government agents to determine religious truths). Several groups opposed the practice also, inviting political entanglements.

Finally, Justice Brennan attacked the majority's reliance on an historical justification on three grounds: 1) The majority's "history" did not rely on the legislative history of the establishment clause, 2) The majority treated the First Amendment as an Act of Congress, thus ignoring that as a constitutional amendment, the First Amendment was ratified by the states, 3) The Constitution was not to be treated as a static document, forever fixed in time. "To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history."[97]

Marsh v. Chambers is the first U.S. Supreme Court establishment clause opinion to rely on an historical justification. Again, "history" was used to avoid legal formalism. Unlike *Walz*, the majority chose to avoid the application of doctrine. The Court's "history" was not exactly founders' intent. Indeed, the Court narrowed the definition of the founders to the acts of the First Congress, excluding both Jefferson and Madison, and state practices. To be sure, Madison's views would have been troublesome. Madison

thought that legislative chaplains violated the establishment clause, and should they exist, must be paid by voluntary contributions, not state money. Chief Justice Burger acknowledged that prominent founders, both John Jay and John Rutledge, publicly objected to the practice; however, Burger simply focused on the First Congress.

This opinion is of interest because the majority reaches an accommodationist outcome without utilizing an accommodationist "list" or *Zorach*'s *dicta*. Unlike previous accommodationist opinions that conclude that the practice did not violate religious liberty (e.g. no tax funds and no coercion), or that a practice constituted Zorach aid (e.g., mere ceremonial deism), Burger reasoned by analogy. He simply argued that if the First Congress paid their chaplain, then the states could pay theirs. This reasoning relied upon no principal or traditional form of accommodationist history or "lists" to reach the final conclusion.

F. The Impact of the Lemon Test: Child Placement Law.

Only in area of orphanages did this survey observe state courts "balancing" the public interest in upholding cash grants to sectarian institutions which took care of wards of the state, despite the absolute language of state Blaine Amendments. A federal court's treatment of the issue of aid to sectarian orphanages, however, would be made in the light of the *Lemon* standard. In *Wilder v. Sugarman* (1974), a federal court upheld the New York foster child placement law which required, when practicable, that children be placed with parents of a compatible religious faith, and a state law which provided funding directly to sectarian institutions.[98]

The first issue the court addressed was the constitutionality of the "matching"

requirement. It is of interest to note that the court resolved this issue by resorting to the long history, dating from Dutch law, of state care of orphans. The Dutch colony of New York provided for the care of orphans housed by religious organizations. By the 1850's, the state built state orphanages and contracted with private agencies for the care of the state wards. The court concluded, from this commitment to the poor and orphans, a legislative commitment to the wards, including their religious needs. "Matching" orphans with parents also dated from 1857 and was put in the state constitution in 1959.[99] This "matching" requirement had been challenged in *Dickens v. Ernesto* (1972), where a New York court held that "matching" was only one factor in child custody decision-making and did not violate the *Lemon* test.[100]

In addition, the state directly funded religious-sponsored foster care programs. The court said this violated *Lemon*; however, the court nevertheless upheld the payment scheme. The payment was justified after elaborate balancing of the public interest. The court concluded, that without alternative remedies, aid for the religious education of orphans was reasonable.

Sugarman illustrates that legal formalism (i.e., the *Lemon* test) was disregarded in favor of the principle that the state has a duty to care for orphans, including their religious needs. While Lemon indicated that government could not directly support sectarian education, state constitutional guarantees, not federal founders' intent, supported the view that the state could reasonably accommodate religious orientations. In order to overcome courts' recognizing of a clear violation of *Lemon* test, the court resorted to balancing as a tool to resolve the issue.

No doubt, the legislative history of the state's commitment to the care of orphans was significant in this case. That history showed a continuous practice that fulfilled an immediate public need. Here, "no law" meant "no law" unless absolutely necessary to the public interest, exalting the formalistic principle of the public interest over the legal formalism of the *Lemon* test. Legal formalism provided an answer ("no" to the aid), as did "history," but the court utilized "balancing" to uphold the funding law.

State aid to sectarian orphanages constitutes a special category in establishment clause litigation. It is the only area, outside of chaplains, where courts have upheld monetary aid to sectarian institutions. However, no court had justified the aid as permissible aid to religion, but rather, as aids to the wards of the state that met an immediate public need.[101] Indeed, this litigation illustrates the tensions between public necessities and the principle of separation of church and state. It is also of interest to note that it was in orphanage aid case where both Thomas Jefferson and Roger Williams were first linked to a separationist interpretation of the First Amendment prior to the U.S. Supreme Court's discussion.[102]

G. When Historians are Taken Seriously: The Jaffree Case.

1. Judge Hand and Silent Prayers in the Public Schools.

At the lower court level there is only one case which has relied on both history and expert testimony to reach its legal outcome, the case of *Jaffree v. Board of School Commissioners* (1983).[103] There, federal Judge Hand substituted history for well-established legal precedent. Mr. Jaffree had challenged several practices of teacher-led prayer activities in the Alabama public schools. Chief Judge Hand dismissed Jaffree's

challenge to sue on the grounds that, since the First Amendment did not apply to the states, Jaffree did not have "standing" to challenge any of the practices. In so ruling, Hand relied upon both written historical scholarship and the expert testimony of historians at trial. Judge Hand became the first judge to rely upon historians as expert witnesses in an establishment clause case.

Judge Hand reasoned that the U.S. Supreme Court had erred in applying the First Amendment to the state governments through the Fourteenth Amendment, which the Supreme Court did in striking down school prayers in *Engel v. Vitale* (1961). According to Judge Hand, this incorporation was unsupported by authority or history. He relied on the constitutional scholarship of Charles Fairman and Raoul Berger in making this argument.[104] He also quoted approvingly from the dissenting opinion in *Engel v. Vitale*, where Justice Stewart had argued that prayers in the public schools were part of the nation's religious tradition. Although federal precedent had consistently held that prayers, even when voluntary, were religious activities in violation of the First Amendment, Judge Hand contended that the Supreme Court relied on neither history nor precedent in *Engel v. Vitale*.

It is interesting to note that Judge Hand did not examine the facts of this case. Instead, he went on to engage in an historical critique of both separationist history and U.S. Supreme Court precedent. He accepted the trial testimony of historians James McClellan and Robert Cord [author of SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982)]. Both Cord and McClellan were of the opinion that the founders were not separationists, arguing that the colonies at

the time of the American Revolution had given preference to Protestantism. McClellan testified at trial that the First Amendment was intended to protect existing state discriminatory practices and state establishments. Robert Cord was cited for the argument that the First Congress had directly aided religion by appointing a paid legislative chaplain. Judge Hand also embraced Cord's argument that Jefferson and Madison are irrelevant for an understanding of the First Amendment.[105]

In short, Judge Hand rejected both separationist intent and incorporation theory in order to reject the application of legal precedent. Indeed, his use of history resulted in, not only a number of controversial historical conclusions, but also the complete avoidance of twenty years of legal precedent.

Judge Hand's accommodationism was atypical of accommodationist opinions. Namely, he did not invoke a traditional "list" argument. Although, at one point, he recited Robert Cord's examples of governmental aid to religion, including Jefferson authorizing money for American Indians, Hand relied primarily upon historical interpretations rather than historical facts/events. By not doing a traditional analysis of the "list," Judge Hand willingly accepted the "dark" side of the "list"-- the protection of state discriminatory practices and church establishments that existed at the time of the ratification.

Most noteworthy, by not doing a traditional "list" argument, Judge Hand exposed the artificiality of the "list." McClellan and Cord's histories were arguments about original intent. The "list," on the other hand, is not really about founders' intent, but rather a judicial construction that is designed to avoid the darker side of history, i.e., the

blind acceptance of the status quo of 1791 as the intent of the founders. Judicial "lists" are lists of governmental aids to religion that are permissible because they involved no tax funds, preference or coercion. Paraded as "founders' intent" or evidence that "We are a religious people," the "list" up to now had supported legal conclusions that the practice in question did not violate the guarantee of religious liberty (no coercion). By not doing a traditional "list" or examining the facts of the case, Judge Hand reached a conclusion without regard to the principle of religious liberty.

In addition, by holding that the First Amendment did not apply to the states, Judge Hand narrowed the issue to whether Jaffree had standing to sue, and avoided having to examine the constitutional merits of the religious activities involved. In fact, Judge Hand did not have to justify the practice. He characterized them neither as *Zorach* aids, acts of ceremonial deism, long-held traditions, nor as acts which did not interfere with religious liberty (or fulfill its guarantee). In short, by focusing on one history, that of incorporation, he avoided any examination of the facts of the case.

Whatever the historical "truths" may be, Judge Hand's were flatly rejected by the Eleventh Circuit, which found that non-statutory teacher-led prayer violated *Schempp*, that the saying of prescribed prayer violated *Engel v. Vitale*, and the moment-of-silence statute failed both the purpose and effect prongs of the *Lemon* test.[106] Judge Hatchett added, "If the Supreme Court errs, no other court may correct it."[107]

2. Justice Rehnquist and the Jaffree Case: The "List" as Evidence of Non Neutrality.

The U.S. Supreme Court, hearing Judge Hand's opinion in *Wallace v. Jaffree*

(1985), affirmed both the findings and conclusions of the court of appeals without addressing the historical controversy.[108] Based on its legislative history, the "moment of silence" statute was an ill-guised attempt to bring back prayer into the public classroom. Under the *Lemon* test, no secular purpose existed; the prayer was not a form of symbolic speech, and the statute was a state endorsement of prayer. Legal formalism prevailed over original intent.

While the majority opinion did not invoke original intent, Justice Rehnquist's dissenting opinion did. Rehnquist accused the majority of misreading history since *Everson*, where the Court accepted the separationist views of Thomas Jefferson and James Madison. Rehnquist, like Judge Hand, found fault with Jefferson and with Madison. In fact, Rehnquist went so far as to argue that Madison was not a separationist.

Justice Rehnquist argued that the founders wished to only prevent the legal recognition of a single national church, and that the founders did not fear government aiding all religions. He adopted a "toleration" or English view of establishment, whereby government was to remain neutral between competing religious sects, but not between believers and non-believers. He read "no law" to mean only the guarantee of religious toleration, not a bar to aid to religion. In fact, he argued that the First Amendment did not mandate neutrality between religion and non-religion. He invoked a "list" as evidence of non neutrality, which included the actions of the First Congress; the Northwest Ordinance of 1787 (he is the first judge to include this law on a "list"); Washington's Thanksgiving Day; federal treaties with the Native Indians; and the pro-Christian attitudes of both Justice Story and Judge Thomas Cooley.[109] Rehnquist's "list" narrowed

"no law" to mean only that neutrality was not required, as long as governmental action did not discriminate.

3. A Comparison and Assessment.

While both accepted accommodationism, Judge Hand's and Justice Rehnquist's opinions were dissimilar in approach. For example, Judge Hand did not invoke a traditional "list" in order to justify the challenged practices, but rather, he cited examples gleaned from Cord and McClellan to refute separationist history and incorporation theory. Hand's examples were evidence that the founders were not separationists, since their action did not correspond to their public statements. Hand went so far as to characterize the founders' actions as constituting "secular Christian activities." In short, Judge Hand inferred intent from the founders' actions, not their words.

In contrast, Justice Rehnquist's approach mirrored a more traditional accommodationist "list" argument, although he, too, sought to refute separationist history. The structure of Rehnquist's argument was different. Rehnquist began with an examination of the debates of the First Congress over drafting the First Amendment (a traditional means to search for legislative intent). Although he covered the same ground as both Justice Rutledge's dissenting opinion in *Everson* and Chief Justice Warren's majority opinion in *McGowan* (the two previous examinations of the dialogues), he reached a different conclusion. For Rehnquist, the "list" of governmental aids to religion was evidence of non-neutrality between religion and non-religion. His "list" included: the Northwest Ordinance; Washington's Thanksgiving Day (now extended to mean a "prayer"); Jefferson's treaty with the Kaskaskia Indians (allocating money for a Roman

Catholic Priest): unrestricted land grants in the territories of the Ohio Company; [110] statements made by Justice Story that "Christianity ought to receive encouragement;" and Judge Thomas Cooley's assertion that legislative chaplains and Thanksgiving days do not offend the constitutions. In short, the First Amendment, according to Rehnquist, prohibited only one national religion and mandated only no preference among religions.

Both Judge Hand and Justice Rehnquist differed on their treatment of incorporation theory. Judge Hand used history to reject it; Justice Rehnquist, in contrast, accepted without question the incorporation of the establishment clause. Working within legal norms, Justice Rehnquist was able to narrow the definition of "no law" to mean only "no national religion" and "no preference."

While both claimed that original intent was relevant in reaching legal conclusions, in the final analysis, neither would have relied on original intent in upholding the practices. Judge Hand used the testimony of historians to refute both separationism and incorporation, which had the effect of dismissing the challenge to the practices without having to justify them. He would have justified them under a "free speech" rationale (but that's another history). Justice Rehnquist's history, in contrast, was used neither to dismiss the case nor to decide it. He failed to take the necessary step – to justify the practices on the grounds that they were part of the "list."

However, their originalism had much in common. Both rejected Jefferson and Madison as authorities on the First Amendment (although Rehnquist was willing to acknowledge Madison's role in the First Congress). Both assumed that previous case law had dictated the wrong answers. Both their accommodationist histories shed little light

on any legal justifications for prayers in the public schools. Finally, neither examined the history of school prayers.

Both Judge Hand and Justice Rehnquist were selective in their original intent, illustrating Paul Brest's point regarding the difficulty of determining "who are the framers."[111] Most originalists rely upon Jefferson and Madison as principal authors of the First Amendment, here they are excluded.

For both, then, the ultimate result of using history (both original intent and the testimony of experts) was the avoidance of any examination of the actual school practices challenged in the case. Again, the use of history had the effect of avoiding legal formalism. There was no concern as to whether there was coercion, compulsion, or preference toward one religion, or the possibility that state agents were composing prayers, thus violating the long held principle that government should not determine religious truths. In short, both never confronted the question of whether the challenged practices interfered with religious liberty (the central tenet of accommodationism is that government could not interfere with religious liberty).

How, then, would the challenged practices be justified? Judge Hand only alludes, in a footnote, that he may uphold the practices as an exercise of the free speech guarantee (assuming that the First Amendment applies to the states!). This approach would fail -- and contradict his rejection of incorporation theory.

On the other hand, Justice Rehnquist suggests that by analogy (school prayers are analogous to Washington's proclamation of a Thanksgiving "Prayer"), the practice would fall with a *Marsh*-type rationale -- that a state could engage in any practice that the

founders accepted. In the final analysis, Justice Rehnquist, unlike Judge Hand, managed to cast his conclusions in terms of traditional legal reasoning by analogy based on precedent.

Justice Rehnquist has not been a consistent "originalist" when it comes to the establishment clause. For example, he joined the majority opinion in *Lemon v. Kurtzman* (1971) (which wrote the three prong test for the establishment clause). In writing the majority opinion in *Mueller v. Allen* (1982) (upholding Minnesota's tax deduction scheme for children attending private schools), he employed the *Lemon* test and invoked no original intent.[112] In *Valley Forge College v. Americans United* (1982) (a grant of surplus governmental property was given to a Christian college was held "action" under the property clause, not the taxing and spending clause -- thus avoiding the establishment clause issue), he employed legal formalism (i.e., standing) to justify the benefit, and made no references to original intent.[113] *Valley Forge* would seem ideal for accommodationists to invoke a "list" argument to justify the grant, since the founders did, indeed, provide for land grants to religious colleges. Nor are his free exercise opinions in line with accommodationism. In short, the use of history by dissenters tends to be a tool of critique, rather than a tool of majority opinions.

H. The "List" as Governmental Speech: Crèches.

In the 1980's, a new characterization of the "list" of governmental aids to religion appeared in a few federal court opinions. Borrowing from First Amendment free speech doctrine, the "list" was viewed as governmental "speech" which neither coerced nor took public money. This view was first utilized by federal Judge Nelson's dissenting opinion

in *American Civil Liberties Union v. Birmingham* (1986).[114] The case involved a challenge to the display of a nativity scene or crèche on the lawn of the city hall of Birmingham, Michigan. A federal court concluded that the nativity scene was an endorsement of the Christian religion in violation of the establishment clause. The court distinguished the facts of the case from those in *Lynch v. Donnelly* (1984), where the U.S. Supreme Court upheld a city-sponsored display of a crèche.[115]

Judge Nelson's dissent was a scathing critique of separationist history. Relying on the historians William Lee Miller and Thomas J. Curry, he noted that the early colonies had state established churches.[116] This was evidence that religion was part of the common law of America. For authority, he quoted from a minister's 1761 sermon -- becoming the first judge to cite a sermon as authority for founders' intent.

As to the display of the crèche, Judge Nelson viewed the display of religious symbols as a form of governmental "message" (later it will be called "speech"). In this analysis, his test became: "Does the federal government send non-Christians impermissible messages?"[117] Under this new test, government had engaged in religious messages when it depicted Mary and Jesus on postage stamps, employed chaplains, referred to God in "In God We Trust," or inserted "under God" in the Pledge of Allegiance.

Applying this test to the facts of the Birmingham city hall, Judge Nelson noted that the founders, who were mostly Protestant, would have found a display of a crèche "Popish." Whether the display would be offensive today, Judge Nelson noted that, because American society was now more diverse, most would not be offended by the

display. However, he found the prospect of offending those of the Jewish faith troubling. Nevertheless, he concluded that nativity scenes, like the religious messages mentioned in *Zorach*, would not be offensive today.

Judge Nelson's opinion is of interest because, while he begins by quoting from history books to attack separationism, and consulted "history of the times" (i.e., what the founders' may have thought of nativity scenes), he ended up disavowing the very theory of original intent by accepting the idea that times had changed. Instead of original intent, he substituted a constitutional norm that reflected contemporary views of society.

Judge Nelson's dissent is most noteworthy for characterizing several governmental references to religion as religious "messages." This is unique, for it is the first time the "list" is made contemporary and given an artificial quality -- it is no longer "founders' intent." Indeed, it is contemporary aids to religion. Judge Nelson had taken the "list" one step ahead.

Again, litigation involving a city's display of a crèche provided a dissenter an opportunity to employ the "list," this time, as governmental "speech" acts that are permissible. In *American Jewish Congress v. City of Chicago* (1987), a federal court of appeals struck down a display of a nativity scene in the lobby of the city-county building. Given the governmental context of the display, the court of appeals held the display conveyed a message of Christianity and had brought church and state together.[118] The display of six disclaimer signs could not save it.

Judge Easterbrook's dissent invoked one of the most comprehensive examinations of James Madison's views and the scholarship of historian Leonard Levy -- only to reach

an accommodationist conclusion that the display of the crèche was analogous to *Lynch*, since any factual distinctions were insignificant. In addition, the crèche would be permissible as governmental "speech," since the display involved no coercion or a captive audience.

Judge Easterbrook's history was threefold: First, because historical accounts had confined their examples of forbidden establishments to tax aid and religious oaths of office, Judge Easterbrook was able to narrow founders' intent as one only prohibiting "the use of governmental force and funds . . . ."[119] Second, like Judge Nelson, Easterbrook characterized the "list," not as founders' intent, but rather, as examples of permissible governmental speech. His "list" included: chaplains, legislative prayer, Madison's Thanksgiving day proclamation, Jefferson's funds for the religious need of Native Americans, Thanksgiving and Christian holidays, National Days of Prayer, Memorial Day, the motto "In God We Trust," the "under God" in the Pledge of Allegiance, the National Anthem, court oaths, courtroom ritual openings, and, finally, Martin L. King's holiday, which honors the life of a Baptist minister.

Third, Judge Easterbrook's independent examinations of the writings of Thomas Jefferson and James Madison led Easterbrook to conclude that their concern for taxing in support of religion was another form of "compulsion." Judge Easterbrook thus concluded that "no law" meant only "no compulsion." Applying this test to the facts of the case, he found the crèche involved no expenditure (it was donated), the only question was whether the display was coercive. The crèche was just another example of governmental speech that does not coerce or hold a captive audience. He distinguished the facts of this case

from precedent that had held that a display of a county seal may impinge on freedom of thought, even if the listeners or viewers were not captive.[120]

Judge Easterbrook's dissent is significant because it contains the most comprehensive examination of James Madison's views on separationism. Paradoxically, this comprehensive examination appears in an opinion that would have reached an accommodationist conclusion -- that the display of a crèche would be permissible. Easterbrook acknowledged that James Madison, like Thomas Jefferson, was a strict separationist. In order to overcome the strict separationism of Madison, Easterbrook characterized the "list" of governmental aids as "governmental speech" acts. Most noteworthy, by following Judge Nelson's novel doctrinal approach, they divorced the "list" from original intent.

Both Judge Nelson and Easterbrook provide ample illustration of how accommodationists have changed "history." They also illustrate the increasing use of historians' history as authority and characterizations of the "list" as contemporary speech acts. Both relied heavily upon secondary historical works, not merely as source books for selective historical fact, but also for arguments, interpretations and positions. Both cited famous *separationist* historians Thomas Curry, William Lee Miller and Leonard Levy. The reliance on these separationists had the effect of narrowing, rather than broadening, the definition of "establishment" to mean only "no tax" and "no compulsion." It is not which historians judges cite, but rather, how judges *use* those historians. It is of interest to note that historical accounts which purport to display the original intent of the founders have resulted not in fixed legal conclusions or separationist outcomes, but in "law office"

history (i.e., cite authorities that agree with your position).

However, both Judges Nelson and Easterbrook dramatically changed the use of the accommodationist "list." By calling it "messages" or "speech," they disavowed the originalism they both purported to support. For Judge Nelson, the issue was whether the display was offensive today. For Easterbrook, the issue was whether the display involved tax money or a captive audience. Both accepted the "list" as embodying contemporary practices that are constitutionally acceptable today (not in the past). In short, the "list" became the justification for the legal status quo.

Like most accommodationists, Judge Easterbrook appears to be an advocate of originalism; however, in practice, he has not been. Judge Easterbrook illustrates how no judge has been faithful to originalism in the establishment clause area. For example, in *Doe v. Village of Crestwood* (1990), Judge Easterbrook abandoned his "no tax," "no compulsion" standard in writing the majority opinion, which struck down municipal sponsorship of a Catholic Mass in an Italian ethnic festival, as an improper endorsement of and preference for religion under *Lemon*.[121] In that very case, Judge Coffey's dissent echoed Judge Easterbrook's *American Jewish Congress* dissent, and argued that as part of a cultural festival, the Mass involved neither tax expenditures nor a captive audience (the city sponsorship consisted only in printing the fliers advertising the event). Like Judge Easterbrook, Judge Coffey has not consistently adhered to his originalism. When given the opportunity to write the majority opinion in *Lubavitch Chabad House Inc. v. City of Chicago* (1990), Judge Coffey relied solely on legal formalism and found no religious discrimination, or equal protection violation, in a city's refusal to allow the display of a

Chanukah menorah in a public area in an airport.[122] Judge Coffey also abandoned originalism in his dissenting opinion in *Doe v. Small* (1991) for an application of the *Lemon* test (which he had previously argued had no historical foundation), in arguing the constitutionality of a city's display of sixteen paintings depicting the life of Jesus Christ (treating the display as a public forum issue).[123]

Both Judge Easterbrook and Judge Coffey began with a scathing critique of the relevancy of Madison and Jefferson's separationist ideas as the proper interpretation of the establishment clause; instead, advocating accommodationism based on other standards (e.g., "speech" or public forums). However, both of their reluctance to use originalism in writing majority opinions illustrates that judges may claim that they know what is the original intent concerning the establishment clause, but they will not always apply it. Indeed, originalism has not resulted in fixed legal conclusions or separationist outcomes. When tested, judges are more comfortable with legal formalism and traditional doctrinal tests. Their reluctance to actually rely upon originalism in subsequent cases suggests that originalism is primarily the tool of dissenters.

Nevertheless, Judges Nelson and Easterbrook dramatically changed the nature of the "list" when they equated it to governmental "speech" acts. In some way, they disavowed originalism, which both had advocated, because their "list" was no long history, but a list of practices acceptable today.

Finally, Judge Nelson and Easterbrook's dissents are of interest because both relied heavily upon well known separationist historians, e.g., Thomas Curry, William Lee Miller and Leonard Levy. In fact, the effect of using separationist historians was to

narrow, rather than broaden, the definition of "no establishment" to mean only "no tax" aid and "no compulsion." This was a clear misuse of the secondary historians' works, especially those of Leonard Levy, who, for last forty years has argued that the First Amendment was meant to prohibit aid to any and all religions.[124]

I. Return to the List as Acknowledgment of God: Lynch and Allegheny.

The U.S. Supreme Court's treatment of city displays of nativity scenes was different from the federal courts.' Both a federal district court and the court of appeals had enjoined the city of Pawtucket's annual Christmas display as a violation of the establishment clause under *Lemon*. The U.S. Supreme Court disagreed, and upheld the display on the grounds that the city was merely depicting the origins of a legal holiday recognized by Congress, which was analogous to religious paintings in public art galleries. Because the display in its holiday context served a secular purpose, the display was held not to advance religion.[125]

Chief Justice Burger's majority opinion was highly critical of Thomas Jefferson's celebrated metaphor of a "wall of separation" between church and state. He claimed that the metaphor no longer accurately described church-state relationships today. He read "no law" to mean the accommodation of religion. He noted various aids to religion given by the First Congress, namely, legislative chaplains and Thanksgiving Days. This aid was evidence to Chief Justice Burger that the First Amendment was intended to accommodate religion. These aids were also evidence of "official acknowledgments" of religion by government. These official acts included: chaplains, mottoes, the Pledge of Allegiance, art galleries displaying religious art, murals depicting religious themes on buildings,

chapels on the capital grounds, and a National Day of Prayer. Not since *Holy Trinity Church* (1892), had a majority opinion characterized the "list" of aids as an official recognition of religion.

Chief Justice Burger had invoked the "list" to reject a strict separationist interpretation of the First Amendment and to suggest that official acknowledgment, at least indirect subsidization, were part of the American tradition. However, not content to rely solely on "tradition" as a justification, he also argued that the crèche was analogous to the hanging of religious art in public museums. Finally, he applied the *Lemon* test, stressing that the crèche was a one-time expenditure with no maintenance fees, it was a symbol of the historical origins of a legal holiday, it was displayed on private parkland, and there was no evidence of entanglements.

To be sure, the dissents of Justices Brennan, Marshall, Blackmun and Stevens rejected the majority's reliance of "history" or tradition. They saw the crèche as a governmental endorsement of Christianity. Nor would "history" or "tradition" justify a clear and fair application of the Lemon test. Under the Lemon test, there was no secular purpose for the display. The majority's list of official acknowledgments could not justify the display. Those aids, said Justice Brennan, were mere evidence of government recognizing religion in a larger secular context. They were not official acknowledgments, but church-state "involvements."

In addition, the dissent was critical of the majority for not examining the history of nativity scenes. Nativity scenes were clearly not part of any American religious heritage or long-held tradition. In fact, the founders, the majority of whom were

Protestant, considered nativity scenes "Popish" and associated with the rituals of the Roman Catholic Church. We know that the early Puritan settlers did not celebrate Christmas; in fact, they passed laws prohibiting others from celebrating the holiday. The crèche was introduced by German and Catholic immigrants in the Nineteenth Century.

Justice Brennan's dissent also observed that the majority's "history" was too broad to lead to any historical conclusions. He noted that when the Court employed "history" it was narrow *legal history*. For example, in *McGowan v. Maryland* (1961), which upheld Sunday closing laws, the Court examined the legislative history which dated back to England. Likewise in *Walz v. Tax Commissioner* (1970), the Court examined the long history of property tax exemptions, again dating back to English practices. In *Marsh v. Chambers* (1983), the Court examined the intent and actions of the First Congress concerning legislative chaplains. Yet here, the majority, said Justice Brennan, invoked no legislative history of the practice. Instead, the majority produced a "list," called it "tradition," and used it as evidence of an American religious tradition, suggesting that the crèche belonged to that tradition.

Like Judge Easterbrook, Chief Justice Burger was not wedded to originalism. While Burger claimed that Jefferson's "wall of separation" metaphor was irrelevant today, he had earlier used it and called it a "useful signpost." In *Larkin v. Grendel's Den* (1982), the Court struck down a city law that permitted a church or school to block the licensing of a business selling alcoholic beverages.[126] There, the statute delegated governmental decision-making to sectarian agents, in violation of the establishment clause. The fatal flaw was that there was no standard to deny the license, allowing churches to veto a

license on any grounds, including religious ones.

In *Larkin*, Chief Justice Burger thought Jefferson's metaphor was a "useful figurative illustration."[127] Had Burger abandoned "separation" in *Lynch*? The best evidence suggests that Burger's reference to Jefferson in *Larkin* was mere "window dressing," since the court's conclusion was based on well-established legal principles concerning delegation of power -- that the state may not vest its discretionary authority in a religious body because such authority could be used to advance religion, which the state itself could not advance.

Another reference to aids to religion as the legal recognition of religion can also be seen in Judge Weiss' dissent in *A.C.L.U. v. Allegheny County* (1989).[128] There, a federal court of appeals enjoined the display of a nativity scene inside the main entrance of a county courthouse and the display of a menorah on the steps of city-county building. The district court had upheld both displays as *Lynch*-type aid. However, the court of appeals disagreed, distinguishing the facts of the case from *Lynch*, striking down both displays. The displays, said the third circuit, were a tacit endorsement of the Christian and Jewish faiths.

Neither the district court nor the court of appeals invoked original intent, relying entirely on the *Lemon* tests. Judge Weiss' dissent, however, like Easterbrook's dissent in *American Jewish Congress*, argued that it was wrong to rely upon Jefferson's "wall of separation" metaphor. Jefferson, who was in France at the time of the ratification of the Bill of Rights, was irrelevant to an interpretation of the First Amendment, according to Judge Weiss (echoing Corwin's 1949 argument).[129]

Judge Weiss contended that the founders wished to acknowledge God. This could be seen in a "list" of governmental aids to religion: the reference to God in the preamble of Jefferson's *Bill for Religious Freedom (1786)*:[130] the reference to a creator in the Declaration of Independence; Jefferson's approval of support for a Catholic priest to the Kaskasia Indians; actions of the First Congress, including the Northwest Ordinance (1787), Washington's Thanksgiving Day, and legislative chaplains. For Judge Weiss, these aids demonstrated that the founders did not wish to separate church and state.

Judge Weiss' dissent is noteworthy. First, his rejection of the relevance of Jefferson's separationist ideas reflects the accommodationist disdain for intellectual history and for the invocation of an historical figure who had not formally authored the First Amendment. Paradoxically, Judge Weiss' "list" of aids includes actions by Jefferson!

Second, Judge Weiss' "list," like Chief Justice Burger's, was a traditional "list" of aids, now called "the legal recognition of God." The "list" was invoked to discredit Jefferson's metaphor. "No law" no longer meant separation, but rather, the union of church and state. However, Judge Weiss would not have used the "list" to justify the display. Indeed, he argues that under *Lemon* the display served a secular purpose. Unlike Judge Easterbrook's "list" which was governmental speech, Judge Weiss' "list" was "founders' intent not to separate church and state."

It is of interest to note that, not since *Holy Trinity Church v. United States*, had judges utilized the "list" as legal recognition of a deity in American law. This characterization, while not new, comes at the very same time that several federal judges

had secularized the "list" as governmental speech.

J. The "List" as American Culture: Graduation Prayers.

One characterization of the "list" of governmental aids to religion is to see aid as the recognition of American religious culture. It is of interest to note that this variety of the "list" appears in litigation involving graduation prayers. The following three cases illustrate this use.

1. Zorach Revisited -- Graduation Prayers: Two Cases.

Prior to the recent U.S. Supreme Court opinion in *Lee v. Weisman* (1992),[131] striking down the practice of high school graduation benedictions, or prayers, two lower courts attempted to resolve the constitutional issue, both citing the accommodationist *dicta* of *Zorach*. In *Weist v. Mt. Lebanon School District* (1974), the Supreme Court of Pennsylvania upheld the practice of an invocation and benediction at a public high school graduation ceremony on the grounds that the practice would not violate the guarantee of free exercise because attendance was voluntary.[132] In addition, the practice did not violate the establishment clause because benedictions were analogous to the public rituals recognized in *Zorach dictum*.[133] Although prior state courts had construed the state's separation of church and state clauses very strictly (e.g., prohibiting the use of public classrooms for Catholic religious instruction or religious activities when school was not in session),[134] the *Weist* court distinguished prayers from the previous case law, noting that graduations were voluntary events. Justice Pomerory, concurring, added that the event was remote from the public classroom and not part of any required educational program.

More than a decade later, in *Stein v. Plainwell Community Schools* (1987), another federal court sustained the constitutionality of ceremonial benedictions under *Marsh*, but held that in this case, where "Christ" was invoked, a preference for one religion over another had been made, invalidating the practice.[135] Nondenominational benedictions would be constitutional only if they preserved the principle of equality of liberty of conscience, the court said.

Judge Wellford, in dissent, argued that under *Zorach*, any benediction was permissible. Here, both majority and dissent accepted the accommodationism of *Zorach*; they parted company on the application of precedent. The majority, relying on *Marsh*, said no single religion could be singled out for preference. The minority, relying on *Zorach*, saw no bar to the preference for Christianity. The dictum of *Zorach* had been applied as if it were the legal rule (*Zorach* involved off-campus religious instruction), illustrating how *dicta* can become legal tradition. However, adherence to originalism (here, American culture) does not lead to uniformity of result.

In the final analysis, both the *Weist* and *Stein* courts acceptance of an American religious tradition was rejected by the U.S. Supreme Court's opinion in *Lee v. Wiseman* (1992), striking down nondenominational high school benedictions. *Lee v. Wiseman* is discussed in **Chapter 4** below.

2. Finally, the "List" as American Culture.

Both concurring and dissenting opinions in a California case invoked the "list" as evidence of "American Culture." In *Sands v. Morongo Unified School District* (1991), the California Supreme Court struck down religious benedictions at public high school

graduation ceremonies as a violation of the First Amendment and the state constitution.[136] This case is of interest because of Chief Justice Lucas' lengthy concurrence, where he said that graduation prayers would be permissible, but joined the majority in striking the practice down as a violation of the *Lemon* test. Chief Justice Lucas characterized governmental aids to religion as part of an American *culture*. He listed: legislative prayer, presidential proclamations, presidential inaugural addresses; Thomas Cooley's remarks on the permissibility of chaplains, legislative prayer and tax exemption; the motto "In God We Trust" on our coins. The Chief Justice is the first to call the "list" "benign American culture."[137]

Not content to rest upon a justification based on culture, the Chief Justice would justify the practice as analogous to *Marsh* (it is of interest to note that the *Stein* court struck down the very same practice under *Marsh*). Although clearly an accommodationist and originalist, he joined the majority in the argument that these practices were offensive to the *Lemon* test. Again, legal formalism prevailed. Contrary to conventional wisdom, that judges merely justify their own bias, Chief Justice Lucas accepted a legal conclusion with which he was clearly uncomfortable.

V. Justice Kennedy and the "List."

One of the most interesting treatments of the "list" can be found in Justice Kennedy's dissent in the *Allegheny* case, where the U.S. Supreme Court struck down the display of a crèche, but allowed for the display of a menorah.[138] Justice Kennedy argued that governmental aids to religion were evidence of a governmental endorsement of religion. His "list" included: the reference to God in the opening ritual of the U.S.

Supreme Court: a proclamation of a National Day of Prayer: the reference to God in the Pledge of Allegiance: the reference to God in the motto on our coins: and both Washington's and Franklin Roosevelt's Thanksgiving Day proclamations.

Unlike Judge Weiss, who in his lower court opinion used the "list" to attack separationism, Justice Kennedy's "list" criticized the non-endorsement test employed by the majority. The "list" was evidence that government had endorsed religion directly. However, in justifying the display of the crèche on the courthouse grounds, Justice Kennedy resorted to precedent, arguing that the display was analogous to *Lynch* and would meet the requirements of his "non-coercion" test for the First Amendment. Like Judge Easterbrook, Justice Kennedy would also justify the crèche under a governmental speech rationale.

Justice Kennedy's "no coercion" test reflected the growing acceptance of Judge Easterbrook's "no compulsion" standard, which is now acknowledged by two lower courts as a major interpretation of the establishment clause. For example, Justice Kennard of the California Supreme Court recognized Justice Kennedy's "no coercion" test as a third approach to the establishment clause, although she noted that the U.S. Supreme Court had rejected that approach.[139] The court in *Doe v. Small* (1991) also recognized Justice Kennedy's approach as one of three historical positions on the establishment clause.[140]

Justice Kennedy's approach to the meaning of the establishment clause is not new; it merely restates the recurring position that no establishment means merely no coercion, i.e., that the establishment clause is the guarantee of religious liberty. His position goes to heart of the dispute between separationists and accommodationists -- whether the

American experiment in religious liberty and separation was an acceptance or rejection of the English model of religious toleration, as first echoed in George Washington's letter to the Hebrew congregation at Newport.[141]

Justice Souter refutes Justice Thomas' interpretation utilizing the very same arguments that Justice Rutledge used fifty years earlier, i.e., a separationist interpretation of the drafting of the First Amendment. Souter and Thomas' debate illustrates that the introduction of Madison has not settled the issue of the historical meaning of the intentions of the founders.

VI. Summary.

This Chapter examined the evolution of the second variety of federal founders intent, that of separationist history (that the founders intended to separate church and state). **Chapter 2** illustrated how separationist history first appeared as state framers' intent, deriving from the aspirations of the Western settlers and the prohibitions contained in state constitutions. This was nevertheless, state, not federal, history.

The first time the First Amendment's establishment clause was invoked was in *Wardens Church of St. Louis of New Orleans v. Blanc* (1844), where a state court applied the First Amendment through a Federal treaty to a former federal territory. As this Chapter discussed, both litigants understood the First Amendment's establishment clause to mean government could not show favor, or grant privileges to religious institutions or former state churches. The core separationist principle--that government is incompetent to determine religious truths--developed out a sense of institutional competency, not out of a concern for individual liberties. This type of separationism or jurisdictional

separation was from the legacy of English common law, one where English courts deferred to church court jurisdiction. This strict separationism would later be seen in the New Hampshire Justice Doe's famous two hundred-page dissent in *Hale v. Everett* (1868) and in *Andrew v. New York Bible and Prayer Book Society* (1850). It still dominates church property jurisprudence today.

These early references to a federal intent were not born out of, nor associated with the separationist ideas of Thomas Jefferson or James Madison, authors of the First Amendment. Indeed, what was observed were a variety of separationist histories, including the ideas of Thomas Jefferson and James Madison; to general principles, including: preventing persecution of religious minorities and non believers; securing freedom from religion; and the need to promote religious pluralism as necessary for democracy. In short, unlike accommodationist history, separationist history did not have a predictable format or take any particular argument.

No doubt, the most familiar sources for separationist history were the ideas, writings, and actions of both Thomas Jefferson and James Madison, architects of the federal constitution. Jefferson's letter to the Danbury Baptists, explaining why he had not declared a Thanksgiving Day as George Washington had done, became the lawyer's sources for the phrase "the high wall of separation between church and state;" and James Madison's pamphlet, *Memorial and Remonstrance* (1785), written to defeat a proposed tax to support parish ministers, were the most popular documentary sources for strict separationist histories. The U.S. Supreme Court in Reynolds v. United States (1898) cited both documents. Prior to that, state judges had utilized Jefferson's ideas, not to

interpret separation, but rather as an authority to deny free exercise liberties.

It was not until 1912, in *Connell*, that Jefferson was first linked to the argument that separation of church and state meant no monetary aid to religion. Later, Justice Riley's dissent in *Murrow Indians Orphan Home v.Childers* (1946) finally linked both Jefferson and Madison to the argument that separation meant no monetary aid to religion. This was significant, for now "no law" meant more than "no coercion, no compulsion;" it meant no tax aid to religion.

Separationist histories were observed in a number of free exercise cases of the 1920's and 40's, namely in *Military Institute v. Leff* (1926), *Reynolds v. Rayborn* (1938), *Cory v. Cory* (1945), and Board *of Education v. Barnette* (1943). To some extent, these histories were citations of the *dictum* from *Board of Education v. Minor* (1872), the Ohio Supreme Court opinion discussed in **Chapter 2** above.

The U.S. Supreme Court adopted strict separationist ideas of Jefferson and Madison in *Everson v. Board of Education* (1947) (mostly by citation to Justice Waite's *Reynolds* opinion). In *Everson*, both majority and dissent cited the very same history, but reach different legal conclusions. Only Justice Rutledge's dissent analogized New Jersey's bus transportation aid to parochial schools to Madison's objections to Henry's proposed tax assessment. *Everson's* separationist history did not settle the debate over the historical meaning of the First Amendment. On the contrary, accommodationist history continued to be invoked after 1947.

Different types of separationist histories were developed after 1947. One variety that was popular was that of European history, e.g., the recounting of religious

discrimination and religious wars of the continent. European history was the centerpiece of Justice Vanderbuilt's *Tudor v. Board of Education* (1953) (striking down the distribution of Bibles in the public schools of New Jersey) and in Justice Black's majority opinion in *Engel v. Vitale* (1961) (striking down New York's practice of state endorsed school prayer in the public schools). European history was once again revisited in *State v. West* (1970); and in *People v.Baldwin* (1974).

Separationist histories were observed in a number of odd places, namely, in opinions reaching accommodationist results. Such was the case in Sunday law litigation in *Two Guys from Harrison v. Furman* (196) and *State v. Gable* (1966); in aid to sectarian colleges, *Horace Mann League v. Board of Public Works* (1966) and *Americans United v. Bubb* (1974); and in bus aid to church schools, *Fox v. Board of Education* (1967). These cases illustrate that the uses of history, even separationist ones, have unpredictable legal results, often not corresponding or contributing to the legal rationale.

The most interesting separationist was that of Supreme Court Justice Douglas. Although a hero of accommodationists because of his "we are a religious people" dictum in *Zorach v. Clauson*, Justice Douglas became a consistent defender of the application of the strict separationist ideas of Jefferson and Madison. He often dissented, invoking separationist histories to counter the accommodationist results reached by the majority, e.g., *Walz* (uphold state tax exemptions for religion). Justice Douglas was devoted to the idea that religious liberty should be protected from government--resulting in a stricter separationist posture.

Separationist histories were also found in cases that avoided the legal formalism

of the *Lemon* test--resulting in stricter separation. Such was the case of *Anderson v. Salt Lake City* (1972) and in *Moore v. Gaston County Board of Education* (1973).

The most comprehensive examination of James Madison's writings on the topic of the establishment clause appeared in an opinion upholding the salary (on secular grounds) of a state legislative chaplain. Clearly, Madison thought legislative chaplains violated the First Amendment, the courts have acknowledged that fact, however several lower courts have sanctioned the aid. Chief Justice Burger consulted Madison's views on free exercise, overturning a Tennessee court's determination that both history and necessity required that clergy be barred from public office. The U.S. Supreme Court made Madison the champion of free exercise, not separation.

The most significant contribution to separationist history came from Justice Steven's concurrence in *A.C.L.U. v. Allegheny* (1989), where he read the First Amendment with the aid of two eighteenth century dictionaries. He concluded that the First's wording meant more than a prohibition of one state church, but was to be a broad ban of aid and promotion of religion--the very same conclusion that Justices Rutledge, Warren, and more recently Souter, have made by examining the drafting of the First Amendment in Congress.

Justice Souter has taken up the mantle that Justice Rutledge wore as defender of a strict separationist historical interpretation of the First Amendment. His most recent debate with Justice Thomas over the exact nature of Madison's views can be seen in the non-establishment case of *Rosenberger v. University of Virginia* (1995). This recent debate illustrates that interpretation of Madison's views is an ongoing debate.

In sum, the introduction of separationist history did not settle the judiciary's search for the historical meaning of the First Amendment's establishment clause. Like accommodationist history, separationist history did not have a predictive value; and it has been used to avoid the *Lemon* test. Often, separationist ideas, if not linked to the writings of James Madison or Thomas Jefferson, were linked to the horrors of European history. Nevertheless, the introduction of history has not changed the core separationist principle--that government is incompetent to determine religious truths.

ENDNOTES TO CHAPTER 3

1

23 Ohio 211 (1872). This case is discussed in **Chapter 2** *infra* note 25 and accompanying texts.

2

See, e.g., WILLIAM McLAUGHLIN, REVIALS, AWAKENINGS, AND REFORMS (1978).

3

See, e.g., Edward Corwin, *The Supreme Court as National School Board*, 14 L. & COMTEMP. PROBS. (1949). *Contra* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM & MARY L.REV. 875 (1986).

4

The "List" often includes: Acts of Congress such as land grants to colleges, mottos on coins, military chaplains, legislative chaplains, the Northwest Ordinance of 1787 art. III, 1 Stat. 50 (1787); George Washington's Proclamation of a Thanksgiving Day, April 30, 1789; federal treaties with Indians such as President Jefferson's treaty with the Kaskakia Indians, August 13, 1803, providing for a Catholic Priest, at 7 Stat. 79 (1803); federal missionaries to the Indians, March 3, 1819, ch. 85, 3 Stat. 516 [Quick Bear v. Leupp, 210 U.S. 50 (1908)]; relief to the Mission Church of the Wyandotte Indians, July 28, 1866, 14 Stat. 309 [Sarataso v. Armstrong, 16 Kan. 192 (1876)]; land grants to the Ohio Company, April 21, 1782, ch. 25, 1 Stat. 257, later authorized to sell land for the support of legally incorporated religious groups, February 20, 1833, ch. 42, 4 Stat. 618 (1833) [State v. Delhi, 11 Ohio 24 (1841)]; land grants to colleges such as Columbian College (Baptist) in D.C., July 4, 1832, ch. 248, 4 Stat. 603 (1932); to Georgetown College (Catholic) in D.C., March 2, 1833, ch. 86, 6 Stat. 538 (1833). Mottos: "In God We Trust" 31 U.S.C. 324, 324a (1865) [Aronow v. United States, 432 F. 2d 242 (1970)]. "A.D" in documents [Ben Miriam v. Office of Personal Management 647 F. Supp. 84 (1986)]. The "National Anthem" 36 U.S.C. 170 (1931) [Sheldon v. Fannin, 221 F. Supp. 766 (D. Ariz. 1963)] and the Pledge of Allegiance 36 U.S.C. 170 (1954) [Board of Education v. Barnette, 319 U.S. 624 (1943)]. Several state practices are often cited: blasphemy laws, Sunday closing laws, sodomy laws [People v. Baldwin, 112 Cal. Rptr. 290 (1974), Conner v. State, 253 Ark. 854, 490 S.W. 2d 714, *app. dismissed*, 94 S. Ct. 342, *reh. denied*, 94 S. Ct. 884 (1973)]; anti-brothal laws; property tax exemptions; legislative prayer and legislative chaplains, prison chaplains; state aid to sectarian colleges; and state religious-matching laws in child custody disputes. Common law traditions are sometimes cited: courtroom rituals, witnesses oaths, grand juror's oath [State v. Albe, 460 P. 2d 651 (Ark. 1969), People v. Cohen, 90 Cal. Rptr. 612, 12 CA. 3d 298 (1970)]; church use of the civil courts to settle property disputes and the

inforcement of charitable bequests and sill provisos by the civil courts [Drace v. Kleindist, 118 A. 902 (Pa. 1922). In re Estate of Lanin, 339 A. 2d 520 (Pa. 1975)].

5
333 U.S. 203 (1948).

6
Walz v. Tax Commissioner, 397 U.S. 664 (1970).

7
Allegheny County v. Pittsburgh A.C.L.U., 492 U.S. 573 (1989) (Kennedy, J., dissenting in part, concurring in part). *See infra* note 128 and accompanying text.

8
Sands v. Morongo Unified School District, 281 Cal. Rptr. 34 (Sup. Ct. Cal. 1991) (Lucas, C.J., concurring). *See infra* note 136 and accompanying text.

9
Lynch v. Donnelly, 465 U.S. 668, 694-96 (1984) (Brennan, J., dissenting). *See infra* note 115 and accompanying text.

10
Id.

11
Id. at 675, 677.

12
See, e.g., A.C.L.U. v. City of Birmingham, 588 F. Supp. 1337, *aff'd*, 791 F. 2d 1561 (1986) (Nelson, J., dissenting); American Jewish Congress v. City of Chicago, 827 F. 2d 120 (Ct. App. 7th Cir. Ill. 1987) (Easterbrook, J., dissenting); A.C.L.U. v. Allegheny County, 842 F. 2d 671 (3d cir. 1988) (Weis, J., dissenting) [*rev'd in part, aff'd in part*, Allegheny County v. Pittsburgh A.C.L.U., 492 U.S. 573 (1989)]. *See infra* notes 115, 118, 128 and accompanying texts.

13
76 Ga. 181 (Sup. Ct. Ga. 1886).

14
Id. at 191.

15
Code § 5006 later was incorporated into the state constitution of 1945, art. I, part

XIV:

No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination or religionists, or of any sectarian institution.

16

Supra note 12 at 76 Ga.196.

17

143 U.S. 457 (1892).

18

Id. at 471. Those who agree, *see, e.g.*, Andrew A. Bruce, *Religious Liberty in the United States*, 74 CENT. L. J. 279 (1912); *contra* Simeon L. Guterman, *Interaction of Religion, Law and Politics in Western Society: Its Historical Character and Influence*, 17 U. OF MIAMI L. REV. 439 (1963). For a commentary, *see also* Allen C. Brownfield, *Constitutional Intent Concerning Matters of Church and State*, 5 Wm & MARY L. REV. 174 (1964); *Nineteenth Century Judicial Thought Concerning Church-State Relations*, 40 MINN. L. REV. 672 (1956).

19

11 Serg. (Pa. 393 (1824); 8 Johns (NY) 225 (1819); 2 How. 127 (1844). *See* **Chapter 1** *supra* notes 81, 74, 94 and accompanying texts.

20

For an examination of ecclesiastical law under the colonial charters, *see, e.g.*, Aaron B. Seidman, *Church and State in the Early Years of Massachusetts Bay Colony*, 18 NEW ENGLAND QUARTERLY 211 (1945). The charters can be found in THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES (Poore ed. 1924, reprinted 1972) [hereafter THE FEDERAL AND STATE CONSTITUTIONS].

21

Holy Trinity *dicta* cited in: United States v. Macintosh, 283 U.S. 605 (1931) (upholding denial of citizenship for the refusal to declare by oath that one would bear arms in defense of the the U.S.); Herold v. Parish Board of School Directors, 136 La. 1034, 68 S. 116 (Sup. Ct. La. 1915) (striking down Bible reading in the public schools of Louisiana); Pirkey Brothers v. Commonwealth, 134 Va. 713, 114 S.E. 765 (Sup. Ct. App. Va. 1922) (sustaining a Sunday law conviction); Gordon v. Board of Education, 78 Cal. 2d 464, 178 P. 2d 488 (1947) (upholding time-release off campus school program for religious education, see White, J., concurring); Doremus v. Board of Education, 5 N. J. 435, 75 A. 2d 880 (Sup. Ct. N. J. 1950) [*app. dismissed*, 342 U.S. 429] (upholding Bible reading in the public schools); Engel v. Vitale, 10 N.Y. 174, 218 N.Y.S. 2d 659, 176

N.E. 2d 579 (Ct. App. N.Y.) (upholding daily prayer in the public schools) [*rev'd* 370 U.S. 421 (1962)]; Chamberlain v. Dade County, 143 S. 2d 21 (Sup. Ct. Fla. 1962) (upholding Bible reading in the public schools) [*rev'd* 377 U.S. 402]; and Chief Justice Burger's dissent in Wallace v. Jaffree, 472 U.S. 38 (1985) (striking down a moment of silent prayer).

22
104 Tex. 1, 109 S.W. 115 (Sup. Ct. Tex. 1908).

23
Tex. CONST. art. I, § 4 (1845):

> All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No man shall be compelled to attend, erect, or support any place of worship, or to maintain any ministry against his consent; no human authority ought, in case whatever, to control or interfere with the rights of conscience, in matters of religion, and no preference shall ever be given by law to any religious societies or mode of worship; but to protect every religious denomination in the peaceable enjoyment of their mode of public worship.

art. I, § 4 (1845):

> No money shall be appropriated or drawn from the treasury for the benefit of any sect or religious society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purposes.

art. 7, § 5 (1845):

> [in reference to the public school fund] . . . none of said money shall. . . ever be appropriated to, or used for the support of, any sectarian school.

24
Church v. Bullock, *supra* note 22 at 104 Tex. 7, 109 S.W. 118.

25
It is of interest to note that the first constitution of the Republic of Texas art. 1 § 9 (1827) established Christianity as the state religion, *in* 2 THE FEDERAL AND STATE CONSTITUTIONS, *supra* note 20 at 1728.

26
136 La. 1034, 68 S. 116 (Sup. Ct. La. 1915).

27
Id. at 136 La. 1043:

> . . . There have been differences in expressions of opinion as to whether this is a Christian land or not, in a strictly limited sense: but there is not, and there has not been, a question as to its being a godly land, or that we are a religious people.

28
La. CONST. art. 4:

> Every person has a natural right to worship God, according to the dictates of his conscience, and no law shall be passed respecting an establishment of religion.

art. 53:

> No preference shall ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship.

29
280 Ill. 613, 117 N.E. 735 (1917).

30
Id. at 280 Ill. 613, 117 N.E. 736.

31
120 Me. 84, 113 A. 39 (1921).

32
The court did not address the First Amendment challenge, citing U.S. v. Cruikshank, 92 U.S. 542 (1875) as controlling. However, Theodore Schroeder, Mockus' counsel, relied on the First Amendment (both free speech and establishment clause), *see, e.g.*, THEODORE SCHROEDER, CONSTITUTIONAL FREE SPEECH: DEFINED AND DEFENDED (1919).

33
See, e.g., State v. Chandler, 2 Har. (Del.) 553 (1837); Updegraph v. Commonwealth, 11 Serg. (Pa.) 393 (1824); Commonwealth v. Kneeland, 37 Mass. 206 (1838); and Theodore Schroeder, *supra* note 32. These cases are discussed in **Chapter 1** *infra*.

34
134 Va. 713, 114 S. E. 764 (Sup. Ct. Va. 1922).

35
Id. at 134 Va. 720, 114 S. E. 766. The court was quoting from People v. Ruggles, 8 John 225, 290 (1819) discussed in **Chapter 1** *infra*.
For an examination of references to a deity in legal documents, *see, e.g.*, Leo Pfeffer, *The Deity in American Constitutional History*, 23 J. of CHURCH AND STATE 215 (1981).

36
152 Ga. 762, 110 S.E. 895 (Sup. Ct. Ga. 1922).

37
Id. at 152 Ga. 770, 110 S.E. 899. Citing Edwin C.Goddard, *The Law in the United States in its Relation to Religion*, 10 MICH. L. REV. 161, 166 (1912).

38
Id. at 152 Ga. 768, 110 S.E. 898. Citing 7 A. L. REG. 417 (Police Ct. Boston, Mass. 1859).

39
Wilkerson v. City of Rome, *supra* note 36 at 152 Ga. 772, 110 S.E. 900.

40
Id. at 152 Ga. 774, 110 S.E. 901. Citing Ga. CONST. art. I § 1, par. 14:

> No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religionists, or of any sectarian institution.

41
Id. at 152 Ga. 785, 110 S.E. 906. Citing Rogers Williams on "No one should be bound to worship, or to maintain a worship against his own consent."

42
171 Minn. 142, 214 N.W. 18 (Sup. Ct. Minn. 1927).

43
8 Stat. 155 (1796).

44
Minn. CONST. art.1 § 16 (1857):

The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect, or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent: nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state, nor shall any money be drawn from the treasury for the benefit of any religious societies, or religious or theological seminaries.

art. 8 § 3:

The legislature shall make provisions. . . [for a] system of public schools. . . But in no case shall moneys derived as aforesaid, or any portion thereof, or any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creed or tenents of any particular Christian or other religious sect are promulgated or taught.

45

81 Colo. 276, 255 P. 610 (Sup. Ct. Colo. 1927). Colo. CONST. art. II. § 4 (1876):

. . . No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.

art. 9 § 9 (1876):

Neither the General Assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation, to any church, or for any sectarian purpose.

art. 9 § 8 (1876):

No religious test or qualification shall ever be required of any person as a condition of admission into any pubic educational institution of the state, either as a teacher or student; and no teacher or student of any such institution

shall ever be required to attend or participate in any religious service whatever. No sectarian tenets or doctrines shall ever be taught in the public schools nor shall ever be taught in the public schools nor shall any distinction or classification of pupils be made on account of race or color.

46
268 U.S. 510 (1925); 262 U.S. 390 (1923).

47
Colo. CONST. art. 9 § 8, *supra* note 45:

> . . . [N]o teacher or student of any such institution [public school] shall ever be required to attend or participate in any religious service whatever. . . .

48
For historical background, *see, e.g.*, G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972); Stephen A. Siegal, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 83 (1991); E.E. Steiner, *The Legal Profession in the Progressive Era: Localism and Legal Education in the Sixth Circuit States, 1890-1925*, 14 U. TOL. L. REV. 759 (1983).

49
78 CA. 2d 464, 178 P. 2d 488 (Dist. Ct. App. Cal. 1947). Gordon is the first California Supreme Court opinion to examine state constitutional history on this subject. This history was later used as evidence that the state framers were separationists in the following: *see, e.g.*, California Educational Facilities Authority v. Priest, 116 Cal. Rptr. 361 (1974) (upholding the use of revenue bonds for private colleges, including religious ones); Chief Justice Bird's concurrence in Fox v. City of Los Angeles, 587 P. 2d 663, 150 Cal. Rptr. 86 (1978) (Bird, C.J., concurring) (striking down city hall display of lights in form of a cross); and Justice Mosk's concurrence in Sands v. Morongo Unified School District, *supra* note 8, (Mosk, J., concurring) (striking down graduation prayers at public high schools).

50
The court cited: Terret v. Taylor, 13 U.S. (9 Cranch) 43 (1815) discussed *supra* **Chapter 1** note 8 and accompanying text; Everson v. Board of Education, 330 U.S. 1 (1947) discussed *infra* **Chapter 4** note 90 and accompanying text; Cochran v. Louisiana, 281 U.S. 370 (1929); and Holy Trinity Church v. United States, *supra* note 17.

51
See also Brusca v. State of Missouri, 332 F. Supp. 275 (1971) (the existence of

state clauses barring aid to sectarian education, *e.g.*, "Blaine" amendments, did not violate the free exericse clause of the First Amendment or the guarantee of equal protection of the laws under the Fourteenth.

52

See, e.g., Bowker v. Baker, 73 Cal. App. 2d 653, 167 P. 2d 256 (Dist. App. Cal. 1946) (upholding bus transportation aid to religious schools under state constitution); and McCollum v. Board of Education, 396 Ill. 14, 71 N.E. 2d 161 (Sup. Ct. Ill. 1947) (state court upheld on-campus religious instruction) [*rev'd*, Illinois v.Board of Education, 333 U.S. 203 (1948) (striking down on-campus religious instruction)].

53

See, e.g., Fox v. City of Los Angeles, *supra* note 49.

54

5 N.J. 435, 75 A. 2d 880, *app. dis.* 342 U.S. 429 (1950). Cited as controlling on the issue of state tax payer standing in Cammack v. Waihee, 932 F. 2d 765 (9th Cir. 1991) *see infra* note 88.

55

See, McColllum [Illinois v. Board of Education], *supra* note 52.

56

See, e.g., HEALEY, JEFFERSON ON RELIGION IN PUBLIC EDUCATION (1962); Joseph F. Costanzo, *Thomas Jefferson, Religious Education and Public Law*, 8 J. of PUBLIC L. 81 (1959).

57

See supra note 6.

58

Id. at 680. *See, e.g.*, Donald L. Drakeman, *Antiestablishmentarianism*, 5 CARDOZO L. REV. 153 (1983). For commentaries on Walz's contribution to establishment clause doctrine, *see also* Wilber G. Katz, *Radiations from Church Tax Exemption*, 1970 SUP.CT. REV. 93; Paul G. Kauper, *Walz Decision: More on the Religion Clause of the First Amendment*, 69 MICH. L. REV. 179 (1970); Kenneth Ripple, *The Entanglement Test of the Religion Clauses--A Ten Year Assessment*, 27 U.C.L.A. L. Rev. 1195 (1980).

59

See THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (1878).

60

See supra note 13 and accompanying text; *see also infra* note 74 and accompanying text.

61

See, e.g., School District of Abington Township v. Schempp, 374 U.S. 203 (1963) discussed in **Chapter 4** *infra* note 114 and accompanying text.

62

Justice Brennan cites Fleet, *Madison's "Detached Memoranda,"* 3 WM & Mary Q. 534 (1946).

63

Marsh v. Chambers, *infra* notes 94, 95 and accompanying texts. For commentary, *See, e.g.*, Donald L. Drakeman, *Antidisestablishmentarianism: The Latest (and Longest) Word From the Supreme Court in Marsh v. Chambers*, 5 CARDOZO L. REV. 153, 172 (1983).

64

343 U.S. 306 (1952).

65

id. at 312.

66

See, e.g., L.A. Powe Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371, 497 (1974). *See also* David Louisell, *Man and Mountain: Douglas on Religious Freedom*, 73 YALE L. REV. 975 (1964), and Leonard Manning, *Douglas' Concept of God in Government*, 39 WASH. L. REV. 47 (1964). Of interest, *see, also "Release Time" Cases Revisited: A Study of Group Decisionmaking by the Supreme Court*, 83 YALE L.J. 1202 (1974) (examining the McCollum and Zorach decisions).

67

198 Tenn. 665, 288 S.W. 718 (Sup. Ct. Tenn. 1956).

68

The court cited: Evans v. Selma Union High School District, 193 Cal. 54, 222 P. 801 (1924) (upholding the purchase of the King James Bible for a public school library) for the argument that the Bible was not sectarian); People v. Stanley, *supra* note 45 (Bible reading in the public schools would be permissible; however required attendance would violate the Fourteenth Amendment guarantee of liberty); Commonwealth v. Cooke, *supra* note 38 (upholding Bible reading in the public schools as not violating religious liberty);

Kaplan v. Independent School District. *supra* note 42 (upholding Bible reading in the public schools on the grounds that mere reading did not violate religious liberty).

69

347 P. 2d 204 (Sup. Ct. Okla. 1959). *See also* Reichwald v. Catholic Bishop of Chicago. 248 Ill. 44. 101 N.E. 266 (1913) (upholding construction of Catholic chapel on county poor farm). *But see* bequests which ran afoul of state prohibitions: Curtis' Adm'r v. Whipple, 24 Wis. 350 (1869); Jenkins v. Inhabitants of Andover, 103 Mass. 94 (1869); Waller v. Everett, 52 Mo 57 (1873); People v. McAdams, 82 Ill. 356 (1876); Trustees of Brooke Academy v. George, 14 W. Va. 411 (1878); Magee v. O'Neill, 19 S.C. 1883); Swadley v. Haynes, 41 S.W. 1066 (1897); Findley v. City of Conneaut 12 Ohio Supp. 161 (1943).

70

Okla. CONST. art. II § 5:

> No public money or property shall ever be appropriate, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, dnomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or religious teacher dignitary, or sectarian institution as such.

71

379 F. Supp. 872 (D. Kan. 1974).

72

Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1970). The Lemon test: First, the legislature must have a secular purpose. Second, the primary effect of state action must be one that neither advances nor inhibits religion. Third, action must not result in excessive entanglement of government with religion. [Hereafter Lemon test.]

73

155 Me. 151, 153 A. 2d 80 (Sup. Jud. Ct. Me. 1959).

74

147 Conn. 374, 161 A. 2d 770 (Sup. Ct. Conn. 1960).

75

Conn. CONST. art. 8 § 2 (1819):

> . . . and no law shall ever be made authorizing said fund to be diverted to any other use than the encouragement and support of public or common schools among the several school societies, as justice and equity shall require.

76

The court cited STANFORD COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1900) (one of the first books on the subject. Cobb argued that American liberty meant the rejection of English concept of toleration at 8); PAUL COONS, THE ACHIEVEMENT OF RELIGIOUS LIBERTY IN CONNECTICUT (1900); and M. LOUISE GREENE, THE DEVELOPMENT OF RELIGIOUS LIBERTY IN CONNECTICUT (1905) for general historical facts concerning the colony.

77

Synder v. Town of Newtown, *supra* note 74 at 147 Conn. 383-384, 161 A. 2d 776.

78

10 N.Y. 174, 218 N.Y.S. 2d 659, 176 N.E. 2d 579 (Ct. App. N.Y. 1961) [*rev'd*, Engel v. Vitale, 370 U.S. 421 (1961)]. The prayer went as follows:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

79

143 S. 2d 21 (Sup. Ct. Fa. 1962), *rem.*, 374 U.S. 487, 160 2d 96, *rev'd*, 377 U.S. 1272 (1964), 171 S. 2d 535 (1965). *See also* Casenote, 17 U. FLA. L. REV. 184 (1964).

80

8 Stat. 80 (1783). The Definitive Treaty of Peace begins with:

> In the name of the Most Holy and Undivided Trinity. . . .

This opinion is the first and only one to cite the Treaty of Peace as part of an accommodationist "list."

81

228 Me. 239, 179 A. 2d 698 (Ct. App. Md. 1962). The practices were at first compulsory, until the state attorney general intervened. For an examination of the role and influence of state attorney generals involving religion in the public schools, *see, e.g.*, Henry Abraham, *State Attorney General: A Friend of the Court?*, 117 U. PA. L. REV. 795 (1969); Richard M. Johnson, *Compliance and Supreme Court Decision Making*, 1967 WIS. L. REV. 170 (1967); Joseph W. Harrison, *Bible, the Constitution and Public Education*, 29 TENN. L. REV. 363 (1962).

82

367 U.S. 488 (1961).

83

See, e.g.., Justice Ashburn's dissent in County of Los Angeles v. Hollinger, 34 Cal. Rptr. 387 (1963) (Ashburn, J., dissenting).

84

See supra notes 79 and 61.

85

176 F. Supp. 466 (D. Mass. 1959) [*rev'd*, 366 U.S. 617]. *See, e.g.*, Casenote, 28 FORDHAM L. REV. 896 (1959/60).

86

221 F. Supp. 766 (D. Ariz. 1963).

87

Id. at 772.

88

673 F. Supp. 1524 (D. Hawaii 1987).

89

124 Cal. Rptr. 244 (1976).

90

395 A. 2d 530 (Sup. Ct. N.J. 1978).

91

456 F. Supp. 983 (D. Minn. 1978).

92

378 Mass. 550, 392 N.E. 2d 1195 (Sup. Jud. Ct. Mass. 1979).

93

See, e.g., Fleet, *supra* note 62. *See also* Leo Pfeffer, *Madison's "Detached Memoranda:" Then and Now, in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 283 (M. Peterson, and R. Vaugham eds. 1988).

94

504 F. Supp. 585 (Neb. 1980), *rev'd in part, aff'd in part, rem.*, 675 F. 2d 228 (1982), *rev'd*, Marsh v. Chambers, 463 U.S. 783 (1983).

95

Id. at 463 U.S. 783.

96

Id. at 792. It is unclear how the majority would have ruled if the chaplain had persisted in invoking Christ.

97

Id. at 817.

98

385 F. Supp. 1013 (D. N.Y. 1974).

99

N.Y. CONST. art. VI § 32.

100

30 N.Y. 2d 61, 330 N.Y.S. 2d 346, 281 N.E. 2d 153, *app. dismissed,*. 407 U.S. 917 (1972). *See, e.g., Parents Right to Prescribe Religious Education of Children*, 3 DE PAUL L. REV. 53 (1953), and Lawrence List, *Child and a Wall: A Study of "Religious Protection" Laws*, 13 BUFFALO L. REV. 9 (1963) (arguing that if placement was mandatory, it would be unconstitutional). *See also* Bonjour v. Bonjour, 566 P. 2d 667, 592 P. 2d 1233 (Alaska 1979) (religious considerations in child custody disputes would not violate the Lemon test).

101

See, e.g., Sargent v. Board of Education, 71 N.Y.S. 954, *aff'd*, 69 N.E. 722 (1904); Dunn v. Chicago Industrial School for Girls, *supra* note 29; Trost v. Ketteler Manuel Training School for Boys, 282 Ill. 504, 118 N.E. 743 (Sup. Ct. Ill 1917); Hedwig's Industrial School for Girls v. Cook County, 289 Ill. 432, 124 N.E. 629 (Sup. Ct. Ill. 1919).

102

See, e.g., Justice Riley's dissent in Murrow Indian Orphans Home v. Childers, 197 Okla. 249, 171 P. 2d 600 (1946) (Riley. J., dissenting) discussed in **Chapter 4** *infra*.

103

554 F. Supp. 1104 (S.D. Ala. 1983) [*rev'd*, 705 F. 2d 1526, *aff'd*, Wallace v. Jaffree, 472 U.S. 38 (1985)].

104

For an examination of Judge Hand's Fourteenth Amendment history, *see, e.g.*, RODNEY K.SMITH, PUBLIC PRAYER AND THE CONSTITUTION: A CASE STUDY IN CONSTITUTIONAL INTERPRETATION (1987); Michael Curtis, *Judge Hand's History: An Analysis of History and Method in Jaffree v. Board of School commissioners of Mobile County*, 86 W. VA. L. REV. 109 (1983); Peter Irons, *Clio on*

the Stand: The Promise and Perils of Historical Review, 24 CAL. W. L. REV. 337 (1987-88).

105

Cord and McClellan's views of Jefferson and Madison are misleading. *See, e.g.*, Jefferson's letter to the Rev. Samuel Miller on the issue of public prayers in THE REPUBLIC OF REASON: THE PERSONAL PHILOSOPHIES OF THE FOUNDING FATHERS 137 (Cousins, ed. 1988), also quoted by Leo Pfeffer in *Madison's "Detached Memoranda"*. . ., *supra* note 93 at 304.

106

Jaffree v. Wallace, 705 F. 2d 1526 (11th cir. 1983).

107

Id. at 1532. *See, e.g.*, A. E. Dick Howard, *The Supreme Court and the Serpentine Wall, in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, *supra* note 93 at 340.

108

472 U.S. 38 (1985).

For examinations of Justice Rehnquist's dissent, *see, e.g.*, Leo Pfeffer, *The Establishment Clause: An Absolutist's Defense*, 4 NOTRE Dame J. L. ETHICS & PUB. POL'Y 699, 720-729 (1990); John S. Baker Jr., *The Religion Clauses Reconsidered: The Jaffree Case*, 15 CUMBERLAND L. REV. 125 (1984/5); Casenote, 1985 S. ILLINOIS U.L.J. 585; and DERRICK DAVIS, ORIGINAL INTENT: CHIEF JUSTICE REHNQUIST AND THE COURSE OF AMERICAN CHURCH-STATE RELATIONS (1991). *See also*, challenging Rehnquist's interpretation of history, LEONARD LEVY, THE ESTABLISHMENT CLAUSE (1987); and Justice Souter's concurrence in Lee v. Weisman, 505 U.S. 577 (1992) (Souter, J., concurring) discussed in **Chapter 4** *infra*.

109

Not since Herold v. Parish Board of School Directors, *supra* note 26, have Justice Story's views been quoted with approval. *But see* the *amici* briefs in Lynch v. Donnelly, 465 U.S. 688 (1984): Brief for the Respondents at 6, 10 (the Solicitor General rejects references to Story, commenting: ". . . One can, however, hardly accept as persuasive authority a text which contends that. . . ."). *See also* Brief for the United States; Brief for the Coalition for Religious Liberty and the Freedom Council at 7.

110

See, e.g., 1 Stat. 257 (1792) (granting lands to the Ohio Company); 4 Stat. 618-19 (1833) (act to sell land originally purchased by the Ohio Company that had been reserved for the support of religion).

111

See, e.g., Paul Brest, *The Misconceived Quest for Original Understanding*, 60 B. U. L. REV. 204 (1980).

112

See, e.g., Mueller v. Allen, 463 U.S. 388 (1982) (upholding Minnesota's tax deduction for private school expenses) (Rehnquist employed the Lemon test, without reference to original intent).

113

See, e.g., Valley Forge College v. United States, 454 U.S. 464 (1982) (upholding grant of surplus property given to a Christian college under the property clause) (Rehnquist employed the legal formalism of the "standing" issue to justify the benefit). This opinion would be ideal for originalists, because the founders provided for land grants for religion (*e.g.*, schools and colleges). However, this original intent is not mentioned.

114

791 F. 2d 1561, 1567 (1986).

115

465 U.S. 688 (1984).

116

791 F. 2d 1561, 1568. *See, e.g.*, THOMAS CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986), WILLIAM LEE MILLER, THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC (1986).

117

791 F. 2d 1561, 1570.

118

827 F. 2d 120 (Ct. App. 7th Cir. Ill. 1987).

119

Id. at 129.

120

Citing Friedman v. Board of County Commissioners, 781 F. 2d 777 (Ct. App. 10th Cir. 1985) (enjoining use of a county seal depicting a Latin cross on it).

121
917 F. 2d 1476 (1990).

122
717 F. 2d 341 (7th Cir. Ill. 1990).

123
934 F. 2d 743 (7th Cir. Ill. 1991) (Coffey, J., dissenting).

124
See, e.g., LEONARD LEVY, CONSTITUTIONAL OPINIONS (1986); THE ESTABLISHMENT CLAUSE (1987).

125
See supra note 115.

126
459 U.S. 116 (1982).

127
Id. at 123.

128
842 F. 2d 655 (3rd Cir. 1988), *aff'd in part, rev'd in part,* Allegheny County v. Pittsburg A.C.L.U., 492 U.S. 573 (1989).

129
Id. at 842 F. 2d 664.

130
842 F. 2d 655, 665 n.1 (1988).

131
505 U.S. 577 (1992).

132
457 Pa. 166, 320 A. 2d 362 (1974).

133
Id. at 457 Pa.172-173, 320 A. 2d 365-366.

134
See, e.g., Hysong v. Gattitzen Borough School District, 164 Pa. 629, 30 A. 2d

482 (1894).

135
822 F. 2d 1406 (6th Cir. Mi. 1987).

136
Sands v. Morongo Unified School District, *supra* note 8 at 46 (Lucas, C.J., concurring).

137
Id. at 55.

138
See supra note 7.

139
See supra note 8 at 37.

140
Doe v. Small, 934 F. 2d 743 (7th Cir. Ill. 1991) (Coffey, J., dissenting).

141
George Washington, *Reply to Moses Seixes of the Hebrew Congregation of Newport, August 17, 1790, in* THE REPUBLIC OF REASON: THE PERSONAL PHILOSOPHIES OF THE FOUNDING FATHERS *supra* note 105 at 61.

142
See Cobb *supra* note 76 at 8.