B. The Book of Common Prayer: The Legacy of English Establishments.

The U.S. Supreme Court finally invoked European and colonial history involving the English Book of Common Prayer to make a separationist argument in a famous case involving prayers in the public schools.[125] The lower state court had upheld the practice of the daily recitation of a state-composed prayer. The lower court considered the prayer merely another acknowledgment of a "God" by the state, not sectarian instruction in the public schools prohibited by the state law. However, the U.S. Supreme Court disagreed, holding that government was without power to prescribe any form of prayer. The Court deemed prayer a religious activity, not, as the New York court had argued, part of America's "spiritual heritage." The vice the lower court failed to notice consisted in the school board composing a prayer for all children to recite, violating the principle that government should not determine religious truths.

In support of the majority opinion, Justice Black reviewed the legal history of the English Book of Common Prayer, the English Church's official prayer book, and observed that official prayers had been the vice of state churches in Europe.[126] Such official prayers had, in fact, led many of the early colonists to flee England and come to America. Indeed, some of the American colonists imposed prayers on the colonists. The founders, following Madison and Jefferson, intended to prohibit government endorsement of any religion, including official prayers. The fact that the prayer was nondenominational or that the recital was voluntary would not save it, since a violation of the establishment clause did not need a showing of coercion or compulsion.

Justice Black, relying on Madison's *Memorial and Remonstrance (1785)*, indicated two additional purposes of the First Amendment's religion clauses: the protection of religion, and the prevention of persecutions of religious minorities. Religion needed to be separated from government because the union of church and state tended to degrade and corrupt religion. Justice Black referred to the examples of John Bunyan and Roger Williams, who were persecuted because they refused to honor the state's official prayer book. It would not be un-American or irreligious to refuse to sanction state-written prayers.

The use of history in *Engel v. Vitale* was mostly "window dressing" to the principles invoked. The relevant history the Court relied on was the *legal* history of the Book of Common Prayer, which demonstrated that a state-composed prayer was, by legal definition, an establishment by law.[127] This legal history was used to define the legal status quo of 1789. To be sure, Justice Black's historical examples of John Bunyan and Roger Williams provided ample fuel for the argument that what was at stake. What both the religious and the representatives of the secular Enlightenment agreed upon was the belief that government could not determine religious truth because it was incompetent to do so. Justice Black did not elaborate on the history of the core principle of the First Amendment -- that government was incompetent to determine religious truths. Instead, he analogized a state-composed prayer, in traditional legal fashion, to the English Book of Common Prayer. Justice Black's narrow legal conclusion was based, not on founders' intent, but rather upon legal texts to reach a legal definition of "prayer."

C. Blasphemy Law: From English Establishment to Freedom of Speech.

Early state courts had upheld state blasphemy laws on the grounds that they were public peace measures; however, in the Twentieth Century, both the dicta and the legal principles would change. In *State v. West* (1970), a Maryland circuit court held that the state's blasphemy statute violated the First Amendment's religious clauses.[128] Indeed, the law had its roots in laws which dated back to 1649, where the colony punished violators with the boring of the tongue for the first offense, the burning of a "B" on the forehead for the second offense, and death for the third offense.

Although the punishment was changed to a fine of one hundred dollars, the court of appeals rejected the argument that the law merely regulated the public peace. The present *wording* of the statute made it not only a crime to blaspheme, but all forms of action, including written as well as spoken, were proscribed, thus striking at the very heart of First Amendment intellectual freedoms. Judge Morton's opinion invoked two histories: 1) the legal history of the blasphemy law; and 2) a reference to Thomas Jefferson taken from Chief Justice Waite's opinion in *Reynolds v. United States* (1878). Judge Morton used legal history to "shock" the modern observer with the horrors of the penalties, and to show that the law's purpose was to protect the Christian religion. His reference to Jefferson was mere "window dressing" because he did not rely on Jefferson to reach the final result, but rather on an application of the *Schempp* test, finding that the law failed to pass the secular purpose test and primary effect test. History, then, was not sufficiently necessary to reach the final legal result. The principles of the secular Enlightenment, not the Anglo-American tradition of blasphemy laws, prevailed.

The blasphemy laws illustrate the *dark side* of American history. Although part

of Anglo-American legal tradition, blasphemy laws are excluded from accommodationist "lists." They do not appear in accommodationist histories because, first of all, "lists" of aid to religion are lists of aid given after the Revolution, and because blasphemy laws represent pre-Revolutionary times and the legacy of English oppressions. Second, the "list"of governmental aids involves neither coercion nor tax moneys. Blasphemy laws are coercive, thus violating the no-coercion rule. Finally, no modern observer would accept the proposition that government today could justify such statutes. At the very least, modern repulsion by blasphemy laws fits Harry Wellington's notion that statutes would be unconstitutional if they breached present day conventional morality.[129] At another extreme, blasphemy laws illustrate Ronald Dworkin's argument that judicial decision making must be based on principle, not policy.[130] America's dark history, illustrated by the blasphemy laws, demonstrates that "history" cannot guarantee justice or be the basis for the protection of individual liberties. It is the existence of this *dark side* of history, which explains the consistent pattern observed of judges resorting to legal formalism to resolve legal issues, rather than rely solely on original intent.

D. Sodomy Law: If it was a Church Crime then, is it Now? What a California Court Said.

It is generally forgotten that one dark side of church-state unions included the existence of ecclesiastical courts, which had jurisdiction over moral transgressions in the community, crimes, which included adultery and sodomy. Statutes against the "moral sin" of sodomy would raise serious First Amendment issues also. In *People v. Baldwin* (1974), a California court of appeals upheld the California law prohibiting oral sodomy

even though the crime was once under the jurisdiction of the ecclesiastical courts and was once regarded as a sin by Judeo-Christian religions.[131]

Counsel had argued that, because the crime of sodomy was once an ecclesiastical crime and the common law (civil) courts had no jurisdiction over such crimes, the enforcement of such a law today would constitute an "establishment" of a religion. Judge Whelan countered that history by noting that merely because the jurisdiction of the ecclesiastical court covered sodomy, this did not lead to the conclusion that jurisdiction today would violate the establishment clause. Employing the rationale of *McGowan* (upholding Sunday laws as having a secular purpose), Judge Whelan argued that what was once religious in origin did not necessarily violate the First Amendment. He upheld the sodomy law on the basis that it violated neither the state's guarantee of religious liberty (since acts of "licentiousness" or those "inconsistent with the peace or safety of this State" under the California constitution were specifically not protected) nor the federal constitution. Judge Whelan's discussion is of interest because he attempted to counter counsel's "Whig" assumption that, in a legal culture which values ever-expanding rights and liberties, all that would be necessary to strike down the sodomy law would be the simple recognition that laws, once enforced by religious bodies, would be abhorrent to American liberties. Instead, Judge Whelan countered that assumption with a very sophisticated legal interpretation of the jurisdiction of the church courts. He did not justify the existence of such laws by tradition, long historical practice, or founders' intent, but rather upheld such laws as a public safety measure.

VII. From Separationist History to Accommodationist Result: Four Cases

in the Mismatch of History.

A. Maryland: Aid to Private Colleges.

One state case which did not rely upon Madison's separationist ideas, but rather on the general "history of the times," to establish a separationist intent can be seen in *Horace Mann League v. Board of Public Works* (1966).[132] A Maryland court of appeals invoked both the "history of the times" and state constitutional history in a case involving state grants for the construction of buildings at denominational private colleges. The court held a state grant to a college, which was not under the exclusive control of its sponsoring church, had no sectarian requirements for its faculty or students, and maintained an atmosphere of academic freedom. However, the court struck down grants to colleges where evidence of religious restraints existed.

Chief Judge Prescott's opinion, like that of Chief Justice Vanderbilt for the New Jersey court, surveyed the European history of the tensions between church and Crown, which contributed to inquisitions, civil wars, and persecutions for religious belief. Chief Judge Prescott relied upon popular sources for this history, including the WORLD BOOK ENCYCLOPEDIA, WILLIAM PRESCOTT, AMERICAN HISTORIES, and EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE. While invoking a broad sweep of the history of intolerance in the Western world, Chief Judge Prescott quoted liberally from Justice Rutledge's historical account of the founders in his dissent in *Everson*, and from Justice Frankfurter's and Douglas' concurrence in *McCollum*. In a footnote, Prescott gave an account of the drafting of the First Amendment.

Chief Judge Prescott turned to his own state's constitutional history. The state of

Maryland had a long history of granting aid to private colleges, which state case law had upheld as serving a public purpose. At the same time, article thirty-six of the state constitution prohibited the maintenance of "any place of worship or any minister" and article fifteen authorized taxation for public purposes only.[133] The language in the Maryland constitution, in fact, predated the language of Jefferson's *Bill for Religious Freedom (1786)*, and reflected a long history of granting complete toleration and freedom from compelled taxation for religious purposes.

Chief Judge Prescott's broad history turned out to be "window dressing," because he analogized these grants to previous grants to orphanages, hospitals and private colleges which did not violate the state constitutional prohibition, under the precedent that such services serve public purposes. .He also employed the purpose-and-effect test of *Schempp*, finding that grants to one independent college served the public purpose of education. However, he found that three of the grants to denominational colleges were "sectarian" in nature because they imposed religious requirements on faculty and students and maintained a religious curriculum. He construed *Everson* to permit "public welfare legislation" but not direct grants of money to religious institutions where the "operative effect" of aid would fund and promote religious activities and religious education. In short, it was the Chief Judge's application of the *Schempp* test and his construction of *Everson*, not his invocation of history, from which he obtained the principle that government should not publicly fund religious education.

Like the case of *Americans United for Separation of Church and State v. Bubb* (1974), which reached similar results, Chief Judge Prescott examined the facts of case in

detail looking for free exercise violations.[134] He treated the lack of academic freedom and institutional autonomy from the sponsoring church as offenses to the establishment clause. Both the court in *Bubb* and Chief Judge Prescott turned the issue into not merely whether the state was aiding a religious institution, but also whether the state was financing free exercise restrictions (i.e., coercion) of a voluntary association. In the final analysis, the court while announcing that the state could not foster the religious missions of the colleges, highlighted the tension between promoting higher education as a public good, and the state prohibition of financing religious instruction, by resorting to the free exercise principle. In short, the ultimate check on the state, in aid to private colleges, was not the establishment clause, but rather the guarantee of free exercise.

Horace Mann is of interest in the uses of history, because it illustrates an example of invoking strict separationist history, from a variety of sources, both European and founders' thoughts, only to be replaced by what at first seems to be legal formalism (i.e., the *Schempp* test), then free-exercise principles applied to the facts of the case. Here, broad history, including state constitutional history, perhaps invoked to teach the lessons of the evils' of church-state unions, was mere *dicta* to the legal result. Separationist histories in opinions reaching accommodationist results were not uncommon and serve to illustrate the tension between historical truths and legal reasoning.

B. North Dakota: Sunday Laws.

Another state opinion which invoked separationist history but reached an accommodationist result was *State v. Gable* (1966).[135] The North Dakota Supreme Court upheld a challenge to its Sunday closing law as violating the guarantee of equal protection

and the non establishment of religion. Finding that present day Sunday laws met the rational-basis test of the equal protection clause as an economic regulation, and a secular purpose of providing a common day of rest, the court repeated in detail Chief Justice Warren's history of the First Amendment in the *McGowan* opinion. Strict separationist intent of the founders was invoked, in a holding sanctioning state practices, which appear to aid Christianity. Again, the use of history was "window dressing" or *dicta* to the application of legal formalism.

C. New Jersey: Transportation Aid to Catholic Schools.

Another opinion which invoked separationist history, but reached an accommodationist result with a separationist twist, is *Fox v. Board of Education* (1967).[136] A New Jersey Superior Court held that under *Everson*, the authorization of bus aid to Catholic schools did not violate the First Amendment, but that the particulars of the contract violated state law which limited transportation to routes serving the public schools. Judge Laner acknowledged the various state court criticisms of *Everson*'s "child benefit" theory, a doctrine that many state courts had rejected. State courts had joined Justice Rutledge's assessment that bus aid directly benefited religion. Despite his own personal agreement with Justice Rutledge, Judge Laner felt obligated to follow *Everson*.

Judge Laner also found that both the wording of the state constitution, and the state convention that wrote it, explicitly authorized bus transportation aid to parochial schools.[137] However, the administrative history of the statutes implementing bus aid limited "non public school transportation" to established routes. Because the contracts in this case did not meet those requirements, the contracts were declared invalid.

Fox illustrates the clear use of legal formalism to defeat the application of precedent. Unlike Federal District Judge Hand in *Jaffree*, Judge Lander acknowledged his duty to follow the U.S. Supreme Court on matters of federal constitutional law. While legal formalism bound Judge Laner to *Everson*, legal formalism also permitted Judge Laner to strike down the bus aid as violating legislative intent. In short, it was not separationist founders' intent, but rather the legislative intent and administrative history of the state statutes, that prevailed. Here, the use of history exposed the judge's personal bias towards separationism.

Another bus aid case which invoked separationist history only to hold that *Everson* was controlling, was *Americans United v. Independent School District* (1970), where the Minnesota Supreme Court upheld the constitutionality of a state statute authorizing the use of public funds to transport children to sectarian schools.[138] Observing that other state courts had struck down similar schemes, on the basis of similar state constitutionals provisions, such as in New York, Washington, Alaska and Hawaii, Justice Otis relied on *Everson* in arguing that aid served a public health and safety purposes.

Although *Everson* settled the issue, Justice Otis went on to quote in length from *Everson*'s and *Engel v. Vitale*'s historical narratives. This invocation of separationist history is unclear, since it neither justifies aid nor is it used to strike down aid. Perhaps it was invoked as background material for the wording of the "no aid" to religious schools clauses of the Minnesota constitution. However, Otis did not follow through to examine his own state framers' intent. While the court sustained the aid, it had not abandoned the

high wall of separation of either the federal or state constitutions.

D. Text Book Aid to Private Schools: The Legacy of Justice Douglas.

Another example of a case where references to James Madison were found in an opinion upholding aid to private schools is *Board of Education v. Allen* (1968).[139] This marked the second time that the U.S. Supreme Court considered the constitutionality of textbooks given, without cost, to private schools. The U.S. Supreme Court upheld the aid on the grounds that the aid benefited the children, not the schools, an earlier rationale the Court had used in a pervious textbook case.[140] The majority opinion invoked no original intent; separationist history can be found in Justice Douglas' dissent.

Justice Douglas' reference to the founders' intent came in the concluding paragraph, quoting James Madison's "three pence" warning of the *Memorial and Remonstrance (1785).* The quote was useful shorthand for his own strict "no aid" to religion position, which expressed his view that government should not give one cent in aid to religion.

Justice Douglas is of interest in the uses of separationist history on the U.S. Supreme Court because he is one of the few Justices to exclusively rely on the founders' writings (e.g., Madison and Jefferson), and to firmly believe that their views should be applied as law. He differs from Justice Brennan, who was unwilling to be bound by original intent to reach the final outcomes, in that Brennan treated the Constitution as a "living" document, while Douglas concluded that the "Framers did all the balancing for us."[141]

For example, Justice Douglas' dissent in *Walz v. Tax commissioner of New York*

(1970), where the majority upheld state property tax exemptions for property used for religious worship because it did not violate the establishment clause, reprinted both Patrick Henry's Assessment Bill and James Madison's *Memorial and Remonstrance (1785).*[142] There, Justice Douglas invoked Madison (quoting from Justice Rutledge's dissent in *Everson*) to illustrate that tax exemptions, like Patrick Henry's proposal, were direct aids to religion. He maintained that government could not finance that which it, itself, could not aid directly, namely, churches. Subsidizing religion would violate free exercise because it would violate equality (e.g., non-believers do not enjoy the benefit); and that granting an exemption to religion not granted to non-believers would violate the nonestablishment principle by showing preference. Indeed, as Justice Douglas pointed out in Madison's *Memoranda*, outlining Madison's thoughts on the establishment clause, that Madison objected to tax exemptions to religion.

It is important to note Justice Douglas' transformation from an accommodationist "We are a religious people" in *Zorach v. Clauson* (1953), discussed in **Chapter 3**, to a strict "no aid" to religion in the latter cases is a paradox. His former law clerk, L.A. Powe Jr. has noted that the underlying and consistent question that Justice Douglas, despite his ever-changing position concerning First Amendment freedoms, seemed to ask: whether facially neutral laws could be used as a tool of religious persecution.[143]

VIII. The Use of Expert Historians: Religious Symbols.

Outside of federal Judge Hand's reliance on the testimony of "expert" historians in *Jaffree* (discussed in **Chapter 3** above) before the courts, the only other observed use of testimony of historians was in *Friedman v. Board of Commissioners of Bernalillo*

County (1985), where a federal court of appeals enjoined the use of a county seal which depicted a Latin cross and the Spanish motto *Con Esta Vencemos* as an establishment of religion.[144] The district court had relied on the testimony of "experts" that the cross merely depicted the history and culture of New Mexico. However, after applying the *Lemon* test, the court of appeals argued that to the average viewer, the display of the cross gave the distinct appearance that the county was "advertising" the Catholic faith. The court was faced with two conflicting traditions. One, as the district court and the dissent observed, religion was a cultural tradition in the southwest. However, this tradition clashed with the fact that the symbols of religion also represented coercion and oppression for the Native Americans and Jews. To resolve this conflict, the court applied the *Lemon* test and found that the depiction of a cross violated the "effect" prong, because the display of the cross gave a strong impression that Christianity was being endorsed.

The very same approach utilized by the *Bernalillo* court was later used to *uphold* the depiction of a church on a city seal. In *Foremaster v. City of St.George* (1987), the court said the depiction of a Mormon temple set among several objects, unlike the cross, was likely to be viewed as an architectural monument, without having the primary effect of endorsing the Mormon religion.[145]

IX. From History to Formalism, and Back Again.

A. Using History to Avoid the Formalism of Lemon.

One notable case is that of *Anderson v. Salt Lake City* (1972).[146] There, a federal court enjoined the display of a granite monument placed on courthouse grounds because the Ten Commandments were depicted on it. Chief Judge Ritter's opinion quoted

verbatim from Justice Rutledge's dissent in *Everson*, and in an appendix, provided reprints of Patrick Henry's proposed bill and Madison's *Memorial and Remonstrance (1785)*. His opinion also featured quotations from both secondary and primary historical sources including: Henry Commager; Thomas Jefferson; James Madison; and Justices Black and Jackson. Finding the monument analogous to Patrick Henry's proposed aid to religion, the district court enjoined the display.

Anderson was reversed on appeal. Unlike the district court, the appellate court applied the *Lemon* test.[147] Anticipating the U.S. Supreme Court's reasoning in *Lynch v. Donnelly* (1984), the court of appeals held that, taken in its context, the symbol of the Ten Commandments, was only one of several symbols on display, that the symbol was not religious in purpose. The application of legal formalism -- the *Lemon* test -- required in an intense review of the facts of the case, which the lower court avoided. The district court's opinion is of interest because it illustrates clearly that, when judges rely upon history or original intent alone, without an examination of the facts of the case or an application of current doctrine, a decision based on "history" will be overturned on appeal.

B. When Avoiding Lemon Results in Even Stricter Separationism.

There are rare occasions where the *Lemon* test was not applied, yet a violation of the establishment clause was found. In *Moore v. Gaston County Board of Education* (1973), a school board's decision to dismiss a student teacher because he did not believe in God, was held to violate the establishment clause.[148] The student teacher had discussed Darwinism in the classroom, parents complained, and the school board called

and asked the teacher if he believed in God.

The federal court's opinion invoked broad and sweeping separationist history, similar to that invoked in *Muzzy v. Wilkins* (1804) and in *State v. West* (1970).[149] The court used history to make the point that freedom *from* religion of state origin was important as freedom *of* religion. The court found a violation of the establishment clause by a careful examination of the facts of the case, which revealed that the school board's inquiring, not about Moore's teaching habits, but his believe in a God, violated the principles of *Epperson*.[150] Without applying the three-prong *Lemon* test, the court reached a stricter separationism.

To be sure, a number of state courts are dissatisfied with the *Lemon* test, preferring to employ a stricter state law standard. A good example of this can be seen in *Gaffney v. State Department of Education* (1974), where the Nebraska Supreme Court struck down textbook loans under the state constitution.[151] There, state constitutional literalism masqueraded as state framers' intent. In rejecting the *Lemon* test, the Nebraska court joined a number of state courts, which have struck down aid to sectarian schools on the basis of independent state grounds. Thus, Virginia, Oregon, and Idaho all struck down textbook aid on the basis of state "no aid" clauses. In short, state courts will utilize framers' intent to avoid unwelcome U.S. Supreme Court doctrine.

X. Back to James Madison.

A. Clergy in Public Office: From Establishment to Free Exercise.

One fact that is not in dispute is that many states, following the English example, prohibited the clergy from seeking public office. Both the meaning and the intent of such

prohibitions are clear. However, in modern times, this undeniable separationism clashed with free exercise principles. The first case to address the conflict was *Kirkly v. State* (1974), where a candidate for office challenged Maryland's constitutional provision declaring the clergy ineligible for state office.[152] A federal court in Maryland said that, although this prohibition had been placed to insure separation of church and state, such prohibitions today violated the guarantee of the free exercise of religion. Observing that members of the clergy sat in the U.S. Congress, the court argued that, if such a prohibition is needful, the ban would presumably extend to federal offices. The court concluded that the goal of "separation" was insufficient to deny free exercise claims.

Not long after, the Tennessee Supreme Court invoked the long historical practice of excluding the clergy from public office in upholding such a clause in *Paty v. McDaniel* (1977).[153] The court found that the ban was justified in advancing separation of church and state, and did not impose a burden on free exercise. The court applied the *Lemon* test and found that the ban avoided religious intrusions into government and religious entanglements, avoiding the religious strife that plagues Lebanon and Northern Ireland.

The use of state constitutional history in *Paty v. McDaniel* is of interest because it is an example of separationist history supporting a separationist conclusion. However, the Tennessee Court was reversed on appeal to the U.S. Supreme Court in *McDaniel v. Paty* (1978).[154] The U.S. Supreme Court found that the ban violated the right to free exercise by conditioning one's right to free exercise on the surrender of one's right to seek office. The case was distinguished from *Torcaso v. Watkins* (1961), where the belief in a god as requirement for office was compelled by law, whereas in Tennessee one's

profession or belief disqualified one from office.[155]

McDaniel v. Paty illustrates the clash between history and principle. The Court noted the long history of this disqualification, where seven of the original states ban the clergy from office, and both John Locke and Thomas Jefferson supported such bans. However, Chief Justice Burger chose to ignore that history and accepted James Madison's views on the subject. Madison had maintained that the state was "punishing" a religious profession by taking away a civil right. The use of Madison merely supported the belief that the Supreme Court's doctrines were correct. In short, "history" had an answer, but it clashed with the guarantee of free exercise principles developed by the Court.

B. Religious Symbols in Public Places.

James Madison again appears in the concurrence in *Fox v. City of Los Angeles* (1978), where the California Supreme Court struck down the illumination of the city hall in the form of a cross at holiday seasons.[156] The majority opinion invoked no references to history, resting its conclusion solely on state constitutional grounds, that such a display constituted a preference toward one religion. However, Chief Justice Bird's lengthy concurrence invoked both state and federal history. She relied on the separationist state history found in *Gordon v. Board of Education* (1947).[157] She argued that the California constitutional restrictions did not mirror the federal and went further in prohibiting any aid to religion. She quoted James Madison's "three pence" warning -- that to give even a small amount of aid would authorize the quest for more aid.

While the Chief Justice relied upon *Lemon* to resolve the First Amendment issue, it is of interest to note that she invoked Madison, not to support a conclusion about the

federal constitution, but rather, to support a literal interpretation of the state's "no appropriation" of money clause. As part of a concurrence, though, this use of Madison did not lead to the majority final result.

1. Nativity Scenes Revisited: The Contribution of Justice Stevens to History.

Separationist history can be seen in the court of appeals opinion in *A.C.L.U. v. City of Birmingham* (1986), where a majority enjoined the display of a nativity scene on the lawn of a city hall.[158] The facts were found to be distinguishable from *Lynch v. Donnelly* (upholding a nativity scene) -- whereas in *Lynch* the display was one of many Christmas images and on private property, here, the display was alone and on public property. The court of appeals concluded that the primary effect of such a display was the endorsement of Christianity.

The majority invoked a brief reference to separationist founders' intent to support the argument that, at the very least, separation of church and state meant both "no endorsement" of Christianity and freedom of choice. Founders' intent was also used to challenge the dissent's claim that past governmental aids to religion demonstrated that the American tradition was accommodationist, not separationist. Nevertheless, the court's legal conclusion rested on its application of the Lemon test.

Another dispute over founders' intent is seen in *A.C.L.U. v. Allegheny* (1989).[159] There, the U.S. Supreme Court, applying the *Lemon* test, held that, while the display of a nativity scene in courthouse violated the First Amendment, the display of a menorah on city property did not. For the majority, Justice Blackmun argued that the nativity had the effect of endorsing a Christian message.

Justice Blackmun's opinion is of interest because, while he invoked founders' intent to support his own strict position of "no endorsement" of religion in challenging Justice Kennedy's "list" argument, Justice Blackmun rejected the use of historical practice as legal justification. To be sure, Justice Blackmun invoked the founders to argue that the general purpose of the First Amendment was to promote and protect religious diversity. He then went on to challenge Justice Kennedy's characterization of past governmental aids to religion. Justice Blackmun argued that the display of the nativity scene was not analogous to ceremonial deism found in the references to a god, or in the Motto or in the Pledge of Allegiance because the display of a creche showed governmental endorsement of one religion. Further, Justice Blackmun pointed out that a "heritage of official discrimination" (i.e., the "list") against non-Christians could not override the "bedrock establishment clause principle that, regardless of history, government may not demonstrate a preference for a particular faith."[160]

Clearly, Justice Blackmun's use of founders' intent is not inconsistent with his later disapproval of Justice Kennedy's characterization of the "list" of aids as original intent. In this opinion, Justice Blackmun was willing to invoke the founders to outline broad principles. What he rejected was the specific and particularized use of scattered historical practices to justify deviations from establishment clause values, e.g., the promotion of religious diversity and freedom from a state endorsed religion. His use of history was a digression; the legal result was dictated by the application of the *Lemon* test.

The significant use of history is seen in Justice Stevens' concurrence. Justice

Steven is the very first commentary, including historians,' to use Eighteenth Century dictionaries to discern the meaning of the First Amendment. His concurrence was a fine exercise in intellectual history, unmatched by the acknowledged scholars of the First Amendment. Stevens employed the Congressional debates, Samuel Johnson's *Dictionary (1785)*, and Sheridan's *Dictionary (1796)*. By doing so, he made two discoveries: 1) In the drafting of the First Amendment, "any national religion" (in Madison's original draft) was changed to read "religion," which was understood to mean: "virtue, as founded upon reverence of God, and expectation of future rewards and punishments," and only secondarily a "system of divine faith, and worship, as opposite to others."[161] Justice Steven concluded that the First Amendment was meant to proscribe a number of religions as well as a single national church. The term "religion" had a broad, not narrow, meaning in the Eighteenth Century. 2) The early drafts of the First Amendment had barred laws "establishing" or "touching" religion. The final version prohibits any law "respecting an establishment." This change in wording is significant. In Eighteenth Century dictionaries, the term "respecting" meant "concerning for" or "reference to." The term also meant with "respect to," "goodwill to," and "regards to." So the First Amendment barred all laws that even paid homage to religion. Again, the eighteenth century understanding encompassed a broad, not narrow, definition of the term "respecting." In short, the words of the First Amendment had a much broader meaning, and thus broader proscription, than what the legal scholarship has led us to believe.

Justice Stevens singularly unique contribution to the intellectual history of the First Amendment came at the very same time that Justice Blackmun rejected a reliance on

history. Justice Steven's historical findings are significant as well as original. However, his conclusion that the First Amendment prohibits more than a state church is not novel. Both Justices Rutledge and Warren, relying on Congressional debates, had argued that the First Amendment prohibits more than a state church, and that the key term in the First Amendment was "respecting." Justice Stevens engaged in intellectual history, perhaps, to challenge Justice Kennedy's characterization of the "list" as original intent. Justice Stevens illustrated that history can give a contrary version of Justice Kennedy's assertion that the First Amendment only was meant to prohibit a state church, but not prohibit aid or homage to religion in general. He was able to show that the plain meaning of the constitutional text supports a broad separationist position, one that holds that the First Amendment prohibits more than a single state church.[162]

In sum, *Allegheny* illustrates the tension between both the increasing utilization of the "list" as original intent (e.g., that the founders wished to aid religion), and the fierce disapproval of the application of original intent to concrete cases. Paradoxically, at the very moment of a modern awareness of "history" comes a resurgence of strict formalism. As Senior Circuit Judge Bownes of the First Circuit Court of Appeals remarked: "It is useless to rehash this continuing debate. . . . we can never know the original intention of the authors of the Constitution."[163]

XI. The Legacy of Justice Souter.

The most recent debates invoking both Thomas Jefferson and James Madison's separationist ideas can be seen in the opinions of Justice Souter. In *Lee v. Weisman* (1992), the U.S. Supreme Court struck down the practice of clergy-led prayers in public

high school graduation ceremonies.[164] Justice Souter wrote a lengthy concurrence, covering in detail the Congressional debates in the drafting of the First Amendment and the writings of Jefferson and Madison. Souter reaches the very same conclusion as that of Justice Stevens -- that the founders wished to prohibit even non-preferential aid to all religions. Instead of relying on Eighteenth Century dictionaries, Souter utilized the dialogue from the First Congress to prove his point.

Justice Souter's most interesting discussion of James Madison's separationist ideas can be found in his dissent in *Rosenberger v. University of Virginia* (1995), which was decided on First Amendment free speech grounds, not on the establishment clause issue.[165] In that case, the majority struck down university policy which refused to fund a student newspaper because it was Christian. The Court held that such a policy violated the *free speech guarantee*. However, Madison's views, involving the meaning of separation, is debated between Justices Thomas and Souter.

To be sure, the establishment clause issue was challenged in this case -- that funding a Christian newspaper was giving monetary support to religion in violation of the establishment clause. Justice Thomas' concurrence approached that challenge by invoking a "list" argument, to make the point that past governmental aids to religion represent a government policy of "neutrality." He went so far as to argue that "history provides an answer for the constitutional question . . . but it is not the one given by the dissent."[166]

Justice Souter, on the other hand, refutes the "list" as evidence of governmental neutrality, remarking that it can "[s]carcely serve as an authoritative guide to the

meaning of the religion clauses."[167] He challenges Justice Thomas' characterization of Madison as "not a separationist."

The *Rosenberger* debate is significant; it illustrates a common observed pattern in establishment clause histories: the persistence of Supreme Court conflicts over the meaning of founders' intent, and conflicting interpretations of Madison's ideas. Once again, Madison is presented as both a strict separationist and as an accommodationist. Justice Souter refutes Justice Thomas' interpretation utilizing the very same arguments that Justice Rutledge used fifty years earlier – a separationist interpretation of the drafting of the First Amendment. Souter and Thomas' debate only illustrates that the introduction of Madison has not settled the issue of the historical meaning of the intentions of the founders.

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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 4

1

See, e.g., United States v. Ballard, 322 U.S. 78, 87 (1943).

2

See, e.g., Sir Thomas Harrison Allen v. Evans, 3 Brown's Parliamentary Reports 465 (1767). *See also* **Chapter 1** *supra* note 44 and accompanying texts.

3

See, e.g. Watson v. Jones, 80 U.S. (13 Wall.) 679, 728 (1871).

4

See e.g., Lemon v. Kurtzman, 408 U.S. 602 (1971) (striking down state aid to church schools). *See also* City of Los Angeles v. Hollinger, 34 Cal. Rptr. 387 (1963) (discussed below, striking down city contract to film a religious parade), and Fox v. City of Los Angeles, 587 P. 2d 663, 150 Cal. Rptr. 86 (1978) (striking down illumination of a cross on city hall). For an examination of the argument that the First Amendment was meant to prevent religious conflict, *see, e g.*, Patricia Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L. J. 615 (1981), and Thomas L indsay, *James Madison on Religion and Politics: Rhetoric and Reality* 85 AM POL. SCI. REV. 1321 (1991).

5

98 U.S. 164 (1878).

6

See, e.g. Address to Religious Bodies, 1789, in THE REPUBLIC OF REASON. THE PERSONAL PHILOSPOHIES OF THE FOUNDING FATHERS 135 (N. Cousins ed. 2d 1988) [hereafter, THE REPUBLIC OF REASON]. For an examination of the judicial uses of Jefferson's "wall" of separation metaphor *see, e.g.*, Joel F. Hansen, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645.

7

See, e.g., James Madsion, *Memorial and Remonstrance (1785)*, and *Memoranda (c. 1832)* in JAMES MADISON ON RELIGIOUS LIBERTY (R. Alley ed. 1987). *See also* Paul Weber, *James Madison and Religious Equality: The Perfect Separation*, 44 REV. OF POL. 163 (1982).

8

See, e.g., HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA (1976).

9
17 Serg. 155 (Pa. 1828).

10
Id. at 160.

11
See, e.g., Donahue v. Richards, 38 Me. 379 (Me. 1854) discussed in **Chapter 2** *supra*; Commonweatlh v. Herr, *infra* note 14; and Lawson v. Commonwealth, *infra* note 16.

12
Supra note 5.

13
See, e.g., People v. Board of Education, 245 Ill. 334, 92 N.E. 252 (Sup. Ct. Ill. 1910); Everson v. Board of Education, 330 U.S. 1 (1947); State v. West, 263 A. 2d 602, 9 Md. App. 270 (1970).

14
78 A. 68 (1910).

15
See, e.g., Hysong v. Gallitizin School District, 164 Pa. 629, 30 A. 542 (Pa. 1894).

16
291 Ky. 437, 164 S.W. 2d 972 (1942).

17
8 U.S. Stat. 154.

18
See, e.g., Connell v. Gray, 127 P. 417, 421 (Sup. Ct. Okla. 1912).

19
See, e.g., Wilkerson v. City of Rome, 152 Ga. 66, 110 S.E. 895 (Sup. Ct. Ga. 1922) discussed in **Chapter 3** *supra*.

20
Connell v. Gray, *supra* note 18.

21

See, e.g., Murrow Indians Orphan Home v. Childers, 197 Okla. 249, 171 P. 2d 600 (Sup. Ct. Okla. 1946) (Riley, J., dissenting).

22

Okla. CONST. art. 1 § 5:

> . . . No money shall be drawn from the treasury for the benefit of any religious or theological institution, nor shall any money be appropriated for the payment of any religious service, in either house of the legislative assembly.

23

Contra. For the interpretation that Roger Williams did not advocate separationism but rather wanted the state to aid religion, *see, e.g.*, Wilkerson v. City of Rome, *supra* note 19, and MARK DE WOLFE HOWE, GARDEN IN THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965). For the opposite interpretation, that Roger Williams was an advocate of separationism, *see, e.g.*, People v. Board of Education, *supra* note 13, the dissent in Wilkerson v. City of Rome, *supra* note 19, and Justice Riley's dissent in Murrow Indians Orphan Home v. Childers, *supra* note 21. For the most recent reference to Roger Williams, *see, e.g.*, the lower court opinion in Weisman v. Lee, 908 F. 2d 1090 [728 F. Supp. 68, *aff'd*, Lee v. Wiseman, 505 U.S. 577 (1972)].

24

See, e.g., Gurney v. Ferguerson, 190 Okla. 254, 122 P. 2d 1002 (Sup. Ct. Okla. 1941).

25

U.S. CONST. art. VI § 3.

26

See, e.g., George Washington, *Reply to Moses Seixas, Sexton of the Hebrew Congregation of Newport, August 17, 1790*, in THE REPUBLIC OF REASON *supra* note 6 at 61.

27

Contra. DAVID RICHARDS, TOLERATION AND THE CONSTITUTION (1986).

28

See, e.g., Thomas Jefferson, *Republic Notes on Religion and an Act Establishing Religious Freedom, 1796, in* THE REPUBLIC OF REASON *supra* note 6 at 123:

> . . . The legitimate powers of government extend to acts only as injurious to others. But it does me no injury for my neighbor to say there are twenty Gods, or no God. It neither picks my pocket nor breaks my leg.

For an examination of the argument that civil virtue is divorced from religion, *see, e.g.*, David Little, *Religion and Civic Virtue in America: Jefferson's Statute Reconsidered, in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM (1988). *See also* judicial opinions which made this argument in Board of Education v. Minor, 23 Ohio 211 (1872) discussed in **Chapter 2** *supra*; Moore v. Monroe, 20 N.W. 475 (Iowa, 1884); Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (Iowa, 1918) (discussed in **Chapter 1** *supra*), or State v. Board of Education, 190 S. 815 (Fla. 1939).

29

For state courts which made this argument, *see, e.g.*, Bloom v. Richards, 1 Ohio387 (1853) (discussed in **Chapter 1** *supra*); Ex parte Newman, 9 Ca. 502 (1858); Board of Education v. Minor, *supra* note 28; State v. District Board, 76 Wis. 177, 44 N.W. 963 (Wis. 1890) discussed in **Chapter 2** *supra*; Swann v. Swann, 21 F. 299 (Ark. 1884) discussed in **Chapter 1** *supra*.

30

See, e.g., James Madison, *Memorial and Remonstrance (1785), in* THE REPUBLIC OF REASON, *supra* note 6 at 310:

> . . . That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever.

31

Wash. CONST. art. 9 § 4.

32

Supra note 17.

33

See, e.g., Counsel's argument in Board of Education v. Minor, *supra* note 29; Hale v. Everett, 53 N.H. 9 (1868); Bloom v. Richards, 2 Ohio 387 (1853) discussed in **Chapter 1** *supra*; and Lawson v. Commonwealth, *supra* note 16.

34

See, e.g., Justice Rutledge's dissent in Everson v. Board of Education of the

Township of Ewing, *supra* note 13 [hereafter, Everson v. Board of Education]; and Justice Souter's concurrence in Lee v. Wiseman, 505 U.S. 577 (1992). Both opinions discussed *infra*.

35

See, e.g., THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (1878).

36

Everson v. Board of Education, *supra* note 13. The Court quoted:

> . . . The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority.

The quote came from a South Carolina state court opinion involving a church dispute over property *in* Harmon v. Dreher, 17 S. C. Eq. (2 Speers) 87 (S.C. 1843). Also quoted *in* Watson v. Jones, *supra* note 3 at 730.

37

See, e.g., State v. Farris, 45 Mo. 183 (Mo. 1869) (arguing that religious disputes do not provide standards to judge by).

38

8 Rob. 51, 18 La. Rpts. 28 (Sup. Ct. La. 1844).

39

For the U.S. Supreme Court's treatment of the right of advowson, *see, e.g.*, Gonzales v. Archbishop, 280 U.S. 1 (1929). For the fullest treatment, *see* BLACKSTONE, COMMENTARIES. Judge Thomas Cooley's edition of BLACKSTONE'S, COMMENTARIES (T. Cooley, ed. 1893) is of interest because at note 5 Cooley remarked:

> The whole subject of advowsons is foreign to the American Law. Congress is forbidden by the first amendment to the constitution of the United States to make any law respecting an establishment of religion, and the people of the states have been careful, by their state constitutions, to prohibit any such establishment under state laws. . .

40

Supra note 38 at 8 Rob. 74-75, 18 La. Rpts. 38.

41
Id. at 8 Rob. 75, 18 La. Rpts. 39.

42
Id.

43
Id. at 8 Rob. 76, 18 La. Rpts. 39.

44
Id.

45
Id. at 8 Rob. 83, 18 La. Rpts. 43.

46
Id.

47
See, e.g., Wardens of Point Coupee v. Martin, 4 Rob. 62, 16 La. Rpts. 34 (La. 1843). This court rejected the argument that a clause in the Treaty of Cession recognizing the rights of the Catholic Church in Louisiana was enforce. Indeed, the court maintained that the application of Spanish law ceased with the Act of Cession.

48
8 Rob 86, 18 La. Rpts. 44.

49
Id. at 8 Rob. 88, 18 La. Rpts. 45.

50
It is of interest to note that the court misquotes the wording of the First Amendment at 8 Rob. 86, 18 La. Rpts. 45.

51
See, e.g., Eberhard P. Deutsch maintained that the Treaty of Cession with France contained the first mention of the term "privileges and immunities of citizens of the United States. The clause read:

> art. III. . . . The inhabits of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible,

according to the principle of the Federal Constitution to the enjoyment of all rights, advantages, and immunities of citizens of the United States.

Quoted *in* Eberhard P. Deutsch, *Civil Law Influences on the Development of Civil Liberties*, 12 TUL. L. REV. 331, 347n (1938).

52

An establishment clause case which involves the issue of representative government is State v. Celmer, 143 N.J. Super. 371, 362 A. 2d 1330, *rev'd*, 157 N.J. Super. 242, 384 A. 2d 894, *rev'd*, 80 N.J. 405, 404 A. 2d 1, *cert. denied*, Ocean Grove Camp Meeting Association of United Methodist Church v. Celmer, 444 U.S. 951 (1979). [See the first opinion]. The fatal feature of church-state unions is that church governments are not always representative democracies. For the argument that accommodating religion is incompatable with democracy, *see, e.g.*, Steven Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U.PITT. L. REV. 75 (1990).

53

Hale v. Everett, *supra* note 33.

54

Church membership is not a vested right. *See, e.g.*, Baker v. Fales, 16 Mass. 487 (1821). The historian Leonard Levy views this case as the motivating force behind the disestablishment of Artice III in Massachusetts' politics. However, Baker v. Fales articulates a very separationist principle--that church membership is not a vested property right. *See, e.g.*, Leonard W. Levy, *Chief Justice Shaw and the Church Property Controversy in Massachusetts*, 30 B.U L. REV. 219 (1950).

55

Citing Robertson v. Bullions, 11 N.Y. 243, 251 (1854).

56

See, e.g., Bloom v. Richards, *supra* note 29, JOURNAL OF THE NEW YORK CONSTITUTIONAL CONVENTION 1821, discussed in **Chapter 1** *supra* notes 77-79 and accompanying texts.

57

6 Super (4 Sandf) 156 (Super. Ct. N.Y. 1850) [*rev'd*, 8 N.Y. (4 Sheld) 559].

58

Id. at 180.

59

Id. at 181. For the court to choose the "rightful religion" would violate the principle of equality (showing preference for one over others).

60

Hale v. Everett, *supra* note 33 at 182.

61

Supra note 57 at 182.

62

However, the common law courts in England had the power to determine the ecclesiastical jurisdiction. For an examination of the rivalry between the two court systems in England, *see, e.g.*, RONALD G. USHER, THE RISE AND FALL OF THE HIGH COMMISSION (1913).

63

Supra note 3.

64

Wardens of Point Coupee v. Martin, *supra* note 47.

65

Id. at 68.

66

Harmon v. Dreher, *supra* note 36.

67

This issue troubled James Madison very deeply. Indeed, his correspondence with the Rev. Smith illustrates their fear of the state recognizing religious bodies as corporations. The Rev. Smith called it a recreation of "star-chamber." They feared religious groups would seek the arm of the state to enforce the internal rules of the religion. *See, e.g.*, THE PAPERS OF JAMES MADISON vol. 8, 80 (R. Rutland ed. 1984). In fact, the states of Missouri and West Virginia provided for this very prohibition on the state governments in their state constitutions: *see, e.g.*, W. VA. CONST. art. IX § 2 (1861) *in* 2 THE FEDERAL AND STATE CONSTITUTIONS at 1990; W. VA. CONST. art. VI § 47 (1872) at 2003. *See also* Mo. CONST. art XIII § 5 at 1114. Mo. CONST. art. 1 § § 12, 13 at 1137, and Mo. CONST. art. II § 8 at 1166.

68

See, e.g., James Madison, *Madison's Veto Message to Congress, February 21 and 28 (1811)*, in JAMES MADISON ON RELIGIOUS LIBERTY *supra* note 7 at 79.

69

See, e.g., Lincoln Rochester Trust Co. v. Smith, 158 N.Y.S. 2d 367, 370 (1956): "A religious society is not a legal entity and although it cannot hold property directly, such society through its members may control property held by others for its use."

70

State v. Hebrew Congregation, 31 La. An. 205, 206, 38 La. Rpts. 138, 139 (Sup. Ct. La. 1879). For an examination of judicial refusals to interfere with internal church matters, *see, e.g.*, Note, *The Power of Courts Over the Internal Affairs of Religious Groups*, 43 CALIF. L. REV. 322 (1955); Don R. Sampen, *Civil Courts, Church Property, and Neutral Principles: A Dissenting View*, 1975 U. OF ILL. L. FORUM 543 (1975).

71

See, e.g., Federal territorial laws imposed property restrictions on church associations *e.g.*, 18 U.S. Stat. 1890 (1873), 48 U.S.C. 1480 (1890) [repealed 92 U.S.Stat. 2483 (1978)]. This was a mortain statute (which date back to Magna Carta, prohibiting or limiting how much property churches can own). It is of interest to note that "separation" of church and state in some countries means churches cannot own property, *e g.*, Mexico. Note also that accommodationist "lists" do not include Spanish and French privileges of the Catholic Church, or Congress' mortain statute, above.

72

Supra note 28.

73

220 N.Y.S. 799 (Buffalo City Ct. 1926).

74

Id. at 801.

75

Id. at 809.

76

Id. at 810. The court quotes Daniel Webster on religious liberty.

77

116 S.W. 2d 836 (Civ. App. Tex. 1938).

78

Id. at 838.

79

70 Cal. App. 2d 563. 161 P. 2d 385 (Dist. Ct. App. 3rd Cal. 1945).

80

Board of Education v. Barnette, 319 U.S. 624 (1943).

81

In adoptions, state courts traditionally have taken the view that religion may one facctor in custody decision making. *See, e.g.*, Bonjour v. Bonjour, 566 P. 2d 667, 592 P. 2d 1233 (Alaska 1979) (holding religious considerations did not violate Lemon, *supra* note 4).

82

See supra note 80.

83

185 Va. 335, 38 S.E. 2d 444 (Sup. Ct. App. Va. 1946). Of interest, *see, e.g.*, State v. Evans, 14 Kan. App. 2d 591, 796 P. 2d 178 (1990) (overturning as condition of probation the requirement of attending church); Marion County v. Coe, 572 N.E. 2d 1350 (Ct. App. 2d Ind. 1991) (City could not condition public services on church attendance). For the most recent controversies, *see also* L.M. v. State, 587 So. 2d 678 (Fla. App. 1 Dist. 1991) (lower court erred in requiring probationer to take a course in religious instruction), *but see* Stafford v. Harrison, 766 F. Supp. 1014 (D. Kan. 1991) (upholding requirement of participation in alcoholic treatment program, patterned after Alcoholics Anonymous, which contained references to a Deity); People v. Carter, 424 N.Y.S. 2d 15, 73 A. 2d 953 (N.Y. 1980) (upholding a sentence requiring religious work).

84

185 Va. 344-345, 38 S.E. 2d 448.

85

See supra note 13.

86

39 A. 2d 75 (1 dissent). The appellate court said that had the funds derived from the school fund, the aid would be unconstitutional under state law, in 44 A. 2d 333 (3 dissents). The distinction between the public school fund and the state's general fund is a crucial one in state law, *see, e.g.*, Matthews v. Quinton, 352 P. 2d 932 (Sup. Ct. Alaska 1962) (striking down bus aid as a violation of the state's organic act); Synder v. Town of Newtown, 147 Conn. 374, 161 A. 2d 77 (1960) (upholding bus aid in principle, but then striking down this scheme because monies came out of the common school fund).

Indeed, strict legal formalism has prevailed for the most part in bus aid litigation, before and *after* Everson: *See, e.g.*, If there is no statute, the aid will be struck down, *e.g.*,

School District v. Houghton, 387 Pa. 236, 128 A. 2d 58 (Sup. Ct. Pa. 1956) or Squires v. Inhabitants of Augusta, 155 Me 151, 153 A. 2d 80 (1959).

Those states striking down bus aid under state law: *See, e.g.*, Van Stratin v. Milquet, 180 Wis. 109, 192 N.W. 392 (Sup. Ct. Wis. 1923); Traub v. Brown, 6 W.W. Har. 181, 36 De. 181, 172 A. 835 (Super. Ct. Del. 1934); Judd v. Board of Education, 278 N.Y. 200, 15 N.E. 2d 576 (N.Y. 1938); Gurney v. Ferguerson, 190 Okla. 254, 122 P. 2d 1002 (Sup. Ct. Okla. 1941); Sherrand v. Jefferson County Board of Education, 294 Ky. 469, 171 S.W. 2d 963 (Ky. 1942); Mitchel v. Consolidated School District, 17 Wash. 2d 61, 135 P. 2d 79 (Sup. Ct. Wash.1943); Visser v. Nookock Valley School District, 33 Wash. 2d 699, 207 P. 2d 198 (Sup. Ct. Wash. 1949); McVey v. Hawkins, 364 Mo. 44, 258 S.W. 2d 927 (Sup. Ct. Mo. 1953); Synder v. Town of Newtown, 147 Conn. 374, 161 A. 2d 77 (1960); State v. Nusbaum, 17 Wis. 2d 148, 115 N.W. 2d 761 (Sup. Ct. Wis. 1962); Matthews v. Quinton, 362 P. 2d 932 (Sup. Ct. Alaska 1961); Board of Education v. Antone 384 P. 2d 11 (Sup. Ct. Okla. 1963); Opinion of the Justices, 57 Del. 196, 216 A. 2d 668 (Sup. Ct. Del. 1966); Spears v. Honda, 51 Hawaii 1, 449 P. 2d 130 (Sup. Ct. Hawaii 1968); Epeldi v. Engelking, 94 Idaho 390, 498 P. 2d 860 (Sup. Ct. Idaho 1971).

Those states which upheld bus aid: *see, e.g.*, Board of Education of Baltimore County v. Wheat, 174 Md. 314, 199 A. 628 (Ct. App. Md. 1938); Nichols v. Henry, 301 Ky. 434, 191 S.W. 2d 930 (Ct. App. Ky. 1945); Bowker v. Baker, 73 Cal. App. 2d 653, 167 P. 2d 256 (Dist. Ct. App. Cal. 1946); Everson v. Board of Education, 44 A. 2d 333 *aff'd* 330 U.S. 1 (1941); Quinn v. School Commissioner of Plymouth, 332 Mass. 410, 125 N.E. 2d 410 (Mass. 1955); Rhodes v. School District, 424 Pa. 202, 226 A. 2d 53 (Pa. 1967) [*cert. denied*, 389 U.S. 846]; Alexander v. Barlett , 14 Mich. App. 177, 165 N.W. 2d 445 (Ct. App. Mich. 1968); Honohan v. Halt, 17 Ohio Misc. 57, 244 N.E. 537 (Ct. Com. Pleas Ohio 1968); Board of Education v. Bakalis, 299 N.E. 2d 737, 54 Ill. 2d 448 (Sup. Ct. Ill. 1973).

87

The Court's earlier cases involved the expenditure of private funds, *see, e.g.*, Bradfield v. Roberts, 175 U.S. 291 (1899); Quick Bear v. Leupp, 210 U.S. 50 (1908).

88

See, e.g., John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964).

89

The Court also cited Watson v. Jones, *supra* note 3 and Davis v. Beason, 133 U.S. 333 (1890).

90

330 U.S. 1, 15-6:

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

Justice Black's celebrate definition is similar to Judge Thomas Cooley's found in footnote 25 *in* BLACKSTONE, COMMENTARIES 25n (T. Cooley, ed. 1893).

91

For an examination of the judicial uses of Jefferson's "wall of separation" metaphor, *see, e.g.*, Joel F. Hansen, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor, supra* note 6 at n. 25-28 (listing both state and federal court references). Merely citing Jefferson's "wall" metaphor does not guarantee a separationist result.

92

For other examinations of the drafting of the First Amendment in the First Congress, *see, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961), Marsh v. Chambers, 463 U.S. 783 (1983), Wallace v. Jaffree, 472 U.S. 38 (1985) (Stevens, J., concurring; Rehnquist, J., dissenting), Weisman v. Lee, 505 U.S. 577 (1990) (Souter, J., concurring).

93

Madison's *Memoranda* (c. 1832) has been given scant attention by the historians. For an argument that the Court has not followed Madison's warnings, *see, e.g.*, Leo Pfeffer, *Madison's "Detached Memoranda": Then and Now, in* THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM 283 (M. Peterson, R. Vaugham, eds. 1988). Perhaps more attention is put on Madison's *Memorial and Remonstrance* because it *precedes* the drafting of the First Amendment.

94

See, e.g., James Madison, *Memorial and Remonstrance (1785), in* THE REPUBLIC OF REASON *supra* note 6 at 310, quoted by Justice Rutledge at 330 U.S. 57.

95

See, e.g., Robert H. Birkby, *Wiley Rutledge and Religious Establishment*, 38 N.Y.S. B. J. 29, 35 (1966). Birkby argued that Justice Rutledge provided new historical evidence that the First Amendment meant a broad prohibition against aiding religion.

96

For criticisms of Justice Black's separationist history, *see, e.g.*,: Gerard V. Bradley, *Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause*, 18 CONN. L. REV. 827 (1986); Brownfield, *Constitutional Intent Concerning Matters of Church and State*, 5 WM & MARY L. REV. 174 (1964); Robert Cord, *Church-State Separation: Restoring the No Preference Doctrine of the First Amendment*, 9 HAR. J. L. & PUB. POL'Y 129 (1986); Edward Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); Joseph F. Costanzo, *Wholesome Neutrality: Law and Education*, 43 N.D.L. REV. 605 (1967); Vincent Crokenberg, *An Argument for the Constitutionality of Direct Aid to Religious Schools*, 13 J. L. & EDUC. 1 (1984); Patricia Curry, *James Madison and the Burger Court: Converging Views of Church-State Separation*, 56 IND. L. J. 615 (1981); Donald L. Drakeman, *Religion and the Republic: James Madison and the First Amendment*, 25 J. OF CHURCH & STATE 427 (1983); Daniel L. Dreisbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Content*, 35 AMER. J. LEGAL. HIST. 172 (1991); Henry S. Drinker, *Some Observations on the Four Freedoms of the First Amendment*, 37 B.U.L. REV. 1 (1957); John E. Dunsford, *Prayer in the Wall: Some Heretical Reflections on the Establishment Syndrome*, 1984 UTAH L. REV. 1 (1984); John R. Graham, *A Restatement of the Intended Meaning of the Establishment Clause in Relation to Education and Religion*, 1981 B.Y.U. L. REV. 333; Clifton Kruse, *Historical Meaning and Judicial Construction of the Establishment of Religion Clauses of the First Amendment*, 2 WASHBURN L. J. 65 (1962); Jerome D. Hannon, *Not One Cent for Religion*, 7 JURIST 45 (1947); Joel F. Hansen, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U. L. REV. 645 (1978); Henry T. Miller, *Constitutional Fiction: An Analysis of the Supreme Court's Interpretation of the Religion Clauses*, 47 LA. L. REV. 169 (1986); Thomas Neuberger, *Separation of Church and State: Historical Roots and Modern Interpretation*, 4 DEL. LAW. 36 (1986); Martin Nussbaum, *Mueller v. Allen: Tuition Tax Relief and the Original Intent*, 7 HARV. J. L. & PUB. POL'Y 551 (1984); Michael A. Paulson, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME LAW 311 (1986); Rodney Smith, *Getting Off the Wrong Foot and Back On Again: A Re Examination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the*

Reynolds and Everson Decisions, 20 WAKE FOREST L. REV. 569 (1984).

Several books have been critical of Everson's history: *see, e.g.*, WILLIAM O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION (1949); PHILIP KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT (1962); MARK DE WOLFE HOWE, GARDEN IN THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY (1965); ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL AND FACT AND CURRENT FICTION (1982).

97

333 U.S. 203, 211 (1948).

98

554 F.Supp. 1104 (1983) [*rev'd*, Jaffree v. Wallace, 705 F. 2d 1526, *aff'd*, Wallace v. Jaffree, 472 U.S. 38 (1985)] discussed in **Chapter 3** *supra*. *See, also*, Schempp v. Abington School District, *infra* note 114 and accompanying texts.

99

See infra note 114 at 257-58 (Brennan, J., concurring). Justice Brennan's footnote 5 cited Judge Thomas Cooley on the scope of the Fourteenth Amendment. Justice Clark had used the very same information on the scope of the Fourteenth, *see, e.g.*, William Clark, *Religion and the Law*, 15 S.C.L. REV. 855, 863-53 (1963). While this historical intent evidence supports Justice Brennan's conclusions, he relied upon logic rather than history to refute the critics. *See, e.g.*, William Brennan, Jr., *My Encounters with the Constitution*, 26 JUDGE(S) J. 6, 8 (1987).

100

463 U.S. 783 (1983); 465 U.S. 688 (1984).

101

14 N.J. 31, 100 A. 2d 857 (1953) [*cert. denied*, Gideon's International v. Tudor 348 U.S. 816 (1954)].

102

See, e.g., Doremus v. Board of Education, 5 N.J. 435, 75 A. 2d 880 [*app. dismissed*, 342 U.S. 429].

103

For biographies of Justice Vanderbilt, *see, e.g.*, EUGENE C. GERHART, ARTHUR T. VANDERBILT: THE COMPLEAT COUNSELOR (1980); ARTHUR T. VANDERBILT II, CHANGING LAW, A BIOGRAPHY OF ARTHUR T. VANDERBILT (1976).

104

One of the earliest "separationist" arguments was made in defending Christianity from the charge that it was responsible for the decline of the Roman Empire, *e.g.*, civic virtue was divorced from religion, *see, e.g.*, SAINT AUGUSTINE, BISHOP OF HIPPO, CITY OF GOD AGAINST THE PAGANS (ca. 413-26).

105

The New York Colony had a law excluding Catholic Priests in 1770, *see, e.g.*, Robert Earl, *Legal Status of Roman Catholics in the Colony of New York*, 60 ALB. L. J. 217 (1899).

William Penn's Charter for the colony of Pennslyvania was the first to provide, in a separate clause, a ban on aid to the ministers or places of worship. *See, e.g.*, THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 2 vols (B. Poore, ed. 1924, reprinted 1972). This important fact is often overlooked by the scholars, for example, Anson P. Stokes multi-volume work on separation of church and state does not mention Penn's provision. *See ,e.g.*, ANSON P. STOKES, CHURCH AND STATE IN THE UNITED STATES (1950). This omission is due to the scholarly preoccupation with searching for early guarantees of *religious liberty*, thus missing restraints placed on the sovereign power which were often placed in sections other than the Bill of Rights of colonial or early state documents.

106

14 N. J. 45, 100 A. 2d 864-65:

> . . . But regardless of what our views on this fundamental question may be, our decision in this case must be based upon the undoubted doctrine of both the Federal Constitution and our New Jersey Constitution, that the state or any instrumentality thereof cannot under any circumstances show a preference for one religion over another. Such favoritism cannot be tolerated and must be disapproved as a clear violation of the Bill of Rights of our Constitutions.

See also Doe v. Small, 934 F. 2d 743, 756 (7th Cir. 1991) (enjoining display of sixteen paintings depicting the life of Christ in a city park):

> Although the debate over the original intent behind the Establishment Clause continues to rage, we decline to jump into the fray by conducting yet another exhaustive review of the Framer's intent. . . . There is no need to do so here, for a proper understanding of the original intent

prevents this Court from sustaining the explicit, preferential accommodation of religion by government that occurred in this case.

For the latest judicial remarks on the futility of history as a standard, *see, e.g.*, Judge Brownes remarks in Weisman v. Lee, *supra* note 23, at 908 F. 2d 1093.

107

56 N.M. 355, 244 P. 2d 520 (Sup. Ct. N.M. 1952).

108

Of interest, *see, e.g.*, Berger v. Rensselaer Central School Corp., 766 F. Supp. 696 (Ind. 1991) (upholding school policy allowing religious organization to distribute the Gideon Bible in the public classroom, because the teacher did not give them out). Case was later *rev'd* 982 F. 2d 1160 (1993).

109

14 N.J. 52, 100 A. 2d 868:

> We are here concerned with the vital question involving the very foundations of our civilization. Centuries ago our forefathers fought and died for the principles now contained in the Bill of Rights of the Federal and New Jersey Constitutions. It is our solemn duty to perserve these rights and to prohibit any encroachment upon them. To permit the distribution of the King James version of the Bible in the public schools of this State would be to cast aside all the progress made in the United States and throughout New Jersey in the field of religious toleration and freedom. We would be renewing the ancient struggles among the various religious faiths to the detriment of all. This we must decline to do.

110

For historical sources, Justice Vanderbilt cited the historians, ANSON P. STOKES (CHURCH AND STATE IN THE UNITED STATES), LEO PFEFFER (CHURCH, STATE AND FREEDOM), and WILLIAM SWEET (RELIGIOUS LIBERTY). It is of interest to note that the lawyer-historian Leo Pfeffer argued orally before the court for the appellants. Justice William Brennan was sitting as a New Jersey State Supreme Court Justice at this time. Justice Brennan went on to write separationist dissents in Marsh v. Chambers, *supra* note 100 and in Lynch v. Donnelly, 465 U.S. 688 (1984).

111

128 S. 2d 181 (Dist. Ct. App. Fla. 1960). Fla. CONST. art. I § 6, revised art. I §

3:

> . . . No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

112

There are two references to Jefferson's "wall of separation" metaphor, one at 184, where the court majority quotes from Everson v. Board of Education; the second, citing the writings of Thomas Jefferson, is in the concluding paragraphs.

113

160 A. 2d 265 (Sup. Ct. N.J. 1960).

114

374 U.S. 203 (1962). This case affirmed Schempp v. School District, 201 F. Supp. 815 (1962), and struck down Murray v. Curlett, 228 Nd. 239, 179 A. 2d 698 (1962). For commentary, *see, e.g.*, Leo Pfeffer, *The Schempp-Murray Decision on School Prayers and Bible Reading*, 4 J. CHURCH AND STATE 165 (1963); Leo Pfeffer, *A Momentus Year in Church and State: 1963*, 6 J. CHUCH AND STATE 36 (1964).

115

Id. at 205. *See, e.g.*, Edward Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949). *But see* Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM 7 MARY L. REV. 875 (1986). For the lastest challenge to the nonpreferential position (*e.g.*, government can aid all religions), *see, e.g.*, Justice Souter concurrence in Lee v. Weisman, *infra* note 164 and acompanying texts.

116

See supra note 114 at 244.

117

See, e.g., Lemon v. Kurtzman, *supra* note 4.

118

72 Wash. 2d 912, 436 P. 2d 189 (Sup. Ct. Wash. 1967), *cert. denied*, 393 U.S. 960.

Wash. CONST. art. I § II:

> No public money or property shall be appropriated for, or applied to any religious worship, exercise, or instruction.

Wash. CONST. art. IX § 4:

> All schools maintained or supported wholly or in part by the public funds shall forever be free from sectarian control or influence.

For an examination of issue of the Bible in higher education, *see, e.g.*, John H. Jackson, & David W. Louisell, *Religion, Theology, and Public Higher Education*, 50 CALIF. L. REV. 751 (1962); Robert C. Casad, *On Teaching Religion at the State University*, 12 U. KAN. L. REV 405 (1964); John J. McGongale, *Teaching About Religion in the Public College and University: A Legal and Education Analysis*, 20 AM. U. L. REV. 74 (1970).

119

102 Wash. 369, 173 P. 35 (Sup. Ct. Wash. 1918).

120

See W.C. Jones, 1 OP. ATTY. GEN. 142 (1891).

121

366 U.S. 420 (1961). The U.S. Supreme Court had dealt with Sunday laws earlier in Hennington v. Georgia, 163 U.S. 299 (1896), where the Court held that under the Commerce Clause a state could not prohibit the running of a railroad engaged in interstate commerce on Sunday. The Court viewed Sunday laws as civil regulations, part of the state's police powers to promote the safety of the community. The Court relied on the precedent of Soon Hing v. Crowley, 113 U.S. 703 (1885) , which said that Sunday laws stemmed, not from any right of the state to promote religion, but rather the state's police power to protect and regulate labor. It is of interest to note, Justice Field who wrote the opinion in Soon Hing had, as Justice of the California Supreme Court, wrote the dissent in the California case of Ex Parte Newman, 9 Cal. 502 (1858) (striking down California's Sunday closing law as a preference for the Christian religion).

122

366 U.S. 420, 445.

123

Id. at 465. Justice Frankfurter provided an extensive legal history of the Sunday laws, perhaps to illustrate that the American Revolution did not represent a complete break with the Anglo past. For him, due process was a long evolving standards of decency found in Anglo-American law, which demonstrated the secularization of the present day Sunday laws. For an examination of Justice Frankfurter's approach to the common law, *see, e.g.*, Felix Frankfurter, *I am Not a Scholar of the Langdell or Ames*

Type: Felix Frankfurter and the Deterioration of the Legal Community, *in* OUR LADY THE COMMON LAW: AN ANGLO-AMERICAN LEGAL COMMUNITY, 1870-1930. (R. Cosgrove, ed. 1987).

124

370 U.S. 421 (1961). The legal scholars have overlooked McGowan as the beginnings of both the Schempp and Lemon standard for the establishment clause.

125

Engel v. Vitale, 10 N.Y. 174, 218 N.Y.S. 2d 659, 176 N.E. 2d 579, *rev'd*, 370 U.S. 4211 (1961). The school prayer was as follows:

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

For commentary, *see, e.g.*, William Butler (who argued the case before the Supreme Court), *Regents Prayer Case: In The Establishment Clause "No Means No,"* 49 A.B.A. J. 44 (1963); Leo Pfeffer, *The New York Regents Prayer Case*, 4 J. OF CHURCH AND STATE 150 (1962). For unfavorable commentary, *see, e.g.*, Louis M. Castruccio, *Engle [sic] v. Vitale: The Internal Establishment Dilemma*, 36 CALIF. L. REV. 240 (1963); Philip B. Kurland, *Regents Prayer Case: "Full of Sound and Fury Signifying. . .".* 1962 SUP. CT. REV. 1; James F. Janz, *Church and State: Prayer in the Public Schools*, 46 MARQ. L. REV. 233 (1962).

126

See, e.g., Richard Ely, *The View from the Statute: Statutory Establishments of Religion in England Ca. 1300 to Ca. 1900*, 8 U. TAS L. REV. 225, 237 (1986) (tracing the use of the term "the church established by law" in English legal history). Ely argues that it was Queen Elizabeth's Book of Common of Prayer that first uses the term "church established by law."

127

Id. Ely confirmed Justice Black's historical interpretation of the Book of Common Prayer as a legal establishment of religion in English law.

128

9 Md. App. 270, 263 A. 2d 602 (Ct. App. Md. 1970).

129

See, e.g., HARRY H. WELLINGTON, INTERPRETING THE CONSITUTION (1990).

130

See, e.g., RONALD DWORKIN, THE LAW'S EMPIRE (1981).

131

112 Cal. Rptr. 290 (Ct. App. 4th Cal. 1974). For examination of the state case law, *see, e.g.*, Casenote: *The Crimes Against Nature*, 16 J. OF PUB. L. 157 (1967). *See also* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia's sodomy law).

132

242 Md. 645, 220 A. 2d 51 (Ct. App. Md. 1966). For commentary, *see ,e.g.*, Casenote: *Grants to Sectarian Colleges for Secular Purpose Held Unconstitutional*, 41 N.Y.U. L. REV. 571 (1966); *Note: Establishment Clause and Governmental Aid to Colleges*, 11 St. LOUIS U. L. J. 464 (1967); Robert F. Drinan, S.J., *Does State Aid to Church-Related Colleges Constitute An Establishment of Religion? Reflections on the Maryland College Cases*, 1967 UTAH L. REV. 491 (1967).

133

See, e.g., Md. CONST. Declaration of Rights, art. 36, art 15 (1864) *in* THE FEDERAL AND STATE CONSTITUTIONS at 860, formerly art XXXIII in CONST. of (1776) at 819, (1851) at 839; art. 36 of CONST. of (1864) at 861; (1867) at 890.

134

See, e.g., Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 892 (1974).

135

144 N.W. 2d 749 (Sup. Ct. N.D. 1966).

136

93 N.J. Super. 544, 226 A. 2d 471 (Super. Ct. N.J. 1967).

137

N.J. CONST. art. VIII § IV part 3:

> The legislature may, within reasonable limitations as to distance to be prescribed, provide for the transportation of children within the age of five to eighteen years inclusive to and from any school.

For cases involving the problem of bus routes which raised constitutional questions, *see, e.g.*, McVey v. Hawkins, 364 Mo. 44, 258 S.W. 2d 198 (Sup. Ct. Wash. 1949); Americans United v. Benton, 413 F. Supp. 955 (D. Iowa 1976); Jamestown v. Schidt, 427 F. Supp. 1337 (D. R.I. 1977); Cromwell Property Owner's Ass'n v. Toffalon, 495 F.

Supp. 915 (D. Conn. 1979).

138
288 Minn. 196. 179 N.W. 2d 146 (Sup. Ct. Minn.1970).

139
392 U.S. 234 (1968).

140
The precedent was Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930) (text book aid to church school did not violate the Fourteenth Amendment).

141
See, e.g., J.R. Powe Jr., *Evolution to Absolutism: Justice Douglas and the First Amendment,* 74 COLUM. L. REV. 371, 372 (1974).

142
See, e.g., Walz v. Tax Commission of New York. 397 U.S. 664 (1990).

143
Surpa note 141 at 410.

144
781 F. 2d 777 (Ct. App. 10th Cir. 1985). "With This We Conquer."

145
See Foremaster v. City of St. George. 655 F. Supp. 844, 849-50 (D. Utah 1987). Of interest. *see, e.g.,* Murphy v. Bilbray. 782 F. Supp. 1420 (Cal. 1991) (striking down display of a cross on city insignia as a violation of the state constitution). *but see* Murray v. City of Austin, Texas. 947 F. 2d 147 (Tex. 1991). *reh. denied,* (upholding display of a cross on a city seal).

146
348 F. Supp. 1110 (D. Utah 1972).

147
Rev'd, 475 F. 2d 2964. *cert. denied,* 414 U.S. 879 (1973). For commentary. *see, e.g.,* Note: *Constitutional Law: Public Monuments and Establishment of Religion,* 13 WASHBURN L. J. 215 (1974). For an earlier case where counsel invoked Madison and Jefferson, but the court relied upon doctrine and no "history." *see, e.g.,* Chance v. Missisippi State Textbook Rating & Purchasing Board. 190 Miss. 453. 200 S. 706 (1941) (upholding textbook aid to church schools).

148
357 F. Supp. 37 (D. N.C. 1973).

149
See, e.g., Muzzy v. Wilkins, 1 Smith (N.H.) 11 (1803) discussed in **Chapter 1** *supra*; State v. West, *supra* note 128.

150
See, e.g., Epperson v. Arkansas, 80 U.S. (13 Wall.) 679, 728 (1871).

151
192 Neb. 358, 220 N.W. 2d 550 (Sup. Ct. Neb.1974).
Neb. CONST. art. VII § 11:

> Neither the state legislature nor any county, city or other public corporations, shall ever make any appropriation from any public fund, or grand any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a government division thereof.

152
381 F. Supp. 327 (D. Md. 1974).

153
547 S.W. 2d 897 (Sup. Ct. Tenn. 1977).

154
435 U.S. 618 (1978).

155
See, e.g., Torcaso v. Watkins, 367 U.S. 488 (1960).

156
587 P. 2d 663, 150 Cal. Rptr. 86 (Sup. Ct. Cal. 1978).

157
78 Ca. 2d 464, 178 P. 2d 488 (Dist. Ct. App. Cal. 1947).

158
588 F. Supp. 1339, *aff'd*, 791 F. 2d 1561 (1986).

159

842 F. 2d 671 (3rd Cir. 1988). *aff'd in part, rev'd in part.* Allegheny County v. Greater Pittsburgh A.C.L.U., 492 U.S. 573 (1989).

160

Id. at 492 U.S. 605.

161

Id. at 492 U.S. 648.

162

See, e.g., Blewett Lee, *Establishment of Religion*, 14 VA. L. REV. 100 (1927) (examining the English and American legal usage of the term "establishment"). Lee argued that a law forbidding the teaching of evolution was an "establishment" of religion, giving "establishment" a broad meaning (*e.g.*, more than mere financial aid to religion). *See also* Justice Rutledge's dissent in Everson v. Board of Education, *supra* note 13; and Chief Justice Warren's opinion for the majority in McGowan, *supra* note 121. Both Rutledge and Warren give a plain word meaning to the term "establishment." Like Justice Stevens, the term "respecting" is treated as the significant term in the First Amendment. *See also* Weisman v. Lee, 908 F. 2d 1090, 1092 (1990), *infra* note 163.

163

Weisman v. Lee, 908 F. 2d 1090, 1092-93 (Bowes, S.C.J., concurring) [*aff'd*, Lee v. Weisman, 505 U.S. 577 (1992)].

164

505 U.S. 577 (1992).

165

515 U.S. 863.

166

Id. at 863.

167

Id. at 872 n2.