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A Conservative Struggles with Lemon: Justice Anthony M. Kennedy's Dissent in Allegheny

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A CONSERVATIVE STRUGGLES WITH *LEMON*: JUSTICE ANTHONY M. KENNEDY'S DISSENT IN *ALLEGHENY*

I. INTRODUCTION

The relationships in America between religion and society, between church and state, always have been the subject of both political controversy and intellectual difficulty. Founded by persons who at least "breathed the air" of a continuing religious tradition in the West—and by some who consciously held to a significantly more substantive religious faith—the religious sentiment in America has always been strong, and has never been far below the surface of any vital public discussion. It is also true, however, that the Founders sought purposely to escape the world of religious idolatry, the use of religious authority to coerce political ends, and the use of political authority to force religious ends.[1] The religion clauses of the First Amendment to the U.S. Constitution express the Founders' attempt to harmonize this unique civic tension: the Free Exercise Clause guaranteed freedom of religious expression, while the Establishment Clause guaranteed the prohibition of a religious-political wedding designed to manipulate either realm.[2]

Of the two religion clauses, the Establishment Clause is clearly the most litigated, with some seventy cases having been decided by the United States Supreme Court in the last fifty years. A great number of those cases have been decided under the "test" the Court adopted in 1971 to evaluate possible Establishment Clause violations. In *Lemon v. Kurtzman*,[3] the Court sought to make consistent its Establishment Clause jurisprudence by requiring of every statute or governmental act that it have a secular purpose, that its principal or primary effect neither advance nor inhibit religion, and that it not foster excessive government entanglement with religion.[4] Yet, unfortunately, these cases represent a

1. *See* Swift, *To Insure Domestic Tranquility: The Establishment Clause of the First Amendment*, 16 HOFSTRA L. Rev. 473 (1988).

2. The clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

3. 403 U.S. 602 (1971).

4. The *Lemon* test has been heavily criticized:

confused and convoluted attempt to understand and apply the Establishment Clause.[5] The Supreme Court continued this winding and directionless journey through Establishment Clause jurisprudence when, in the summer of 1989, it handed down its decision in *County of Allegheny v. ACLU*.[6] There the Court upheld the County's display of a Chanukah menorah but held violative of the Establishment Clause the County's display of a crèche depicting the Christian nativity scene. In doing so, the Court reflected a view of the history of the Establishment Clause that is indeed questionable, revealed the avowedly secularist aims of the Court's *Lemon* test,[7] and continued an unfortunate tradition in constitutional interpretation that both generalizes historically specific language and gives federal judges broad discretion to overturn the decisions of elected officials.

In dissent, Justice Anthony M. Kennedy, writing his first Establishment Clause opinion,[8] concurred with that part of the Court's decision upholding the display of the menorah but concluded that the display of the crèche was not violative of the Establishment Clause. Justice Kennedy asserted that the government has wide latitude in accommodating

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> The chief objection to these criteria is their lack of any basis in the words of the establishment clause. Nothing in the text requires the government to act always for secular purposes; nothing forecloses the government from advancing or prohibiting religion in general, or one or more religions in particular, either as a primary or subsidiary effect; and nothing speaks to the possibility of government and religion becoming entangled in constitutionally unacceptable ways.

Porth & George, *Trimming The Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 129 (1987).

5. *See* L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1986). Levy states that "[n]o one can make much sense out of the Court's establishment clause opinions. The Court has reaped the scorn of a confused and aroused public because it has been erratic and unprincipled in its decisions." *Id.* at 163.

6. 109 S. Ct. 3086 (1989).

7. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court announced that for government conduct to pass a challenge under the establishment clause it must: 1) have a secular purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) avoid excessive entanglement of government and religion. *Id.* at 612-13.

8. Since the writing of the present article, Justice Kennedy has concurred in the Court's decision of June 4, 1990 in Board of Educ. of the Westside Community Schools v. Mergens, 110 S. Ct. 2356 (1990). In *Mergens* the Court granted relief to students who wished to use school facilities for religious meetings. The Court ruled that denial of the students' request violated the Equal Access Act which, in turn, was held not to be violative of the Establishment Clause. In his concurrence, Justice Kennedy wrote that while government cannot give direct benefits to religion to the extent that it establishes a religious faith "or tends to do so," "incidental benefits" that accompany official recognition of religious clubs do not establish a religion. *Id.* at 2377. Justice Kennedy continued in his insistence that government does not establish religion unless it "coerces" religious participation or exercise. *Id. See infra* notes 130-139 and accompanying text. Finally, Justice Kennedy continued his criticism of the "endorsement test." *Id.* at 2377. *See infra* notes 152-64 and accompanying text. Although the concurrence was short, it is important to note that Justice Kennedy made no mention of the Court's *Lemon* test. *Id.* at 2376-78.

the religious beliefs of its citizens[9] and that government "establishes" a religion only when it uses force or public funds to "coerce" religious affiliation or identification.[10] Because neither the crèche nor the menorah compelled religious conformity, and because both were merely symbolic governmental accommodations of religion, neither display violated the Establishment Clause. In this, Justice Kennedy is correct, being consistent with a prior Supreme Court holding.[11] Given, however, that the dissent adheres to the use of the traditional *Lemon* test, this note posits that the dissenting opinion's "accommodation" and "coercion" themes run counter to the neutrality and strict separationist jurisprudence underlying *Lemon*.

II. FACTS AND ISSUES

Allegheny dealt with the constitutionality of two recurring holiday displays located on public property in downtown Pittsburgh, a crèche[12] depicting the Christian nativity scene and an 18-foot Chanukah menorah[13] or candelabrum. The menorah was placed outside the Pittsburgh City County[14] building next to the city's 45-foot decorated Christmas tree.[15] At the foot of the tree was a sign bearing the mayor's name and a message declaring the city's "salute to liberty."[16]

On December 10, 1986, the Greater Pittsburgh Chapter of the ACLU and seven local residents filed suit against the county and the city,

9. *Allegheny*, 109 S. Ct. at 3135 (Kennedy, J., dissenting).

10. *Id.* at 3136. The coercion element in the Establishment Clause holds that before government conduct can be held to violate the establishment clause there must be a showing of "direct governmental compulsion" of an action which "compels others to conform." Coercion was rejected by the Supreme Court as an element in determining an Establishment Clause violation in Engel v. Vitale, 370 U.S. 421, 438 (1962). *See infra* text accompanying notes 133-42.

11. Lynch v. Donnelly, 465 U.S. 668 (1984).

12. The crèche is the visual representation of the manger and the birth of Jesus of Nazareth whom Christians believe to be Messiah. The crèche was donated to the city by the Holy Name Society, a Roman Catholic group. It bore a sign to that effect. *Id.* at 3095.

13. *Allegheny*, 109 S. Ct. at 3093. The menorah is part of the lamp lighting ritual of Chanukah or Hanukkah, the annual Jewish holiday celebrating Judas Maccabus' rededication of the Temple of Jerusalem in 164 B.C. "The menorah is owned by Chabad, a Jewish group, but is stored, erected, and removed each year by the city." *Id.*

14. The City-County Building, jointly owned by the City of Pittsburgh and Allegheny County, houses county administrative offices as well as the mayor's office. *Id.* at 3094.

15. *Id.* at 3094.

16. *Id.* at 3095. The crèche was displayed on the Grand Staircase of the Allegheny County Courthouse. *Id.* at 3093. The County Courthouse, owned by Allegheny County, houses county administrative offices as well as the mayor's office. *Id.* It is separate and a block removed from the City-County Building. *Id.* at 3094. The Grand Staircase is the main part of the Courthouse. *Id.* at 3093. The crèche's manger had at its crest a sign saying "Gloria in Excelsis Deo!" *Id.* at 3094. The crèche included figures of the infant Jesus, Mary, Joseph, farm animals, shepherds, and wise men. *Id.*

seeking to prohibit permanently the county from displaying the crèche in the County Courthouse and the city from displaying the menorah in front of the City-County Building.[17] Plaintiffs claimed that the displays violated the Establishment Clause of the First Amendment to the United States Constitution.[18]

Relying on *Lynch v. Donnelly*,[19] the U.S. District Court for the Western District of Pennsylvania denied the plaintiff's request for a permanent injunction.[20] The Third Circuit Court of Appeals reversed, distinguishing *Lynch* and determining "that the crèche and menorah must be understood as endorsing Christianity and Judaism."[21] The U.S. Supreme Court granted the petitions for certiorari of the county, the city, and Chabad.[22] The Court, in determining whether the crèche and the menorah violated the Establishment Clause of the Constitution, affirmed the court of appeals with regard to the crèche but reversed with regard to the menorah.[23]

III. THE DECISION OF THE COURT

The Court, in a 6-3 decision, reversed the court of appeals with regard to the menorah, finding that the menorah did not violate the Establishment Clause.[24] Justice Blackmun, writing for the majority, determined that the menorah did not have the prohibited effect of endorsing religion[25] given its "particular physical setting."[26] The fact that the menorah was in a display with the Christmas tree simply served to celebrate the "winter-holiday season."[27] The tree, because of its size and central location, served to downplay the menorah and enabled the menorah to communicate that Christmas is not the only way to celebrate the season.[28] The mayor's sign did not represent sponsorship of the religious beliefs expressed by the symbols; rather, it indicated the nation's cultural diversity.[29] Asserting that the determination of whether the menorah

17. *Id.* at 3097-98.
18. *Id.* at 3098.
19. 465 U.S. 668 (1984).
20. *Allegheny*, 109 S. Ct. at 3098.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 3093.
25. *Id.* at 3111-16.
26. *Id.* at 3116.
27. *Id.* at 3113.
28. *Id.* at 3113-14.
29. *Id.* at 3114-15.

would be seen as a governmental endorsement of Judaism turned on a "reasonable observer" standard, the Court held that it was not likely the residents of Pittsburgh would see the menorah as such an endorsement.[30] Justice O'Connor concurred,[31] but Justice Brennan joined by Justices Marshall and Stevens dissented, asserting that the display of the menorah did in fact violate the Establishment Clause.[32]

The Court decided 5-4 that the crèche did violate the Establishment Clause. Justice Blackmun's analysis focused on the second prong of the *Lemon* test[33] and stated that "a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect . . . ."[34] A governmental action advances religion, Justice Blackmun wrote, when the action makes "adherence to a religion relevant in any way to a person's standing in the political community."[35] Thus, the Court held that, in the context in which it was displayed, the crèche violated the Establishment Clause because it was seen to direct observance to Christmas "as a Christian holy day," instead of acknowledging Christmas simply as a "cultural phenomenon."[36] The Court distinguished *Allegheny* from *Lynch*, in which the crèche was set in a context with other secular symbols of Christianity. In *Allegheny*, the Court found that there was nothing to detract from the crèche's sectarian message;[37] therefore, its display was ruled unconstitutional.[38]

The Chief Justice, Justice White, and Justice Scalia joined Justice Kennedy in dissent, concluding that both the menorah and the crèche were permissible under the Establishment Clause.[39] While giving the now familiar disclaimer concerning the *Lemon* test—that it is not a sole or even primary guide to Establishment Clause cases—Justice Kennedy sought "to remain within the *Lemon* framework . . . ."[40] The *Lemon* prong implicated in *Allegheny* was that of primary effect: the law must neither advance nor hinder religion. Justice Kennedy's analysis seeks to

30. *Id.* at 3115.
31. *Id.* at 3117.
32. *Id.* at 3124.
33. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).
34. *Allegheny*, 109 S. Ct. at 3100 (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).
35. *Id.* at 3101 (quoting Lynch v. Donnelly, 465 U.S. 687 (1984) (O'Connor, J., concurring)).
36. *Id.* at 3105.
37. *Id.* at 3104.
38. *Id.* at 3105.
39. *Id.* at 3134 (Kennedy, J., dissenting).
40. *Id.*

apply the meaning of that part of the test.[41]

The ultimate goal of the Establishment Clause, asserted the dissent, is neutrality.[42] This neutrality is not, however, that of a rampant secularism, nor is it one that is hostile to religion. Establishment Clause neutrality is that which "permits government some latitude in . . . accommodating the central role religion plays in our society."[43] Kennedy wrote that the Court must therefore be careful to guard "the border between *accommodation* and *establishment*" of religion.[44]

Justice Kennedy argued that government crosses the line from permissible accommodations to an impermissible establishment of religion when it *coerces* religious affiliation or aid.[45] Coercion is not limited to *direct* coercion, rather "[s]ymbolic recognition or accommodation of religious faith may violate the Clause. . . ."[46] There is no establishment of religion, however, when the symbolism is merely "passive."[47] Ultimately, coercion determines whether government has actually *established* a religion.[48] In determining, in turn, whether government has established a religion, Justice Kennedy wrote: "we refer to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our caselaw."[49]

Justice Kennedy looked at the Christmas crèche upheld in *Lynch*[50] and the saying of legislative prayers upheld in *Marsh v. Chambers*[51] and indicated that the primary effect prong of *Lemon* should be interpreted through the idea of governmental coercion.[52] These precedents, Kennedy concluded, show that "[n]on-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[53]

Applying his interpretation of *Lemon*'s second prong to the facts of

41. *Id.*
42. *Id.* at 3134-35.
43. *Id.* at 3135.
44. *Id.*
45. *Id.* at 3137.
46. *Id.* at 3136 (emphasis added).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 3137-38.
51. *Id.* at 3138.
52. *Id.* at 3139.
53. *Id.* at 3138.

Allegheny, Justice Kennedy failed to find any governmental coercion. He found that the county did not further religious interests: no significant amount of tax money was expended; no one was compelled to worship; the government made no effort to proselytize.[54] Furthermore, the context of the display, Justice Kennedy asserted, was not the physical setting of the display itself; it was rather the "[religious symbol] in the context of the [holiday] season."[55] This means that neither the display of the crèche nor the menorah moved government down the "forbidden road" of establishment.[56] The Court's use of Justice O'Connor's endorsement test, wrote Justice Kennedy, would only serve to undo many of the traditional practices that recognize the part religion plays in our society.[57]

The dissent criticized the majority for the use of its "least religious means test," a requirement that government should always use a more secular alternative when it can in order to accomplish a legitimate goal.[58] The majority used the test to strike down the crèche display. The test, asserted Justice Kennedy, was inconsistent as used in the Court's opinion because it undermined the Court's affirmation of a permissible use of a crèche. It was unworkable because it puts the Court in a position to determine what looks "out of place," and it did not comport with the Court's decision in *Lynch*.[59] If *Lynch* were still good law, wrote Justice Kennedy, the menorah and the crèche would have survived an Establishment Clause challenge.[60]

IV. A BRIEF HISTORY

Modern Establishment Clause jurisprudence dates to the Supreme Court's decision in *Everson v. Board of Education*.[61] There, Justice Hugo

54. *Id.* at 3139.
55. *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 679 (1894)).
56. *Id.* at 3140.
57. *Id.* at 3142-43.
58. *Id.*
59. *Id.*
60. *Id.* at 3140.
61. 330 U.S. 1 (1947). The principal passage of Justice Black's opinion provided that:

> 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 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 disbeliefs, 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

L. Black promulgated for the Court what would become a theoretical and historical consensus with regard to the Establishment Clause upon which a generation of later cases would be decided.[62] The *Everson* court emphasized three aims of the Establishment Clause: neutrality,[63] voluntarism, and separatism.[64]

The *Everson* court asserted that the standard the Constitution requires concerning the relation between religion and government is neutrality.[65] The main theme of neutrality entails prohibitions of government aid to religion.[66] In other words, "the standard demands a neutrality between religion and no religion" and thus "prohibits governmental preference for religion" in general.[67] As Justice Black inferred, government may not aid religion at all.[68] At the same time, however, Justice Black wrote that government could not exclude anyone from the general benefits of social welfare legislation on the basis of their religion.[69] While the "social benefit" exception served to mitigate the strict neutrality theme of *Everson*, embodying "an ideal of equal aid to religion and nonreligion,"[70] the spirit and the use of the word "neutrality" seemed to become dominant in the Court's Establishment Clause analysis, emphasizing separation between government and religion.[71]

The *Everson* court also saw separation as one of the main roots of the Establishment Clause, as it was understood in the early struggle for

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> the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

Id. at 15-16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878) (italics in original)). Justice Rutledge, dissenting in the Court's holding, did not disagree with Justice Black's reading of the history. *Id.* at 31-43.

62. *See, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); Illinois *ex rel.* McCullom v. Board of Educ., 333 U.S. 203 (1948).

63. "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Everson*, 330 U.S. at 18. For a critical analysis of the neutrality theme in *Everson* and in later cases, see Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83 (1986).

64. For an excellent discussion of the voluntarist and separationist themes, see Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L.J. 770.

65. *Everson*, 330 U.S. at 18.

66. *Id.*

67. *See* Evans, *Contradictory Demands on the First Amendment Religion Clauses: Having It Both Ways*, 30 J. CHURCH & ST. 463, 482 (1988).

68. *Everson*, 330 U.S. at 18.

69. *Id.* at 16.

70. *See* Valauri, *supra* note 63, at 98.

71. *See* L. LEVY, *supra* note 5, at 123.

religious liberty in Virginia.[72] Significantly, the Supreme Court has interpreted the separationist theme to mean more than just institutional separation between church and state. Separation has been interpreted to mean that the state should not derive its claim to authority from religious sources, that religious groups should not be granted governing power,[73] and that religious differences should not be allowed to divide the political community.[74]

Voluntarism is also important to the Court's understanding of the Establishment Clause, particularly as the Clause is comprehended in relation to the free exercise clause. The latter certainly was intended to assure the freedom of conscience, as well as toleration for different religious sects, and it clearly prohibits "any degree of compulsion in matters of belief."[75] Thus, if religious groups are to prosper they must do so on the basis of the merit of their own views, not on the basis of governmental coercion in their favor. Individuals should be left free to affiliate, or not to affiliate, with a religious view, free from the oppressive hand of government.[76]

The themes of neutrality, separatism, and voluntarism, fully articulated for the first time in the *Everson* decision, found their fullest systematic expression in the Court's decision in *Lemon*.[77] There, the Court gleaned from its previous cases a three pronged test to be used to determine whether a state action violates the Establishment Clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive entanglement with religion.' "[78] The *Everson* emphasis on neutrality is seen in *Lemon*'s first and second prong;[79] the emphasis on separation is found in the third

72. *Everson*, 330 U.S. at 11.

73. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1161 (1988).

74. While the Court has struck down various programs (particularly aid to parochial schools) that were likely to generate religious based political division (*see, e.g.*, Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Meek v. Pittenger, 421 U.S. 349 (1975); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)), a threat of political divisiveness is not enough, without more, to justify striking down a challenged program. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

75. *See* L. TRIBE, *supra* note 73, § 14-3, at 1160.

76. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 231 (1963) (Brennan, J., concurring).

77. Lemon v. Kurtzman, 403 U.S. 602 (1971).

78. *Id.* at 612-13 (citations omitted) (citing Board of Educ. v. Allen, 392 U.S. 236 (1968) (quoting Walz v. Tax Comm'n, 397 U.S. 664 (1970)).

79. *See* Evans, *supra* note 67, at 482.

prong.[80] The voluntarist idea underlies the whole.[81] Despite contradictory results[82] and failures always to apply the *Lemon* test formally, the *Everson-Lemon* approach to the Establishment Clause had, before 1985, reached the status of being a consensus on the Court.

There has developed, however, in the past several years, a body of historical evidence that stands in opposition to the neutrality-separationist themes of the Court's *Everson-Lemon* tradition.[83] Much of this evidence suggests that the purpose of the Establishment Clause was not to forbid the government from legislating on the subject of religion, but it was rather to protect state religious establishments[84] from "disestablishment," and to prevent the national government from giving aid to one religion over another.[85] This "no preference" understanding of the Establishment Clause holds that the Clause primarily was meant to prohibit the establishment of a national church or religion and to prevent the preference of one religious group over another. The Establishment Clause does not require the "high and impregnable" wall of separation of church and state, and it was not meant to prohibit all government aid to religion in general or state accommodations of religion.[86]

The academic debate over the original meaning of the Establishment Clause reached the Supreme Court in 1985 in the case of *Wallace v. Jaffree*.[87] The Court struck down an Alabama statute permitting meditation or voluntary prayer in schools.[88] The Court's opinion dealt with a defense of the Court's precedents that had been attacked in the District

80. *See* L. TRIBE, *supra* note 73, § 14-14, at 1278.

81. *Id.* § 14-3, at 1160-61.

82. *See* Valauri, *supra* note 63, at 94-106. *See also* L. LEVY, *supra* note 5, at 162-63.

83. The academic debate and the literature describing it are extensive. The following citations are only a sampling: R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982); T. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT (1986); L. LEVY, *supra* note 5; Aspen, *Some Thoughts on the Historical Origins of the United States Constitution and the Establishment Clause*, 21 J. MARSHALL L. REV. 239 (1988); Dunsford, *The Relevance of Original Intention in Thinking About Establishment Clause Problems*, 6 ST. LOUIS U. PUB. L. REV. 197 (1987); Laycock, *"Nonpreferential" Aid To Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875 (1986); McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986); Porth & George, *supra* note 4; Van Alstyne, *What is "An Establishment of Religion?,"* 65 N.C.L. REV. 909 (1987).

84. At the time of the passage of the Constitution in 1787, many states had "established religions," i.e., churches officially sponsored by the state, and maintained at taxpayer's expense. *See* L. LEVY, *supra* note 5, at 162.

85. *See* Cord, *Church-State Separation: Restoring the "No Preference" Doctrine of the First Amendment*, 9 HARV. J.L. & PUB. POL'Y 129, 137-38 (1986).

86. *Id.* at 133-36.

87. 472 U.S. 38 (1985).

88. *Id.* at 61.

Court below. The opinion did not debate the history of the Establishment Clause.[89] Justice O'Connor's concurrence reasoned that the historical question concerning public schools was an open one, since the Framer's of the First Amendment had not dealt with the issue.[90]

Then Justice Rehnquist's dissent in *Jaffree*, however, challenged the Court's *Everson* history directly for the first time and posed a "non-preferentialist" theory underlying the Establishment Clause.[91] Rejecting completely Jefferson's "wall of separation" metaphor as fairly explaining the Framer's intent, and instead depending upon post First Amendment church-state involvements enacted by the first Congress,[92] Justice Rehnquist wrote that the Establishment Clause was meant to prohibit a "national," as well as governmental preferences for one religious denomination or sect over others.[93] Furthermore, Justice Rehnquist wrote, the Establishment Clause did not require "government to be strictly neutral between religion and irreligion,"[94] it did not prohibit government "from pursuing legitimate secular ends through nondiscriminatory sectarian means,"[95] and it did not prohibit the government from providing non-discriminatory aid to religion.[96] The dissent reviewed as

89. *Id.* at 48-56.

90. *Id.* at 80-81.

91. *Id.* at 113.

92. *Id.* at 100-06. Robert Cord noted five post adoption practices as significant in helping to understand the intentions of the Framers of the establishment clause. First, on the same day that Jefferson's Virginia Bill for Establishing Religious Freedom, Madison introduced a bill to punish "sabbath breakers," which later became law. Second, following the affirmative vote to recommend the Bill of Rights to the states for ratification, the first Congress proposed a resolution asking President George Washington to issue a Thanksgiving proclamation (setting aside a day of "public humiliation and prayer"). When James Madison, author of the original draft of what would become the Bill of Rights, became President, he issued four such Thanksgiving proclamations. On Madison's latter day recanting of the constitutionality of such measures—found in his "Detached Memoranda"—see L. LEVY, *supra* note 5, at 98-99. Third, the first Congress established and funded the Congressional Chaplain system, James Madison being one of the six members of the Joint Congressional Committee recommending the system. Fourth, in 1803, President Jefferson signed a United States Senate Treaty with the Kaskaskia Indians which provided for the United States to build a Roman Catholic church and to provide a yearly stipend for the priest for missionary work. And, finally, from 1796-1804, the U.S. Congress passed laws that paid, in large land grants, an evangelical Christian sect to spread and maintain the gospel among Indians in the Territory of Ohio. Presidents Washington, Adams, and Jefferson all signed these various laws into law. These examples of religious accommodation in the years immediately following the passage of the Bill of Rights casts at least some doubt on the neutrality and separationist themes of the Court's *Everson* tradition. *See* Cord, *Founding Intentions and the Establishment Clause: Harmonizing Accommodation and Separation*, 10 HARV. J.L. & PUB. POL'Y 47, 49-51 (1987).

93. *Jaffree*, 472 U.S. at 106.

94. *Id.* at 113.

95. *Id.*

96. *Id.* at 106.

well a significant amount of pre-adoption First Amendment history.[97]

The debate over the intention of the Framers of the Establishment Clause shows no sign of being reconciled. Clearly, there is now disagreement in the Supreme Court between the traditional *Everson*-neutrality-separationist history and the more recent "no-preferentialist" history of the clause. Justice Kennedy's dissent in *Allegheny* is influenced by both historical schools of thought. His loyal adherence to the *Lemon* test[98] and to its goal of neutrality for the Establishment Clause[99] belies his dependence on the *Everson* theory. However, his emphasis on coercion as an element in Establishment Clause violations,[100] and on the permissibility of symbolic governmental accommodations of religion "that have existed unchallenged throughout our history"[101] indicate a dependence on the non-preferential history of the Establishment Clause.

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97. *Id.* at 92-100. There are two major points in this pre-adoption history. First is the background of the struggle for religious liberty in Virginia. In response to a bill proposed in the Virginia legislature in 1784 requiring a general assessment tax for the support of the Christian religion, James Madison wrote his famous "Memorial and Remonstrance Against Religious Assessments," part of which states:

> We remonstrate against the said Bill,
>
> . . . .
>
> 3. Because . . . [w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?
>
> . . . .
>
> 11. Because, it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects.

THE FOUNDING FATHERS: JAMES MADISON: A BIOGRAPHY IN HIS OWN WORDS 183-91 (M. Peterson ed. 1974). For the full text, see the appendix in Justice Rutledge's dissent in *Everson*, 330 U.S. at 63. The Virginia legislature subsequently defeated the general assessment bill and adopted instead Thomas Jefferson's Bill for Establishing Religious Freedom which prohibited compulsive support for religious worship. *See* Swift, *supra* note 1, at 492-96.

The second major element of the pre-adoption history regards the debates in the First Congress concerning the language of the First Amendment. James Madison, in defending his proposed, but amended, language ("no religion shall be established by law") said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." 1 ANNALS OF CONGRESS 730 (J. Gales ed. Aug. 15, 1789). Madison had originally proposed the phrase so as to include the adjective "national" before "religion" because:

> [h]e believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent.

Id. at 731. The word "national" was left out of the proposed amendment because it was feared that it would offend the Antifederalists who did not view the new general government as a "national" one, consolidating the Union, but rather simply a *Federal* government. *Id.* at 731. *But see* L. LEVY, *supra* note 5, at 75-89.

98. *Allegheny*, 109 S. Ct. at 3134 (Kennedy, J., dissenting).

99. *Id.* at 3135.

100. *Id.* at 3137.

101. *Id.*

It seems doubtful that a consistent and principled Establishment Clause jurisprudence could ever result from the kind of methodological tension found in the *Allegheny* dissent. It doesn't seem possible to synthesize the requirement in *Lemon* that the governmental purpose be secular with a holding that symbolic governmental accommodations "that have existed throughout our history" are constitutionally permissible. Since many of these governmental accommodations are manifestly religious, how can they withstand the rigid secularity requirement of *Lemon*? Nor does it seem possible to synthesize the demand in *Lemon* that government neither advance nor inhibit religion with the idea that government establishes a religion only when it coerces support of or participation in any religion or its exercise. Indeed, it is possible for a governmental act actually to advance the cause of religion (e.g., protecting religious freedom against persecution) without coercing anyone's belief or practice. Justice Kennedy's holding—to uphold the menorah and the crèche—would have been better explained from the standpoint of a nonpreferentialist history of the Establishment Clause. However, this would have required a rejection of the *Lemon* test, which Justice Kennedy was unprepared to do. An analysis of the resulting tension follows.

V. Analysis of the Dissent

Section III of this article outlined Justice Kennedy's dissent in *Allegheny*, showing how he urged a "coercion" test to be made applicable to the second prong ("principle or primary effect") of the *Lemon* test. Arguing that "primary effect" is a standard that is unduly hostile to religion in our country—at least in its application—and that Justice O'Connor's "endorsement" test (applied as well to the second prong of *Lemon*) is a "recent" and "unwelcome" addition to Establishment Clause jurisprudence,[102] Kennedy seemed to be elucidating a new reading of *Lemon*.

The Analysis section of the paper will evaluate Justice Kennedy's dissent from various different perspectives, cumulatively designed to show that the real themes of the dissent—accommodation and coercion—struggle against *Lemon* and its underlying separationist and neutrality foundations.

102. *Id.* at 3141. Because the endorsement test "embraces a jurisprudence of minutiae, a reviewing court must consider whether the city has included Santas, talking wishing wells, reindeer, or other secular symbols as 'a center of attention separate from the crèche.'" *Id.* at 3144 (citations omitted).

A. *Neutrality and Accommodation*

Justice Kennedy's dissent is characterized chiefly by the tension found in it between the competing themes of neutrality and accommodation. Unwilling to overturn *Lemon*,[103] Justice Kennedy asserted that the goal of the Establishment Clause was that of "neutrality."[104] As previously discussed,[105] the idea that governmental neutrality toward religion underlies the Establishment Clause is the traditional Supreme Court history of the Establishment Clause, originating in *Everson*. At the same time, however, Justice Kennedy asserted that "the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society."[106] A "categorical approach," Kennedy wrote, would require federal courts to maintain an "absolute 'wall of separation,' sending a clear message of disapproval" to the religious community,[107] and thus denigrating the "wall of separation" metaphor so important to the neutrality approach to the Establishment Clause.[108] Further on, Justice Kennedy asserted that to determine a violation of the Establishment Clause, the Court must "refer to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our caselaw,"[109] and that no Establishment Clause violation exists unless the governmental action "benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[110] The "history"[111] and "any more than"[112] tests align themselves with those cases in which the Supreme Court has disfavored the use of the

103. *Id.* at 3134 ("I am content for present purposes to remain within the *Lemon* framework, but do not wish to be seen as advocating, let alone adopting, that test as our primary guide in this difficult area."). Along with the last statement, however, was Justice Kennedy's approving quotation of Chief Justice Burger's language in *Lynch*: "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* at 3134 (quoting Lynch v. Donnally, 465 U.S. 668, 679 (1984)). Justice Kennedy then wrote that "[s]ubstantial revision of our Establishment Clause doctrine may be in order . . . ." *Id.*

104. *Id.* at 3135.

105. *See supra* notes 61-80 and accompanying text.

106. *Allegheny*, 109 S. Ct. at 3135 (Kennedy, J., dissenting).

107. *Id.*

108. *See supra* note 86 and accompanying text.

109. *Allegheny*, 109 S. Ct. at 3137 (Kennedy, J., dissenting).

110. *Id.* at 3138.

111. See Marsh v. Chambers, 463 U.S. 783, 791 (1983), where the Court used a "unique history" test to uphold the constitutionality of legislative chaplains. *See also* Cord, *supra* note 63, at 165-66.

112. *See* Lynch v. Donnelly, 465 U.S. 668, 680-82. *See also* Van Alstyne, *supra* note 64, at 782-84.

Lemon test and has favored a more accommodationist approach to governmental recognition of religion.[113]

Justice Kennedy did indeed tip his hat to the forms of the Court's Establishment Clause jurisprudence since *Everson*, with its emphasis on separation, voluntarism, and federalism.[114] But where, in *Lynch*, at least a half-hearted attempt was made to apply the *Lemon* test,[115] Justice Kennedy failed truly to apply *Lemon* to the situation in *Allegheny*. The only *Lemon* factor implicated in the *Allegheny* case, the dissent asserted, was the second prong or "principal or primary effect" part of *Lemon*.[116] This does not seem, however, to be a major part of the dissent. The "principal or primary effect" prong of *Lemon* is the focus in *Allegheny*, but while Justice Kennedy attacked the majority's use of Justice O'Connor's "endorsement" test to *Lemon*'s second prong,[117] he did not himself stay true

113. The demise of the *Lemon* test may have begun in the case itself. *See Lemon*, 403 U.S. at 614 ("[the establishment clause erects] a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."). Time and again, the Court has refused to be bound by the test. *See, e.g., Lynch*, 465 U.S. at 679 (and cases cited therein); Mueller v. Allen, 463 U.S. 388, 394 (1983) (the test is "no more than [a] helpful signpos[t]") (quoting Hunt v. McNair, 413 U.S. 734, 741) (1973)); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980) (under the *Lemon* test, the Court has sacrificed "clarity and predictability for flexibility"); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 n.31 (1973) (the test is only a guideline) (referring to Tilton v. Richardson, 403 U.S. 672, 677-78 (1971)).

114. Professor Van Alstyne asserts separation, voluntarism and federalism to be the values underlying the establishment clause. *See* Van Alstyne, *supra* note 64, at 774 ("Accepted at face value, the concerns of voluntarism, separatism, and federalism were not at odds with one another. They framed no tension; rather, they mutually reinforced a single proposition: Questions of religious choice were not to be the business of the national government."). *See also* Van Alstyne, *supra* note 83. *But see* Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1115, 1135 n.109 (arguing that if voluntarism and separation had truly been at the heart of the first amendment, the amendment would never have been enacted by those states which at the time maintained established religions).

115. *See* Van Alstyne, *supra* note 64, at 782.

116. *Allegheny*, 109 S. Ct. at 3134 (Kennedy, J., dissenting). In regard to the secular purpose prong of *Lemon*, Justice Kennedy criticized Justice Blackman's dependence on the "least religious means" or "more secular alternative" test. *Id.* at 3143. Typically, when referring to the Court's evaluation of the governmental action in relation to a secular purpose, a type of "least religious means test" is used, formulated first by Justice Brennan in his *Abington* concurrence:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.

Abington School Dist. v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring). The language in Brennan's concurrence seems to indicate that the Establishment Clause is violated when government uses religious forms as a willful tool of a secular purpose. As Professor Van Alstyne notes, Chief Justice Burger "virtually stood the Brennan criteria upside down" when, in *Lynch*, the Chief Justice declared that "*any* discernable secular purpose, no matter how minor" is enough, and that it is irrelevant if government has used essentially religious means to accomplish this goal. *See* Van Alstyne, *supra* note 64, at 784 n.47.

117. *Allegheny*, 109 S. Ct. at 3142.

to the Court's traditional approach in this area. His use of the "coercion" standard[118] seems out of step with the traditional way of evaluating whether a governmental action has the primary effect of advancing religion.[119]

A *standard* way of applying the second prong of the *Lemon* test is not Justice Kennedy's intent. Rather, his reasoning seems to run like this: governmental action, in the forms of direct or indirect symbolic recognition of religion and of the accommodation of religious practices, violates the Establishment Clause when it becomes coercive. Ultimately, however, to determine when an establishment has occurred, when government action becomes coercive, an appeal to history is made.[120] This does not appear to be a serious application of the *Lemon* test: the opinion seems to depend more upon "the other types of church-state contacts that have existed unchallenged throughout our history" than upon the application of the primary effect prong of *Lemon*; and the "coercion" standard seems out of step with the Court's traditional application of *Lemon*'s second prong.

Justice Kennedy might be better to discard neutrality altogether as the theoretical goal of the religion clauses. An argument can be made that the *Everson* neutrality vision is internally contradictory,[121] and that this fact leads to the contradictory results in Establishment Clause jurisprudence.[122] Furthermore, Justice Kennedy's type of neutrality—one

118. *See id.* at 3136-37.

119. The traditional way is that the governmental act violates the Establishment Clause if it has "the direct and immediate effect of advancing religion." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973).

120. It is unclear why the dissent does not begin the analysis with historical practices in the first place.

121. *See, e.g.*, Valauri, *supra* note 63, at 86. Professor Valauri's position is that the idea of "neutrality" as used by the Supreme Court in Establishment Clause cases is complex, formal, and ambiguous. He finds two actual neutrality requirements in *Everson*, the Court's seminal establishment clause case, and believes that this initial tension has led inevitably to the Court's confusing establishment clause holdings. Valauri writes:

> Everson created a dilemma when it simultaneously adopted two different and incompatible conceptions of Establishment Clause neutrality—a separationist conception prohibiting aid to religion and an accommodationist conception allowing religious participation in secular governmental programs of general social benefit.

Id. at 86 (footnotes omitted).

122. For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip. A State may pay

that is self-consciously accommodationist as in the *Lynch* tradition[123]—may not be able to withstand the scrutiny of the different types of neutrality found in Establishment Clause jurisprudence: strict neutrality, political neutrality, denominational neutrality, and free exercise neutrality.[124] Under any of these neutrality schemes, Laurence Tribe has pointed out that cases like *Lynch* and *Marsh* are difficult, if not impossible, to justify.[125] The chief reason for this difficulty is the idea that time, traditional practice, and context effectively neutralize the religious quality of some messages.[126] Thus, in *Marsh* and *Lynch*, the Court implied that the saying of legislative prayers and the display of the crèche, respectively, were religious practices that had been divested over time of their religious import.[127] But such an exception to the requirement of neutrality, argues Professor Tribe, threatens to undercut completely the rule stemming from the secular purpose requirement of *Lemon* prohibiting government from the use of religious means to accomplish secular ends when there are secular means available to accomplish the task.[128] For "time may restore what it has removed,"[129] and symbols now secularized may once again be invested with their traditional religious impact such that the autonomy of religious non-adherents will clash with the religious sentiments of the majority. Neutrality then, as a theoretical construct,

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for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building.

Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting) (footnotes omitted).

123. [T]he metaphor ["wall of separation"] itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state .... Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any.

Lynch, 465 U.S. 668, 673 (citing Zorach v. Clauson, 343 U.S. 306, 314, 315 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211 (1948)).

124. *See* L. TRIBE, *supra* note 73, § 14-7, at 1188-201. "Strict neutrality" forbids religious classifications to be made by government and seems at odds with the free exercise clause. *Id.* at 1188-89. "Political neutrality" permits some religious classifications based either on a "secularly relevant factor" or for the purpose of denying "benefits to a religious organization that abuses those benefits in a manner that distorts the principle of religious voluntarism." *Id.* at 1189-90. "Denominational neutrality" "prevents the state from drawing lines between religions, when such lines are not supported by any free exercise argument." *Id.* at 1190. "Under free exercise neutrality, . . . the government may (and sometimes must) accommodate religious practices." *Id.* at 1193 (quoting Hobbie v. Unemployment Appeals Comm'n, 107 S. Ct. 1046, 1051 (1987)). *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963).

125. L. TRIBE, *supra* note 73, § 14-15, at 1284-97.

126. *Id.* at 1294.

127. *Id.* at 1294-95.

128. *See supra* note 91.

129. L. TRIBE *supra* note 73, § 14-15, at 1296.

seems to be essentially antithetical to the expression by the political community of any shared religious beliefs. Adoption by the dissent of a strictly non-preferential and accommodationist goal of the Establishment Clause would render unnecessary the need of the Court to justify its discussions on the basis on "neutrality" and to use the beleaguered *Lemon* test.

B. *Coercion as a Standard*

Justice Kennedy applied as a standard or test on Establishment Clause claims that of requiring a finding of a coercive governmental act before a violation could be declared.[130] While the traditions of the country and the theory of the Establishment Clause "permit[] government some latitude in recognizing and accommodating the central role religion plays in our society,"[131] the dissent noted there is always a need to observe the border between accommodation and establishment. Government goes from accommodation to establishment when it "coerce[s] anyone to support or participate in any religion or its exercise."[132]

The majority rejected Justice Kennedy's requirement of coercion in finding an Establishment Clause violation, citing precedents.[133] In concurrence, Justice Stevens noted that a showing of indirect or direct coercion in Establishment Clause cases is "out of step with our precedent."[134] This may be true, but in requiring the coercion standard, Justice Kennedy seems to have history on his side.

Justice Kennedy quoted as authority for his position on coercion James Madison's statement in the First Congress regarding the bill for taxes for the support of religion.[135] If Madison's words are any indication of the intent of the establishment clause, coercion is an essential element. If coercion of religious affiliation and support is the primary

130. [F]or it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.

Allegheny, 109 S. Ct. at 3136 (Kennedy, J., dissenting).

131. *Id.* at 3135 (citing Lynch v. Donnelly, 465 U.S. 668, 678 (1984); Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

132. *Id.* at 3136.

133. *Id.* at 3103 n.47. Writing for the majority, Justice Blackmun cited with approval the Court's words in Engel v. Vitale, 370 U.S. 421, 430 (1962) ("The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.").

134. *Allegheny*, 109 S. Ct. at 3131 n.6 (Stevens, J., concurring).

135. *See supra* note 71. *See also Allegheny*, 109 S. Ct. at 3136-37 (Kennedy, J., dissenting).

evil against which the Framers designed the Establishment Clause, the many post-adoption practices[136] of the Framers and of later Congresses could not be seen to violate the Establishment Clause.[137]

Of course, application of the coercion standard would require modification of, if not overturning of, the *Lemon* test which prohibits any activity that has the effect of advancing religion. The test fails to distinguish those actions that attempt to coerce religious belief from those that merely facilitate the exercise of one's faith.[138] Thus, *Lemon* has the effect of being hostile to religious expressions that do not coerce.[139] Therefore, the effort to hold to a coercion theory of the Establishment Clause *and* to the *Lemon* test with its neutrality theory is inconsistent.

C. *Rejection of Adorned/Unadorned*

Justice Kennedy is to be commended for his attempt to correct what seems to have become an often made error in interpreting the *Lynch* decision, the idea that because the crèche was displayed in a context adorned by other symbols of the Christmas season more secular in nature the Establishment Clause was not violated.[140] The *Allegheny* majority used the *Lynch* test[141] in striking down the county's display of the crèche where it held that the crèche stood alone and was "the single element of

136. *See supra* note 69.

137. *See* McConnell, *supra* note 83, at 934-36 (arguing also that the dictum in Engel v. Vitale, 370 U.S. 421 (1962), is out of step with their previous coercion statements with regard to the Establishment Clause, most notably Zorach v. Clauson, 343 U.S. 306 (1952), McCollum v. Board of Educ., 333 U.S. 203 (1948), and Cantwell v. Connecticut, 310 U.S. 296 (1940)). *See also* American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987) (Easterbrook, J., dissenting):

> The genesis of the Establishment Clause persuades me that force or funds are essential ingredients of an "establishment". Yet I offer this conclusion in the spirit of constructive criticism, because it is plainly not the law today .... The passage is circular: it says that there needn't be coercion, there need only be "establishment". If establishment *means* force or funds, then you can't have one without the other. The passage also is ukase. It is unreasoned, unsupported by history, and irrelevant to the case at hand.

Id. at 137 (emphasis in original). Judge Easterbrook's dissent may be the finest judicial expression to date of the coercion theory.

138. McConnell, *supra* note 83, at 940.

139. Recent examples might be Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (holding unconstitutional school programs paying public school teachers to teach some nonpublic school students conducted in "leased" classrooms in the nonpublic schools) and Aguilar v. Felton, 473 U.S. 402 (1985) (holding unconstitutional New York City's use of federal funds to pay the salaries of public school employees who teach in parochial schools in the City).

140. For a discussion of the influence of this reading of *Lynch*, see Myers, *The Establishment Clause and Nativity Scenes: A Reassessment of Lynch v. Donnally*, 77 KY. L.J. 61, 70-90 (1988-89).

141. This supposed test of the *Lynch* Court has been given various names, one of which is the "St. Nicholas too" test. *See, e.g.*, ACLU v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir.), *cert. denied*, 107 S. Ct. 421 (1986) (Nelson, J., dissenting).

the display on the Grand Staircase."[142] Thus, the crèche was held to be inconsistent with *Lynch*.

The adorned requirement reading of *Lynch* stems most probably from Justice Brennan's dissent in that case, a clever and ultimately successful attempt to limit the scope of *Lynch*. Justice Brennan asserted that *Lynch* was a "narrow result which turn[ed] largely upon the particular holding context in which the city of Pawtucket's nativity scene appeared."[143] Three federal courts of appeals adopted Justice Brennan's interpretation and concluded that particular displays of nativity scenes were violative of the Establishment Clause.[144] The Second Circuit, however, in *McCreary v. Stone*,[145] adopted the broader reading of *Lynch* and permitted the public display of a nativity scene. "According to this [broad reading] neither the physical context in which the crèche is displayed nor the precise location of the display is particularly significant."[146]

In his dissent, Justice Kennedy criticized the majority for threatening to "trivialize constitutional adjudication"[147] by requiring the Court to investigate whether there were present in Christmas displays Santas and reindeer.[148] The Court could thus only help lower courts by deciding "a long series of holiday display cases, using little more than intuition

142. *Allegheny*, 109 S. Ct. at 3104.

> Under the Court's holding in *Lynch*, the effect of a crèche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the crèche's religious message. The *Lynch* display comprised a series of figures and objects, each group of which had its own focal point. Santa's house and his reindeer were objects of attention separate from the crèche, and had their specific visual story to tell. Similarly, whatever a "talking" wishing well may be, it obviously was a center of attention separate from the crèche. Here, in contrast, the crèche stands alone: it is the single element of the display on the Grand Staircase.

Id. at 3103-04.

143. Lynch v. Kurtzman, 465 U.S. 668, 695 (1984) (Brennan, J., dissenting).

144. ACLU v. Allegheny County, 842 F.2d 655 (3d Cir. 1988), *aff'd*, 109 S. Ct. 3086 (1989) (this was the lower court case in *Allegheny*); American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987); ACLU v. City of Birmingham, 791 F.2d 1561 (6th Cir.), *cert. denied*, 107 S. Ct. 421 (1986).

145. 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided court sub nom.*, Board of Trustees v. McCreary, 471 U.S. 83 (1985). The Second Circuit Court of Appeals noted that: "[t]he Supreme Court did not decide the Pawtucket case based upon the physical context within which the display of the crèche was situated; rather, the Court consistently referred to 'the crèche in the context of the Christmas season.'" *Id.* at 729 (citing Lynch v. Donnelly, 465 U.S. 668, 679 (1984)).

146. Myers, *supra* note 140, at 72.

147. *Allegheny*, 109 S. Ct. at 3144 (Kennedy, J., dissenting).

148. *Id.*

and a tape measure."[149] Justice Kennedy charged the majority with mischaracterizing the Court's opinion in *Lynch* as an endorsement-in-context test.[150] From the wording in the *Lynch* case itself, he appears to be correct in that the "context" spoken of in *Lynch* refers not to the physical setting of the display but to the context of the Christmas season.[151]

D. *The Endorsement Test*

A significant aspect of Justice Kennedy's dissent is devoted to the Majority's use of the endorsement test,[152] made applicable to the "principal or primary purpose" prong of the *Lemon* test.[153] The dissent has

149. *Id.* at 3144-45.

150. *Id.* at 3144.

151. In this case, the focus of our inquiry must be on the crèche in the context of the Christmas season.

. . . .

When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the crèche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message.

. . . .

The display is sponsored by the city to celebrate the Holiday and to depict the origin of that Holiday.

Lynch, 465 U.S. at 679-81.

152. The scholarly discussion on the endorsement test, particularly as it is formed in Justice O'Connor's concurrence in Lynch v. Donnally, 465 U.S. 668, 691 (1984), is extensive. *See, e.g.*, Feder, *And a Child Shall Lead Them: Justice O'Connor, The Principle of Religious Liberty and Its Practical Application*, 8 PACE L. REV. 249 (1988); Heck & Arledge, *Justice O'Connor and the First Amendment 1981-84*, 13 PEPPERDINE L. REV. 993 (1986); Marshall, *"We Know It When We See It:" The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 MICH. L. REV. 266 (1987); Comment, *The Emerging Jurisprudence of Justice O'Connor*, 52 U. CHI. L. REV. 389 (1985).

153. The endorsement aspect of the Court's decision is found at *Allegheny*, 109 S. Ct. 3100-04. The Court asserted that "in recent years" it has paid close attention to whether the governmental practice has the effect of "endorsing" religion, but that the term "endorsement" is not "self-defining." *Id.* at 3100. The Court in *Allegheny* quoted, among other decisions, Justice Goldberg's concurrence in *Abington*: "The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion." Abington School Dist. v. Schempp, 374 U.S. 203, 305 (1963). In *Allegheny*, the Court held that "[t]he Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'" *Id.* at 3101 (quoting Lynch v. Donnelly, 465 U.S. 668, 687 (1983) (O'Connor, J., concurring)). Depending exclusively on Justice O'Connor's concurrence in *Lynch* as the definitive opinion in that controversial case, the Court held that any endorsement of religion is "invalid" because such an endorsement sends a message to nonadherents of the endorsed religion that they are not full members of the political community. *Id.* at 3102. The Court then derived two relevant constitutional principles: "the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *Id.* at 3103. The Court, determining that this latter principle required the Allegheny County crèche and menorah to be subjected to the "adorned context" test, held the crèche violative of the establishment clause because "it endorsed the Christian religion." *Id.*

three criticisms of the use of the endorsement test: (1) it violated the doctrine of *stare decisis* in Establishment Clause jurisprudence;[154] (2) it prohibited reasonable governmental accommodations of religion that themselves do not violate the Establishment Clause;[155] and (3) it consigned to least favored status the beliefs and feelings of adherents to "[t]hose religions enjoying the largest following."[156]

Justice Kennedy seems correct in asserting that the endorsement test violated *stare decisis* at least in this case because of its relation to *Lynch*. Instead of using the principles enunciated in *Lynch* as controlling in a like case, such as *Allegheny*, the majority used Justice O'Connor's endorsement test in her *concurring* opinion in *Lynch* as controlling.[157] As Justice Kennedy points out, the Court extends the rule in *Lynch* to include the *dissent* in that case as well.[158] Such an approach is clearly violative of the doctrine of *stare decisis* for that principle "directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."[159]

Justice Kennedy failed to convince, however, when he found that the endorsement test was more hostile to religious accommodations than was the traditional application of the *Lemon* test. For while it is true that endorsement would require prohibitions of governmental actions such as legislative prayers and the Presidential proclamation of Thanksgiving,[160] it is *not* clear that the standard application of *Lemon* would *permit* such accommodations. But such is the dissent's implied belief: *Lemon* as it stands, "when applied with proper sensitivity to our traditions and our caselaw,"[161] is accommodating to religious affirmations by government; it is *endorsement* that makes *Lemon* excessively secular and hostile to religion. This view does not comport, however, with what the Supreme Court has actually done.

In *Lynch*, there is little disagreement that the Court only partially applied the *Lemon* test.[162] In *Marsh*, the legislative prayer case, *Lemon*

at 3105. The menorah placed in the context with a Christmas tree and the mayor's sign concerning liberty was held not to endorse religious faith. *Id.* at 3115.

154. *Id.* at 3141.
155. *Id.* at 3142-44.
156. *Id.* at 3145.
157. *Id.* at 3101-03.
158. *Id.* at 3141 n.6.
159. *Id.* at 3141.
160. *Id.* at 3142.
161. *Id.* at 3134.
162. *See supra* note 112.

was not applied at all.[163] It is not clear that in those cases, had *Lemon* been applied forthrightly, the governmental action could have been upheld. *Lemon* does not need the endorsement test to be excessively hostile to the religious traditions of the American people. Thus, Justice Kennedy's extensive criticism of the endorsement test, while not incorrect, might better have been aimed at *Lemon* itself.

E. *Incorporation of the First Amendment*

The Bill of Rights was originally intended to protect citizens only from encroachments by the *federal* government.[164] However, over time, portions of the Bill of Rights have been "incorporated" to apply to the States via the "due process" clause of the Fourteenth Amendment. This is true of the Establishment Clause.[165]

The incorporation of the Establishment Clause has never been seriously questioned in the Court's jurisprudence.[166] Even then Justice Rehnquist's dissent in *Jaffree*, the most radical Establishment Clause opinion on record, accepted the incorporation of that clause without discussion.[167] Rehnquist did at least mention the fact of incorporation, which, unfortunately, cannot be said for Justice Kennedy's dissent in *Allegheny*.[168]

It may be that it is "too late in the day" to reconsider seriously the incorporation of the Establishment Clause because of the score of cases that would thus be overturned.[169] However, the Supreme Court can undo precedent, and some of its most celebrated cases have done just

163. Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting) ("I must begin by demonstrating what should be obvious: that, if the Court were to judge legislative prayer through the unsentimental eye of our settled doctrine, it would have to strike it down as a clear violation of the Establishment Clause.").

164. *See* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833). *See also* R. BERGER, GOVERNMENT BY JUDICIARY (1977); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

165. *See* Everson v. Board of Educ., 330 U.S. 1 (1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

166. However, in an interesting recent case, Brevard Hand, Chief Judge for the Southern District of Alabama, ruled that his court had no jurisdiction to rule in an Establishment Clause case concerning the State of Alabama because "the Constitution had not been amended to incorporate the first amendment to the states." Smith v. Board of School Comm'rs, 655 F. Supp. 939, 943 (S.D. Ala. 1987). Predictably, the United States Court of Appeals for the Eleventh Circuit rejected Judge Hand's argument. Jaffree v. Wallace, 705 F.2d 1526, 1532-33 (11th Cir. 1983). The case reached the U.S. Supreme Court on the substantive grounds *sub nom.* Wallace v. Jaffree, 472 U.S. 38 (1985).

167. *Jaffree*, 472 U.S. at 113 (1985) (Rehnquist, J., dissenting).

168. The majority's opinion asserts the prevailing law in *Allegheny*, 109 S. Ct. at 3098.

169. This assertion is made by Leonard Levy in L. LEVY, *supra* note 5, at 165. *But see* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 387 (1981).

this.[170] Furthermore, if there is evidence that the Framers of the Fourteenth Amendment specifically did not intend to incorporate the Establishment Clause,[171] it is not clear why it would be unreasonable for the Court to consider the evidence expressed in the intentions of the Framers of both the Establishment Clause and the Fourteenth Amendment.

F. *Issues in Constitutional Interpretation*

Justice Kennedy does not do a serious historical evaluation of the Establishment Clause in an effort to find the Clause's original meaning. Therefore, he is not in a position to criticize as effectively as he could the Court's interpretive methodology; nor is he able to put forward one of his own, particularly as it relates to the religion clauses. This is unfortunate, given the debate going on in constitutional law over the issue of constitutional interpretation generally and of original intent specifically. The issues impinge deeply on the Establishment Clause. If Justice Kennedy had wanted to write an *apologia* for the ideas of original intent in interpretation, of judicial restraint, and of the constraining limits that historical understanding places upon us, this case offered a fine opportunity to do so.

One issue is how broadly should the Establishment Clause be interpreted or, in other words, how high a level of generality should the language of the constitutional text be taken? If what appears to be the intention of the Framers in regard to the Establishment Clause is limited to the prohibition of the Federal government from preferring one sect or one religious denomination over another and from establishing a state church,[172] then to broaden the scope of the phrase might mean to prohibit other involvements of government with religion that the Framers did not intend to prohibit. This approach places the Court in a position of going beyond the historical limitations placed upon it by the language of the Constitution and the structure of government which that document creates. To do so, the Court, in making substantive decisions of

170. *See* Maltz, *Some Thoughts on the Death of Stare Decisis in Constitutional Law*, 1980 WIS. L. REV. 467, 494-96 (1980).

171. From 1875 to 1882, Congress debated a proposal, which never passed, to amend the Constitution in such a way that would have subjected the states to the religion clauses: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." *See* Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 (1951) (quoting 4 CONG. REC. 5580 (1876)). The introduction of the amendment and the ensuing floor debates seem to indicate that, seven years after the passage of the Fourteenth Amendment, no one believed the Amendment to make the religion clause applicable to the States. *Id.*

172. *See supra* notes 92-96 and accompanying text.

law, must necessarily have before it a particular social vision that guides its decisions; it must select a political source "from which to extract concepts of equality and justice,"[173] so as to enforce those "values which are fundamental to our society."[174] The Court must do this whenever it decides that the text of the Constitution cannot give to courts specific guidance, but rather only speaks in the vaguest and most general of terms, generalities, however majestic.[175] The view that federal courts should go beyond the specific and historical text of the Constitution and seek to enforce norms and values not specifically stated or clearly implicit in the document raises two issues that Justice Kennedy might have addressed in his dissent: the level of generality at which courts should interpret constitutional language and the institutional role of the Supreme Court itself in our system of government.

Much has been written in previous years in the academy concerning the level of generality of constitutional language.[176] The debate has failed to bring any desired consensus. It is clear that the more general or abstract way in which one interprets phrases such as "establishment clause," "equal protection of law," or "due process," the more discretion a court has in applying the discerned meaning of the phrase to situations either not foreseen by the authors of the phrase or to situations contemplated but for various reasons rejected by the authors. These are extremely difficult problems, especially realizing that the level of generality may change from one text to another. Historical intent is often difficult to find because it is not always clear how much discretion the authors of a text intended to grant to succeeding generations, and often we face situations unknown to the various groups of authors of different constitutional texts. Yet, when we can discern with relative certainty a historical intention, however limiting that intention may be in comparison to our contemporary standards of equality, justice, freedom, and tolerance, and when we can determine that the language of the text gives a "rule" requiring certain judicial outcomes in specific situations, instead of a "standard" that envisions a political value and that invites discretion, the

173. Monaghan, *supra* note 169, at 355.

174. Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 227 (1980).

175. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 945 (1973).

176. Brest, *supra* note 174, at 204; Ely, *supra* note 175, at 945. *See* Monaghan, *supra* note 169. *See also* J. ELY, DEMOCRACY AND DISTRUST (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261 (1981).

judicial process that abstracts the rule from its historical limitations changes, in essence the text itself, though its words remain the same.[177] It is a subtle though powerful way of constitutional *amendment.* It is possible that the "wall of separation" metaphor and the theory of neutrality underlying it have done just this to the Establishment Clause, abstracting it from the limiting "rule" of non-preferentialism to the general "standard" of neutrality.[178] Justice Kennedy might have addressed this fact.

The process of generalization, however, changes not only the meaning of the constitutional text; it changes the institutional role of the federal courts as well.[179] The courts cease to be the enforcer of political values explicit in the Constitutional text or clearly implicit in it and become instead "the expounder of basic national ideals of individual liberty and fair treatment, even when the content of these ideals is not expressed as a matter of positive law in the written constitution."[180] Such a theory of judicial review is problematic. It seems to run against the grain of the constitutional structure of government itself that the fundamental political values and policy choices of the country will be made by those who are electorally accountable and not by those who are merely politically influenced. Neither does such a theory provide protection from abuses of power in the judicial department. The dissent's failure to address these problems in any systematic way weakens its force.

VI. CONCLUSION

The ambiguities in the Supreme Court's Establishment Clause jurisprudence stem from a false start in the historical understanding of the clause, and from the tension created when the Court attempts to combine competing values such as accommodation and neutrality. This is the legacy of the *Everson* decision. The result of this case law has been a patchwork of unprincipled and inconsistent decisions, confusing the citizenry as to the proper relation between religion and the state, and earning the Court a lessened sense of public respect.

Justice Kennedy's dissent in *Allegheny* is influenced by the confusion characteristic of the Court's Establishment Clause decisions. Unwilling to discard the *Lemon* test, Justice Kennedy is forced to accept, at

177. *See* American Jewish Congress v. City of Chicago, 827 F.2d 120, 137-40 (7th Cir. 1987) (Easterbrook, J., dissenting).
178. *Id.* at 138-39.
179. *Id.* at 139.
180. Brest, *supra* note 174, at 227.

least in large part, that test's goal of neutrality and its underlying separationist jurisprudence. But it is not clear how this understanding of the Establishment Clause is consistent with a view that, unless government coerces religious faith, it is free to accommodate practices that are consistent with the nations history. For there is all the difference in the world between the requirement that government remain neutral with regard to religion and irreligion and the freedom of government to accommodate religious symbolism. The former seems logically to compel a completely secularist society; the latter permits government's use of religious symbolism.

The dissent's holding in *Allegheny*—that both the Chanukah menorah and the Christian crèche can be permissibly displayed—fits better with the view that the Establishment Clause was intended to prohibit a national church as well as official preferences of one religion over another. The dissent's holding is inconsistent with *Lemon*, and Justice Kennedy would be encouraged to follow the lead of the Chief Justice who advocates *Lemon*'s immediate overthrow.

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