SUPREME COURT OF THE UNITED STATES

Nos. 83-812 AND 83-929

GEORGE C. WALLACE, GOVERNOR OF THE STATE OF ALABAMA, ET AL., APPELLANTS

83-812 v.

ISHMAEL JAFFREE ET AL.

DOUGLAS T. SMITH, ET AL., APPELLANTS

83-929 v.

ISHMAEL JAFFREE ET AL.

ON APPEALS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 4, 1985]

JUSTICE REHNQUIST, dissenting.

Thirty-eight years ago this Court, in *Everson* v. *Board of Education*, 330 U. S. 1, 16 (1947) summarized its exegesis of Establishment Clause doctrine thus:

> "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' *Reynolds* v. *United States*, [98 U. S. 145, 164 (1879)]."

This language from *Reynolds*, a case involving the Free Exercise Clause of the First Amendment rather than the Establishment Clause, quoted from Thomas Jefferson's letter to the Danbury Baptist Association the phrase "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation be-

tween church and State." 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861).[1]

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years. Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the states. His letter to the Danbury Baptist Association was a short note of courtesy, written fourteen years after the amendments were passed by Congress. He would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the Religion Clauses of the First Amendment.

Jefferson's fellow Virginian James Madison, with whom he was joined in the battle for the enactment of the Virginia Statute of Religious Liberty of 1786, did play as large a part as anyone in the drafting of the Bill of Rights. He had two advantages over Jefferson in this regard: he was present in the United States, and he was a leading member of the First Congress. But when we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, including Madison's significant contributions thereto, we see a far different picture of its purpose than the highly simplified "wall of separation between church and State."

During the debates in the thirteen colonies over ratification of the Constitution, one of the arguments frequently used by opponents of ratification was that without a Bill of Rights guaranteeing individual liberty the new general government carried with it a potential for tyranny. The typical response

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[1] *Reynolds* is the only authority cited as direct precedent for the "wall of separation theory." 330 U. S., at 16. *Reynolds* is truly inapt; it dealt with a Mormon's Free Exercise Clause challenge to a federal polygamy law.

to this argument on the part of those who favored ratification was that the general government established by the Constitution had only delegated powers, and that these delegated powers were so limited that the government would have no occasion to violate individual liberties. This response satisfied some, but not others, and of the eleven colonies which ratified the Constitution by early 1789, five proposed one or another amendments guaranteeing individual liberty. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom. See 3 J. Elliot, Debates on the Federal Constitution 659 (1891); 1 *id.*, at 328. Rhode Island and North Carolina flatly refused to ratify the Constitution in the absence of amendments in the nature of a Bill of Rights. 1 *id.*, at 334; 4 at 244. Virginia and North Carolina proposed identical guarantees of religious freedom:

> "[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." 3 *id.*, at 659; 4 *id.*, at 244.[8]

On June 8, 1789, James Madison rose in the House of Representatives and "reminded the House that this was the day that he had heretofore named for bringing forward amendments to the Constitution." 1 Annals of Cong. 424. Madison's subsequent remarks in urging the House to adopt his drafts of the proposed amendments were less those of a dedicated advocate of the wisdom of such measures than those of a prudent statesman seeking the enactment of measures sought by a number of his fellow citizens which could surely do no harm and might do a great deal of good. He said, *inter alia*:

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[8] The New York and Rhode Island proposals were quite similar. They stated that no particular "religious sect or society ought to be favored or established by law in preference to others." 1 Elliot's Debates, at 328; *id.*, at 334.

"It appears to me that this House is bound by every motive of prudence, not to let the first session pass over without proposing to the State Legislatures, some things to be incorporated into the Constitution, that will render it as acceptable to the whole people of the United States, as it has been found acceptable to a majority of them. I wish, among other reasons why something should be done, that those who had been friendly to the adoption of this Constitution may have the opportunity of proving to those who were opposed to it that they were as sincerely devoted to liberty and a Republican Government, as those who charged them with wishing the adoption of this Constitution in order to lay the foundation of an aristocracy or despotism. It will be a desirable thing to extinguish from the bosom of every member of the community, any apprehensions that there are those among his countrymen who wish to deprive them of the liberty for which they valiantly fought and honorably bled. And if there are amendments desired of such a nature as will not injure the Constitution, and they can be ingrafted so as to give satisfaction to the doubting part of our fellow-citizens, the friends of the Federal Government will evince that spirit of deference and concession for which they have hitherto been distinguished." *Id.*, at 431–432.

The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." *Id.*, at 434.

On the same day that Madison proposed them, the amendments which formed the basis for the Bill of Rights were referred by the House to a committee of the whole, and after

several weeks' delay were then referred to a Select Committee consisting of Madison and ten others. The Committee revised Madison's proposal regarding the establishment of religion to read:

> "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." *Id.*, at 729.

The Committee's proposed revisions were debated in the House on August 15, 1789. The entire debate on the Religion Clauses is contained in two full columns of the "Annals," and does not seem particularly illuminating. See *id.*, at 729–781. Representative Peter Sylvester of New York expressed his dislike for the revised version, because it might have a tendency "to abolish religion altogether." Representative John Vining suggested that the two parts of the sentence be transposed; Representative Elbridge Gerry thought the language should be changed to read "that no religious doctrine shall be established by law." *Id.*, at 729. Roger Sherman of Connecticut had the traditional reason for opposing provisions of a Bill of Rights—that Congress had no delegated authority to "make religious establishments"—and therefore he opposed the adoption of the amendment. Representative Daniel Carroll of Maryland thought it desirable to adopt the words proposed, saying "[h]e would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community."

Madison then spoke, and 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." *Id.*, at 730. He said that some of the state conventions had thought that Congress might rely on the "necessary and proper" clause to infringe the rights of conscience or to establish a national religion, and "to prevent these effects he presumed the amendment was intended, and

be thought it as well expressed as the nature of the language would admit." *Ibid.*

Representative Benjamin Huntington then expressed the view that the Committee's language might "be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it." Huntington, from Connecticut, was concerned that in the New England states, where state established religions were the rule rather than the exception, the federal courts might not be able to entertain claims based upon an obligation under the bylaws of a religious organization to contribute to the support of a minister or the building of a place of worship. He hoped that "the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronise those who professed no religion at all." *Id.*, at 730–731.

Madison responded that the insertion of the word "national" before the word "religion" in the Committee version should satisfy the minds of those who had criticized the language. "He 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 that if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." *Id.*, at 731. Representative Samuel Livermore expressed himself as dissatisfied with Madison's proposed amendment, and thought it would be better if the Committee language were altered to read that "Congress shall make no laws touching religion, or infringing the rights of conscience." *Ibid.*

Representative Gerry spoke in opposition to the use of the word "national" because of strong feelings expressed during the ratification debates that a federal government, not a national government, was created by the Constitution. Madi-

son thereby withdrew his proposal but insisted that his reference to a "national religion" only referred to a national establishment and did not mean that the government was a national one. The question was taken on Representative Livermore's motion, which passed by a vote of 31 for and 20 against. *Ibid.*

The following week, without any apparent debate, the House voted to alter the language of the Religion Clause to read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." *Id.*, at 766. The floor debates in the Senate were secret, and therefore not reported in the Annals. The Senate on September 3, 1789 considered several different forms of the Religion Amendment, and reported this language back to the House:

> "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."

C. Antieau, A. Downey, & E. Roberts, Freedom From Federal Establishment 130 (1964).

The House refused to accept the Senate's changes in the Bill of Rights and asked for a conference; the version which emerged from the conference was that which ultimately found its way into the Constitution as a part of the First Amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

The House and the Senate both accepted this language on successive days, and the amendment was proposed in this form.

On the basis of the record of these proceedings in the House of Representatives, James Madison was undoubtedly the most important architect among the members of the House of the amendments which became the Bill or Rights,

but it was James Madison speaking as an advocate of sensible legislative compromise, not as an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution. During the ratification debate in the Virginia Convention, Madison had actually opposed the idea of any Bill of Rights. His sponsorship of the amendments in the House was obviously not that of a zealous believer in the necessity of the Religion Clauses, but of one who felt it might do some good, could do no harm, and would satisfy those who had ratified the Constitution on the condition that Congress propose a Bill of Rights.[1] His original language "nor shall any national religion be established" obviously does not conform to the "wall of separation" between church and State idea which latter day commentators have ascribed to him. His explanation on the floor of the meaning of his language—"that Congress should not establish a religion, and enforce the legal observation of it by law" is of the same ilk. When he replied to Huntington in the debate over the proposal which came from the Select Committee of the House, he urged that the language "no religion shall be established by law" should be amended by inserting the word "national" in front of the word "religion."

It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in *Everson*—while correct in bracketing Madison and Jefferson together in their exertions in their home state leading to the enactment of the

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[1] In a letter he sent to Jefferson in France, Madison stated that he did not see much importance in a Bill of Rights but he planned to support it because it was "anxiously desired by others . . . [and] it might be of use, and if properly executed could not be of disservice." 5 Writings of James Madison 271 (G. Hunt ed. 1904).

Virginia Statute of Religious Liberty—is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights.

The repetition of this error in the Court's opinion in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948), and, *inter alia*, *Engel* v. *Vitale*, 370 U. S. 421 (1962), does not make it any sounder historically. Finally, in *Abington School District* v. *Schempp*, 374 U. S. 203, 214 (1963) the Court made the truly remarkable statement that "the views of Madison and Jefferson, preceded by Roger Williams came to be incorporated not only in the Federal Constitution but likewise in those of most of our States" (footnote omitted). On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history.[4] And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; *stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history.

None of the other Members of Congress who spoke during the August 15th debate expressed the slightest indication that they thought the language before them from the Select Committee, or the evil to be aimed at, would require that the Government be absolutely neutral as between religion and irreligion. The evil to be aimed at, so far as those who spoke were concerned, appears to have been the establishment of a national church, and perhaps the preference of one religious sect over another, but it was definitely not concern about whether the Government might aid all religions evenhandedly. If one were to follow the advice of JUSTICE BRENNAN,

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[4] State establishments were prevalent throughout the late Eighteenth and early Nineteenth Centuries. See Massachusetts Constitution of 1780, Part. 1, Art. III; New Hampshire Constitution of 1784, Art. VI; Maryland Declaration of Rights of 1776, Art. XXXIII; Rhode Island Charter of 1663 (superseded 1842).

concurring in *Abington School District* v. *Schempp*, *supra* at 236, and construe the Amendment in the light of what particular "practices . . . challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent," one would have to say that the First Amendment Establishment Clause should be read no more broadly than to prevent the establishment of a national religion or the governmental preference of one religious sect over another.

The actions of the First Congress, which re-enacted the Northwest Ordinance for the governance of the Northwest Territory in 1789, confirm the view that Congress did not mean that the Government should be neutral between religion and irreligion. The House of Representatives took up the Northwest Ordinance on the same day as Madison introduced his proposed amendments which became the Bill of Rights; while at that time the Federal Government was of course not bound by draft amendments to the Constitution which had not yet been proposed by Congress, say nothing of ratified by the States, it seems highly unlikely that the House of Representatives would simultaneously consider proposed amendments to the Constitution and enact an important piece of territorial legislation which conflicted with the intent of those proposals. The Northwest Ordinance, 1 Stat. 50, re-enacted the Northwest Ordinance of 1787 and provided that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *Id.*, at 52, n. (a). Land grants for schools in the Northwest Territory were not limited to public schools. It was not until 1845 that Congress limited land grants in the new States and Territories to nonsectarian schools. 5 Stat. 788; Antieau, Downey, & Roberts, Freedom From Federal Establishment, at 163.

On the day after the House of Representatives voted to adopt the form of the First Amendment Religion Clause

which was ultimately proposed and ratified, Representative Elias Boudinot proposed a resolution asking President George Washington to issue a Thanksgiving Day proclamation. Boudinot said he "could not think of letting the session pass over without offering an opportunity to all the citizens of the United States of joining with one voice, in returning to Almighty God their sincere thanks for the many blessings he had poured down upon them." 1 Annals of Cong. 914 (1789). Representative Aedanus Burke objected to the resolution because he did not like "this mimicking of European customs"; Representative Thomas Tucker objected that whether or not the people had reason to be satisfied with the Constitution was something that the states knew better than the Congress, and in any event "it is a religious matter, and, as such, is proscribed to us." *Id.*, at 915. Representative Sherman supported the resolution "not only as a laudable one in itself, but as warranted by a number of precedents in Holy Writ: for instance, the solemn thanksgivings and rejoicings which took place in the time of Solomon, after the building of the temple, was a case in point. This example, he thought, worthy of Christian imitation on the present occasion . . . ." *Ibid.*

Boudinot's resolution was carried in the affirmative on September 25, 1789. Boudinot and Sherman, who favored the Thanksgiving proclamation, voted in favor of the adoption of the proposed amendments to the Constitution, including the Religion Clause; Tucker, who opposed the Thanksgiving proclamation, voted against the adoption of the amendments which became the Bill of Rights.

Within two weeks of this action by the House, George Washington responded to the Joint Resolution which by now had been changed to include the language that the President "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a form of government for their safety

and happiness." 1 J. Richardson, Messages and Papers of the Presidents, 1789-1897, p. 64 (1897). The Presidential proclamation was couched in these words:

> "Now, therefore, I do recommend and assign Thursday, the 26th day of November next, to be devoted by the people of these States to the service of that great and glorious Being who is the beneficent author of all the good that was, that is, or that will be; that we may then all unite in rendering unto Him our sincere and humble thanks for His kind care and protection of the people of this country previous to their becoming a nation; for the signal and manifold mercies and the favorable interpositions of His providence in the course and conclusion of the late war; for the great degree of tranquillity, union, and plenty which we have since enjoyed; for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national one now lately instituted; for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge; and, in general, for all the great and various favors which He has been pleased to confer upon us.
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> "And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions; to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually; to render our National Government a blessing to all the people by constantly being a Government of wise, just, and constitutional laws, discreetly and faithfully executed and obeyed; to protect and guide all sovereigns and nations (especially such as have shown kindness to us), and to bless them with good governments, peace, and concord; to promote the knowledge and practice of true religion

and virtue, and the increase of science among them and us; and, generally, to grant until all mankind such a degree of temporal prosperity as He alone knows to be best." *Ibid.*

George Washington, John Adams, and James Madison all issued Thanksgiving proclamations; Thomas Jefferson did not, saying:

> "Fasting and prayer are religious exercises; the enjoining them an act of discipline. Every religious society has a right to determine for itself the times for these exercises, and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." 11 Writings of Thomas Jefferson 429 (A. Lipscomb ed. 1904).

As the United States moved from the 18th into the 19th century, Congress appropriated time and again public moneys in support of sectarian Indian education carried on by religious organizations. Typical of these was Jefferson's treaty with the Kaskaskia Indians, which provided annual cash support for the Tribe's Roman Catholic priest and church.[9] It was not until 1897, when aid to sectarian

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[9] The Treaty stated in part:

"And whereas, the greater part of said Tribe have been baptised and received into the Catholic church, to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support of a priest of that religion . . . [a]nd . . . three hundred dollars, to assist the said Tribe in the erection of a church." 7 Stat. 79.

From 1789 to 1825 the U. S. Congress had provided a trust endowment of up to 12,000 acres of land "for the Society of the United Brethren for propagating the Gospel among the Heathen." See, e. g., ch. 46, 1 Stat. 490. The Act creating this endowment was renewed periodically and the renewals were signed into law by Washington, Adams, and Jefferson.

Congressional grants for the aid of religion were not limited to Indians. In 1787 Congress provided land to the Ohio Company, including acreage for the support of religion. This grant was reauthorized in 1792. See 1 Stat. 257. In 1833 Congress authorized the State of Ohio to sell the land

education for Indians had reached $500,000 annually, that Congress decided thereafter to cease appropriating money for education in sectarian schools. See Act of June 7, 1897, 30 Stat. 62, 79.; cf. *Quick Bear* v. *Leupp*, 210 U. S. 50, 77–79 (1908); J. O'Neill, Religion and Education Under the Constitution 118–119 (1949). See generally R. Cord, Separation of Church and State 61–82 (1982). This history shows the fallacy of the notion found in *Everson* that "no tax in any amount" may be levied for religious activities in any form. 330 U. S. at 15–16.

Joseph Story, a member of this Court from 1811 to 1845, and during much of that time a professor at the Harvard Law School, published by far the most comprehensive treatise on the United States Constitution that had then appeared. Volume 2 of Story's Commentaries on the Constitution of the United States 630–632 (5th ed. 1891) discussed the meaning of the Establishment Clause of the First Amendment this way:

> "Probably at the time of the adoption of the Constitution, and of the amendment to it now under consideration [First Amendment], the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.
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> "The real object of the [First] [A]mendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity, but to exclude all rivalry among Christian sects, and to prevent

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set aside for religion and use the proceeds "for the support of religion . . . and for no other use or purpose whatsoever. . . ." 6 Stat. 618–619.

any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cut off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been trampled upon almost from the days of the Apostles to the present age. . . ." (Footnotes omitted.)

Thomas Cooley's eminence as a legal authority rivaled that of Story. Cooley stated in his treatise entitled Constitutional Limitations that aid to a particular religious sect was prohibited by the United States Constitution, but he went on to say:

"But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed, when chaplains are designated for the army and navy, when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general exemption of the houses of religious worship from taxation for the support of State government. Undoubtedly the spirit of the Constitution will require, in all these cases, that care be taken to avoid discrimination in favor of or against any one religious denomination or

sect; but the power to do any of these things does not become unconstitutional simply because of its susceptibility to abuse. . . ." *Id.*, at 470–471.

Cooley added that,

> "[t]his public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order." *Id.*, at 470.

It would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations. Indeed, the first American dictionary defined the word "establishment" as "the act of establishing, founding, ratifying or ordaining(,)" such as in "[t]he episcopal form of religion, so called, in England." 1 N. Webster, American Dictionary of the English Language (1st ed. 1828). The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.

Notwithstanding the absence of an historical basis for this theory of rigid separation, the wall idea might well have served as a useful albeit misguided analytical concept, had it led this Court to unified and principled results in Establishment Clause cases. The opposite, unfortunately, has been true; in the 38 years since *Everson* our Establishment Clause

cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities,* have with embarassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." *Lemon* v. *Kurtzman*, 403 U. S. 602, 614 (1971); *Tilton* v. *Richardson*, 403 U. S. 672, 677–678, (1971); *Wolman* v. *Walter*, 433 U. S. 229, 236 (1977); *Lynch* v. *Donnelly*, 465 U. S. ——, (1984).

Whether due to its lack of historical support or its practical unworkability, the *Everson* "wall" has proven all but useless as a guide to sound constitutional adjudication. It illustrates only too well the wisdom of Benjamin Cardozo's observation that "[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 94, 155 N. E. 58, 61 (1926).

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. The "crucible of litigation," ante at 14, is well adapted to adjudicating factual disputes on the basis of testimony presented in court, but no amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of separation between church and State" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.

The Court has more recently attempted to add some mortar to *Everson*'s wall through the three-part test of *Lemon* v.

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*Tilton v. *Richardson* 403 U. S. 672, 677 (1971); *Meek* v. *Pittenger*, 421 U. S. 349 (1975) (partial); *Roemer* v. *Board of Public Works of Maryland*, 426 U. S. 736 (1976); *Wolman* v. *Walter*, 433 U. S. 229 (1977).

Many of our other Establishment Clause cases have been decided by bare 5–4 majorities. *Committee for Public Education* v. *Regan*, 444 U. S. 646 (1980); *Larson* v. *Valente*, 456 U. S. 228 (1982); *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Lynch* v. *Donnelly*, 465 U. S. —— (1984); *cf. Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1973).

Kurtzman, *supra*, at 614–615, which served at first to offer a more useful test for purposes of the Establishment Clause than did the "wall" metaphor. Generally stated, the *Lemon* test proscribes state action that has a sectarian purpose or effect, or causes an impermissible governmental entanglement with religion. *E. g.*, *Lemon*, *supra*.

Lemon cited *Board of Education* v. *Allen*, 392 U. S. 236, 243 (1968), as the source of the "purpose" and "effect" prongs of the three-part test. The *Allen* opinion explains, however, how it inherited the purpose and effect elements from *Schempp* and *Everson*, both of which contain the historical errors described above. See *Allen*, *supra*, at 243. Thus the purpose and effect prongs have the same historical deficiencies as the wall concept itself: they are in no way based on either the language or intent of the drafters.

The secular purpose prong has proven mercurial in application because it has never been fully defined, and we have never fully stated how the test is to operate. If the purpose prong is intended to void those aids to sectarian institutions accompanied by a stated legislative purpose to aid religion, the prong will condemn nothing so long as the legislature utters a secular purpose and says nothing about aiding religion. Thus the constitutionality of a statute may depend upon what the legislators put into the legislative history and, more importantly, what they leave out. The purpose prong means little if it only requires the legislature to express any secular purpose and omit all sectarian references, because legislators might do just that. Faced with a valid legislative secular purpose, we could not properly ignore that purpose without a factual basis for doing so. *Larson* v. *Valente*, 456 U. S. 228, 262–263 (1982) (WHITE, J., dissenting).

However, if the purpose prong is aimed to void all statutes enacted with the intent to aid sectarian institutions, whether stated or not, then most statutes providing any aid, such as textbooks or bus rides for sectarian school children, will fail because one of the purposes behind every statute, whether

stated or not, is to aid the target of its largesse. In other words, if the purpose prong requires an absence of *any* intent to aid sectarian institutions, whether or not expressed, few state laws in this area could pass the test, and we would be required to void some state aids to religion which we have already upheld. *E. g., Allen, supra.*

The entanglement prong of the *Lemon* test came from *Walz v. Tax Commission*, 397 U. S. 664, 674 (1970). *Walz* involved a constitutional challenge to New York's time-honored practice of providing state property tax exemptions to church property used in worship. The *Walz* opinion refused to "undermine the ultimate constitutional objective [of the Establishment Clause] as illuminated by history," *id.*, at 671, and upheld the tax exemption. The Court examined the historical relationship between the state and church when church property was in issue, and determined that the challenged tax exemption did not so entangle New York with the Church as to cause an intrusion or interference with religion. Interferences with religion should arguably be dealt with under the Free Exercise Clause, but the entanglement inquiry in *Walz* was consistent with that case's broad survey of the relationship between state taxation and religious property.

We have not always followed *Walz*'s reflective inquiry into entanglement, however. *E. g., Wolman*, 433 U. S., at 254. One of the difficulties with the entanglement prong is that, when divorced from the logic of *Walz*, it creates an "insoluable paradox" in school aid cases: we have required aid to parochial schools to be closely watched lest it be put to sectarian use, yet this close supervision itself will create an entanglement. *Roemer v. Board of Public Works of Maryland*, 426 U. S. 736, 768–769 (1976) (WHITE, J., concurring in judgment). For example, in *Wolman*, *supra*, the Court in part struck the State's nondiscriminatory provision of buses for parochial school field trips, because the state supervision of sectarian officials in charge of field trips would be too

onerous. This type of self-defeating result is certainly not required to ensure that States do not establish religions.

The entanglement test as applied in cases like *Wolman* also ignores the myriad state administrative regulations properly placed upon sectarian institutions such as curriculum, attendance, and certification requirements for sectarian schools, or fire and safety regulations for churches. Avoiding entanglement between church and State may be an important consideration in a case like *Walz*, but if the entanglement prong were applied to all state and church relations in the automatic manner in which it has been applied to school aid cases, the State could hardly require anything of church-related institutions as a condition for receipt of financial assistance.

These difficulties arise because the *Lemon* test has no more grounding in the history of the First Amendment than does the wall theory upon which it rests. The three-part test represents a determined effort to craft a workable rule from an historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service. The three-part test has simply not provided adequate standards for deciding Establishment Clause cases, as this Court has slowly come to realize. Even worse, the *Lemon* test has caused this Court to fracture into unworkable plurality opinions, see *supra*, n. 6, depending upon how each of the three factors applies to a certain state action. The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.

For example, a State may lend to parochial school children geography textbooks[1] that contain maps of the United States, but the State may not lend maps of the United States for use in geography class.[2] 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

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[1] *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

[2] *Meek*, 421 U. S., at 362–366. A science book is permissible, a science kit is not. See *Wolman*, 433 U. S., at 249.

class. A State may lend classroom workbooks, but may not lend workbooks in which the parochial school children write, thus rendering them nonreusable.[8] A State may pay for bus transportation to religious schools[9] but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.[10] A State may pay for diagnostic services conducted in the parochial school but therapeutic services must be given in a different building; speech and hearing "services" conducted by the State inside the sectarian school are forbidden, *Meek* v. *Pittenger*, 421 U. S. 349, 367, 371 (1975), but the State may conduct speech and hearing diagnostic testing inside the sectarian school. *Wolman*, 433 U. S., at 241. Exceptional parochial school students may receive counseling, but it must take place outside of the parochial school,[11] such as in a trailer parked down the street. *Id.*, at 245. A State may give cash to a parochial school to pay for the administration of State-written tests and state-ordered reporting services,[12] but it may not provide funds for teacher-prepared tests on secular subjects.[13] Religious instruction may not be given in public school,[14] but the public school may release students during the day for religion classes elsewhere, and may enforce attendance at those classes with its truancy laws.[15]

These results violate the historically sound principle "that the Establishment Clause does not forbid governments . . . to [provide] general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid'

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[8] *See Meek*, *supra*, at 364–366, nn. 3, 4, 362–366.

[9] *Everson* v. *Board of Education*, 330 U. S. 1 (1947).

[10] *Wolman*, *supra*, at 252–256.

[11] *Wolman*, *supra*, at 241–243; *Meek*, *supra*, at 362, n. 2, 367–372.

[12] *Regan*, 444 U. S., at 648, 657–660.

[13] *Levitt*, 413 U. S., at 479–482.

[14] *Illinois ex rel.* v. *McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

[15] *Zorach* v. *Clauson*, 343 U. S. 306 (1952).

religious instruction or worship." *Committee for Public Education* v. *Nyquist*, 413 U. S. 756, 799 (1973) (BURGER, C. J., concurring in part and dissenting in part). It is not surprising in the light of this record that our most recent opinions have expressed doubt on the usefulness of the *Lemon* test.

Although the test initially provided helpful assistance, *e. g.*, *Tilton* v. *Richardson*, 403 U. S. 672 (1971), we soon began describing the test as only a "guideline," *Committee for Public Education* v. *Nyquist*, *supra*, and lately we have described it as "no more than [a] useful signpos[t]." *Mueller* v. *Allen*, 463 U. S. 388, 394 (1983), citing *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973); *Larkin* v. *Grendel's Den, Inc.*, 459 U. S. 116 (1982). We have noted that the *Lemon* test is "not easily applied," *Meek*, *supra*, at 358, and as JUSTICE WHITE noted in *Committee for Public Education* v. *Regan*, 444 U. S. 646 (1980), under the *Lemon* test we have "sacrifice[d] clarity and predictability for flexibility." 444 U. S., at 662. In *Lynch* we reiterated that the *Lemon* test has never been binding on the Court, and we cited two cases where we had declined to apply it. 465 U. S., at ——, citing *Marsh* v. *Chambers*, 463 U. S. 783 (1983); *Larson* v. *Valente*, 456 U. S. 228 (1982).

If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," *ante*, at 14, has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the 'blurred, indistinct and variable barrier' described in *Lemon* v. *Kurtzman*." *Regan*, *supra*, at 671 (STEVENS, J., dissenting). We have done much straining since 1947, but still we admit that we can only "dimly perceive" the *Everson* wall. *Tilton*, *supra*. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.

The true meaning of the Establishment Clause can only be seen in its history. See *Walz*, 397 U. S., at 671–673; see also

Lynch, *supra*, at ——. As drafters of our Bill of Rights, the Framers inscribed the principles that control today. Any deviation from their intentions frustrates the permanence of that Charter and will only lead to the type of unprincipled decisionmaking that has plagued our Establishment Clause cases since *Everson*.

The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the "incorporation" of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

The Court strikes down the Alabama statute in No. 83-812, *Wallace* v. *Jaffree*, because the State wished to "endorse prayer as a favored practice." *Ante*, at 21. It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the majority, prohibits the Alabama Legislature from "endorsing" prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." History must judge whether it was the father of his country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

The State surely has a secular interest in regulating the manner in which public schools are conducted. Nothing in

the Establishment Clause of the First Amendment, properly understood, prohibits any such generalized "endorsement" of prayer. I would therefore reverse the judgment of the Court of Appeals in *Wallace* v. *Jaffree*.