The First Amendment and Sunday

*By David K. Huttar**

The First Amendment says, in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Many people will wonder whether anything new can be said regarding this provision and in particular about the Establishment Clause. And that assessment may indeed be correct. Be that as it may, this article seeks to explore a facet of the question that is not frequently brought into the discussion.

We will look first at some aspects of the background to the current religious establishment issue. Secondly, we will examine a clause contained in the Constitution that may shed some light on how we should interpret the Establishment Clause. Then, we will seek to draw some appropriate conclusions from this examination of the Constitution's "Sunday Clause." Finally, we will ask what might be further implications of our analysis for the work of the courts, as they seek to interpret and apply the Establishment Clause for today's needs.

I. Background to the Issue

For a century and a half there seemed to be little challenge to the idea that the First Amendment's words regarding "an establishment of religion" were intended to prohibit a state-sponsored church, that is, an established church. At first this must have been understood as a prohibition of any *federally* established church rather than a prohibition that individual *states* could have established churches. In fact, some states did have established churches. In time, however, the principle was extended to prohibit even states from having established churches,[1] and eventually this led to the dis-establishment of churches by those states that still had such establishments. But in spite of this development in interpretation of the Establishment Clause, it is important to note that the widespread understanding was that the First Amendment forbade the establishment of a church that would be supported by public money derived from broadly based taxation.

The situation shifted, however, in the mid-twentieth century, when the Establishment Clause was interpreted in terms of its requiring "a wall of separation" between church and state.[2] Since that time there have been a number of decisions that have progressively limited the ways in which the government or other public entities can be involved in religious questions. In fact, although the 1947 decision that introduced the wall terminology into court decisions did so in terms of *church* and state,[3] subsequent interpretation of the wall, if not by the courts, at least in public opinion, has tended to define the separation as one between *religion* and state.

Perhaps the most extreme version of this concept of separation (which I will refer to as the radical view) is that which holds that the First Amendment requires the government to be involved in no religious expression whatsoever. An argument that has been used to support this position is the observation that the First Amendment forbids "an establishment of *religion*," not an establishment of *a religion*. Michael Newdow, for example, has made this point in some public statements. Whether this argument is valid or not, it serves to illustrate this radical view of the Establishment Clause. The view argues that if the Framers had meant merely to forbid the establishment of a state-sponsored church, they would have better chosen the words "an establishment of *a religion*." At any rate, the radical interpretation understands the clause to forbid all expressions of religiosity, including the government use of the motto "In God We Trust" and the inclusion of "under God" in the Pledge of Allegiance.[4]

Those who hold that the First Amendment does not go nearly this far in forbidding expressions of religion have responded to the radical interpretation in a variety of ways. One common response is to place the phrase "establishment of religion" in its historical context by seeking to marshal evidence that the concept of religious establishment in late eighteenth century America referred to setting up an established church rather than to a wall of separation between church and state. Generally speaking, academic historians such as Daniel Driesbach[5] and Philip Hamburger[6] take this approach.

In a somewhat similar way, there are some who draw on the historical context of the Establishment Clause by quoting the words of the Framers and other early American statesmen that underline the value of religion for a democratic society. In this way they try to show that the prohibition of an establishment of religion was never intended to be the radical understanding that has come about in the late twentieth century.[7] Along the same lines are references to religious sentiments inscribed on national buildings and monuments.[8]

Another possible response is more philosophical in nature. It would claim that to interpret the amendment as ruling out government involvement in religion is, paradoxically, to rule out its involvement in irreligion as well. If such atheistic belief systems as Buddhism, Confucianism, and Ethical Humanism are still considered religious systems, there does not seem to be any convincing reason why any philosophical belief system cannot also be considered religious.[9] Accordingly, government support of a thoroughgoing secularism would be just as much a violation of the Establishment Clause as would government acknowledgement of more traditional religious belief or practice.

Yet another type of response is that approach cultivated in much of the legal and judicial community. This method partially accepts the road to radical interpretation but seeks to provide rules designed to control such interpretation so that the radical conclusion is not actually reached but a middle ground is established. These controls consist of principles such as compelling state interest and undue burden. The creation and application of such principles

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as these have tended to produce extremely convoluted argumentation and contradictory results, as seen in Justice Rehnquist's dissenting opinion in *Wallace*.[10] Similarly, Justice Thomas referred to "inconsistent guideposts" in his *Van Orden* concurring opinion,[11] and Justice Scalia likewise expressed despair in his *McCreary* dissenting opinion.[12]

However effective these responses may or may not be, this paper seeks to strike out in a different direction and to explore one of the few religious expressions in the Constitution itself with a view to determining what impact that expression might have on a good, valid, and workable interpretation of the Establishment Clause. The effect of this argument will, it is hoped, demonstrate that the grounds for holding the radical interpretation are decidedly, if not decisively, mitigated.

II. Analysis of the Sunday Clause

The Constitution's Article I, Section 7 includes discussion of the President's right to veto bills passed by Congress and Congress's right to override the Presidential veto. In the course of this discussion we find the following provision: "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law."

Our concern here is solely with the words "Sundays excepted." What are the implications of this wording for a proper understanding of the First Amendment's Establishment Clause? And in particular, can any light be shed on this issue by a consideration of Madison's *Notes of Debates in the Federal Convention of 1787*[13] or of the *Federalist Papers*?[14]

Although the reason for the specific requirement of the Sundays Clause is not addressed in Madison's *Notes*, it may be useful to trace in his record the development of the broader issue of the presidential veto and its override as these were discussed in the Convention.

The subject of the presidential veto was put before the assembly as early as the first day of substantive discussion (May 29),[15] when Edmund Randolph of Virginia set forth his 15 resolutions, but the resolution that contained the veto was not taken up until June 4.[16] These early discussions of the qualified negative, as it is usually called, were limited to questions of 1) whether such a presidential right was advisable, 2) whether the right should be shared with the judiciary or exercised by the executive branch alone, 3) whether this negative should be absolute or qualified, that is, with the possibility of being overridden by the legislative branch, and 4) whether such an override should require a 2/3 or 3/4 vote by each of the houses of the legislature.[17] But there is nothing in all this discussion that pertains to a time limit for the President to exercise the veto power.

However, on August 6 the Convention received the Report of the Committee of Detail, in which the proposal is put into this provisional form. "If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the legislature, by their adjournment, prevent its return; in which case it shall not be a law."[18]

Consideration of the Report of the Committee of Detail was delayed until the following day, when the report was debated point by point from its beginning. It was not until August 15, therefore, that the Convention considered the issue cited above.[19] On that occasion the proposal was changed so as to replace the words "seven days" with the words "ten days (Sundays excepted)" and in that form the section was approved, nine states agreeing, New Hampshire and Massachusetts dissenting, with New York and Rhode Island absent.[20] But there is no record of any discussion surrounding the inclusion of the words "Sundays excepted." It almost seems to have come out of nowhere. No committee or person is even associated with its introduction into the "debate." Not even a motion for its inclusion is mentioned. Madison simply wrote: "'Ten days (Sundays excepted)' instead of 'seven' were allowed to the President for returning bills with his objections."[21] It does seem, however, that the clause was introduced into the Constitution's text on that August 15 session, since it was not part of the text that came from the Committee of Detail to the full deliberative body.

On September 12 the entire text of the Constitution, with a few points left open to discussion, was presented to the Convention. The wording of the sentence containing the Sunday Clause is identical to that which had been approved on August 15.[22] The whole document was not immediately approved. Rather, there were various motions to improve it so that it could be finally voted on and submitted to the states for ratification.[23]

On the following day (September 13) a rather insignificant clarifying motion by Madison to add the words "the day on which" between "after" and "it" was defeated as being unnecessary.[24] Thus the section on the presidential veto had reached its final form that is presently in the Constitution.

Although the Sunday Clause itself has no clear or obvious antecedent, the idea of putting a limit on the number of days the Executive has to return a vetoed bill does have some earlier expressions. Two state constitutions had employed that device in one way or another: New York (1777)[25] allowed ten days and Massachusetts (1780)[26] allowed five. But neither of these provisions said anything about excepting Sunday from the count of days.

On the other hand, at least two state documents have something to say about excepting Sunday from a counting of days, although not in the context of the return of a vetoed bill. Thus Delaware's 1776 Constitution provided that "if any of the said 1st and 20th days of October should be Sunday, then, and in such case, the elections shall be held, and the general assembly meet, the next day following."[27] Similarly, the Pennsylvania Constitution of 1696, although not the one of 1776, stipulated:

> Be it further enacted by the authority aforesaid, that as oft as any days of the month, mentioned in any article of this act, shall fall upon the first day of the week, commonly called the Lord's

> day, the business appointed for that day, shall be deferred till the next day, unless in cases of emergency.[28]

In light of this background for concern over Sunday, it seems most likely, as speculative as it is, that the Sundays Clause came into the federal Constitution through the suggestion of one of the delegates from Delaware or Pennsylvania. Indeed, the most likely source appears to be one or more of the Delaware delegation (Richard Bassett, Gunning Bedford, Jacob Broom, John Dickinson, and George Read), any one of whom would likely have been familiar with and convinced of the value of the provisions of their own state constitution. Read was the President of the convention that wrote the Delaware Constitution and Dickinson was frequently influential in the Philadelphia Convention.

Perhaps the main outcome of this review is the observation that we have no record from Madison's *Notes* of any debate on the words "Sundays excepted." No extant account from this source explains why these words were inserted or what specifically they were intended to convey.

On the other hand, one aspect of the Convention's activities may be thought to shed some light on the participants' attitudes toward at least one aspect of governmental involvement in religion. That is the inferred motive for the apparent reluctance to bring to a vote Benjamin Franklin's motion to begin the Convention's sessions each morning with prayer for Divine assistance.[29]

On June 28, addressing General Washington, President of the Convention, Franklin bemoaned the fact that after several weeks of intensive debate there had been so little progress or agreement:

> How has it happened, Sir, that we have not hitherto once thought of humbly applying to the Father of lights to illuminate our understandings? . . . I therefore beg leave to move that henceforth prayers imploring the assistance of Heaven and its blessing on our deliberations be held in this assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service.[30]

The motion was seconded by Roger Sherman,[31] who would later be part of the committee that would author the Establishment Clause.

Several, including Hamilton, "expressed their apprehensions that however proper such a resolution might have been at the beginning of the Convention, it might at this late day . . . lead the public to believe that the embarrassments and dissensions within the Convention had suggested this measure."[32]

After Sherman and others responded that, "the past omission of a duty could not justify a further omission,"[33] Madison next reports that Hugh Williamson, a future member of the First Congress's House of Representatives, "observed that the true cause of the omission could not be mistaken. The Convention had no funds."[34] This remark appears to be an attempt to speak against Hamilton's caution and thus to support the suggestion of Dr. Franklin.

There was a second motion much to the same effect as Dr. Franklin's.[35] Then, Madison relates, "after several unsuccessful attempts for silently postponing the matter by adjournment the adjournment was at length carried, without any vote on the motion."[36] Nor was either of the seconded motions taken up the following day.

What should be made of the apparent suppression of these motions? Some in the Convention may indeed have been uncomfortable with what had been suggested in the motions, even though that sentiment was not ever actually expressed, or at least not reported by Madison. On the other hand, some men of influence (Sherman, Williamson, Randolph) apparently spoke in favor of the motions and therefore would not have seen any improper governmental involvement in religion with their execution.[37]

In any case, it is at least as speculative to infer a separation-between-government-and-religion motive for the suppression of the motions as to infer a limited-government-involvement-in-religion motive for the inclusion of the Sunday Clause. It is therefore difficult to use this incident to minimize the effect of the Sunday Clause's inclusion in the Constitution.

If an examination of the *Notes* does not reveal the reasoning behind the Sunday Clause, we are no better off when we turn to the *Federalist Papers*. Naturally, Hamilton was concerned to defend the reasonableness of having the qualified negative, that is, the presidential veto with the power of Congress to override it (No. 73).[38] But as to the number of days the President had in order to implement the veto—let alone the Sunday Clause—the *Papers* makes no mention.

Nor do we obtain a more successful result from examining discussions of the Sunday Clause in the state ratifying conventions. There are simply not enough materials extant from those conventions to be of much help. We are left then to consider the meaning and implication of these words from a broader perspective. And as in many historical questions, we can expect at best a conclusion in terms of probability rather than certainty.

In this discussion I use the term "provision" to speak of the mere fact that Sundays were not to be counted, as distinct from the purpose of this provision—whatever we determine that to be—and from its result. We cannot be confined solely to the provision and seek to escape asking about purpose and result or effect. The law does not operate apart from issues of purpose and result.

What were the alternatives available to the Convention? The delegates could, of course, have simply left the words "Sundays excepted" out of the Constitution entirely, as was the case with the form in which the section came from the Committee of Detail. The effect of this non-inclusion would have been to shorten by one or two days the time period the President had to issue a veto. This would have posed no real burden on his effectiveness and could actually have been compensated for by increasing the "ten days" to "twelve days." The Clause's non-inclusion could also have required the President and one of the houses of

Congress to act on Sunday if the President chose to take advantage of the full ten days. Or the Convention could have changed the seven days referred to in the Report of the Committee of Detail directly to twelve or fifteen or any other suitable number. They also could have selected another day of the week, say, Monday, to be the exception.

The fact that they did none of these things raises some interesting questions. Why did they insert the words "Sundays excepted" or retain them once they had been inserted but before final approval of the document? And even if we may not be able to determine conclusively the intent of their inclusion, we still have to contend with the resulting fact that these words are a part of the Constitution.

It will be easier to start with the matter of the provision's result. The immediate and perhaps primary *result* of the Sundays excepted clause is that it protects the President's free exercise of religion, to use the phrase later adopted in the First Amendment. That is, it relieves the President (and the house that would be the recipient of his returning a bill) from having to do a certain kind of "work" on Sunday, if it should happen that the tenth day falls on a Sunday and if the President wishes to take advantage of the full ten days and if the President should consider doing that work an infringement on his religious liberty or on that of the members of the respective house.

The clause, apparently, does not prohibit the President from acting on a Sunday. Nor without the clause would the President be forced to act on a Sunday; he could return the bill on the ninth day instead of the tenth. The clause simply guarantees that Sundays not be counted in determining the *full extent* of time allotted for the President to act. It allows him the full extent without requiring him or the house of Congress involved to violate any religious scruple regarding Sunday observance they might have.

It should also be noted that the clause does not result in protecting a Sabbatarian from the need to compromise his religious scruples in the same way that it results in protecting a non-Sabbatarian.

It apparently also has a secondary result of reinforcing the recognition that Sunday was commonly commemorated as a Christian day of worship and rest from work. The idea that some sort of Sunday observance was the common practice is strengthened by the fact that this concession is all of a piece with the Convention's own practice of not scheduling any formal or general meetings on Sunday, as is clear from the days of meeting entered in Madison's *Notes*.[39]

We turn now to the provision's purpose. Were these results also part of its purpose? What we have above called the primary result of protecting the President's and Congress's free observance of religious scruples seems also legitimately to be considered part of the provision's purpose. But can we go further than this? Is the aforementioned secondary result also a part of the provision's purpose? This question is not easily answered.

On the one hand, it may well be that its incidental *ad hoc* nature in the context of a totally different subject (the presidential veto) and the lack of clear indication in the sources as to its purpose restrain the conclusion that its design was positively to promote the Christian practice.

On the other hand, it is possible to see this reference, brief as it is, as a conscious attempt to insure that the new republic would not go the way France at the time was tending and become a purely secular state. As early as 1785 there were measures afoot in France to revise the Gregorian calendar, in order specifically to de-Christianize that nation.[40] It makes entirely good sense, then, to see the proposers of the Sunday Clause, whoever they were, as wanting to guide the new government in a different direction. Without more evidence, this suggestion must remain only a possibility, but with a further connection between these movements in France and the American experiment it may rise to the level of probability.

It is unlikely that the clause had a merely secular purpose in the way that Sunday closing laws were later deemed by the Supreme Court to be consistent with the Establishment Clause on the basis that their purpose was secular. In the very decision in which this point was made the Court admitted that *originally* the Sunday closing statutes were primarily religious (sectarian) in nature.[41] In view of this context for Sunday closing laws we probably ought not to assume that the Constitution's Sunday Clause was intended to achieve merely some secular end.

A possible criticism of this approach is that it is too intentionalist in its interpretive stance, rather than being textualist by restricting the investigation to the plain meaning of the text and ignoring its legislative history.[42] However, textualism must surely have its limitations when we are dealing with a two-word text ("Sundays excepted") without much grammatical context to use for guidance. In such a case we are forced to go beyond the text to explore legislative history.

Of course, the difference between the two approaches is not that intentionalism pays attention to the question of purpose and textualism does not. The law cannot escape the issue of purpose. Rather, the difference is in the way the two approaches go about determining the purpose—whether from the words alone or from the words in light of their legislative history. Because of the brevity of this text, strict textualism is not workable.

III. Implications of the Analysis for Understanding the Establishment Clause

Having examined the Sunday Clause in its context in the Constitution, we need to raise the question of the relationship between this idea and the ideas expressed in the First Amendment, particularly the Establishment Clause.

This issue of the relationship between the two sections of the Constitution is complicated by the fact that the Framers (and Ratifiers) of the First Amendment were a somewhat different group from the Framers (and Ratifiers) of the body of the Constitution. We are also, of course, dealing with two different temporal points.[43]

However, we must not exaggerate the matter of the two sets of Framers being different. After all, twenty of the fifty-five delegates (36%) to the Constitutional Convention were either Representatives or Senators in the First Congress at the time of the approval of the First Amendment.[44] Or put

the other way around, twenty of the eighty-one members (25%) of the First Congress had previously been participants in the Constitutional Convention. And some of these (Oliver Ellsworth, Elbridge Gerry, Rufus King, James Madison, Roger Sherman, Hugh Williamson) were among the most vocal contributors at the Convention.[45] Others (Pierce Butler, Daniel Carroll, William Paterson, George Read) were somewhat less influential but still contributed substantially to the debates.[46] Moreover, four of these influential Convention delegates (Ellsworth, Madison, Sherman, Paterson) were on the six-member joint House-Senate conference committee that wrote the final form of the Establishment Clause.[47]

It is important to acknowledge that the Sunday Clause and its apparent accommodation to Christian practice are part of the Constitution itself. We have, of course, similar expressions of religiosity in other important documents. The Declaration of Independence, for example, has four references in various ways to belief in God. Those who wish to maintain the radical view that all state expressions of religiosity are violations of the Establishment Clause are quick to point out that the Declaration is not the document that constitutes the nation in the way that the Constitution is such a document. Now that we have identified a similar, perhaps even more specific, expression of religion in the Constitution itself, the supreme law of the land, that objection can no longer stand.

We could hardly expect that the Framers of the Constitution would have had the First Amendment in mind when they voted in favor of including the words "Sundays excepted." Even the Representatives and Senators comprising the First Congress scarcely knew what the First Amendment would say until rather late in the debating process. So the question of the relationship between the two sections must be posed in terms of whether the Framers of the First Amendment would have had in mind the specific detail involved in the Presidential veto power.

How then should the Establishment Clause and the Sundays clause be related? There seem to be only four possible ways of relating the two clauses: (1) The members of the First Congress did not reflect on the Sunday Clause at all and therefore it is inappropriate to raise the question of consistency or inconsistency; (2) The First Congress reflected on the Sunday Clause, recognized an inconsistency but allowed it to stand; (3) The First Congress reflected on the Sunday Clause, recognized an inconsistency and purposely desired it to stand; (4) The First Congress reflected on the Sunday Clause and did not see any inconsistency. Let us consider each of these four ways of relating the clauses and their respective probabilities.

A. No Reflection on the Sundays Clause

This possibility does not seem very likely for several reasons. First, we have already pointed out the considerable overlap of personnel between the Constitutional Convention and the First Congress. And if the members of the Constitutional Convention are rightly described as the conscientious and intellectually well-endowed giants that they were, this would be only slightly, if at all, less true of the members of the First Congress.

Moreover, even for those members of the First Congress who did not participate in the Constitutional Convention the Constitution was in their possession and we have every right to assume that, as Representatives or Senators, they would have known its contents thoroughly. This would especially be the situation in the case of the very first Congress under the new Constitution, knowing as it did its unique place in the founding of the nation. It is not for naught that those original eighty-one individuals and their replacements are thought of as the greatest Congress.

To these considerations we may add, at least in reference to the twenty members who were also delegates to the Constitutional Convention, that according to Madison's *Notes* a number of them gave significant attention to all sorts of details of wording and concept, sometimes moving to add a clarifying word or phrase, sometimes suggesting the deletion of an unnecessary or misleading element.[48] And no one was more prone to this attention to detail than Madison.[49] We could, therefore, certainly expect this attitude toward detail in general to carry over into the writing of the Amendments in the form of recalling the details in the Constitution.

To be sure, there is no evidence in the records of the First Congress of specific reflection on the Sunday Clause. But this may be largely due to the fact that there was apparently no specific reflection on it during the Constitutional Convention itself.

On the other hand, if there is no evidence of reflection on the Sunday Clause as such, there is evidence that some members of the First Congress had shown during the Constitutional Convention a clear interest in the Presidential veto question in general. Early on, Elbridge Gerry and Rufus King gave several speeches each on the question of whether the veto should be exercised by the President alone or in connection with some other body.[50] And later in the discussion, when the issue concerned the margin by which the Senate and House might override a presidential veto, a speech by Gerry was accompanied by speeches or motions from Madison and Hugh Williamson.[51]

Thus there was definite interest in the Executive veto power that forms the context of the Sunday Clause on the part of those at the Convention who were later, as members of the First Congress, to participate in the formation of the Establishment Clause. Accordingly, it does not seem very likely that there was no recollection of the Sunday Clause as the First Congress went through the laborious process of formulating the Establishment Clause.

B. Inconsistency Allowed to Stand

Regarding this second possible resolution of the relationship between the Sunday Clause and the Establishment Clause we must ask what the purpose would be to let stand such an inconsistency as is contemplated by this theory. Perhaps the Congress viewed the alleged inconsistency as what after the fact was perceived to be an unfortunate blemish in the product of the Convention that would eventually work itself out either through the

amendment process or through the judicial process. However, there is no concrete evidence that this was their attitude.

Furthermore, even if this way of relating the Establishment Clause and the Sunday Clause is correct, we are still left with the question of how they interact with one another. In other words, the supposed inconsistency needs somehow to be smoothed out.

One model for doing this would be to resolve the difficulty through seeing the true attitude of the Framers as a compromise position. That is, the true understanding of the Constitution would be something in-between the prohibition of an establishment of religion and the allowance for some public expressions that are concessions to a prevailing religiosity. But this resolution of the supposed difficulty is not really all that different from the claim that there is no inconsistency to begin with. Furthermore, this approach results in a resolution that is quite different from the radical reading of the Establishment Clause that is espoused by some today. This resolution does not sustain the conclusion that the First Amendment forbids all government involvement in religious expression.

The only other model for resolving an inconsistency between the two clauses, assuming that such an inconsistency really does exist, would be to claim that one side of the inconsistency takes precedence over the other side. This procedure, of course, will be more successful than the option just discussed, since it will be clear to most that the Establishment Clause is principial, whereas the Sunday Clause appears to have been more incidental. Still, this method of treatment assumes rather than demonstrates a difficulty of inconsistency in the first place. It has not borne the burden of proving the inconsistency, as it should have done.

C. Inconsistency Intended

This position is simply a more radical version of the previous one and suffers from the same defects as that one does. Someone trying to hold this explanation might appeal to the idea that there may be a few places in the Constitution where the Framers intentionally left language that is ambiguous. But that hardly appears to be the situation in this case. After all, an ambiguity is not quite the same as an inconsistency. Typically an ambiguity involves a word or phrase that may have more than one meaning or construction. An inconsistency, on the other hand, usually involves two statements or concepts that are at variance. It is therefore difficult to see how an appeal to intended ambiguity, if such in fact exists in the Constitution, can be successfully used to support an alleged intentional inconsistency. Certainly the burden of proof rests on the theory that there is inconsistency rather than on the view that the Framers were at least relatively consistent in their work.

D. Consistency

If we are left then with the view that the Framers of the First Amendment saw consistency between the Establishment Clause and the Sunday Clause, the consistency they must have seen between the two clauses flows from the idea that state accommodation to some religious practices of the majority in the population does not violate the Establishment Clause precisely because it is not an establishment of religion. Such concessions may be made because the state is not thereby setting up or sponsoring a state church. In other words, this line of argumentation supports the idea that the prohibition involved in the Establishment Clause is the prohibition of a state-sponsored church. It is not the prohibition of all religious activity on the part of the state.

IV. Implications For the Court's Application of the Establishment Clause

Although the main focus of the paper has been to show that the radical interpretation of the Establishment Clause is unlikely to have been intended by the Framers, it may be useful to extend the discussion to include any implications this analysis may have for the work of the Supreme Court.

As far as is ascertainable, the Court has rarely, if ever, brought a consideration of the Sunday Clause into its Establishment Clause decisions or commented on it in any other way or for any other purpose.[52] Although it may be somewhat hazardous to put forth the negative statement that the Sunday Clause has not been used in relation to Establishment Clause issues, that situation appears to be the case. Even Story appears not to discuss the Clause.[53]

True, a relatively uncritical writer seems to have claimed that the Sunday Clause was commented on by the Senate Judiciary Committee in a January 19, 1853 report to the full Senate.[54] But this claim is unfounded. The report does have a lot to say about the role of Sunday in American life of that time and in the years leading up to it.[55] However, there is nothing in the report that specifically mentions the Sunday Clause or purports to interpret it.

Even the cases dealing with the Sunday closing laws seem not to have appealed to the Constitution's Sunday Clause in arriving at their conclusions. Although local Sunday closing laws have largely been eliminated because of the increasing secularization of American society, the Court held them constitutional when it confronted the issue. For example, in *McGowan v. Maryland* the Court argued that such closing laws had a secular purpose and were therefore constitutional.[56] *Braunfeld v. Brown* took essentially the same approach, ruling that Saturday observers were placed under no undue burden by being required to close on Sunday, even though they had also closed on Saturday.[57]

Rulings such as these do not really exhibit much increased understanding of the Sunday Clause itself. On the other hand, they do show a tendency to preserve the day, while at the same time secularizing the original significance of the day. They preserve Sunday by "de-Sundayizing" it.

In fact, it may be questioned whether the Sunday closing rulings and the Sunday Clause are analogous at all. Whatever the resemblance might superficially be, there are some significant differences. First, these rulings concern local statutes, whereas the Sunday Clause is a federal rule. Second, the Sunday closing statutes upheld by the Court as

constitutional prohibit operating businesses on Sunday or at least a part of it. The Sunday Clause, on the other hand, does not prohibit the President from acting on Sunday. If it prohibits anything, it prohibits forcing the President to relinquish his free exercise rights in order to carry out his duties. Finally, the closing of business on Sunday has a far greater potential impact on society than does the permission granted to the President not to be compelled to act on Sunday. In fact, it is this last factor (impact of Sunday business on society) that enables the Court to see Sunday closings as primarily secular in nature.

If we receive no particular help for understanding the place of the Sunday Clause in Establishment Clause jurisprudence either from specific comment on it or from Sunday closing rulings, we must next turn to the vast body of Establishment Clause cases.

Obviously, this is not the place for a comprehensive overview of such a vast literature. Rather, my more modest goal is to examine a number of Establishment Clause cases to understand the tests that have been employed to determine constitutionality or unconstitutionality. I am not concerned here even with the correctness of these principles or with the correctness of the conclusions drawn from them. My only concern is to understand the tests so that we might be able to raise the question as to how well the Sunday Clause would stand up to them.[58]

A. Recent Tests for Establishment/ Non-Establishment

For the most part, Establishment Clause cases fall into two series, one dealing with government financing in education where religious schools are at least indirect beneficiaries, the other addressing "ceremonial" issues such as display of religious symbols (Ten Commandments, crèches) on or near government property or under government auspices and having prayers in a similar relationship to governmental entities. Although the former series appears to have less bearing on the Sunday Clause, we will cite some examples before giving most of the effort to the second series. Even so, the tests employed in each series are substantially the same.

A good place to begin the first series is with *Lemon*, with its three-pronged test that a statute, in order to be constitutional, must be secular in its purpose, religiously neutral in its effect, and free from excessive entanglement of government and religion.[59] Justice Burger for the Court not only enunciated these tests, but also applied them in the *Lemon* decision. The Pennsylvania and Rhode Island statutes did not offend the constitution in either the first prong[60] or the second.[61] They ran afoul, however, in the third.[62]

The *Lemon* test is used with almost no modification in *Committee for Public Education and Religious Liberty v. Regan*, in which Justice White wrote for the Court: "Grading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect;"[63] and "On its face, therefore, the New York plan suggests no excessive entanglement."[64] The same use of the *Lemon* test is true of *Mueller v. Allen*.[65] Writing for the Court, Rehnquist made it clear that a Minnesota statute passed *Lemon's* first,[66] second,[67] and third[68] prongs.

A shift from the use of the *Lemon* criteria to the newly-introduced endorsement test becomes evident in *Witters*.[69] While O'Connor's endorsement test had been suggested in a previous concurring opinion, Justice Marshall, writing for the Court, here applied it to a financial aid case: "On the facts we have set out, it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion."[70]

This shift did not, of course, mean that *Lemon* had been abandoned. In *Edwards v. Aguillard*, Justice Brennan relied on a first-prong *Lemon* argument to hold a law requiring balanced treatment of creation science and evolution unconstitutional: "The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose."[71]

Chief Justice Rehnquist authored the opinion of the Court in *Zobrest v. Catalina Foothills School District*.[72] He had elsewhere expressed hesitation about using the *Lemon* criteria,[73] and perhaps that is why he seems reluctant to use explicit *Lemon* terminology here. Nevertheless, his argument sounds very much like the second prong approach:

> The IDEA creates a neutral government program dispensing aid not to schools but to individual handicapped children. If a handicapped child chooses to enroll in a sectarian school, we hold that the Establishment Clause does not prevent the school district from furnishing him with a sign language interpreter there in order to facilitate his education.[74]

Even Justice O'Connor, champion of the endorsement test that she was, reverted to the second and third prongs of *Lemon* in her *Agostini* opinion of the Court:

> To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement.[75]

Finally, Chief Justice Rehnquist summarized the school funding program at issue in *Zelman* in broad terms: "[T]he Ohio program is entirely neutral with respect to religion."[76] But he earlier in the opinion used more specific terminology:

> The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government,

> whose role ends with the distribution of benefits.[77]

Furthermore, he writes:

> We have repeatedly recognized that no reasonable observer would think that a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. . . . Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.[78]

We turn now to the second series of Establishment cases, presumably closer in concept to the Sunday Clause issue, having to do with similar "ceremonial" expressions of religion in public life. And we begin with *Marsh v. Chambers*,[79] which, although it has a financial component similar to the ones we have been looking at, still belongs primarily in this second series. Chief Justice Burger delivered the opinion of the Court. Many claim that *Marsh* stands as an anomaly, completely bypassing the *Lemon* tests—indeed, Chief Justice Burger himself adhered to this view[80]—and pre-dating the endorsement test introduced in *Lynch v. Donnelly*.[81] It is certainly true that the main thrust of his argument is on the long and consistent history of Nebraska's practice of opening its legislative sessions with prayer and on his answer to various objections. Nevertheless, there may be an oblique reference to one or more of the *Lemon* prongs in Chief Justice Burger's statement that "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[82]

Lynch is so known for Justice O'Connor's introduction of endorsement in her concurring opinion[83] that we may tend to forget that Chief Justice Burger's opinion for the Court was along the lines of *Lemon*'s first,[84] second,[85] and third[86] prongs. Burger concluded by saying:

> "We are satisfied that the city has a secular purpose for including the crèche, that the city has not impermissibly advanced religion, and that including the *crèche* does not create excessive entanglement between religion and government."[87]

Wallace v. Jaffree[88] is oriented to *Lemon's* first prong. Justice Stevens wrote for the Court that "[t]he statute had *no* secular purpose."[89] On the other hand, *County of Allegheny v. ACLU*[90] focuses on the effects prong of *Lemon* in the form of the endorsement test. In Justice Blackmun's opinion for the Court we read:

> Government may not engage in a practice that has the effect of promoting or endorsing religious beliefs. The display of the *crèche* in the county courthouse has this unconstitutional effect. The display of the menorah in front of the City-County Building, however, does not have this effect, given its particular physical setting.[91]

Public prayer cases illuminate another distinct analysis—the coercion test. The Court first adopted this analysis in *Lee v. Weisman*.[92] The Court employed this mode in *Santa Fe Independent School District v. Doe*.[93] *Santa Fe* also appeals to purpose and endorsement, relying on the objective observer's perception of effect.[94] Thus, the purpose and effect prongs of *Lemon* are essentially retained.[95]

The plurality opinion in *Van Orden v. Perry* once again does not use the exact terminology generally associated with the *Lemon* test for constitutionality.[96] Indeed, Chief Justice Rehnquist in fact denies the usefulness of the *Lemon* test for this case.[97] Yet, the importance of *Lemon's* purpose prong still remains important to the Court. While *Van Orden* had no evidence of any impermissible religious purpose in erecting the Ten Commandments on the Texas Capitol Grounds, the Court reached the opposite conclusion as to the constitutionality of the Ten Commandments display in *McCreary County v. ACLU*.[98] There, the purpose analysis was critical to the Court's finding the display unconstitutional: "Given the ample support for the District Court's finding of a predominantly religious purpose behind the Counties' third display, we affirm the Sixth Circuit in upholding the preliminary injunction."[99]

Thus, *Lemon*'s purpose prong remains important to the Court's analysis of "ceremonial" Establishment Clause cases, as does the effect of the government's act—whether that act is coercive or whether a reasonable observer would find that it endorses religion.

B. Application of the Tests to the Sunday Clause

If these tests were applied to the Sunday Clause, would the result be that the Sunday Clause would thereby be declared unconstitutional?

First, however, is the question whether and how such an application could come about. Would it require someone with standing to bring a suit, someone injured by the presence of the Sunday Clause? And if so, what might the circumstances be that would result in an injury from its presence. While we cannot discuss here this matter in detail, we may note that if Mr. Van Orden could claim injury from the passive display of the Ten Commandments, it is not beyond the bounds of reason to suppose that someone might attempt a similar claim in regard to the Sunday Clause.

We begin the question of applicability with the first prong of the *Lemon* test—secular legislative purpose. If we consider what we have called the primary purpose, the Sunday Clause would perhaps be unconstitutional, because it appears that the purpose of the Clause was not secular but religious—the protection of the free exercise of religion rights of the President and members of Congress. On the other hand, the phrase might survive this scrutiny on the assumption that the religious goal was very narrow, affecting

only a few specified individuals. Furthermore, such a purpose would seem to have the support of the Free Exercise Clause.

If we were to analyze the Sunday Clause in terms of a merely secular purpose, it would, of course, withstand the purpose test. Such a secular purpose would presumably be to standardize for society as a whole a weekly day of cessation from work, which happened to be in line with the then accepted Christian practice. But it seems quite out of the question that this secular purpose of the clause was in mind, given the restricted context in which the Sunday Clause occurs and the prevailing sentiments regarding Sunday observance in the generation of the Framers.

If we consider what we have called above the Clause's secondary purpose and if our speculation concerning that purpose is well founded, the Sunday Clause would probably fail the first prong of *Lemon.*

In terms of the second prong of the *Lemon* test the Sunday Clause would be unconstitutional if its primary effect is either to advance or inhibit religion. It seems that the primary effect of the Sunday Clause is the protection of the President's and Congress's free exercise of religion. The Clause then seems to advance religion, and under this test that may be unconstitutional. But again, the fact that this result is restricted to a few specified individuals may rescue the Clause from a strict application of the effects test.

The Clause may, of course, have the secondary effect of reinforcing the Christian observance of Sunday practice, but this should be irrelevant to the *Lemon* test, which speaks only of principal and primary effect. The Court, however, may very well reverse what it considers primary and secondary. If so, the Sunday Clause could be unconstitutional based on relevant Supreme Court precedent.

In terms of the endorsement principle, the Sunday Clause might also be held to be unconstitutional. It is not difficult to envision a Court decision that maintained that a reasonable observer would conclude that the presence of the Sunday Clause might cause some to feel like second class citizens.

On the other hand, it is hard to envision how the Sunday Clause could be stuck down as a result of the coercion test. Nobody is being religiously coerced, not even the President or members of Congress. The only coercion involved is very minor, in that the public may have to wait a couple of extra days in order to learn the President's decision in regard to a veto, and even this is not a religiously oriented coercion. Furthermore, this consideration cannot have had much meaning in the days in which the Sunday Clause was approved, since at that time many citizens living at a distance from the seat of government would have to wait many more than one or two days to hear of the President's decision to veto or not to veto.

Thus, it appears that applying the Supreme Court's Establishment Clause precedents may well invalidate the Sunday Clause. It should also be mentioned that if the clause protects the rights of non-Sabbatarians but not those of Sabbatarians, it may also run into problems with the Equal Protection Clause of the 14th Amendment. But that is a matter for another study.

C. Implications of the Sundays Clause's Unconstitutionality

Let us deal first with the idea that a part of the Constitution may be declared unconstitutional. This may happen, of course, through amendments, and amendments have rendered earlier portions of the Constitution invalid. However, the first ten amendments are not amendments in exactly the same way the other amendments are. These did not change anything in the Constitution, but only added to or reinforced elements that were already present. Thus, it seems there is no easy way to substantiate a claim that the First Amendment's Establishment Clause set aside the Sunday Clause, making it unconstitutional.

Can the Court make a part of the Constitution unconstitutional? It may appear that such is the case. Take, for example, the recent ruling regarding eminent domain that appears to set aside the last clause of the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."

But this analogy is not an apt one. Contrary to popular perception, the Court did not nullify the amendment. Rather, it defined "public" in a way that was not done previously.

Since it is curious in the extreme to hold that a part of the Constitution is unconstitutional, that stance suggests that the fundamental principles used by the Supreme Court to determine constitutionality under the Establishment Clause need to be re-examined. Alternatively, if one wants to integrate the Sundays Clause, that is by definition constitutional, into the current interpretative standards, one must conclude that it does not advance religion, since that is what is required by the second *Lemon* criterion. But then, if the Sundays Clause does not advance religion, neither would a number of other items that are now claimed to be advancements of religion.

CONCLUSION

If, as we have shown, a constitutional deference to the Christian religion in the matter of acknowledgement of Sunday does not establish religion and therefore is not in conflict with the Establishment Clause, how can other similar items be said to establish religion? Specifically, to cite issues that are current, how can the use of "under God" and "In God We Trust" be seen as establishing religion? It appears that the radical interpretation of the Establishment Clause has gone too far and has not been faithful to the Constitution it professes to uphold. To be consistent, the radical interpreters should seek to amend the Constitution so as to eliminate the Sunday Clause. Without such a move the radical understanding cannot stand and constitutional interpretation should return to a less radical position.

Actually, even this move of amending the Constitution, while it may remove the current constitutional reference to Sunday, cannot obliterate the fact that in the generation of the Framers, the Constitution allowed the accommodation to Sunday to exist side by side with the prohibition against establishing religion. The impact of this fact on the Framers' understanding of an establishment of religion can never be erased, not even by constitutional amendment.

FOOTNOTES

[1] Most scholars hold that the Fourteenth Amendment made the prohibition applicable to the states.

[2] Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947). Actually, the wall of separation had been mentioned as early as *Reynolds v. U.S.* 98 U.S. 145 (1878). Chief Justice Waite, writing for the Court, cited Thomas Jefferson's words to the Danbury Baptist Association: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, 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 between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." *Id.* at 164. However, although the wall of separation was thus referred to in *Reynolds*, Waite did not build his conclusion specifically on them but on the broader sense of Jefferson's words. Waite said, "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order." *Id.* Thus Waite did not specifically depend on the wall terminology. That step was taken in Everson.

[3] Everson v. Board of Education of Ewing Township, 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable.").

[4] While the Supreme Court has not treated the issue substantively, the Ninth Circuit's ruling in *Newdow v. United States Congress* reflects this radical approach. 292 F.3d 597, 611-12 (9th Cir. 2002).

[5] Daniel L. Driesbach, Real Threat and Mere Shadow: Religious Liberty and the First Amendment (1987).

[6] Philip Hamburger, Separation of Church and State (2002).

[7] Among many examples, one of the most straightforward is that contained in Washington's Farewell Address published September 19, 1796. "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. . . . Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." James D. Richardson, ed., *Compilation of Messages and Papers of the Presidents, 1789-1897*, I, 213, 220 (1907). Similarly, and even closer in time to the point of framing the Constitution and the First Amendment, the Northwest Ordinance at Section 14, Article 3, passed by the Second Continental Congress on July 13, 1787 (*Journals of the Continental Congress*, XXXII, 340 (1936) and by the First Congress on August 7, 1789 says, "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *(Public Statutes at Large of the United States of America*, I, 52, (1845)).

[8] An interesting expression of religiosity from the general period of the Framers is found in the Journals of Congress under the date of June 20, 1782, when the Second Continental Congress approved the great seal of the United States, the reverse of which contained: "a pyramid unfinished; in the zenith, an eye in a triangle, surrounded with a glory proper; over the eye these words, 'Annuit Coeptis'." *Journals of the Continental Congress,* XXXII, 339 (1914). These were explained in the Journal as follows: "The Pyramid signifies strength and duration. The eye over it and the motto allude to the many signal interpositions of providence in favour of the American cause." *Id.* The words "*annuit coeptis*" are thus understood as meaning that divine Providence has looked with favor on the deeds of the nation. These words are an adaptation of similar words from Vergil's Anneid (Book 9, line 625 or 857, depending on whether the edition is critical or pre-critical), in which Ascanius prayed to Jove/Jupiter for favor on his venture.

[9] *See, e.g.,* Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961) ("Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others."); *see also* Washington Ethical Society v. District of Columbia, 249 F.2d 127 (1957).

[10] Wallace v. Jaffree, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) ("The results from our school services cases show the difficulty we have encountered in making the *Lemon* test yield principled results.").

[11] Van Orden v. Perry, 125 S. Ct. 2854, 2865 (2005) ("This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause.").

[12] McCreary County v. ACLU, 125 S. Ct. 2722, 2751 (2005) ("Today's opinion . . . admits that it does not rest upon consistently applied principle."); *id.* at 2756 n.8 ("Nothing so clearly demonstrates the utter inconsistency of our Establishment Clause jurisprudence.").

[13] Adrienne Koch, ed., *Notes of Debates in the Federal Convention of 1787 Reported by James Madison* (Washington, 1965). References are by date so that any edition may be consulted, as well as by page in this edition, hereafter cited simply as *Notes*.

[14] The Federalist Papers (Clinton Rossiter, ed. 1961).

[15] *Notes*, *supra* note 13, at 32.

[16] *Id.* at 61.

[17] *Id.* at 66.

[18] *Id.* at 389.

[19] *Id.* at 465.

[20] *Id.* at 465.

[21] *Id.* at 465.

[22] *Id.* at 619.

[23] For the sake of completeness I mention a rather confusing discussion that took place on September 12 (*Id.* at 627-29), in which Williamson moved successfully to change the 3/4 vote required to override a veto back to 2/3. What is confusing is that Madison's record of the form that had come on that day before the Convention from the Committee of Style did not consistently reflect the 3/4 requirement that had previously been passed on August 15 (*Id.* at 465). In any case, none of this has any bearing on the Sundays clause question.

[24] *Id.* at 633-34.

[25] Benjamin Perley Poore, ed., The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States 1332 (1924) ("And in order to prevent any unnecessary delays, be it further ordained, that if any bill shall not be returned by the council within ten days after it shall have been presented, the same shall be a law, unless the legislature shall, by their adjournment, render a return of the said bill within ten days impracticable; in which case the bill shall be returned on the first day of the meeting of the legislature after the expiration of the said ten days.").

[26] *Id.* at 960 ("And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of law.").

[27] *Id.* at 277.

[28] *Id*. at 1536.

[29] *Id.* at 210.

[30] *Id.*

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] *Id.*.

[35] *Id.* at 210-11.

[36] *Id.* at 211.

[37] *Id.* at 210-11.

[38] Federalist Papers*, supra* note 14, at 442-47.

[39] Madison's record is arranged chronologically by date and day of the week. Normally, the Convention met from Monday through Saturday, with some days occasionally off for things like committee work and the celebration of the anniversary of independence. There is no example of the convention meeting on Sunday.

[40] 15 Encyclopaedia Britannica 447 (2003).

[41] McGowan v. State of Maryland, 366 U.S. 420, 433-34 (1961) ("But, despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor.").

[42] For a recent discussion of intentionalism and textualism as well as purposivism, *see* Joel Schellhammer, *Defining the Court's Role as Faithful Agent in Statutory Interpretation*, 29 Harv. J. L. & Pub. Pol'y 1119, 1119-31 (2006).

[43] The body of the Constitution was framed in the summer of 1787 by 55 delegates (39 signers) and ratified in state conventions 1787-1790. The First Amendment was framed in September 1789 by the First Congress and ratified in state conventions from 1789 to 1791.

[44] The twenty included eleven Senators (Bassett, Butler, Ellsworth, Few, Johnson, King, Langdon, Robert Morris, Paterson, Read, and Strong) and 9 Representatives (Baldwin, Carroll, Clymer, Fitzsimons, Gerry, Gilman, Madison, Sherman, and Williamson).

[45] By a rough count of the number of pages the delegates are referenced in Koch's Index To Delegates I obtain the following numbers: Ellsworth, 74; Gerry, 124; King, 82; Madison, 162; Sherman, 134; Williamson, 90.

[46] My count for these is: Butler, 64; Carroll, 30; Paterson, 13; Read, 32. In addition, Paterson had put forth the New Jersey Plan, by which act he exercised considerable influence at the Convention.

[47] The two who had not been present at the Convention were Senator Charles Carroll (Maryland) and Representative John Vining (Delaware).

[48] For example on June 23, Sherman moved to insert the words "and incapable of holding" after the words "[in]eligible to offices" in Randolph's third proposition. *Notes, supra* note 13, at 180. Again, on August 8, Sherman moved to strike out the word "resident" and insert "inhabitant," as less liable to misconstruction. *Id.* at 406.

[49] Some examples of Madison's attention to detail include his motion on August 17 to strike the words "and punishment" from the proposed right of the Legislature to declare not only the law but also the punishment of piracies, felonies, counterfeiting, etc. *Id.* at 472. On September 7, he moved to substitute "until such disability be removed, or a President shall be elected" for "until the time for electing a President shall arrive." *Id.* at 594. We have already noted his motion on September 13 to insert the words "the day on which" into the provision of the ten day period for the President's return of a veto. *Id.* at 633. On September 14, Madison moved to replace the word "annually" with the words "from time to time." *Id.* at 641.

[50] These speeches took place on June 4 and June 6. *Id.* at 61, 80.

[51] September 12, *id.* at 627-29.

[52] The existence of the clause is mentioned without further comment in McGowan v. Maryland, 366 U.S. 420, 452 n.22 (1961).

[53] Joseph Story, Commentaries on the Constitution of the United States (1833).

[54] David Barton, The Myth of Separation 110 (1989).

[55] The report in question is No. 376 of the 32nd Congress, second session. It is interesting in many ways in shedding light on the attitudes of the Judiciary Committee and of the full Senate that implicitly adopted the report. But it is not a direct comment on the Sundays Clause, as appears to be claimed by Barton. The report is mentioned by Chief Justice Burger in Marsh v. Chambers 463 U.S. 783, 788 n.10 (1983).

[56] *McGowan*, 366 U.S., at 444 ("In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.").

[57] Braunfeld v. Brown, 366 U.S. 599, 607 (1961) ("But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden.").

[58] A similar restricted focus in reviewing judicial decisions is found in Kristi L. Bowman, *Seeing Government Purpose Through the Objective Observer's Eyes: The Evolution-Intelligent Design Debates*, 29 Harv. J. L. & Pub. Pol'y 442-61 (2006), although the particular focus of her discussion is different from mine, dealing with the development of the Court's use of the objective observer concept.

[59] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) ("Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such test may be gleaned from our cases. 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 government entanglement with religion.") (internal citations omitted). Of course, as the quote shows, *Lemon* did not invent these tests but simply summarized them.

[60] *Id*. at 613 ("Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statues affords no basis for a conclusion that the legislative intent was to advance religion.").

[61] *Id*. at 613 ("We need not decide whether these legislative precautions restrict the primary effect of the programs to the point where they do not offend the Religion Clauses.").

[62] *Id*. at 614 ("We conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion.").

[63] Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 657 (1980).

[64] *Id.* at 660.

[65] Mueller v. Allen, 463 U.S. 388 (1983).

[66] *Id.* at 394 ("Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose.").

[67] *Id.* at 402 ("Thus we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.").

[68] *Id.* at 403 ("Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not 'excessively entangle' the State in religion.").

[69] Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).

[70] *Id.* at 488-89.

[71] Edwards v. Aguillard, 482 U.S. 578, 597 (1987).

[72] 509 U.S. 1 (1993).

[73] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 108-114 (1985) (Rehnquist, J., dissenting).

[74] *Zobrest*, 509 U.S. at 13-14.

[75] Agostini v. Felton, 521 U.S. 203, 234 (1997).

[76] Zelman v. Simmons-Harris, 536 U.S. 639, 662 (2002).

[77] *Id.* at 652.

[78] *Id.* at 354.

[79] 463 U.S. 783 (1983).

[80] *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (noting that *Marsh* did not apply the *Lemon* test).

[81] *See id.* at 688-89 (O'Connor, J., concurring).

[82] *Marsh*, 463 U.S. at 794-95.

[83] *Lynch,* 465 U.S. at 688 ("Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.").

[84] *Id.* at 681 ("The narrow question is whether there is a secular purpose for Pawtucket's display of the *crèche*. The display is sponsored by the city to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.").

[85] *Id.* at 682 ("We are unable to discern a greater aid to religion deriving from inclusion of the *crèche* than from these benefits and endorsements previously held not violative of the Establishment Clause.").

[86] *Id.* at 683 ("The District Court found that there had been no administrative entanglement between religion and state resulting from the city's ownership and use of the *crèche*.").

[87] *Id.* at 685.

[88] 472 U.S. 38 (1985).

[89] *Id.* at 56.

[90] 492 U.S. 573 (1989).

[91] *Allegheny,* 492 U.S. at 621 (internal quotation marks omitted). The endorsement test was again emphasized, and limited, in Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753, 769 (1995) ("But the State may not, on the claim of misperception of official endorsement, ban all private religious speech from the public square, or discriminate against it by requiring religious speech alone to disclaim public sponsorship.").

[92] 505 U.S. 577, 599 (1992) ("No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.").

[93] 530 U.S. 290, 312 (2000) ("[T]he delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship.").

[94] *Id.* at 317 ("The policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."), 308 ("An objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.").

[95] The *Newdow* cases involving the constitutionality of "under God" in the Pledge of Allegiance has not been substantively addressed by the United States Supreme Court. *See* Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004) (dismissing the case on standing grounds). However, the Ninth Circuit found that the recitation of the pledge in public schools violated the *Lemon* test. Newdow v. U.S. Congress 292 F.3d 597, 611 (9th Cir. 2002) ("Therefore, the policy fails the effects prong of *Lemon*, and fails the *Lemon* test. In sum, both the policy and the Act fail the *Lemon* test as well as the endorsement and coercion tests.").

[96] 125 S. Ct. 2854 (2005).

[97] *Id.* at 2864.

[98] 125 S. Ct 2722 (2005).

[99] *Id.* at 2745. Bowman argues that *McCreary* engages in a significant extension of the objective observer principle from being an objective observer of result to being one of purpose. *See supra* note 58, at 457. However, I believe Bowman has overreached in handling the evidence and that the Court has not [yet] relinquished its right as the arbiter of legislative purpose. As I read Souter's argument, he is not contrasting a role of an observer of legislative purpose who stands exterior to the Court with the role the Court has as an observer of legislative purpose. Rather, he is contrasting the Court's psychoanalytical attempt to determine legislative purpose with a more objective method, one that "takes account of the traditional external signs that show up in the text, legislative history, and implementation of the statute, or comparable official act and looks to plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history and the historical context of the statute and the specific sequence of events leading to its passage" (internal marks and cites omitted). What is objective, then, in the observation is not being external to the Court, but applying more-or-less objective standards of determination of purpose, rather than the subjective approach presumed to be attached to a psychoanalyzing of the legislator. After all, Souter concludes the paragraph by saying, "there is, then, nothing hinting at an unpredictable or disingenuous exercise when a *court enquires into purpose* [emphasis mine] after a claim is raised under the Establishment Clause." *See McCreary*, 125 S. Ct. at 2733. It appears that Scalia has succumbed to the same misreading of Souter. *Id.* at 2757.