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William W. Van Alstyne
William & Mary Law School

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A JUDICIAL POSTSCRIPT TO THE CHURCH-STATE DEBATES OF 1989: HOW POROUS THE WALL, HOW CIVIL THE STATE?

WILLIAM VAN ALSTYNE*

I.

Since the presentation of the papers in this Symposium, the Supreme Court has written still another decision pertinent to its subject. In *County of Allegheny v. American Civil Liberties Union*,¹ delivered on the last day of the 1988-89 Term, the Court provided a strong clue as to where the debate now seems to be headed. Some brief comment on that decision may serve as an updating postscript to the principal papers presented here. Judging by the quite polarized opinions written in *County of Allegheny*, we may yet be headed for more conflict, rather than less. For the moment, a single Justice, Justice O'Connor, holds center stage. Formerly she has been most usually associated quite closely with Chief Justice Rehnquist's views. Now, as others had already seen in her earlier work, something is developing of a more independent course. Here, roughly speaking, with every hope of encouraging the substantiality of the position she has come to represent, is how it momentarily plays out on the current Court.

Justices Scalia and Kennedy have succeeded to the positions formerly held by Warren Burger and Lewis Powell (allowing for Justice Rehnquist's move from his Associate Justice position to that of Chief Justice). Each of them, it now seems reasonably clear, is uninterested in maintaining anything even roughly like the rigor of the original *Everson* doctrine,² the doctrine that spoke for all nine Justices of the Supreme Court when it first appeared four decades ago, in 1947. Neither of the newest Justices seems to feel the pull of the Madison-Jefferson view of the first amendment, moreover, in nearly the degree as did Justice Powell. With Justice Rehnquist now presiding as Chief Justice, and with Justice White roughly congenial to Justice Rehnquist's highly limited view of the

* Perkins Professor of Law, Duke University.

1. 109 S. Ct. 3086 (1989).

2. *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947) (quoted *infra*, note 6).

establishment clause—a limited view evidently shared by Justices Scalia and Kennedy as well—there is good reason to see the Court as a Court generally divided four-to-four in a *categorical*, and not merely in a line-drawing, fashion.

Eight of the nine Justices are deadlocking over essentials, and not simply over details. Here, quite equivalently to what also appears to have occurred in the abortion field during this last term of the Supreme Court, Justice O'Connor holds crucial ground.³ What is at stake, moreover, is more than her vote. Rather, it is a question of her constitutional attitude that one is most appropriately interested to understand. In *County of Allegheny*, it comes through quite distinctly and well. Overall, moreover, for those inclined to think that Madison and Jefferson were substantially sound in the shared perspectives they held of the first amendment—to maintain a civil government of civil equals, fully to respect religious liberty but not to confuse it with civil government—this most recent case is a sign of good health.

County of Allegheny is a reprise on *Lynch v. Donnelly*.⁴ Like *Lynch*, it, too, is decided by a vote of five-to-four. By this narrow majority, distinguishing the facts from those in *Lynch*, the Court has held that where a municipality installs a complete Nativity Scene inside its Hall of Justice, dominating the principal staircase with an unmistakable seriousness of physical presence and official endorsement, the city's subsidy, entanglement and involvement have come finally too far.⁵

The controlling vote in the case was cast by Justice O'Connor, affirming the lower court which had itself limited the license of *Lynch v. Donnelly*, as nearly every other lower federal court had also done. To be sure, it is Justice Blackmun, rather than Justice O'Connor, who writes the lead opinion announcing the judgment of the Supreme Court in the *County of Allegheny* case. He begins early on by quoting the strong and familiar language from *Everson v. Board of Education*.⁶ He also

3. 109 S. Ct. 3040 (1989).

4. 465 U.S. 668 (1984).

5. However, the same case also holds (by a different five-to-four majority of course) that the city's installation of a giant menorah furnished by one Jewish sect, Chabad, immediately outside the city-county building a block away, when accompanied by a giant Christmas tree furnished by the city, is all right.

6. The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his

invokes the implementing three-part *Lemon* test Professor Esbeck has explored in his paper.⁷ It is Justice O'Connor's concurrence, lifted from *Lynch v. Donnelly*, however, that dominates even what Justice Blackmun writes.⁸ And it essentially resonates to a principle both Madison and Jefferson shared.

The suggestion ventured by Justice O'Connor in *Lynch*, and applied in *County of Allegheny*, is recalled in her separate opinion in *County of Allegheny*, in the following way:

In my concurrence in *Lynch*, I suggested a clarification of our Establishment Clause doctrine to reinforce the concept that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community. . . . [The establishment clause prohibits government from sending] 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."⁹

will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. [In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."]

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). (The original closing sentence from *Everson* appears here in brackets; in *County of Allegheny*, Justice Blackmun dropped it out.)

7. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). According to this test, the state action challenged on establishment clause grounds must reflect some secular purpose, yield primarily a secular effect, and not involve undue entanglement of government and religion. The latter two parts of that test were deemed principally implicated in the *County of Allegheny* case.

8. See, e.g., 109 S. Ct. at 3100-02.

9. *Id.* at 3118. In his *Memorial and Remonstrance Against Religious Assessments* (1785), James Madison remonstrated against the incorporation of religion within the practices of the civil state. He noted that it "degrades from the equal rank of Citizens" those identified thereby as strangers; it produces a "tendency to banish our Citizens." Madison, *Memorial and Remonstrance*, reprinted in 5 THE FOUNDERS' CONSTITUTION 8 (P. Kurland & R. Lerner ed. 1787). Similarly, in the BILL FOR ESTABLISHING RELIGIOUS FREEDOM, adopted by the Virginia Assembly following Madison's campaign, the BILL took care to declare that no one's opinion in matters of religions "shall in [any] wise diminish, enlarge, or affect their civil capacities." Jefferson, *A Bill for Establishing Religious Freedom* (1779), reprinted in *id.* at 77. It

Justice Blackmun correspondingly absorbs that suggestion within his opinion for himself, Stevens, Marshall, and Brennan.¹⁰ Indeed, he incorporates it to decide the case:

Our [decisions subsequent to *Lemon v. Kurtzman*] further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of "endorsing" religion

. . . .

Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

. . . .

Although Justice O'Connor joined the majority opinion in *Lynch*, she wrote a concurrence that differs in significant respects from the majority opinion. The main

requires no particular sophistication to appreciate the pertinence of these observations to Justice O'Connor's observations in *County of Allegheny*. (Indeed, they were applicable also to *Lynch*.) See, e.g., Redlich, *Nativity Ruling Insults Jews*, N.Y. Times, Mar. 26, 1984, at A19, col. 2; see also Van Alstyne, *What is a Law Respecting "An Establishment of Religion"?*, 65 N.C.L. REV. 909, 913-16 (1987).

10. These were, of course, the four *dissenting* Justices in *Lynch*. All four tend to hold fairly strongly to the Madison-Jefferson view of the church-state clauses of the first amendment. The Chief Justice, Justice White, and now Justices Scalia and Kennedy (in this respect different from Justice Powell, who overall came closer to his Virginia intellectual history of Madison and Jefferson than to the New England view), have pretty well announced a repudiating of Madison and Jefferson for a preference barely short—if short at all—of Justice Story's view that our government may affirmatively report and reflect its judeo-Christian (*very* small "j," *very* large "C") founding in its actions, its laws, its appropriations, and its own internal, official and unofficial conduct. See, e.g., 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 627-34 (M. Bigelow 5th ed. 1891) (1833) ("[I]t is impossible for those who believe in the truth of Christianity as a divine revelation to doubt that it is the especial duty of government to foster and encourage it among all the citizens and subjects. . . . The real difficulty lies in ascertaining the limits to which government may rightfully go in fostering and encouraging religion. . . . The real object of the amendment 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 any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.").

difference is that the concurrence provides a sound analytical framework for evaluating governmental use of religious symbols.¹¹

While not framed as Madison or Jefferson would necessarily have put it, it comes close enough in the end.

II.

In sharp contrast, Justice Kennedy, writing for himself and for Justices Rehnquist, White, and Scalia, is essentially a pole widely apart from this view. For Justice Kennedy, the controlling point, so far as the establishment clause is concerned, seems to be that no one is being religiously coerced (in any obvious way) or even "proselytized" (in their view) by the state. Picking up from Chief Justice Burger's earlier opinion in *Lynch v. Donnelly*, these Justices, now cast into a momentary dissenting role (insofar as in this case they failed to hold Justice O'Connor), have no difficulty at all accepting the city's actions in *County of Allegheny*. The position they take is bolstered, they say, by past instances of what they regard as widely accepted practice. The city's actions thus easily meet the former Chief Justice's, barrier-clearing, "no more than" test as he had outlined that test in *Lynch v. Donnelly*.¹² Justice Kennedy finds that that test fits this case quite nicely in the following way:¹³

11. *County of Allegheny*, 109 S. Ct. at 3100-02 (quoting *Lynch v. Donnelly* 465 U.S. 668, 687 (O'Connor, J., concurring)).

12. For a critical review and discussion of this "test," see Van Alstyne, *Trends in the Supreme court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 782-87.

13. The following quotation reproduced here is reproduced to call attention to its technique, and not to suggest that the comparisons it offers are true. Indeed, every example employed to make *Marsh* look plausible within existing case law is utterly distinguishable in terms of the opinion actually discussing that example. Not one comes within a ballpark of *Marsh*. Property tax exemption of religiously-held property, in common with such status for other nonprofit-held property, as was involved in the case actually decided by the Supreme Court, is not inconsistent with *Everson* or with the Madison-Jefferson view; no such thing can be said with respect to taking money by taxation to pay sectarian ministers conducting prayers agreeable to the dominant religion(s) of those who thus appropriate money from the public fisc to hear prayers said. See the strong criticism by Madison of this practice in his *Detached Memoranda* (CA. 1817), reprinted in 5 THE FOUNDERS' CONSTITUTION, *supra* note 9, at 103. Compare *Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (especially Justice Harlan's opinion) with *Marsh v. Chambers*, 463 U.S. 783 (1983). Similarly, Justice Kennedy's comparison of *Marsh* with *Everson* is even more far-fetched. Reimbursement of parents for ordinary bus fare on the usual municipal transit line on a neutral basis in order for their children to reach school safely each day, regardless of the nature of the

[I]n *Marsh v. Chambers*, we found that Nebraska's practice of employing a legislative chaplain did not violate the Establishment Clause, because [in our view] "legislative prayer present[ed] no more potential for establishment than the provision of school transportation, beneficial grants for higher education, or tax exemptions for religious organizations." Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage.¹⁴

This passage pretty well absorbs Justice Story's views *de facto* (if not quite *de jure*).¹⁵ It can be best appreciated by fitting it with the observations offered in explaining the majority position in *Lynch*, observations such as they were, by Chief Justice Burger, on whose *Lynch* opinion Justice Kennedy firmly relies. So, just as a brief, comparative flashback to the opinion in *Lynch v. Donnelly*, here is how Chief Justice Burger similarly found no establishment clause problem with an outdoor park display of a city-owned, compulsory-taxpayer-maintained sectarian nativity scene cum Santa Claus, in 1984:

Of course the crèche is identified with one religious faith but no more so than the example we have set out from prior cases¹⁶

We can assume, *arguendo*, that the display advances religion. . . ; [but] whatever [the] benefit to one faith . . . [.] display of the crèche is no more an advancement or

school each child may attend, involves no tax paid to any religion, to any church, or to any parochial school. Neither, of course, were the buses owned, operated, controlled, or governed by any religion or church. (*Compare* *Everson v. Board of Educ.*, 330 U.S. 1 (1947) *with* *Wolman v. Walter*, 433 U.S. 229 (1977).) The grants sustained in *Tilton v. Richardson*, 403 U.S. 672 (1971), were indeed grants for "higher education," in the Court's view of the particular case, and for nothing else. Nothing of the sort can be said of *Marsh*. When Justice Kennedy speaks of practices that are "accepted" in our National heritage, *id.* at 3138, one is entitled to ask, "accepted" by whom? See, for example, the views of Jefferson on one such "accepted" practice in Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), *reprinted* in 5 *THE FOUNDERS' CONSTITUTION*, *supra* note 9, at 98. As to the "practices" Justice Kennedy thus identifies as "accepted," note how the proposition is then slipped sideways, as it were, leading to judicial approval of still more-and-more-and-more such "practices" as they spill out of government virtually as from an official church.

14. *County of Allegheny*, 109 S. Ct. at 3138 (citations omitted).

15. See *supra* note 10.

16. *Lynch v. Donnelly*, 465 U.S. 668, 685 (1984) (emphasis added).

endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass"¹⁷

Prior to this, Chief Justice Burger pointed out that, [T]o conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion . . . than . . . [specific forms of assistance previously allowed such as textbook loans to parochial schools and bus fare reimbursements, or] more of an endorsement of religion than the Sunday Closing Laws upheld in *McGowan v. Maryland*. . . [or the payment of chaplain salaries sustained in *March v. Chambers*].¹⁸

When it first appeared this way, in *Lynch*, this "no more than" test seemed to me to be no help. It moved merely from one item to another, eliding, adding, and expanding, as it moved. Indeed, I thought then that it invited immediate flagging,¹⁹ to try, in that way, to appeal to Justice Powell, and to do so before the Madison-Jefferson view of the establishment clause was destroyed, swept away by mass erosion, by the then Chief Justice who never wanted that view to govern at all. But the apparent straightfaced manner in which it has appeared again, this time with two new Justices straightfacedly appearing to join in, certainly gives one pause. Do the new Justices, Kennedy and Scalia, really mean to proceed in this way? It appears that both indeed do. Yet, both these Justices are able, well-read, experienced, serious people. Both surely know what they are about. The more straightforward explanation of what they are about is that they are drawn far more to Justice Story's leanings than to either Madison or to Jefferson. The "no more than" test is merely a means of getting from here to there.

One gets there from here by beginning with some seemingly unprepossessing statement of "our national heritage," for example, a congressionally-enjoined, simple, short, executive proclamation of national thanksgiving, which no one short of some crazed atheist is supposed to be capable of finding objectionable.²⁰ After that, what's really different about (a) altering the motto (to make it theistic), (b) using tax revenues for legis-

17. *Id.* at 683.

18. *Id.* 681-82.

19. See Van Alstyne, *supra* note 12.

20. But see Van Alstyne, *supra* note 12 at 775, for a discussion of Jefferson's objections as President to such proclamations. See also *Gaylor v.*

lative chaplains, or (c) a crèche in the courthouse itself, or (d), (e), (f), (g), and (h)? If one concludes (as one who wants to easily can, though falsely) that each add-on is *no more* religiously-endorsing, *no more* sect-favoring, and/or *no more* tax-misappropriative than some previous thing, *i.e.*, if one concludes that the first amendment actually frames a "no more than" clause rather than a wholly different sort of clause, the game is obviously up. The "accepted" tradition itself expands. It lays in its own additional pieces, mosaically, one-by-one. And those who felt merely trivially uneasy in the "origins" of these "traditions," find themselves ever more marginalized as citizens, pushed, as it were, to the side.

Of course, to the extent that all along one earnestly believed that Justice Story's views should have commanded the judicial interpretation of the first and fourteenth amendments in the first place, one is not likely to be disturbed. For the moment, albeit narrowly, we have seen the different tracery of Madison and Jefferson at work with the Court and especially, or rather importantly, with Justice O'Connor. The larger question, revisited in the papers Professors Esbeck and Smith have given us, is whether the Supreme Court ought to confine civil government to civil restraint and to civil means. In my view, it surely should, although it cannot succeed without our help.