ADDRESS OF THE ATTORNEY GENERAL
ANNUAL LAW SCHOOL DINNER
PEPPERDINE UNIVERSITY SCHOOL OF LAW
LOS ANGELES, CALIFORNIA
FEBRUARY 4, 1984

Tonight I would like to address a subject that I know commands your interest and the interest of many citizens across the nation as well -- the Establishment Clause of the First Amendment. This part of our Constitution states: "Congress shall make no law respecting an establishment of religion . . ."

For almost 150 years the Supreme Court had little occasion to construe the meaning of these words. Then, in 1947, in the course of deciding Everson v. Board of Education, a case involving state aid to parochial schools, the Court stated that the federal and state governments must be neutral in regard to religion. Since Everson the Court has decided more than 30 establishment-clause cases.

My remarks tonight will proceed in three stages. First, I will focus on the original meaning of the establishment clause. Second, I will summarize Supreme Court interpretations of the establishment clause since Everson v. Board of Education. Finally, I will discuss the administration's legal positions on issues in this important area concerning church and state.

Many of our Founding Fathers, including Madison, the Father of the Constitution and the chief architect of the Religion Clauses in the First Congress, did not think the First Amendment was necessary. The Constitution -- the original, unamended Constitution -- was regarded by Madison and many of his colleagues as itself a bill of rights, a protector of freedom, a charter that in respect to church and state would prevent the establishment of religion and thus ensure religious liberty.

With the passage of decades and centuries, we often remember the conclusion of a matter, not the thoughts and arguments behind it. But it bears recalling that the original Constitution reflected what the leading framers called a "new science of politics."

This was a science of politics that included several principles. Some are familiar -- the principles

of representation, separation of powers, and federalism, for example. Others are less familiar -- for example, the principle of an extended republic. It was this principle -- the principle of an extended republic -- that lay behind the original Constitution and made unnecessary, in Madison's view, both the establishment and free exercise clauses of the First Amendment.

For Madison, a nation of large size and population -- an extended republic -- would be religiously diverse. And the more religious diversity, he believed, the less likely it would be that any particular religious group would rise into a position of political power in the federal government from which it might compel others to adopt its beliefs. To state his view succinctly: Diversity of religions would prevent an established religion, and in the absence of an established religion, religious liberty would exist for all.

At the Virginia Convention in 1788, Madison stated that freedom of religion "arises from that multiplicity of sects which pervades America and which is the best and only security for religious liberty in any society . . . Where there is such a variety of sects there cannot be a majority of any one sect to oppress and persecute the rest."

This view of Madison was held by many others. And whether expressed in the Madisonian framework of the extended republic or not, it was widely believed by most Americans that an establishment of religion would threaten religious liberty.

The unamended Constitution satisfied Madison as a guarantee against an establishment of religion. But as we know, in order to obtain ratification of the Constitution, a more explicit assurance against an establishment of religion was required, not to mention more explicit assurances on some other matters. So a Bill of Rights was added.

The Bill of Rights applied to the national government only. The First Amendment thus was a guarantee to each state and to each individual citizen that the federal government would not establish religion. But what was actually meant by prohibiting the making of any law respecting an establishment of religion?

Madison introduced in the House of Representatives what eventually became the First Amendment. Madison's original proposal was substantially

amended in committee before it was considered by the whole House. When floor debate began, the proposal read as follows: "No religion shall be established by law nor shall the equal rights of conscience be infringed."

This language prompted concern among some representatives that the amendment would prevent nondiscriminatory state aid to religion. One voiced a fear that such language might "be thought to have a tendency to abolish religion altogether." Another thought the language should be amended to read "no religious doctrine shall be established by law."

Madison sought to quiet such concerns by explaining that: "(H)e apprehended the meaning of the words to be, that Congress should not establish a religion and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."

Two points emerge from these debates in the First Congress. First, Congress was attempting to address the fear that the federal government might establish a national church, use its influence to prefer certain sects over others, or require or compel persons to worship in a manner contrary to their conscience. Second, in addressing this fear, Congress did not want to act in a manner that would be harmful to religion generally or would defer to the small minority who held no religion.

The House-passed version read as follows: "Congress shall make no law establishing religion, or to prevent the free exercise thereof or to infringe the rights of conscience." The Senate narrowed the scope of the clause to read: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion."

As we know, the final version of the amendment contained the language: "respecting an establishment of religion." And it is clear that by this language, Congress meant to forbid the establishment of a national church or the giving of preference to one religious sect over another.

There seems to be no conclusive evidence that the First Congress meant to preclude governmental aid to religion so long as it was provided on a nondiscriminatory basis. Neither, it seems, did they intend to disable the state from acknowleding, or

permitting the acknowledgement, that religion is a vital part of our heritage. Not surprisingly, the same Congress that approved what became the First Amendment also retained a chaplain and called for a day of prayer and thanksgiving to God.

Of course, not everyone agreed with this view of church and state. For example, some in the First Congress objected to the Thanksgiving Day Proclamation passed by a majority. As president, Thomas Jefferson refused to issue such a proclamation. And although Madison himself issued at least four of these proclamations, late in life, on reflection, he opposed their issuance by the federal government.

Nonetheless, down through our history and until recently, the general view of separation of church and state evidenced in the intentions and actions of the First Congress has been the accepted view. National legislative and military chaplaincies were established early in our history and continue to this day. For many years federal funds were committed to the building of churches through treaty agreements with Indians. And until very late in the Nineteenth Century, Congress was appropriating annually more than $500,000 in support of sectarian education of Indians that was provided by religious organizations.

Meanwhile, in the states, which under the First Amendment were left to deal with matters of religion as they wished, established churches died out by 1833. For many years thereafter the states maintained a variety of involvements in religion, including, but not limited to, the sponsorship of legislative chaplaincies. For example, states required the teaching of religion in state colleges and universities, and in prisons, reformatories, asylums, orphanages, and homes for soldiers. Until very recently in our history, many states required or encouraged prayer and other devotional exercises in the public schools.

The Supreme Court's landmark decision in Everson v. Board of Education commenced the federal judiciary's deep involvement in establishment clause issues. It is in Everson that the Supreme Court extended the establishment clause for the first time to the states. And it is in Everson that the Supreme Court, relying primarily on the writings of Jefferson and Madison, interpreted the meaning of the establishment clause. In the opinion of the Court, written by Justice Black,

"The 'establishment' . . . clause . . . 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 . . . No tax in any amount, large of 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 Thomas Jefferson, the clause against establishment of religion was intended to erect a 'wall of separation between church and state.'"

Everson thus set forth the principle that the state should be neutral in religious matters. A year later, relying on this principle, the Court held for the first time that an action by a local school board was unconstitutional under the establishment clause. In McCollum v. Board of Education, the Court struck down a program permitting students to have a period of time during the school day and on the school campus to take religious education classes taught by religion instructors.

In 1962 and 1963, the Court spoke to a different church-state issue -- whether the state oversteps constitutional bounds when it finances or conducts religious exercises. Relying on Everson, the Court strove to maintain what it called "complete and unequivocal" separation of church and state by striking down state-sponsored school prayers and devotions.

In 1971, the Supreme Court returned to the issue first raised in Everson -- that of state-aid to church related schools. In Lemon v. Kurtzman, the Court refined the establishment-clause jurisprudence developed and applied over the previous quarter century. Writing for the Court, Chief Justice Burger announced a three-part test. A law must have a secular legislative purpose; it must have as its principal or primary effect neither the advancement nor inhibition of religion; and it must not foster "an excessive government entanglement with religion." To pass constitutional muster, a statute must pass each part of this test.

The Court has applied the Lemon standard to establishment-clause questions for better than a decade now. And to some observers, the results are confusing and inconsistent. The Supreme Court has, for example,

approved government aid to church-related colleges but not to sectarian primary and secondary schools. It has approved government funding of bus transportation to parochial schools, but then struck down such funding of transportation for field trips. It has approved state aid to parochial schools if it takes the form of textbooks, but not if it comes in the guise of other instructional materials, such as maps.

Since the 1979 term, the Supreme Court itself has seemed uncomfortable with the Lemon test and even with the view of separation of church and state which underlies that test. In 1980, the Court applied this standard in striking down a Kentucky statute requiring the posting of a copy of the Ten Commandments on the wall of each public classroom of the state. But in 1981, in another case involving an establishment clause question, the Court preferred not to apply the Lemon test, moving Justice Rehnquist to ask in dissent whether the Court had, as he put it, "temporarily retreated from its expansive view of the Establishment Clause." Then, in 1982, the Court for the second year in a row decided not to use the Lemon standard in an establishment-clause case.

This brings us to the term completed last summer, and thus to the three most recent establishment clause decisions. In Larkin v. Grendel's Den, Inc., the Court applied the Lemon test as it struck down a Massachusetts law preventing the sale of liquor within 500 feet of a church if the church objects. In Mueller v. Allen, the Court applied the standard but in a less stringent manner than traditionally as it upheld a Minnesota statute permitting tax deductions for tuition and other school expenses in both public and private schools, including church-related ones. And in Marsh v. Chambers, the Court declined to use the Lemon test as it approved Nebraska's practice of sponsoring a chaplain for the state legislature. This case represented the first time the Court considered traditional church-state involvement of this kind.

One must exercise caution in drawing conclusions from these three cases. The Lemon test remains the Court's standard, as evidenced by the Larkin case. But the Court seems willing to apply it more loosely than before, at least in the context of state aid to church-related schools, as the Mueller case suggests. And the Court seems inclined to abandon the Lemon standard when a traditional state involvement in

religion, such as the legislative chaplaincy, is at issue.

These movements in the Court's approach to establishment-clause issues are ones that the administration welcomes. Indeed, these are movements that we encouraged in friend-of-the-court briefs in both the Mueller and Marsh cases, and which we are continuing to encourage in our briefs in the current term.

For example, we have entered a case concerning another traditional relationship between state and church -- a city's participation in setting up a Christmas Nativity scene. As we did in the Marsh case involving a legislative chaplaincy, we have argued in our brief that the Lemon test need not be applied and that a consideration of the intentions of the Framers of the establishment clause and more generally of our nation's history is sufficient to decide this case.

Also, we are asking the Court to review a school prayer case from Alabama. In particular, we are asking the Court to weigh the constitutionality of a statute permitting a moment of silence in the public schools during which students may pray, meditate, or otherwise do as they please. We believe that such a statute is consistent with the Constitution because it accommodates in a neutral and noncoercive way the practice of an individual's religion.

The issue of governmental accommodation of religion is an extremely important one today. The Court's decisions 21 and 22 years ago in the school prayer and devotion cases, and the Court's refinement of its establishment-clause approach in the Lemon case, have been understood by many state and lower federal courts as precluding all governmental accommodations of religion. For example, courts have prohibited students' voluntary prayers before meals, periods of meditation before class, and student prayer meetings in school buildings outside of class hours. Remarkably, one court has even held that a school system's decision to permit students to conduct voluntary meetings for "educational, religious, moral, or ethical purposes" on school property before or after class hours violates the establishment clause.

As we are arguing in our Alabama brief, we would like to see the Court reassess the consequences of its own establishment-clause precedents and the lower courts' increasing tendency to be hostile toward religion. If not soon, at some later point the Court may

wish to decide that a subtler analysis of the establishment clause is in order, one that encourages the state to take an attitude of -- in the Court's own words -- benevolent neutrality toward religion.

I am very pleased to be here tonight, addressing issues that I know concern the students and faculty of this outstanding institution. Religion, as Tocqueville observed, gave birth to the first colonies, and religion has given birth to Pepperdine University. Here, as elsewhere in this great country, individuals are free to worship and believe as they see fit. The policy of the Reagan administration is to make sure that the hand of government does not suppress this vital freedom.

Last year the President said:

"The First Amendment was not written to protect the people and their laws from religious values; it was written to protect those values from government tyranny."

That is the essence of the matter, and it contains a challenge that is as real today as it was 200 years ago.