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## Justice Rutledge's Appendix

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## JUSTICE RUTLEDGE'S APPENDIX

JOHN T. VALAURI\*

If “all men are by nature equally free and independent,” all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights. Above all they are to be considered as retaining an “*equal* title to the free exercise of Religion according to the dictates of Conscience.”<sup>1</sup>

This Article seeks to clarify the much disputed meaning of the Establishment Clause of the First Amendment by going back to the basics of Establishment Clause doctrine: the relationship between establishment,<sup>2</sup> equality, the seminal case *Everson v. Board of Education*,<sup>3</sup> and the administrative state. The modern Establishment Clause era began with the *Everson* decision by the Supreme Court in 1947.<sup>4</sup> This case wrestled with issues of equality, evenhandedness, and separation between church and state, providing the model, for better or worse, for subsequent church/state litigation. *Everson* was also influential in setting the historical tone of much Establishment Clause discourse. It focused discourse on James Madison’s role in the religious freedom arguments in Virginia during the 1780s—the years

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1. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785), reprinted in 5 THE FOUNDERS’ CONSTITUTION 82, 82 (Philip B. Kurland & Ralph Lerner eds., 1987) (emphasis added) (quoting Articles 1 and 16, respectively, of the Virginia Declaration of Rights (1776)).

2. I use “establishment” in its broad, modern sense as meaning government aid to, preference for, and endorsement of religion.

3. 330 U.S. 1 (1947).

4. See *infra* notes 5-7. But see *infra* note 13.

preceding the drafting of the United States Constitution.<sup>5</sup> This focus was in part because Justice Rutledge appended Madison's *Memorial and Remonstrance Against Religious Assessments* (hereinafter *Remonstrance*) to his *Everson* dissent,<sup>6</sup> making the *Remonstrance* the central historical document in the subsequent debate on the meaning of the Establishment Clause.<sup>7</sup>

Almost as common in the literature as affirmations of the importance of history to Establishment Clause doctrine are complaints that the history has too often been misinterpreted and misapplied,<sup>8</sup> and that the Court has made a conflicted mess of the doctrine.<sup>9</sup> Altogether,

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5. Justice Rutledge, though a dissenter in the case, did much to frame the terms of the debate, not just in this case, but in the entire debate that ensued. On the importance of history in determining the meaning of the clause, he says:

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination.

*Everson*, 330 U.S. at 33-34 (Rutledge, J., dissenting) (citations omitted).

6. *Id.* at 63-72. Hence, the title of this Article.

7. As one commentator put it, "Since the Supreme Court's decision in *Everson v. Board of Education*, contemporary courts have looked to the *Memorial* as a guiding light in resolving issues of religious liberty." Rodney K. Smith, *Getting Off on the Wrong Foot and Back on Again: A Reexamination of the History of the Framing of the Religion Clauses of the First Amendment and a Critique of the Reynolds and Everson Decisions*, 20 WAKE FOREST L. REV. 569, 589 (1984) (citation omitted).

8. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading [wall of separation between church and state] metaphor for nearly 40 years.").

9. Perhaps the most emphatic statement of this kind comes from Leonard Levy, who says, "[T]he Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the justices." LEONARD LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 221-22 (2d ed. 1994). As if to demonstrate the truth of Levy's assertion, Michael McConnell quotes the statement and then adds, "I stand at a pole opposite to Levy on most of these issues, but I agree with that assessment." Michael W. McConnell, *Religious*

too much writing in the area has a harshly negative and polemical tone and purpose. Much heat, but little light, has come from this venting.

This Article has a different, more conciliatory aim. That aim is to both explain how the history of Establishment Clause doctrine has led jurists to focus on negativity and argue how both the constitutional historical narrative and doctrine can be made better. Blame for this negativity belongs not to Madison, the *Everson* judges, or later participants in the debate. The difficulties they labored under arose mainly from changes in historical circumstances and in the nature and scope of the American government since the 1780s. Under the conditions of that era, Madison and others strongly believed that foundational natural rights of citizens, especially free exercise rights, compelled government to take a separationist, no aid posture toward religion.<sup>10</sup> This was to be done, they thought, for the benefit of both religion and government<sup>11</sup> and also for the preservation of free exercise rights for all.

However, the rise of the administrative state, with its extensive public welfare and public benefit programs, has changed the equation. Under the contemporary circumstances of the administrative state, governmental application of a separationist, no aid posture toward religion leads to discrimination against religion and religious individuals rather than to equal rights. This has created a constitutional dilemma because government cannot now follow, as it could in the 1780s, both the ends of equality and the separation of church and state. Most of the judicial doctrinal contortions since *Everson* have been caused by this fact and by the struggle of the Court and commentators to deal with it by choosing one horn of the resultant dilemma or the other, or by attempting somehow to have it both ways. None of these options have proven workable or justifiable.

The role played by history in this process, unfortunately, has been more to provide ammunition for polemical disputes rather than to light the path to resolution of the conflict. This Article suggests a different approach to history that will allow history to play a different role in

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*Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 115 (1992).

10. See, e.g., Madison, *supra* note 1, ¶ 1.

11. Madison gives as a reason against establishment of religion, "Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation." Madison, *supra* note 1, ¶ 7.

Establishment Clause debate. History should be used to explain how the modern Establishment Clause dilemma might be resolved. Under this approach, not all history is equally important or relevant to current cases. But, unlike law office (i.e., one-sided, partisan) history, which values history based upon what side in the dispute it favors and which led to the current impasse, this approach introduces a distinction between underlying principles or rights (e.g., natural and equal rights and liberties) on the one hand and applications of those principles (e.g., separation of church and state in the framers' era) on the other hand. This view opposes approaches on both sides of the Establishment Clause debate that mechanically plug-in the framers' injunctions from the 1780s into contemporary situations.<sup>12</sup> Changed conditions between that time and our own may well call for different applications of the same principles and for the identification of the underlying principle and application of the underlying principle behind the Establishment Clause in a necessarily limited historical context.

In the remainder of this Article, I will flesh out my admittedly abstract thesis concerning Establishment Clause interpretation and doctrine by going back to its origins in two senses—in the framing debates of the 1780s and in the treatment of those debates in *Everson*, the founding case of modern Establishment Clause doctrine. I will look at the role of Madison's *Remonstrance* in the spirited debate among the Justices in the *Everson* case (itself a 5-4 decision by the Court). The Justices in *Everson*, despite their differences, largely agree on the importance of the founding history in general, and the importance of Madison and the *Remonstrance* in particular, in determining the meaning of the Establishment Clause. I will argue that equality of natural right, especially free exercise of religion, as argued

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12. I agree, for example, with Justice Stewart's statement about the Establishment and Free Exercise Clauses that, "It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of 'separation of church and state,' which can be mechanically applied in every case to delineate the required boundaries between government and religion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 308-09 (1963) (Stewart, J., dissenting). Justice Stewart's sentiment is shared by Justice Brennan who otherwise held opposite views concerning religion and Establishment. Justice Brennan said in that same case, "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons . . ." *Id.* at 237 (Brennan, J., concurring).

by Madison in the *Remonstrance*, justifies the result the Court reached in that case, although this is not the rationale that Justice Black, writing for the Court, in fact gives. The separationist doctrine that both sides argue for presents a stunted and wooden understanding of the Establishment Clause—an understanding which, when followed, leads to the violation of the very principles of equal religious liberty Madison strove to protect.

#### MADISON, *EVERSON* AND THE *REMONSTRANCE*

*Everson* began the modern Establishment Clause era. It also set the tone for subsequent Establishment Clause litigation by making the framing history of the clause the leading issue in Establishment Clause argument. It put Madison and the *Remonstrance* at the center of that argument, leading to the doctrinal conflict and standoff that has ensued. Some later critics have challenged this choice and the quality of the Court's historical analysis. Critics have even presented alternative Establishment Clause histories.<sup>13</sup> Without entering into this debate, this Article assumes that it is too late in the day to hit the reset button in Establishment Clause doctrine and argument, which, for better or worse, has been established in the frame that the *Everson* Court gave it. Constitutional interpretation, like other precedent, is constrained—path dependent. What has gone before necessarily affects—even when it does not fully determine—what can be decided now and how it can be justified. I therefore remain within the terms of the debate given by *Everson* and attempt to describe, analyze, and clarify the doctrinal conflict that has arisen out of that decision.

In this part of the Article, I will examine Justice Black's use of

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13. Carl Esbeck, for example, begins a recent comprehensive analysis of the use of text and history in Establishment Clause argument by saying:

The text and original meaning of the Establishment Clause as drafted by the First Federal Congress was diminished in its importance when the United States Supreme Court handed down its decision in *Everson v. Board of Education of the Township of Ewing* in 1947. Instead of looking to the record of the debates and minutes of the First Congress, the *Everson* Court adopted the principles animating the disestablishment struggle in Virginia . . . to give substantive content to the Establishment Clause.

Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. (forthcoming 2011) (manuscript at 3), available at <http://ssrn.com/abstract=1663829> (citations omitted).

Madison's arguments writing for the majority in *Everson*, especially those in the *Remonstrance*, and Justices Jackson and Rutledge's use of Madison's arguments writing in dissent. My aim here is to identify the underlying causes of doctrinal conflict in order to determine how this conflict can be rectified. With all the discussion of *Everson* and the *Remonstrance* in Establishment Clause literature, it is surprising how little attention has been paid to this issue. This is unfortunate, since such attention will be repaid in doctrinal and analytic illumination.

The facts of the *Everson* case can be stated briefly.<sup>14</sup> A New Jersey statute allowed school districts to make regulations and enter into contracts relating to the transportation of students to school.<sup>15</sup> Pursuant to this statute, one local board of education permitted reimbursement of the cost of bus transportation to parents of public school and parochial school students.<sup>16</sup> The case resulted from a taxpayer challenge to that plan.<sup>17</sup> The federal constitutional provisions cited were the Due Process Clause of the Fourteenth Amendment and the Establishment Clause.<sup>18</sup> This Article focuses only on the Establishment Clause aspects of the case.

After disposing of the due process objection to the reimbursement plan, Justice Black turned to the Establishment Clause issue.<sup>19</sup> Justice Black began his discussion of the Establishment Clause with an immigration narrative emphasizing the religious persecution that motivated many to come to America and how, ironically, in the 1780s, these people suffered from the same religious persecution they sought to escape.<sup>20</sup> Eventually, Justice Black tells us, Americans came to

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14. For the Court's rendition of the facts of the case, see *Everson v. Board of Education*, 330 U.S. 1, 3-4 (1947).

15. *Id.* at 3.

16. *Id.* Transportation to for-profit private schools was not included in the Board of Education's reimbursement plan, but this was part of neither the taxpayer's constitutional challenge nor the Court's decision in the case. See *id.* at 4-5 & n.2.

17. *Id.* at 3.

18. *Id.* at 5.

19. *Id.* at 8. Justice Black introduces the topic, saying, "A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches." *Id.* A paragraph later he adds, "These practices of the old world were transplanted to and began to thrive in the soil of the new America." *Id.* at 9.

20. *Id.* at 9.

oppose establishments of religion, concluding that “[i]t was these feelings which found expression in the First Amendment.”<sup>21</sup> Justice Black finds the religious liberty struggle in Virginia in the 1780s, and especially the work of James Madison and Thomas Jefferson, as the culmination of this effort.<sup>22</sup> Justice Black therefore concludes that Jefferson and Madison’s Virginia efforts also illuminate the meaning of the Establishment Clause.<sup>23</sup>

Note, however, this cannot be the whole story. Many Americans, including many in Virginia in the 1780s, favored government support of religion. Almost half the states at the time still had established churches.<sup>24</sup> Even if Justice Black is correct on the state level, he does not offer any historical evidence of his assertion that the Virginia statute and the First Amendment had like aims, such as statements to that effect by Jefferson or Madison. But let us put objections of this sort to one side in order to follow Justice Black’s argument further. My concern here is more with the content of the *Everson* narrative, rather than with its historical accuracy.

After his historical narrative, Justice Black famously announces his definitional conclusion:

[T]he ‘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

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21. *Id.* at 11 (“These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers salaries and to build and maintain churches and church property aroused their indignation.”).

22. *Id.* at 11-12 (“The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia’s tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law.” (citations omitted)).

23. *Id.* at 13 (“This Court has previously recognized that the provisions of the First Amendment in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against government intrusion on religious liberty as the Virginia statute.” (citations omitted)).

24. See LEVY, *supra* note 9, at 27-78 (providing a historical survey of post-Revolutionary War state religious establishments in the United States explaining these facts and others).

nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa. In the words of Jefferson, the clause against the establishment of religion was intended to erect 'a wall of separation between Church and State.'<sup>25</sup>

It is unclear how all these conclusions flow from the foregoing historical narrative that Justice Black presents, except perhaps as a summary of what Jefferson and Madison sought to make the rule in Virginia in the 1780s. In any event, one might understandably anticipate that the Board of Education's modest school bus fare reimbursement program stood no chance of being upheld after this lead up—but one would be wrong in this conclusion!

Shortly after the long list of "thou shalt nots" quoted above, Justice Black says, "But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power."<sup>26</sup> Citizens have a right to freely exercise their religion, and, according to Justice Black, they cannot be excluded from public benefits because of that free exercise.<sup>27</sup> He later adds that the First Amendment requires religious neutrality from government.<sup>28</sup>

Several puzzling conclusions follow from the juxtaposition of this

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25. *Everson*, 330 U.S. at 15-16 (citation omitted).

26. *Id.* at 16.

27. *Id.* ("On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude . . . the members of any . . . faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." (emphasis added)).

28. *Id.* at 18 ("That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.").

neutrality language with the equally categorical separationist language that precedes it. Justice Black gives no historical support for the neutrality language. In fact, no authority of any kind is proffered to back up these statements of law. This stands in quite marked contrast to the historical narrative that Justice Black gives to underpin his list of “thou shalt nots.” A yet bigger problem is that these two positions point to contrary results in the case. All the more the surprise to the dissenters when Justice Black uses this relatively brief and ahistorical public welfare/neutrality argument to hold the bus fare reimbursement program constitutional in contradiction to the longer historical separationist argument that precedes it.<sup>29</sup>

In dissent, not surprisingly, Justice Jackson finds the opinion of the Court to lead in one direction before, at the last minute, reaching the opposite conclusion.<sup>30</sup> According to Justice Jackson, “The New Jersey Act in question makes the character of the school, not the needs of the children determine the eligibility of parents to reimbursement.”<sup>31</sup> Echoing Justice Black’s words and turning them against him, Justice Jackson asserts:

The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church [sic] The prohibition against the establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.<sup>32</sup>

He then concludes that, “It seems to me that the basic fallacy in the Court’s reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which the beneficiaries of this expenditure are selected.”<sup>33</sup>

Justice Jackson also joins in Justice Rutledge’s dissent (as do Justices Frankfurter and Burton). Unlike Justice Jackson’s solo

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29. *Id.*

30. *Id.* at 19 (Jackson, J., dissenting) (“In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.”).

31. *Id.* at 20.

32. *Id.* at 24.

33. *Id.* at 25.

dissent, this opinion is deeply based on an interpretation of Jefferson and Madison's views on religious establishment, especially as expressed in the religious liberty struggles in Virginia in the 1780s.<sup>34</sup> In this it is like the first, main portion of Justice Black's majority opinion, but its conclusion is, of course, quite different. Let us inquire as to why this is so, since both opinions have the same historical focus.

Justice Rutledge's analytic aim in his *Everson* dissent is to define an establishment of religion in order to determine the scope of the clause's prohibition.<sup>35</sup> He asserts, "Not simply an established church, but any law respecting an establishment of religion is forbidden."<sup>36</sup> He extends this broad interpretation to the meaning of the word "religion" itself in the clause.<sup>37</sup> The combination of Justice Rutledge's description of what constitutes an establishment of religion with his expansive definition of religion gives his understanding of the meaning of the Establishment Clause an exceedingly wide prohibitory scope.

He further emphasizes the importance of this issue and ties it to the constitutional founding, saying, "For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general."<sup>38</sup> For Justice Rutledge, the political conflict over the Assessment Bill in Virginia in 1784-85 was the most important and

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34. *Id.* at 33-34 (Rutledge, J., dissenting) ("No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summary of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination." (citation omitted)).

35. *Id.* at 29 ("This case forces us squarely to determine for the first time what was 'an establishment of religion' in the First Amendment's conception.").

36. *Id.* at 31. Justice Rutledge continues, "But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* at 31-32.

37. *Id.* at 33 ("The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.").

38. *Id.* at 34.

meaningful event in the battle for religious freedom.<sup>39</sup> Justice Rutledge maintains Madison played a pivotal role in the debate over the bill and that Madison's views on that subject, and on the establishment of religion generally, are most clearly and comprehensively stated in Madison's *Memorial and Remonstrance Against Religious Assessments*. He says, "The Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" <sup>40</sup>

In the *Remonstrance*, Justice Rutledge sees Madison as taking a categorical stance against governmental aid to, or relation with, religion.<sup>41</sup> This was especially true with regard to taxation for religious support. Justice Rutledge says, "In no phase was he more unrelentingly absolute than in opposing state support or aid by taxation."<sup>42</sup> From this, Justice Rutledge announces, "In view of this history, no further proof is needed that the Amendment forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises."<sup>43</sup> Even the lack of confirmation in the adoption history of the First Amendment does not move Justice Rutledge from this conclusion.<sup>44</sup>

From this historical exploration, Justice Rutledge concludes, "New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck."<sup>45</sup> Justice Rutledge does not, however, refute Justice Black's public welfare argument to avoid Justice Black's decision upholding the

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39. *Id.* at 36 ("The climax came in the legislative struggle of 1784-1785 over the Assessment Bill.").

40. *Id.* at 37.

41. *See id.* at 39-40 ("As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority."). Justice Rutledge states this again when he says, "With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom." *Id.*

42. *Id.*

43. *Id.* at 41.

44. *Id.* at 42 ("By contrast with the Virginia history, congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled." (citation omitted)).

45. *Id.* at 46.

constitutionality of the New Jersey bus transportation reimbursement program. Justice Rutledge's rhetorical strategy in answering Justice Black is to cast the majority opinion as a stark either/or choice: either we prohibit all relation with, and aid to, religion by government, or else we cannot prevent their complete commingling and a full place for religion in public welfare expenditures. Justice Rutledge is confident that neither the Clause's history, nor the popular will can support the second option.

He turns to potential line drawers who would permit some, but not all, aids to religion based upon whether or not they are direct or indirect, large or small, essential or not important, and so on. We cannot, Justice Rutledge suggests, meaningfully distinguish among different aids to parochial school education.<sup>46</sup> In his mind, a dollar given for one form of aid to religion is functionally, and therefore, constitutionally indistinguishable from a dollar given for any other form of aid to religion. The two are fungible.

With this foundation, Justice Rutledge next asserts that, since no constitutional distinction can be made between different forms of aid to religion, acceptance of Justice Black's public welfare argument is tantamount to the constitutional permissibility of any and all governmental aid to religion.<sup>47</sup> Putting the issue and the alternatives in the starkest terms, Justice Rutledge asserts:

We have here then one substantial issue, not two. To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion

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46. *Id.* at 48 ("Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation.").

47. *Id.* at 49-50 ("If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, together with the legislature's decision that the payment of public moneys for their aid makes their work a public function, then I can see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public instruction.").

and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones.<sup>48</sup>

Justice Rutledge will not let Justice Black or anyone else have it both ways because, for him, a religious purpose is a private purpose and a public purpose is necessarily secular. When the question is posed in this way, he is confident that his answer will follow. He is also confident that his answer to this question is Madison's answer. He says:

In truth this view contradicts the whole purpose and effect of the First Amendment as heretofore conceived. The 'public function'—'public welfare'—'social legislation' argument seeks in Madison's words, to 'employ Religion (that is, here, religious education) as an engine of Civil policy.' Remonstrance, Par. 5. It is of one piece with the Assessment Bill's preamble, although with the vital difference that it wholly ignores what that preamble explicitly states.<sup>49</sup>

In this way Justice Rutledge identifies New Jersey's bus transportation reimbursement program with the Assessment Bill's provision for the payment of Christian teachers and ministers in the 1780s. The upshot of this argument is that government may not aid religion in any way.<sup>50</sup>

Although not "unsympathetic toward the burden which our constitutional separation puts on parents who desire religious

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48. *Id.* at 51.

49. *Id.* This passage cites the Assessment Bill preamble, which reads in part: Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers . . . it is judged that such provision may be made by the Legislature, without counteracting the liberal principle heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies of communities of Christians.

*Id.* at 51 n.43 (quoting WILLIAM HENRY FOOTE, SKETCHES OF VIRGINIA 340 (1850)).

50. *Id.* at 52-53 ("Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances . . .").

instruction mixed with secular for their children,”<sup>51</sup> Justice Rutledge insists “we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion.”<sup>52</sup> Rather than being unfair, Justice Rutledge insists, “it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship.”<sup>53</sup> For Justice Rutledge, this command is not merely one of prudence or good sense, but one of constitutional principle.<sup>54</sup>

#### EQUAL FREE EXERCISE OF RELIGION

Let us turn now from a close reading of what Everson says to a critique of the opinions and doctrine in the case, starting with a weighing of the arguments presented. Considering just what Justices Black, Jackson and Rutledge have to say in their *Everson* opinions, the two dissenters seem at first to have much the better of the argument on the facts, history, and doctrine. Justice Jackson is correct that much of Justice Black’s opinion—certainly its discussion of the framing history of the Establishment Clause—leads the reader to become convinced of the strength of the separationist arguments made by all three Justices and to anticipate the Court ruling against the constitutionality of the bus fare reimbursement program in the case. Both Justices Black and Rutledge make detailed arguments that Madison accepted a broad, categorical view of separation of church and state—one that brooked no exceptions or accommodations of religion and one that they (and we) should accept too. This historical separationist argument makes Justice Black’s opinion, and in particular his public welfare/neutrality argument, appear both unsupported by the framing history and insufficient to justify the conclusion it is employed to support.

These appearances change markedly, however, if we also consider what the Justices do *not* say about Madison’s views, especially those in the *Remonstrance* concerning religious freedom and equal rights of

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51. *Id.* at 58.

52. *Id.* at 59 (citing Madison, *supra* note 1, ¶¶ 8,12).

53. *Id.*

54. *Id.* at 63 (“The matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison’s day it is one of principle, to keep separate the separate spheres as the First Amendment drew them . . .”).

citizens. Recall Justice Rutledge's statement that, "For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general."<sup>55</sup> Here, Justice Rutledge is talking about the founders' political and historical struggle, and not about the underlying philosophical debate about the natural rights of citizens. One would not know from the quotations from the *Remonstrance* in these opinions that, in the *Remonstrance*, Madison rises above the political rhetorical level to give a philosophical justification for his immediate political arguments. Nor would one know that this justification was based on equal rights and freedom of conscience.<sup>56</sup>

Madison emphasizes freedom of conscience and equality of rights throughout the *Remonstrance*. In the very first paragraph, he proclaims, "The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate."<sup>57</sup> He is also emphatic that this individual right of conscience is an equal right of all.<sup>58</sup> He complains of the Assessment Bill, "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the legislative authority."<sup>59</sup> Madison sums his argument up in the last paragraph of the *Remonstrance* in this way:

Because, finally, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "Declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of Government," it is enumerated with equal solemnity, or rather studied emphasis.<sup>60</sup>

From this we can see the basis for Madison's view on religious liberty. He grounded his opposition to the Assessment Bill not in his

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55. *Id.* at 34.

56. *See, e.g.,* Madison, *supra* note 1, ¶ 1.

57. *Id.*

58. *Id.* ¶ 3. In the fourth paragraph of the *Remonstrance* Madison says, "[T]he bill violates that equality which ought to be the basis of every law[.]" *Id.* ¶ 4.

59. *Id.* ¶ 9.

60. *Id.* ¶ 15.

personal preferences or political strategies, but on a natural rights philosophy, which he shared with his fellow Virginians<sup>61</sup> and fellow Founders. This philosophy underpins and illuminates not just his views on religious liberty and the Establishment Clause, but the Constitution generally. This approach also has the virtue of showing the unity of constitutional rights and structures through basic shared values and underlying purposes.

This is not a claim that can be accurately made about the separationist views of Justices Black, Rutledge, and Jackson in *Everson* or of modern Establishment Clause doctrine generally. This is not an issue that is simply of historical importance, however. It has a very important impact on the doctrinal dispute among Establishment Clause scholars. Recall that Justices Black and Rutledge both claim that Madison's role in the Virginia religious liberty disputes of the 1780s and, above all, Madison's *Remonstrance* support, yea compel, strict separation between church in the modern day.<sup>62</sup> Recall further that Black offers no historical support for his public welfare argument in favor of the New Jersey bus fare reimbursement program.

If we look at both the religious liberty struggle in Virginia in the 1780s and the bus fare program in New Jersey in the 1940s in light of Madison's equal liberty arguments in the *Remonstrance*, important contrasts and differences emerge. Madison's objections to the Assessment Bill flow from the violations of equal rights and freedom of conscience it will cause. The Bill does not present a truly equal benefit to all,<sup>63</sup> so Madison and the others in this debate are simply not confronted with the question of a truly neutral, generally available public benefit.<sup>64</sup> So, "the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience" is

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61. Madison's quote from the Virginia Declaration of Rights indicates Virginians agreed with Madison's views on natural rights.

62. See *supra* notes 18-24, 37-43 and accompanying text, respectively, for the arguments of Black and Rutledge on the "unrelentingly absolute" views of Madison on the issue.

63. Some Christian groups and all non-Christian and non-religious groups were excluded. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 72 (1947).

64. It is fair here to note that the Court is not actually confronted with such a benefit in *Everson*—transportation to for-profit private schools is not included in the bus fare reimbursement plan. See *supra* note 16. The Court, however, treats the program as if it were a neutral, generally available benefit.

violated by this unequal scheme. It is the right of equality which is absolute and not separationism.

Circumstances are different in *Everson*, at least as the Court sees the relevant facts. A neutral, generally available public welfare benefit, such as the bus fare reimbursement program enforces, rather than violates, equality of rights and citizenship. No class or group of citizens is subordinated to any other.<sup>65</sup> On the other hand, enforcement of the no-aid separationist "principle"<sup>66</sup> would mandate discrimination against religion and violation of freedom of conscience; it would not guarantee equality.<sup>67</sup> Thus, Justice Black correctly links his public welfare theory to the Free Exercise Clause.<sup>68</sup> However, Justice Black fails to link this argument up with the clause's framing history.

Two criticisms of Rutledge's account of separation flow from the arguments presented here. First, Justice Rutledge's account confuses a principle (equality of rights and citizenship) with an application of that principle in a particular historical setting (separation in the Virginia religious liberty debate in the 1780s). In this way, it reduces establishment doctrine to a mechanical rule that sometimes subverts rather than protects the equality it was created to serve. Second, Rutledge's account creates a needless conflict with the Free Exercise Clause. For if, as Justice Black argues, the Free Exercise Clause prohibits the government from excluding citizens from general public welfare benefits because of their religion, while the Establishment Clause, as Justice Rutledge argues, requires such an exclusion, "the Establishment Clause is said to require what the Free Exercise Clause forbids."<sup>69</sup> Both of these shortcomings are avoided if we start from the basic philosophical premises of Madison's *Remonstrance*, i.e., equal religious liberty and freedom of conscience, rather than from the application of this principle in the context of Virginia in the 1780s.

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65. The anti-subordination principle is an important feature of contemporary equal protection doctrine and theory. For a leading work in the area, see Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976).

66. Recall that Justice Rutledge calls this a matter of principle. *See supra* notes 51-54 and accompanying text.

67. This is the "burden" Justice Rutledge admits that the application of separationist doctrine imposes upon religious scruple. *See supra* note 51 and accompanying text.

68. *See supra* notes 29-31 and accompanying text.

69. McConnell, *supra* note 9, at 118.

In truth, the decision to start from the basic philosophical premises of Madison's *Remonstrance* is not easy, otherwise it would have been arrived at sooner and with less conflict. We do not know with complete assurance what Madison or the other founders would have done in *Everson* and other modern cases, simply because the founders never confronted cases like the contemporary cases. This is primarily due to the great changes in the country in the intervening time. Perhaps most significant among these changes is the rise of the modern administrative welfare state.

The modern administrative welfare state complicates the application of the principles of the *Remonstrance* to contemporary cases in at least two ways. First, it requires a more nuanced determination of what bears upon, in either a positive or a negative manner, equality of religious liberty. Separation of church and state is not the default setting. Instead, the determination must be made contextually. Perhaps more significantly, not only did Madison not anticipate the administrative welfare state, but it contradicts his basic understanding of the nature and scope of the American republic. Remember, Madison is the man who wrote in *The Federalist* that "[t]he powers delegated by the proposed Constitution to the federal government, are few and defined."<sup>70</sup> He neither contemplated nor approved of the broad powers possessed by the modern administrative state. Madison is the President who vetoed the Internal Improvements Bill,<sup>71</sup> which would have funded roads and other public works, and he likely would not have accepted the constitutionality of independent agencies and broad federal regulatory powers.

If Madison would have disagreed with the emergence of the

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70. THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

71. In his veto message, President Madison stated:

The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation with the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.

James Madison, Veto Message, (Mar. 3, 1817), in A COMPILATION OF THE MESSAGE AND PAPERS OF THE PRESIDENTS 584-85 (James D. Richardson ed., Washington D.C., Government Printing Office 1896).

administrative welfare state, how does this change in governance affect our understanding of the applicability of the *Remonstrance* to contemporary Establishment Clause cases? At the very least, it cannot leave them unchanged, lest it, like separationism, use Madison as the justification for the violation of the very principles of equal rights of free exercise and conscience that he wrote to protect. It will undoubtedly add some uncertainty to the mix. It will make any conclusion we come to second best, unless we roll back government to the limited scope Madison originally intended where equal religious rights and separation of church and state could coexist (a move no one writing about the Establishment Clause today in fact suggests). Nevertheless, given the choice between struggling to apply the principle of equality in circumstances where Madison's original assumptions do not hold and mechanically enforcing separation regardless of the effect on equality of rights and conscience, the principle of equality of rights should prevail.

#### CONCLUSION

Much disagreement and dispute have occurred since the Supreme Court inaugurated the modern era of Establishment Clause doctrine in 1947 in *Everson v. Board of Education*. Yet, rather than turn elsewhere, this short Article argues that the best path to clarification of this doctrine lies in a return to basics, a return to what *Everson* put forward as the basis of the meaning of the Establishment Clause—Madison's role in the religious liberty struggle in Virginia in the 1780s and, above all, his *Memorial and Remonstrance*. But this examination focuses on that which the Justices in *Everson* did not—the principle of equal religious liberty that underpins *Memorial and Remonstrance* and Madison's view of church/state relations generally.

