

## **BUILDING THE WALL BETWEEN CHURCH AND STATE: HOW ANTI-CATHOLIC SENTIMENT HAS SHAPED ESTABLISHMENT CLAUSE JURISPRUDENCE**

### **I. Introduction**

Modern Establishment Clause jurisprudence dates from the Supreme Court's 1947 decision in *Everson v. Board of Education*.<sup>1</sup> At that time, the Court adopted a standard of radical separation between church and state, which had as its defining application and consequence a constitutional ban against aid to parochial schools:<sup>2</sup>

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 [...] 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." [...] That wall must be kept high and impregnable.<sup>3</sup>

This prophetic language has governed the Supreme Court's approach to Establishment Clause issues concerning aid to parochial schools ever since.

It is my contention that the Court's interpretation of the Establishment Clause, as it pertains to aid to religious schools, cannot properly be understood as a hermetically sealed body of constitutional law.<sup>4</sup> It follows that the profoundly complex and seemingly inconsistent doctrine which has emerged from the Supreme Court's decisions in this area cannot adequately be expounded jurisprudentially. A complete and coherent account of this body of law cannot be derived merely from the traditional sources of text, history and structure.<sup>5</sup> It must, rather, be analyzed in a social and political context. In this light, the Court's modern "school aid"

jurisprudence can be correctly understood as the product of a profound distrust of and hostility towards Catholicism and the Catholic Church.<sup>6</sup> It is a doctrine which has been shaped by centuries of political conflict between Catholics and Protestants, and their respective positions on the proper relationship between Church and State.<sup>7</sup>

**I. *Everson's* "Wall Between Church and State" Is Not Rooted in History, But Rather Based in Bigotry**

The Supreme Court in *Everson* contended that its strict separationist construction of the Establishment Clause was rooted in and compelled by the "command of history."<sup>8</sup> However, the Court's theory that the First Amendment dictates a strict separation between church and state cannot persuasively be attributed to either the text of the Amendment or the original understanding of its Framers.<sup>9</sup> With no additional support from history or tradition, the Justices of the *Everson* Court braided into the Constitution the notions that the establishment provision was meant to create a "wall of separation" between religion and the government.<sup>10</sup>

**A. The Separationist Rhetoric Set Forth in *Everson* is Neither Demanded by Constitutional Text Nor Supported by Original Intent**

According to Justice Brennan, concurring in *Abington School District v. Schempp*, the First Amendment should be construed in the light of what particular practices "threaten those consequences which the Framers deeply feared" and whether the practices "tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent."<sup>11</sup> There is no historical foundation, however, for the proposition immortalized in *Everson* that the Framers intended to build a "wall of separation" between church and state. Rather, history tends to indicate that the evil "which the Framers deeply feared" was not more than the establishment of a national church.<sup>12</sup>

The Supreme Court in *Everson* relied extensively on the select words of two private individuals and the experience of but one of the thirteen ratifying states to perpetuate its separationist doctrine.<sup>13</sup> In the seven pages of historical analysis offered in the Court's majority opinion, Justice Black embraced the assumption that the First Amendment had the same purpose and intent as the Bill for Religious Liberty adopted three years prior in Virginia.<sup>14</sup>

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 governmental intrusion on religious liberty as the Virginia statute.<sup>15</sup>

For several reasons, however, Virginia's statute cannot be determinative of the original intent behind the Establishment Clause. For one, the First Amendment and the Virginia statute served two entirely different functions. The Bill of Rights was intended to limit the powers of the new federal government, while Virginia's Bill for Religious Liberty was a state effort to protect certain fundamental rights. In addition, while the perceived intent of two prominent Virginians may be sufficient from which to glean the original understanding of an amendment to Virginia's constitution, the same cannot be said for an amendment to the federal Constitution.

The metaphorical language of "a wall separating church and State" is not found in the Constitution but rather comes from a letter written by President Thomas Jefferson in 1802 to a Baptist Association in Connecticut.<sup>16</sup> As stated by Justice Rehnquist, dissenting in *Wallace v.*

*Jaffree*:

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.<sup>17</sup>

Despite Justice Black's assertion to the contrary, Thomas Jefferson did *not* play a leading role in the drafting or adoption of the First Amendment.<sup>18</sup> Not only was he not a Member of the First Congress, but also, at the time the First Amendment was passed by Congress and ratified by the States, Jefferson was thousands of miles away, serving as the American ambassador in Paris, France.<sup>19</sup> Moreover, his letter to the Danbury Baptist Association, described as "a short note of courtesy," was written fourteen years after the First Amendment was passed by Congress.<sup>20</sup> Accordingly, Jefferson would seem to be "a less than ideal source of contemporary history" as to the meaning of the Establishment Clause of the First Amendment.<sup>21</sup>

James Madison, on the other hand, did play a role in the drafting of the Bill of Rights as an acting Member of the First Congress. Nonetheless, to equate Madison's intent with that of the entire body of Congress and the several states is unwarranted.<sup>22</sup> Madison's contribution to the language of the Establishment Clause, moreover, does not conform to the "wall of separation" between church and State rhetoric which has been ascribed to him.<sup>23</sup>

[E]ven if more extreme notions of the separation of church and state can be attributed to Madison, many of them clearly stem from "arguments reflecting the concepts of natural law, natural rights, and the social contract between government and a civil society," rather than the principle of nonestablishment in the Constitution.<sup>24</sup>

Nonetheless, Madison's Memorial and Remonstrance, together with Jefferson's "wall of separation" language, provided "an impressive pedigree for the separationist philosophy that *Everson* engrafted onto the First Amendment."<sup>25</sup>

The Establishment Clause bars Congress from making any law "respecting an establishment of religion."<sup>26</sup> Clearly, the doctrine adopted by the *Everson* Court, which proclaimed in absolute terms that no aid could go to religious schools, has little support in the text of the First Amendment.<sup>27</sup> The Amendment's phrasing suggests rather that Congress can

neither establish nor disestablish religion. On this reading alone, the Establishment Clause adopts no substantive policy regarding separation of church and state. It merely divests the national government of authority on the subject.<sup>28</sup>

Moreover, the evidence bearing on what the First Congress did intend the Establishment Clause of the First Amendment to mean is ambiguous at best.<sup>29</sup> Each of the amendments which formed the Bill of Rights was debated in the House of Representatives on August 15, 1789. Significantly, none of the Members of Congress who spoke during the debate on the Religion Clauses expressed the slightest indication that they thought the language before them would require the Government to be absolutely neutral as between religion and irreligion.<sup>30</sup> Not one of the ninety delegates ever mentioned the idea of a separation between church and state.<sup>31</sup>

In addition, the contemporaneous actions of the First Congress lend support to the conclusion that the Framers did not intend for the State to be entirely walled off from religion.<sup>32</sup> For example, on the same day Madison introduced what would become the First Amendment, Congress ratified the Northwest Ordinance.<sup>33</sup> That enactment, which listed the requirements for statehood, provided: “[r]eligion, morality, and knowledge ... being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”<sup>34</sup> Pursuant to this language, Congress proceeded to set aside federal lands in the Northwest Territory for the use of schools.<sup>35</sup> As there was no requirement that the schools be “public,” many of the beneficiaries of these land grants were undoubtedly religiously affiliated schools.<sup>36</sup> It stands to reason that Congress would not approve legislation which they believed would fundamentally contradict one of the proposed amendments they were simultaneously examining.<sup>37</sup>

It is also highly improbable that the Establishment Clause was intended to do away with the formal establishments which flourished among the colonies at the time the First Amendment was adopted.<sup>38</sup> In fact, at that time, seven of the fourteen States maintained government-sponsored churches.<sup>39</sup> With the arguable exception of Rhode Island, no American state could have been found in compliance with the modern understanding of separation of church and state.<sup>40</sup> These new states would not have adopted, with little to no discussion or debate, a constitutional provision which condemned their then-existing practices.<sup>41</sup>

In any case, although these formal establishments disappeared early in the nineteenth century, their elimination did not lead to a complete separation of religion from public life.<sup>42</sup> For example, before the mid-1800s, most schools in America were operated by religious organizations, and many received aid from states and cities.<sup>43</sup> Between 1800 and 1830, New York provided public funds to Presbyterian, Episcopalian, Methodist, Quaker, Dutch Reformed, Baptist, and Lutheran schools. Significantly, none of these arrangements were challenged as “establishments” under either state or federal constitutions.<sup>44</sup> This history indicates that, notwithstanding the broad rhetoric to the contrary in *Everson*, neither the states nor the First Congress intended the Establishment Clause to mean that “no tax in any amount” could be levied for religious activities in any form.<sup>45</sup> On the contrary, according to Joseph Story, who sat on the Supreme Court from 1811 to 1845, the Establishment Clause was originally understood to mean:

[T]hat Christianity ought to receive encouragement from the State so far as was not incompatible with the private rights of conscience and the freedom of religious worship. An attempt to level all religions, and to make it a state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.<sup>46</sup>

This understanding proves much more consistent with the command of history than does the interpretation adopted in *Everson*.

**B. In its Political Origins, the Principle of A Wall of Separation Between Church and State Was Aimed Not Only to Prevent an Establishment of Religion, But Also to Maintain One**

The determination of what effect the First Amendment's establishment provision was intended to have on the provision of public aid to parochial schools requires extrapolation of reasoning beyond the Amendment's historical foundation.<sup>47</sup> State-sponsored public education was virtually nonexistent at the time the Framers drafted the Constitution.<sup>48</sup> Where such systems did exist, however, they had a distinctly religious orientation.<sup>49</sup>

**Early Public Schools Constituted "De Facto" Protestant Establishments**

Nineteenth century Americans generally believed that Protestant values formed an important part of the moral foundation on which a free and democratic society was built.<sup>50</sup> Thus, when the states began to establish publicly-funded school systems in the early nineteenth century, they intended to impart moral education based on these shared religious principles through the open teaching of Protestant Christianity.<sup>51</sup> Horace Mann, the secretary of the nation's first board of education, believed that the mission of a public school was fundamentally religious in nature, and he encouraged the use of common schools as an instrument for the inculcation of Protestant values and teachings.<sup>52</sup> Protestant ministers and churchmen, who led the common-school movement, served on state school boards and as school superintendents.<sup>53</sup> These state-funded, religiously-oriented schools came to be characterized as "de facto" Protestant establishments, and yet they flourished among the states throughout the nineteenth century.<sup>54</sup>

A problem confronting these “de facto” establishments was that Protestantism was not one religion, but many.<sup>55</sup> As the movement for free public education gained headway, various Protestant sects began to disagree over the way their children should be taught.<sup>56</sup> So-called “common schools” were designed to diffuse conflict among Protestant sects in that they taught a “least-common-denominator,” generalized Protestantism.<sup>57</sup> For example, the common schools mandated regular readings from the King James Bible without commentary from the teacher, a practice on which all Protestants agreed.<sup>58</sup> Accordingly, supporters claimed that their schools were “nonsectarian,” because the presence of the Bible was demanded by many sects rather than by any one sect.<sup>59</sup> New York City’s Public School Society promoted its schools as distinctly Protestant, declaring that its “primary object, without observing the particular forms of any religious society, [was] to inculcate the sublime truths of religion and morality contained in the Holy Scriptures.”<sup>60</sup> It was considered essential to the Protestant consensus of support for the state-funded common schools that education be “religious,” but that it remain “nonsectarian.”<sup>61</sup>

However, this consensus proved unwelcoming to the growing population of Catholic immigrants,<sup>62</sup> who objected to the Protestant-oriented curriculum of the common schools.<sup>63</sup> The regular prayers recited in the schools were unmistakably Protestant,<sup>64</sup> and common school textbooks, such as the McGuffey reader, portrayed Catholics as deceitful, murderous, and ignorant.<sup>65</sup> Additionally, the Protestant practice of reading the King James Bible without comment was especially offensive to many Catholics.<sup>66</sup> The King James Bible was a Protestant translation of the Scriptures, which omitted several books included in the Catholic Douay Bible.<sup>67</sup> The Douay version included authoritative annotation and comment, as the Catholic Church feared that “reading the unadorned text invited the error of private interpretation.”<sup>68</sup> Religious conflict over Bible reading grew intense.<sup>69</sup> In Maine and Massachusetts, Catholic

students suffered beatings or expulsions for refusing to read from the Protestant Bible, and crowds in Philadelphia rioted over whether Catholic children could be released from the classroom during Bible reading.<sup>70</sup> These conflicts persisted throughout the 1800s, and yet the Protestant nature of the publicly-funded schools showed no signs of yielding to changing demographics. Thus, many Catholic parents were persuaded to send their children to privately-subsidized, Catholic parochial schools.

### **Protestants Asserted “Separation of Church and State” as a Constitutional Principle Which Prohibited Aid to Parochial Schools**

In the mid-nineteenth century, Catholics began to seek public for the development and maintenance of their school systems.<sup>71</sup> For example, in 1840, Catholics in New York City petitioned the public school Board of Assistants to provide public funding for Catholic schools.<sup>72</sup> The Church contended, in support of its demands, that the parochial schools served a public good in that they contributed to the educated citizenry necessary to democracy.<sup>73</sup> Moreover, Catholic parochial schools relieved the population pressures felt by public schools.<sup>74</sup> On behalf of the Church, Bishop John Hughes argued that the state’s refusal to provide aid to Catholic schools effectively discriminated against Catholics; by forcing Catholics to pay taxes to support public schools refusing to return those funds in the form of aid to parochial schools, the state was placing a financial burden upon Catholic parents, which was in turn weakening the capacity of the Church to maintain a parochial school system..<sup>75</sup>

In rejecting the Church’s petition for funding, the New York Board of Assistants asserted that:

[T]he constitutions of the United States and of the states had declared in some form or other: that there should be no establishment of religion by law; that the affairs of the State should be kept entirely distinct from, and unconnected with those of the

Church; [...] that all Churches and religions should be supported by voluntary contributions; and that no tax should ever be imposed for the benefit of any denomination of religion, for any cause, or under any pretense, whatever. The purity of the Church and the safety of the State, are more surely obtained, by a distinct and separate existence of the two, than by their union.<sup>76</sup>

This was the first time since Jefferson that such absolute and unequivocal separationist language was applied to the church-state relationship.<sup>77</sup> The New York legislature responded a year later by prohibiting funding of any school where “any religious sectarian doctrine or tenet shall be taught, inculcated, or practiced.”<sup>78</sup> The sole purpose of the legislation was “to form a barrier high and eternal as the Andes, which shall forever separate the Church from the State.”<sup>79</sup> The ban against aid to religious schools thus found its support and its conviction in Jefferson’s wall of separation.<sup>80</sup>

Thereafter, Protestant churches and leaders joined forces with public officials and educators in the fight to prevent Catholic schools from acquiring public aid.<sup>81</sup> The Protestant view was that the religious and the political spheres were and should always be separate and distinct. Such separation, moreover, should extend not only to the institutions of church and state, but also to their means of support.<sup>82</sup> The Protestant forces found a willing ally in President Ulysses S. Grant, who brought the issue of parochial school funding to the national stage in his 1875 speech to the Army of Tennessee.<sup>83</sup> In unwavering terms, President Grant urged Americans to:

Encourage free schools and resolve that not one dollar of money appropriated for their support no matter how raised, shall be appropriated to the support of any sectarian school. Resolve that neither the State nor the Nation, nor both combined, shall support institutions of learning other than those sufficient to afford to every child growing up in the land of opportunity of a good common school education, [u]nmixed with sectarian, pagan or atheistical tenets [...] *Keep the church and state forever separate.*<sup>84</sup>

Congressman James G. Blaine seized the political opportunity to propose a constitutional amendment prohibiting the use of public funds to support religious schools.<sup>85</sup> Though the Blaine Amendment fell four votes short of the Senate, several states subsequently enacted comparable amendments prohibiting public aid from supporting sectarian schools.<sup>86</sup> Through Enabling Acts, Congress forced western territories to include versions of the Blaine Amendment in their proposed state constitutions as a condition of achieving statehood.<sup>87</sup> The anti-Catholic impetus behind these provisions was clear:

[T]he conclusion that [the Blaine Amendments] were driven by the Protestant/Catholic divide is unmistakable, despite the fact that none of the amendments refer specifically to Roman Catholics or Catholic Schools. This appears to be the scholarly consensus. It is also supported by the statistics regarding private school religious affiliation at the time, the Senate debate over the Federal Blaine Amendment, and the breakdown of social and political groups that supported and opposed the measure.<sup>88</sup>

By 1890, twenty-nine of the forty-five States had strongly worded constitutional prohibitions on the use of public money to support sectarian schools.<sup>89</sup>

## **II. The History of Anti-Catholicism and its Relationship to Church-State Relations**

Demands for separation of church and state drew upon fears of Catholic power and echoed an individualistic suspicion of the Church's theology. Protestants understood the concept of separation to advance the liberty of the individual by constraining the power of the church, and they used this principle as a bulwark against Catholic encroachment.<sup>90</sup> Protestant anti-Catholicism was largely defined by the conviction that the Catholic Church was infinitely dangerous because it sought to use its worldly power to convert the United States into a Catholic country.<sup>91</sup>

### **A. Nineteenth Century Anti-Catholicism**

Although *Everson* marked the first significant pronouncement under the Establishment Clause, the anti-Catholic forces that shaped the Court's opinion were at work long before the mid-twentieth century.<sup>92</sup> At the time of the Revolution, only about one per cent of the people of the American colonies were Catholic.<sup>93</sup> In such an atmosphere the colonial Catholics were treated as outsiders by the other colonists, and when the new nation broke away from European control, the so-called "Romanists" were suspect because of their continued allegiance to a European ruler.<sup>94</sup>

American Protestants had inherited traditional fears about the anti-Christian character of Catholicism and its union of church and state.<sup>95</sup> Both the Puritans of Massachusetts Bay and the Anglicans of Virginia shared the fear and hatred of Rome.<sup>96</sup> Their grandfathers had been alive when Henry VIII led the nation away from the Church; their fathers had witnessed wars with Catholic France which threatened to restore the Pope to his former supremacy and had despaired for their faith with the ascension to the throne of Bloody Mary.<sup>97</sup> The settlers themselves had seen the constant plot and counterplot of the reigns of Elizabeth and James I when Catholic forces threatened to engulf their land, and they had become convinced that Catholicism was a dangerous and constantly threatening force.<sup>98</sup>

The great wave of immigration was probably the greatest causal force leading to the revival of anti-Catholic sentiment in the nineteenth-century.<sup>99</sup> As Catholic immigrants poured into the country from Ireland and Germany, Protestants increasingly feared that Catholics would attempt to subvert representative government, or that they would gain enough adherents to impose religious tyranny by democratic means.<sup>100</sup> President Grant added fuel to the fire of anti-Catholicism by stating that, if the nation were to have a second civil war, "the dividing line will

not be Mason and Dixon's but between patriotism and intelligence on the one side and superstition, ambition and ignorance on the other."<sup>101</sup> In context, there is no doubt that the feared "superstition, ambition, and ignorance" was the Roman Catholic Church, rapidly growing from immigration, with its alleged papal conspiracy to dominate the country.<sup>102</sup>

These immigrants seemed to live a life apart; they were the poorest and the least assimilated members of the American community, and their presence increased the feeling among non-Catholics that the Roman Catholic Church did not "belong" in America.<sup>103</sup> Protestants were greatly apprehensive of the new immigrants' customs and of the Catholic religion, viewing it as superstitious and, because of its hierarchical organization and theology, anti-democratic.<sup>104</sup> Many believed that the Catholic Church's authoritarian institutional structure, its association with monarchical governments, and its insistence on church-state union were fundamentally inconsistent with the America's core principles of freedom and democratic equality.<sup>105</sup> Throughout the nineteenth century, this feeling of hostility often broke out into open persecution.<sup>106</sup> Anti-Catholic fanatics caricatured priests, burned down convents, and spread rumors that Catholics were plotting to capture the country by armed rebellion.<sup>107</sup>

At the heart of the campaign against Catholicism was the claim that Catholic doctrine could not be harmonized with American ideals.<sup>108</sup> Critics pointed to a litany of papal statements opposing church-state separation. For example, in 1864 Pope Pius IX issued his "Syllabus of Errors," which was a list of eighty propositions that the Roman Catholic Church deemed anathema to Catholic teaching.<sup>109</sup> Of particular significance was the fallacy that "[t]he Church ought to be separated from the State and the State from the Church."<sup>110</sup> However, this belief in the necessity of a union between religion and state was not unique to the Catholic Church. Each of the three monotheistic religions which originated in the Middle East - Islam, Judaism, and

Christianity - avows that religion is *not* a purely private affair that can simply be walled off from questions of public virtue and policy, at least without doing violence to the very nature of their beliefs and practices.<sup>111</sup> Nevertheless, by promoting the necessity of church-state union, the Catholic Church seemed to threaten the religious and political liberty which defined American democracy.<sup>112</sup> Insofar as Catholic and Protestant values and practices diverged, the separation of church and state became partly a mechanism that Protestants could invoke to prevent or retard the imposition of Catholic views.<sup>113</sup>

### **B. Twentieth Century Anti-Catholicism: The School Question**

By the mid-twentieth century, Catholics had become the country's largest denomination.<sup>114</sup> American Protestantism, though still the largest religious group in the nation, had begun to acquire a minority psychology, in which almost everything was shaped by the fear of Catholic domination.<sup>115</sup> Particularly troublesome to Protestants was the Catholic insistence on educating their children in their own religious institutions.<sup>116</sup> The public school, which had been "designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," became the educational embodiment of separation of church and state and the effective "symbol of [American] democracy."<sup>117</sup> In rejecting the public schools, Catholics had proven that they were determined to hold only their allegiance to a foreign ruler and to resist democracy.<sup>118</sup> This "minority-group defensiveness" turned American Protestants into champions of a strict separation of church and state, and of religion and education, particularly in the face of Catholic efforts to gain public support for parochial schools.<sup>119</sup>

The "tremendous revival of anti-Catholic feeling in the United States," in the twentieth century focused largely on the educational philosophy of the Catholic Church.<sup>120</sup> The Catholic educational philosophy consisted of two basic principles.<sup>121</sup> First, every subject taught had to be

“permeated with Catholic piety.”<sup>122</sup> A school in which certain subjects were taught from a non-Catholic point of view was not believed to provide an adequate Catholic education.<sup>123</sup> Second, the government had no primary right to educate at all.<sup>124</sup> Although the government, according to Catholic theory, had a duty to provide the means for education, it had no primary right or capacity to educate.<sup>125</sup> That right had been given by God, the source of all governmental power, to the Roman Catholic Church.<sup>126</sup> Pope Pius IX enunciated the teaching for American Catholics in 1864:

And first of all education belongs pre-eminently to the Church, by reason of a double title in the supernatural order, conferred exclusively upon her by God Himself; absolutely superior therefore to any other title in the natural order ... every form of instruction, no less than every human action ... cannot be withdrawn from the dictates of the divine law, of which the Church is guardian, interpreter and infallible mistress ... it is the duty of the State to protect in its legislation ... the supernatural rights of the Church in this same realm of Christian education.<sup>127</sup>

Pervasive separatism and segregation in Catholic parochial schools seemed to threaten national unity.<sup>128</sup> Not only did Catholic schools isolate students from their non-Catholic peers, but they also shielded young Catholics from what became termed the “democratic way of life.” Pictures of the Last Supper, not George Washington crossing the Delaware, decorated Catholic school classrooms. Catholic students memorized the catechism, instead of developing a “recognition of values achieved on the basis of experience.”<sup>129</sup> It was believed that Catholicism was antagonistic to a free and critical education.<sup>130</sup> It was warned that, if funds were provided to Catholic schools, their children

[W]ill be shut up in schools that do not teach them what, as Americans, they most of all need to know, the political geography and political history of the world, the rights of humanity, the struggles by which those rights are vindicated, and the glorious rewards of liberty and social advancement that follow. They will

be instructed mainly into the foreign prejudices and superstitions of their fathers, and the state, which proposes to be clear of all sectarian affinities in religion, will pay the bills!<sup>131</sup>

Some believed that all children should be required to attend public schools “in order that they might be protected against divisive cultural influences and helped to acquire a common outlook.”<sup>132</sup> In response, many states proposed legislation which would require students to attend public schools.<sup>133</sup> For example, in 1922, the voters of Oregon approved a referendum, backed by the Ku Klux Klan, which required all able-bodied children to attend public school.<sup>134</sup> The law was challenged by the Society of Sisters on the basis that the law impermissibly denied private and parochial schools the liberty to do business in violation of due process guaranteed by the Fourteenth Amendment.<sup>135</sup> In defense of the legislation, the State of Oregon asserted that:

The voters in Oregon might [...] have based their action in adopting this law upon the alarm which they felt at the rising tide of religious suspicions in this country, and upon their belief that the basic cause of such religious feelings was the separation of children along religious lines during the most susceptible years of their lives, with the inevitable awakening of a consciousness of separation, and a distrust and suspicion of those from whom they were so carefully guarded. The voters of Oregon might have felt that the mingling together, during a portion of their education, of the children of all races and sects, might be the best safeguard against future internal dissensions and consequent weakening of the community against foreign dangers.<sup>136</sup>

In *Pierce v. Society of Sisters*, the Supreme Court voted unanimously to strike down the law, on the ground that that “[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.”<sup>137</sup> The Justices thus conceded a “formal legality” of the existence of parochial schools, to which parents were free to send their children.<sup>138</sup> But the “freedom” was really no more than “a simple immunity, on par with that

which the government grants to the religious eccentricities of Jehovah's Witnesses, which forbid them to salute the flag."<sup>139</sup>

In the 1930s and 1940s, even as the nineteenth-century anti-Catholicism faded from public view, intellectuals increasingly feared that Catholicism might create a disposition amenable to authoritarian rule.<sup>140</sup> Contributing to this fear was the collapse of democracy in Europe.<sup>141</sup> Responding in part to Catholic support for General Franco in the Spanish Civil War, many perceived Catholicism as inimical to democracy and conducive to fascism and authoritarian government.<sup>142</sup> Protestants feared that parochial schools were indoctrinating students with a respect for authority that would incline these students toward authoritarianism and away from democracy.<sup>143</sup>

At the same time, increased tax burdens to support public schools fell on Catholics and non-Catholics alike, placing even more financial pressure on Catholic parents asked to subsidize parochial schools.<sup>144</sup> The ensuing effort on the part of the Catholic Church to obtain federal aid for their school systems provoked a strong response from Protestants, and caused a substantial rise in Protestant-Catholic hostilities.<sup>145</sup> In 1941, three Baptist groups formed the Baptist Joint Committee on Public Affairs in order to fight the growing influence of the Catholic Church, especially on the issues of federal aid to parochial schools.<sup>146</sup> One year later, the National Association of Evangelicals formed and took a strict separationist position with regard to aid for religious schools.<sup>147</sup> The American Civil Liberties Union ("ACLU") joined these groups in opposing public funding for religious education, including transportation to religious schools.<sup>148</sup>

In May of 1947, leaders of Protestant denominations and organizations launched Protestants and Other Americans United for the Separation of Church and State ("POAU"), a lobbying group whose sole purpose was "the maintenance of the American principle of

separation of church and state.”<sup>149</sup> POAU was dedicated to promoting “cultural and spiritual democracy,” and it aggressively fought against legislative or judicial approval of any aid to religious schools.<sup>150</sup> Early in 1948, newspapers across the country published POAU's Manifesto, which declared the great political awakening of Protestants.<sup>151</sup> They claimed that religious liberty was imperiled by “[a] powerful church, unaccustomed in its own history and tradition to the American ideal of separation of church and state.”<sup>152</sup> They warned that the government had to be purged of creeping “entanglement [with] a particular church,” or “shameful religious resentment and conflict [...] will inevitably ensue.”<sup>153</sup>

The Nation further intensified the debate between Catholics and non-Catholics (Protestants and secular modernists) when it published, between November 1947 and June 1948, a series of critical articles by Paul Blanshard concerning the Catholic Church's teachings with respect to medicine, sexual conduct, education, fascism, democracy, censorship, and science.<sup>154</sup> He warned that Catholic demands for complete public financial support of parochial schools was the first step towards the “eventual establishment of Catholicism in all public classrooms, as in Spain and Italy.”<sup>155</sup> The overwhelming praise that Blanshard's articles received indicates that education was simply “ground zero” in the larger political battle between Catholics and Protestants.<sup>156</sup> The Catholic Church was feared to be on the verge of seizing control of the nation's political institutions and making America a Catholic country subject to the dictates of the Pope.<sup>157</sup>

The desire to preserve public schools and their mission of assimilating students from diverse backgrounds reinforced Protestant opposition to public aid for parochial schools.<sup>158</sup> In a widely publicized 1952 address, Harvard President James Bryant Conant contended that to use taxpayers' money to assist parochial schools was to suggest “that American society use its own

hand to destroy itself.”<sup>159</sup> In 1947, John Dewey, America’s foremost philosopher of education, wrote an essay which declared:

[M]ore treacherously and boldly than ever before is suggested the idea that schools sponsored by organizations of various sectarian persuasions should be supported by the public treasury [...]Roman Catholic hierarchy, for example, has attempted for many years to gain public fiscal aid and its program has been advanced through active lobbying for school lunches, health programs and school transportation facilities for Catholic schools [...] It is essential that this basic issue be seen for what it is, namely, as the encouragement of a powerful reactionary world organization in the most vital realm of democratic life with resulting promulgation of principles inimical to democracy.<sup>160</sup>

The Catholic school system had become a threat to American democracy, and the perception arose that Catholic school teachers could not be trusted with public money.<sup>161</sup>

### **III. The Strict Separation Doctrine Adopted by the Court in *Everson* was Rooted in the Personal Ideologies of the Justices and the Conventional Understanding of Twentieth-Century America.**

“It requires no flight of imagination to believe that the justices' views of what the Constitution should mean powerfully inform their views of what it does mean, and that normative beliefs often reflect prevailing attitudes.”<sup>162</sup>

The only conclusion to be drawn from the history and circumstances surrounding the decision is that when the *Everson* Court reached back to Virginia for the paradigm of separation, they were not obeying a command from the Framers.<sup>163</sup> Rather, the Justices were making a choice based upon little more than political ideology and prevailing attitudes, and they imagined a past to confirm that interpretation.<sup>164</sup> The past they imagined seemed obvious, because it fit precisely what they wanted and expected the Constitution to say.<sup>165</sup> Thus, the real origins of the modern Establishment Clause lay not so much (or at least not only) in the utterances of Madison and Jefferson but in the political experiences and values that made aid to religious schools so problematic.<sup>166</sup>

Thus, the Supreme Court's judicial enforcement of religious freedom after World War II can be understood, in part, as a Protestant reaction to the perceived Catholic threat within the American democracy.<sup>167</sup> The Catholic question was among the most discussed issues of the 1940s and 1950s.<sup>168</sup> Protestants saw Catholicism as a dangerous element that had to be purged from public life.<sup>169</sup> This fear of the Catholic Church directly informed the birth of postwar Establishment Clause jurisprudence, as Protestants and liberals alike urged the use of the First Amendment as a tool to protect democracy from Catholic power.<sup>170</sup>

### **A. The Decision**

*Everson v. Board of Education* inaugurated the modern era of Establishment Clause jurisprudence.<sup>171</sup> At issue in *Everson* was the constitutionality of a New Jersey state statute, pursuant to which a township reimbursed parents for the cost of bus transportation for students attending both public and parochial schools.<sup>172</sup> Plaintiff Arch *Everson*, a Protestant taxpayer, argued that the legislation forced citizens to pay taxes to support and maintain schools which were dedicated to, and which regularly taught, the Catholic Faith.<sup>173</sup> When New Jersey's highest court found no violation of state law, the issue came before the Supreme Court for an interpretation of the federal Constitution.<sup>174</sup> Not only did *Everson* present the Court with an opportunity to interpret and apply the Establishment Clause, but it also gave the Justices the occasion to re-shape an already existing Catholic-Protestant conflict over religion, education, and funding.<sup>175</sup>

Although the Court was split as to its application, no Justice disagreed with the basic doctrinal principle that: "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."<sup>176</sup> Moreover, the Court was in no doubt about the prohibition of

the establishment clause as it related to parochial schools: “New Jersey cannot, consistently with the ‘establishment of religion’ clause of the First Amendment, contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.”<sup>177</sup> Nevertheless, the Court held five-to-four that the township's action did not violate the Establishment Clause on the grounds that the legislation did no more than “provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.”<sup>178</sup>

Because the result of the decision was so anomalous with its reasoning, two strong dissents were written, joined by four justices.<sup>179</sup> The dissenters were irate at what they regarded a perversion of the principles as stated to the facts of the cases. “Neither so high nor so impregnable today as yesterday,” Rutledge wrote, “is the wall raised between church and state by Virginia's great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth.” The dissenting justices believed that the benefit to religion was too pronounced to survive the Court’s adopted principle of no establishment, no aid.

As expressed by Justice Jackson: “It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school ... The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.”<sup>180</sup> New Jersey’s use of tax-raised funds forced a taxpayer to “contribute to the propagation of opinions which he disbelieves in so far as ... religions differ.”<sup>181</sup> It exposed religious liberty to the threat of dependence on state money, and it had already sparked political conflicts with opponents of public funding.<sup>182</sup>

If there had been any doubt that the issue of public funding for Catholic schools was at the core of the *Everson* case, Justice Jackson eliminated it in his dissenting opinion.<sup>183</sup> In his dissent, Jackson wrote that the parochial schools at issue “are parochial only in name--they, in fact, represent a world-wide and age-old policy of the Roman Catholic Church.”<sup>184</sup> He added that “Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself.”<sup>185</sup> Jackson went on to quote extensively from Catholic Canon Law regarding the requirement that Catholic children be educated in Catholic schools. He asserted that “[o]ur public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values.”<sup>186</sup> “The assumption behind the public school,” Jackson concluded, “is that after the individual has been instructed in worldly wisdom he will be better suited to choose his religion.”<sup>187</sup>

Although it ultimately upheld the challenged governmental action, *Everson* has been called “the foundation of the separationist paradigm.”<sup>188</sup> Justice Black's majority opinion, which concluded with Jefferson's metaphor of a “high and impregnable” wall between church and state, unambiguously espoused a strict separationist interpretation of the Establishment Clause.<sup>189</sup> Justice Rutledge's dissenting opinion, which was joined by the other three dissenting justices, echoed Justice Black's approach by stating that the object of the First Amendment “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.” Moreover, the separationist language of both majority and dissent confirmed the understanding of American Protestants that the Constitution itself condemned school aid.

In the mid-twentieth century, Madison's Enlightenment worldview had re-emerged as the dominant ideal in democracy and American culture.<sup>190</sup> The doctrine of strict separation in the 1940s and 1950s meant separation of the state from religious institutions, particularly schools.<sup>191</sup> It was based partly on the Jeffersonian notion that, if the Court granted subventions from tax funds to parochial schools, it would violate individual religious freedom by compelling citizens to pay taxes for the support of religious ideas which they believe to be false.<sup>192</sup> It was "sinful and tyrannical," wrote Jefferson, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."<sup>193</sup> More broadly, however, this standard was intended to implement a non-establishment policy that avoided religious involvement in the public sphere altogether.<sup>194</sup> The term "wall" as Jefferson used it means a distinction, a limitation, a definition of fields of competence and authority.<sup>195</sup> It is a line between two orders of experience, between absolutes on one side and relativities on the other, between the deep issues of faith and the practical issues of politics.<sup>196</sup> It separates two realms of authority, each of which functions best when the two are distinguished.<sup>197</sup>

All nine justices agreed that the establishment clause embodied Madison's approach to disestablishment.<sup>198</sup> The essence of the Court's argument in *Everson* was that James Madison's concept of the relationship between church and state, as reflected in his Remonstrance, defined the terms of the Establishment Clause of the First Amendment.<sup>199</sup> As a "wholly private" interest, religion existed apart from the state in "the kingdom of the individual man and his God," which the government was required to keep "free from sustenance." *Everson* at 39-40, 53, 57-58. Madison's belief that religion should be kept inviolately private is a "sectarian philosophy" which originated in the eighteenth-century Enlightenment movement.<sup>200</sup> By reading this

philosophy of separation into the Constitution, the Supreme Court in *Everson* effectively established a religion - a “deistic version of fundamentalist Protestantism.”<sup>201</sup>

The Court’s discussion in *Everson* reflected the Madisonian concern that secular and religious authorities must not interfere with each other’s respective spheres of choice and influence.<sup>202</sup> Madison’s belief that religion was a theologically personal, private and interior matter of the individual conscience was based on the belief that religion, by its nature, is inherently divisive.<sup>203</sup> Thus, the mixing of government and religion posed a clear threat to free government.<sup>204</sup> Only “[a]nguish, hardship and bitter strife” result “when zealous religious groups struggle with one another to obtain the Government’s stamp of approval.”<sup>205</sup> Such a struggle can “strain a political system to the breaking point.”<sup>206</sup>

Providing public aid to parochial schools, it seemed to the Justices, would pose the same threat of divisiveness. Subvention of parochial schools from public funds would necessarily advantage the denomination which had the largest system of parochial schools - the Roman Catholic Church.<sup>207</sup> This would have three inevitable consequences. First, the Catholic Church would actively campaign for the maintenance or increase of the financial benefits on which they will have become reliant.<sup>208</sup> Second, denominations which have fewer parochial schools will feel that, if they are to survive, they must also build schools and claim their share of public funds for this purpose.<sup>209</sup> Finally, nonbelievers, or those of other faiths, will mobilize to oppose such aid, and the national community will become polarized.<sup>210</sup> This posed an inherent threat to government, since political positions defined by essentially irrational matters of faith are, by their nature, less susceptible to the compromises necessary in a democratic political system.<sup>211</sup>

## **B. The Justices**

There is no question that the Supreme Court Justices who decided *Everson* were aware of the denominational hostility underlying the debate over aid to parochial schools.<sup>212</sup> They likely knew that the general public did not view *Everson* as a case concerning bus fares, but rather as a case concerning the public funding of Catholicism.<sup>213</sup> For example, Justice Murphy, the only Catholic on the Court, initially abstained in *Everson*, recognizing that the public perceived it as a Catholic case, even joking to Justice Rutledge that he was disqualified because it was “a Baptist-papist fight.”<sup>214</sup> In November 1946, during oral arguments in *Everson*, Justice William Douglas, in jest, passed a note to Justice Hugo Black, which stated that: “[i]f the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business.”<sup>215</sup> After the same argument, Justice Wiley Rutledge expressed his suspicion of Catholicism in a post-conference memo, writing that *Everson* was “really a fight by the Catholic schools to secure this money from the public treasury.” Aid to Catholic parents, Rutledge warned, would have the deleterious effect of increasing the number of children in religious schools.<sup>216</sup>

Several of the other justices appear to have shared an underlying suspicion of Catholic intentions with respect to education.<sup>217</sup> The Conference Notes from the *Everson* decision indicate that Justice Frankfurter deeply resented the influence of the established Roman Catholic hierarchy in Vienna, Austria, which subjected him to mandatory religious instruction in Catholic doctrine in his early schooling.<sup>218</sup> He thus strongly resisted church influence in the schools as dangerous for this country.<sup>219</sup> In a 1943 Justice Frankfurter refused to recognize the right of students who were Jehovah’s Witnesses to excuse themselves from saluting the flag, in part because he saw in such religious toleration an opening wedge for federal aid to parochial

schools.<sup>220</sup> A year later, he confided to his colleague, Justice Wiley Rutledge, that the Court might “rue the implications of *Pierce*.”<sup>221</sup>

In *Lemon v. Kurtzman*, decided almost twenty-five years after *Everson*, Justice Douglas expressed his belief that it was an “admitted and obvious fact that the *raison d’être* of parochial schools is the propagation of a religious faith.”<sup>222</sup> He went on to quote from a notoriously anti-Catholic book, entitled “Roman Catholicism”:

In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.<sup>223</sup>

He concluded by asserting that “[p]ublic funds supporting that structure are used to perpetuate a doctrine and creed in innumerable and in pervasive ways.”<sup>224</sup>

Hugo Black’s background is particularly instructive.<sup>225</sup> Appointed to the Court in 1937, Black had narrowly escaped a forced resignation after an investigative reporter revealed that during the 1920s in Birmingham, Alabama, he had been an active member of the local virulently anti-Catholic KKK.<sup>226</sup> During his Alabama Senate campaign, Black reportedly “could make the best anti-Catholic speech you ever heard.”<sup>227</sup> Black had also played on anti-Catholic sentiment by vocally opposing fellow Democrat Al Smith in 1928.<sup>228</sup> As his son recalled, “He suspected the Catholic Church. He used to read all of Paul Blanshard’s books exposing power abuse in the Catholic Church.”<sup>229</sup> In addition, after *Everson* was decided, Justice Black told his colleagues that he had purposefully tailored the opinion: “I made it as tight and gave them as little room to

maneuver as I could.” He considered the decision no more than a “pyrrhic victory” for those who favored aid to parochial schools, and he believed the opinion gave “weight to the basically religious nature of Catholic education.”<sup>230</sup> Black promised his skeptical colleagues that he would permit no further aid.<sup>231</sup>

### **C. The Legacy: Unworkable Standard Based in Anti-Catholic Sentiment**

“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>232</sup>

The *Everson* Court launched a barrage of metaphors into the next generation: the “wall,” “not even ‘three pence,’” “early and indelible indoctrination,” the “strict and lofty neutrality” of public schools, and parochial schools as “the rock” on which the whole structure of the Roman Catholic Church rests.” In doing so, the Court veiled a complex question of constitutional interpretation in a profoundly oversimplified standard: a wall between church and state which translates into “no aid to religion.”<sup>233</sup> But what the Court failed to articulate in *Everson* is that no perfect or absolute separation of church and state ever has or ever will exist.<sup>234</sup> Religion and government must interact, if only because both permeate almost every aspect of society. The wall metaphor has been described by the Court as a “blurred, indistinct, and variable barrier,” which “is not wholly accurate” and can only be “dimly perceived, and the boundaries of the First Amendment cannot accurately or consistently be delineated by such a standard.”<sup>235</sup>

Because the “wall of separation” doctrine cannot logically be applied to every situation, the Court has necessarily approached Establishment Clause issues on a somewhat flexible, ad hoc basis. Particular factual circumstances often control, and decisions were more a matter of judgment than of principle.<sup>236</sup> The considerable internal inconsistencies in the Court’s

Establishment Clause jurisprudence reflect the inherent limitations in formulating general principles on a case-by-case basis.<sup>237</sup>

In the period from 1947 to 1968, the basic principle of no aid to religion through school benefits was unquestioned.<sup>238</sup> Yet, as Justice Frankfurter prophetically declared, “agreement, in the abstract, that the First Amendment was designed to erect a ‘wall of separation between Church and State,’ does not preclude a clash of views as to what the wall separates.”<sup>239</sup> By the time of *Allen*, the difficulty of drawing a line which preserved the principles of separation and no aid to religion had led to the formulation of a test that required secular, primary intent and effect as necessary conditions of any permissible program.<sup>240</sup>

*Board of Education v. Allen* recognized that “religious schools pursue two goals, religious instruction and secular education.”<sup>241</sup> If state aid could be restricted to serve the latter, it might be permissible under the Establishment Clause.<sup>242</sup> Subsequent attempts to provide aid to religious schools generated significant controversy and litigation, as States attempted to demarcate the line between the secular and religious in education.<sup>243</sup> By the time *Lemon v. Kurtzman* was decided in 1971, it had become clear that the two goals of parochial schools were so intertwined that aid to secular education could not readily be segregated. In addition, the monitoring required to enforce these programs raised Establishment Clause concerns about the entanglement of church and state.<sup>244</sup>

The tripartite test set forth in *Lemon* represents a concerted effort to create a workable rule by which courts could determine whether *Everson*’s “wall of separation” standard had been breached.<sup>245</sup> First, the statute must have a secular legislative purpose; second, its primary effect must neither advance nor inhibit religion; and third, the law must not foster “an excessive government entanglement with religion.”<sup>246</sup> However, the *Lemon* test has proven time and again

that a rule can only be as sound as the doctrine it attempts to service.<sup>247</sup> For example, under the *Lemon* test, the Court prohibited the state reimbursement of funds for teacher-prepared tests on secular subjects.<sup>248</sup> However, purportedly applying the same standard, the Court upheld the state-financed administration and grading of state-prepared standardized tests in parochial schools.<sup>249</sup> The Court declared unconstitutional state programs that supplied parochial schools with instructional materials such as maps, globes, and film projectors.<sup>250</sup> Textbooks, however, could be supplied by the state without violating the Establishment Clause.<sup>251</sup> Moreover, although the Court in *Everson* upheld state reimbursement for bus transportation to religious schools, it declared in *Wolman v. Walter* that a state may not provide a parochial school with funds for bus transportation in connection with a field trip.<sup>252</sup>

In what was perhaps *Lemon*'s most rigid application, *Aguilar v. Felton* held that public school teachers could not enter parochial school buildings to provide secular, remedial education to children entitled to these services by federal statute. The federal program met the basic requirements of *Lemon*, even though it was conducted on the premises of parochial schools. It was not intended to promote religion in any way, nor did it did advance religion, either directly or indirectly.<sup>253</sup> However, the Court concluded that, because of the "pervasively sectarian" environment of the schools, the program would require permanent and extensive supervision to ensure that the teachers did not teach religion. It is in the Court's perception of the need for constant surveillance that the essential note of distrust of the parochial schools becomes evident. Catholic schools were considered untrustworthy in a modern democracy; they were perceived as so intimately fused with the Catholic Church that they were identified with it entirely.<sup>254</sup> Accordingly, taxpayers could not trust parochial school authorities not to abuse the purpose of the public funds.

Because the Establishment Clause was aimed at preventing government intrusion into religion, the Court found that the monitoring itself violated *Lemon*'s "excessive entanglement" prong. By seeking to avoid aid to religion, the state had created "an unconstitutional permanent and pervasive state presence" in the sectarian schools.<sup>255</sup> Therefore, the entire program was held to be unconstitutional. In his concurring opinion, Justice Powell compounded the negative view of parochial school education by emphasizing the political divisiveness which would inevitably result from government aid to Catholic schools. "As this Court has repeatedly recognized," he said, "there is a likelihood whenever direct governmental aid is extended to some groups that there will be competition and strife among them and others to gain, maintain, or increase the financial support of the government."

#### **IV. Conclusion**

*Everson*'s "wall of separation between church and State" has no basis in the history of the amendment it seeks to interpret, and it has failed to serve as a workable analytical guide in the Supreme Court's Establishment Clause jurisprudence.<sup>256</sup> The juxtaposition of soaring rhetoric declaring no aid to religion as a constitutional norm with a host of instances where government aids or supports religion was one of the key legacies of *Everson*. 129-130. However, with remarkable consensus, later Courts accepted *Everson*'s perspective as historical truth.<sup>257</sup>

For example, in *Abington School District, v. Schempp*, the Supreme Court remarked that "the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States." Over twenty years later, Justice Rehnquist concluded that this statement was "demonstrably incorrect as a matter of history," and "its repetition in varying forms in succeeding opinions of the Court can give it no

more authority than it possesses as a matter of fact.”<sup>258</sup> Although *stare decisis* binds courts as to matters of law, “it cannot bind them as to matters of history.”<sup>259</sup>

History should furnish the informed perspective needed to fashion a rational constitutional standard that serves several purposes, including cognizance of the evil consequences feared by the framers, appreciation of values presently cherished, and capability of consistent application to the relevant problems.<sup>260</sup> Given their detailed inconsistencies, however, too strong a reliance on history and experience will result only in ad hoc, unreasoned rulings.<sup>261</sup> As demonstrated in *Everson*, such rulings conceal value judgments that, although inevitable in constitutional decision making, should be laid bare by the articulation of general principles.<sup>262</sup>

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<sup>1</sup> James E. Zucker Note, *Better a Catholic Than a Communist: Reexamining McCollum v. Board of Education and Zorach v. Clauson*, 93 Va. L. Rev. 2069, 2074 (Dec. 2007); Robert S. Alley, *Public Education and the Public Good*, 4 Wm. & Mary Bill Rts. J. 277, 321 (1995); John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich. L. Rev. 279, 281, 284 (2001).

<sup>2</sup> Jeffries and Ryan, *supra* n.1 at 281.

<sup>3</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947).

<sup>4</sup> See Jeffries and Ryan, *supra* n.1 at 281

<sup>5</sup> *Id.*

<sup>6</sup> See Zachary R. Calo, Note, “*The Indispensable Basis of Democracy*”: *American Catholicism, The Church-State Debate, and the Soul of American Liberalism*, 91 Va. L. Rev. 1037, 1041 (June 2005); Berg.

<sup>7</sup> *Id.* at 1041; Jeffries and Ryan, *supra* n.1 at 281.

<sup>8</sup> *Everson*, 330 U.S. at 14-15.

<sup>9</sup> Jeffries and Ryan, *supra* n.1 at 281.

<sup>10</sup> Mary Ann Glendon and Raul F. Yates, *Structural Free Exercise*, 90 Mich. L. Rev. 477, 485 (Dec. 1991); Jeffries and Ryan, *supra* n.1 at 291-2.

<sup>11</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 236 (1963).

<sup>12</sup> *Wallace v. Jaffree*, 472 U.S. 38, 100 (Rehnquist, J., dissenting).

<sup>13</sup> William W. Bassett, *Changing Perceptions of Private Religious Schools: Public Money and Public Trust in the Education of Children*, 2008 B.Y.U. L. Rev. 249-50 (2008); John C. Fisher, *Separation of Church and State: The Supreme Court's Misleading Metaphor*, 1 First Amend. L. Rev. 53 (2003).

<sup>14</sup> *See Everson*, 330 U.S. at 8-14.

<sup>15</sup> *Everson*, 330 U.S. at 13; *See Id.* at 33-34 (Rutledge, J., dissenting) (asserting that the First Amendment was “the direct culmination” of the Virginia struggle for religious freedom).

<sup>16</sup> Daniel J. Morrissey, *The Separation of Church and State: An American-Catholic Perspective*, 47 Cath. U. L. Rev. 1, 14-15 (Fall 1997); 8 Writings of Thomas Jefferson 113 (H. Washington ed. 1861) (“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.”).

<sup>17</sup> *Wallace*, 472 U.S. 38, 92 (Rehnquist, J., dissenting).

<sup>18</sup> *See Everson*, 330 U.S. at 13; *Everson Revisited* at 126.

<sup>19</sup> *Everson Revisited* 126; *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting); Glendon and Yates, *supra* n.10.

<sup>20</sup> *Wallace*, 472 U.S. at 92 (Rehnquist, J., dissenting).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; *See also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 856 (1995) (“In any event, the views of one man do not establish the original understanding of the First Amendment”).

<sup>23</sup> The language Madison proposed for what ultimately became the Religion Clauses of the First Amendment was this: “The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of

conscience be in any manner, or on any pretext, infringed.” 1 Annals of Cong. 434; *Wallace*, 472 U.S. at 94 (Rehnquist, J., dissenting).

<sup>24</sup> *Rosenberger*, 515 U.S. at 856 (Thomas, J., concurring).

<sup>25</sup> Jeffries and Ryan, *supra* n.1 at 286; *Id.* at 63-72.

<sup>26</sup> U.S. Const. amend. I.

<sup>27</sup> Kauper, 317.

<sup>28</sup> Jeffries and Ryan, *supra* n.1 at 292.

<sup>29</sup> Frederick Mark Gedicks, *The Rhetoric of Church and State: A Critical Analysis of Religion Clause Jurisprudence* 14 (Durham: Duke University Pres, 1995).

<sup>30</sup> *Wallace*, 472 U.S. at 95-99.

<sup>31</sup> 1 Annals of Cong. 729-31 (Joseph Gales ed., 1834); Fisher, *supra* n. 13 at 56.

<sup>32</sup> *Wallace*, 472 U.S. at 100 (Rehnquist, J., dissenting).

<sup>33</sup> *Id.*; Northwest Ordinance 1 Stat. 51, 52 (1789); See Act of Aug. 7, 1789, ch. 8, 1 Stat. 50.

<sup>34</sup> *Id.* at 52, n. (a).

<sup>35</sup> See, e.g., Act of Mar. 3, 1803, ch. 21, § 1, 2 Stat. 225-226; Act of Mar. 26, 1804, ch. 35, § 5, 2 Stat. 279; Act of Feb. 15, 1811, ch. 14, § 10, 2 Stat. 621; Act of Apr. 18, 1818, ch. 67, § 6, 3 Stat. 430; Act of Apr. 20, 1818, ch. 126, § 2, 3 Stat. 467.

<sup>36</sup> See C. Antieau, A. Downey, & E. Roberts, *Freedom From Federal Establishment, Formation and Early History of the First Amendment Religion Clauses* 163, 174 (1964) (noting that “almost universally[,] Americans from 1789 to 1825 accepted and practiced governmental aid to religion and religiously oriented educational institutions”). *Rosenberger*, 515 U.S. at 862-63 (Thomas, J., concurring).

<sup>37</sup> *Wallace v. Jaffree*, 472 U.S. 38 (1985).

<sup>38</sup> Gedicks, *supra* n.29 at 14; EC&Aid 263.

<sup>39</sup> Jeffries and Ryan, *supra* n.1 at 292.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Gedicks, *supra* n.29 at 15.

<sup>43</sup> Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. Cin. L. Rev. 151, 199 (Fall 2003); Stuart Biegel and Amy Stuart Wells, *Public Funds for Private Schools: Political and First Amendment Considerations*, 101 Amer. J. of Educ. 209, 211 (May 1993).

<sup>44</sup> Diane Ravitch, *The Great School Wars, New York City, 1805-1973: A History of the Public Schools as Battlefield of Social Change* 6-7 (1974).

<sup>45</sup> *Everson*, 330 U.S. at 15-16; 472 U.S. at 104.

<sup>46</sup> Joseph Story, *Commentaries on the Constitution of the United States*, section 988, ed. Ronald D. Rotunda & John E. Nowak (Durham, N.C.: Carolina Academic Press, 1987), 700.

<sup>47</sup> Jeffries and Ryan, *supra* n.1 at 294.

<sup>48</sup> *Id.*; Jesse H. Chopper, *The Establishment Clause and Aid to Parochial Schools*, 56 Cal. L. Rev. 260, 263 (April 1968).

<sup>49</sup> Jeffries and Ryan, *supra* n.1 at 294

<sup>50</sup> Gedicks, *supra* n.29 at 15; Tocqueville observed that nineteenth century Americans “combine the notions of Christianity and of liberty so intimately in their minds that it is impossible to make them conceive the one without the other.” 1 Alexis de Tocqueville, *Democracy in America*, ed. Phillips Bradley (New York: Vintage, 1990), 306; See also Gerard V. Bradley, *Imagining the Past and Remembering the Future: The Supreme Court’s History of the Establishment Clause*, 18 Conn. L. Rev. 827, 834-35 (1986).

<sup>51</sup> Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 Ohio St. L. J. 409, 418 (1986); Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 B.Y.U. L. Rev. 295, 302 (2008); Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, The Doctrine, and The Future*, 6 U. Pa. J. Const. L. 222 (Nov. 2003); Robert William Gall, *The Past Should Not Shackle the Present: The Revival of a Legacy of Religious Bigotry by Opponents of School Choice*, 59 N.Y.U. Ann. Surv. Am. L. 413, 419 (2003); Religious Communities 157; See also Jeffries and Ryan, *supra* n.1 at 297 (These early public schools were founded on the belief “that Americanism and Protestantism were synonyms and that education and Protestantism were allies.”).

<sup>52</sup> Gall, *supra* n.51 at 419.

<sup>53</sup> *Id.* at 418; Jeffries and Ryan, *supra* n.1 at 297.

<sup>54</sup> Mark De Wolfe Howe, *The Garden and the Wilderness* (Chicago: University of Chicago Press, 1965), 11-15, 31, 98.

<sup>55</sup> Jeffries and Ryan, *supra* n.1 at 298.

<sup>56</sup> Paul Blanshard, *American Freedom and Catholic Power* 64 (Boston: The Beacon Press, 1951).

<sup>57</sup> Green, *supra* n.51 at 304; Jeffries and Ryan, *supra* n.1 at 298-99; Berg, *supra* n.43 at 200.

<sup>58</sup> *Lemon v. Kurtzman*, 403 U.S. 602, 628 (1971) (Douglas, J., concurring) (“Early in the 19th century the Protestants obtained control of the New York school system and used it to promote reading and teaching of the Scriptures as revealed in the King James version of the Bible); Jeffries and Ryan, *supra* n.1 at 298-99; Berg, *supra* n.43 at 200 (“This was Mann’s solution for achieving ‘non-sectarian’ but still religious education: allow the Bible ‘to do what it is allowed to do in no other system - to speak for itself.’”).

<sup>59</sup> Philip Hamburger, *Separation of Church and State* 228 (2002); In the period of the emergence of the public school system, “non-sectarian” did not mean non-religious. *Mitchell v. Helms*, Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Petitioners at \*6-\*7. On the contrary, it meant schools that taught religious doctrine acceptable to most Protestants, but dissociated from the sectarianism of the multiplying Protestant denominations. Will Herberg, *Religious Communities in Present-Day America*, 16 Rev. of Politics 155, 157 (April 1954); See *Vidal v. Girard’s Ex’rs*, 43 U.S. 127, 200 (1844) (“Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a divine revelation in the college - its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidence of Christianity, from being read and taught in the college by lay-teachers? ... Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?”)

<sup>60</sup> Green, *supra* n.51 at 303.

<sup>61</sup> Jeffries and Ryan, *supra* n.1 at 299

<sup>62</sup> Green, *supra* n.51 at 304. At the time of the Revolution, 30,000 Catholics lived in the new United States, barely one percent of the population; by 1830, that number had swelled to 600,000. Jeffries and Ryan, *supra* n.1 at 299. With the final defeat of Napoleon in 1815, Europe hastened to remove all obstacles from the paths of their nationals who, suffering in the postwar depression, sought homes in the new world. Ray Allen Billington, *The Protestant Crusade: 1800-1860: A Study of the Origins of American Nativism* 33 (Rinehart & Co., New York: 1952). This population was mostly immigrant, particularly from Ireland and Germany, and mostly poor. Berg, *supra* n.43 at 199

<sup>63</sup> Green, *supra* n.51 at 316; Jeffries and Ryan, *supra* n.1 at 300.

<sup>64</sup> Berg, *supra* n.43 at 200; J&R, 300; Laycock, *supra* n.51 at 418.

<sup>65</sup> Ian Bartrum, *The Constitutional Structure of Disestablishment*, 2 N.Y.U. J. of Law & Liberty 311, 357-58 (2007); Billington, *supra* n.62 at 143-4; Vincent P. Lannie, *Public Money and Parochial Education* 103-13 (University of Notre Dame Press, South Bend: 1974); Green, *supra* n.51 at 303; *See e.g.*, Gall, *supra* n.51 at 419 (“the Roman Church supported absolutist government to the detriment of the common people, that its policy was to keep the masses in ignorance, that it forbade its members to read the Bible, [and] that the French and Spanish explorers were motivated by avarice and cruelty while the English sought to convert and civilize those whom they found in darkness.”).

<sup>66</sup> Berg, *supra* n.43 at 200.

<sup>67</sup> Laycock, *supra* n.51 at 418; Jeffries and Ryan, *supra* n.1 at 300.

<sup>68</sup> Jeffries and Ryan, *supra* n.1 at 300.

<sup>69</sup> *Id.*; Berg, *supra* n.43 at 200.

<sup>70</sup> Jeffries and Ryan, *supra* n.1 at 300. An incident referred to as the "Eliot School Rebellion" illustrates the Protestant dominance of public education in Boston during the 1850s. On March 1859, a teacher at Boston's Eliot School ordered Thomas Whall, a Catholic school boy, to read the Ten Commandments from the King James Bible. Whall refused, having been admonished by his father not to do so. An assistant to the school principal then stepped into the classroom and informed the class, "Here's a boy that refuses to repeat the Ten Commandments, and I will whip him till he yields if it takes the whole forenoon." The administrator then beat Whall severely with a rattan stick for half an hour. At the conclusion of this beating, the Eliot School principal ordered all boys not willing to read from the King James version of the Bible to leave the school, and about 100 Catholic schoolboys were discharged. The following day, three hundred Catholic school boys were discharged from school for the same offense. Richard Fossey and Robert LeBlanc, *Vouchers for Sectarian Schools after Zelman: Will the First Circuit Expose Anti-Catholic Bigotry in the Massachusetts Constitution?*, 193 Educ. L. Rep. 343, 359 (2005).

<sup>71</sup> Jeffries and Ryan, *supra* n.1 at 300; Hamburger, *supra* n.59; Laycock, *supra* n.51 at 418; Berg, *supra* n.43 at 201.

<sup>72</sup> John W. Pratt, *Religion, Politics, and Diversity: The Church-State Theme in New York History* 176 (Cornell University Press 1967).

<sup>73</sup> Ronald B. Flowers, *That Godless Court?* 63 (John Knox Press, Louisville: 1994).

<sup>74</sup> *Id.*

<sup>75</sup> Stanley Rothman, *The Politics of Catholic Parochial Schools: An Historical and Comparative Analysis*, 25 *J. of Politics* 49, 52 (Feb. 1963).

<sup>76</sup> Hamburger *supra* n.59; Report of the Committee on Arts and Sciences and Schools of the Board of Assistants, on the Subject of Appropriating a Portion of the School Money to Religious Societies, for the Support of Schools, 346-47.

<sup>77</sup> *Id.*

<sup>78</sup> Jeffries and Ryan, *supra* n.1 at 301.

<sup>79</sup> Hamburger *supra* n.59; 1845 Address of the General Executive Committee of the American Republican Party of the City of New York, 9-10.

<sup>80</sup> Remonstrance of the Public School Society, by their Executive Committee, to the Honorable, the Common Counsel of the City of New-York (March 2, 1840) (declaring that “the political compact by which these United States are governed, divorced the unholy alliance between Church and State.”); Remonstrance of the Ministers, Elders and Deacons of the Reformed Protestant Dutch Church, in the City of New-York (March 15, 1840) (asserting that the Catholic proposal could only be regarded as “in effect creating an odious union between Church and State: a union, not less repugnant to the sentiments and wishes of the Protestant portion of this community, that it is forbidden by the genius of our republican institutions.”)

<sup>81</sup> Jeffries and Ryan, *supra* n.1 at 282; Gall, *supra* n.51 at 421; Green, *supra* n.51 at 315-16.

<sup>82</sup> Harold E. Fey, *Problems of Church and State in the United States: A Protestant View*, in *The Wall Between Church and State*, ed. Dallin H. Oaks at 34 (University of Chicago Press, Chicago: 1963).

<sup>83</sup> *Mitchell v. Helms*, Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Petitioners at \*14; Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States* 272 (rev. one-vol. ed. 1964).

<sup>84</sup> President Ulysses S. Grant, Address to the Army of Tennessee at Des Moines, Iowa (quoted in Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 *Emory L.J.* 43, 51 (1997))

<sup>85</sup> Steven K. Green, *The Blaine Amendment Reconsidered*, 36 *Am. J. Legal Hist.* 38, 38 (1992); Gall, *supra* n.51 at 422. The Amendment read as follows: No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof, and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious

sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

<sup>86</sup> Gall, *supra* n.51 at 423; Green, *supra* n.51 at 295-96; *Mitchell v. Helms*, Brief of the Becket Fund for Religious Liberty as Amicus Curiae in Support of Petitioners at \*12-\*13.

<sup>87</sup> Fossey and LeBlanc, *supra* n.70 at 350; Jeffries and Ryan, *supra* n.1 at 305.

<sup>88</sup> Fossey and LeBlanc, *supra* n.70 at 351.

<sup>89</sup> Jeffries and Ryan, *supra* n.1 at 305.

<sup>90</sup> Hamburger *supra* n.59.

<sup>91</sup> Richard E. Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, S. Ct. Rev. at 26 (1973).

<sup>92</sup> Zucker *supra* n.1 at 2074-75.

<sup>93</sup> Blanshard, *supra* n.56 at 8.

<sup>94</sup> *Id.* at 8-9.

<sup>95</sup> Hamburger, *supra* n.59.

<sup>96</sup> Billington, *supra* n.62 at 1.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 2

<sup>99</sup> *Id.* at 33

<sup>100</sup> *Id.* at 36; Hamburger, *supra* n.59; Blanshard, *supra* n. 56 at 9.

<sup>101</sup> Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 Emory L. J. 43 (Winter 1997); Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States* 272 (rev. one-vol. ed. 1964).

<sup>102</sup> Laycock, *supra* n. 101.

<sup>103</sup> Blanshard, *supra* n. 56 at 9.

<sup>104</sup> Berg, *supra* n.43 at 200; Green, *supra* n.51 at 316-17.

<sup>105</sup> Jeffries and Ryan, *supra* n.1 at 302.

<sup>106</sup> Laycock, *supra* n.51 at 417; Billington, *supra* n.62 at 309; Blanshard, *supra* n. 56 at 9.

<sup>107</sup> Blanshard, *supra* n.56 at 9.

<sup>108</sup> Calo, *supra* n.6 at 1045.

<sup>109</sup> *Id.* at 1046.

<sup>110</sup> *Id.*

<sup>111</sup> *Everson Revisited: Religion, Education and the Law at a Crossroads* 128 (ed. Jo Renee Formicola and Hubert Morken) (Rowman & Littlefield).

<sup>112</sup> Jeffries and Ryan, *supra* n.1 at 303; Calo, *supra* n.6 at 1046.

<sup>113</sup> Feldman, *supra* n.51 at 232.

<sup>114</sup> Jeffries and Ryan, *supra* n.1 at 306.

<sup>115</sup> *Id.*.

<sup>116</sup> Will Herberg, *Protestant Catholic Jew: An Essay in American Religious Sociology* 236 (Doubleday & Co, 1955).

<sup>117</sup> *McCollum*, 333 U.S. at 216, 231; See also John Dewey, 15 *The Later Works, 1925-1953*, at 284-85 (Jo Ann Boydston ed., 1989) (One of the basic ideas which made possible the creation of a homogeneous society out of the welter of heterogeneous peoples in this New World was that the power of the State came to be irrevocably divorced from the power of any Church).

<sup>118</sup> Stephen V. Monsma, *When Sacred and Secular Mix* 139 (1998); Green, *supra* n.51 at 304-5.

<sup>119</sup> Herberg, *supra* n.116 at 235; Feldman, *supra* n.51 at 234.

<sup>120</sup> Blanshard, *supra* n.56.

<sup>121</sup> *Id.* at 65.

<sup>122</sup> *Id.*; Robert T. Miller and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court* 452; *Politics of Catholic Schools* 52-53.

<sup>123</sup> Miller and Flowers, *supra* at 452.

<sup>124</sup> *Id.*; Blanshard, *supra* n.56 at 65; Rothman, *supra* n. 75 at 52-53.

<sup>125</sup> Blanshard, *supra* n.56 at 65; *See* Miller and Flowers, *supra* n.122 at 452 (“The bishop of Trenton went so far as to say that ‘the idea that the state has a right to teach ... is not a Christian idea. It is a pagan one.’”)

<sup>126</sup> Blanshard, *supra* n.56 at 65.

<sup>127</sup> *Id.* at 65-66; Pius XI’s *Divinus Illius Magistri* on the Christian Education of Youth, issued on December 31, 1929 (“... the mere fact that a school gives some religious instruction (often extremely stunted), does not bring it into accord with the rights of the Church and of the Christian family, or make it a fit place for Catholic students. To be this, it is necessary that all the teaching and the whole organization of the school, and its teachers, syllabus and textbooks in every branch, be regulated by the Christian spirit, under the direction and maternal supervision of the Church; so that religion may be in very truth the foundation and crown of the youth’s entire training ...”); *See Id.* (“... the frequenting of non-Catholic schools, whether neutral or mixed, those namely which are open to Catholics and non-Catholics alike, is forbidden for Catholic children, and can be at most tolerated, on the approval of the Ordinary alone, under determined circumstances of place and time, and with special precautions.”)

<sup>128</sup> John McGreevy, *Catholicism and American Freedom* 185 (2003); Basset, *supra* n.13 at 252; John Courtney Murray, *Law or Prepossessions?*, 14 *Law and Contemporary Problems* 23, 34 (Winter 1949); *See also* Andre Siegfried, *America Comes of Age*, trans. H.H. Hemming and Doris Hemming (New York, 1927), 50-51 (“The Catholic Church is thus a thing apart from the heart of the American body politic. It collaborates in its own time and in its own way, but in the long run remains distinct and does not fuse”); Christian Century, *Pluralism-National Menace*, June 13, 1951 (“The proliferation of Catholic parochial schools [...] means that a conscious and well-planned large-scale attempt is being made to separate Catholics from other Americans in almost every area of social life.”)

<sup>129</sup> Elin Anderson, *We Americans: A Study of Cleavage in an American City* (Cambridge, Mass., 1937), 80, 97, 110, 113.

<sup>130</sup> Perry Miller, *review of Communism, Democracy, and Catholic Power* by Paul Blanshard, *New York Herald Tribune*, June 10, 1951, sec. VI, p. 1.

<sup>131</sup> Charles Glenn, *The Myth of the Common School* 227-229 (1987); Berg, *supra* n.43 at 201.

<sup>132</sup> Jeffries and Ryan, *supra* n.1 at 318.

<sup>133</sup> Zucker *supra* n.1t; William G. Ross, *Forging New Freedoms: Nativism, Education, and the Constitution, 1917-1927*, at 142-47 (1994).

<sup>134</sup> Philip B. Kurland, *The Clouded Crystal Ball: The Supreme Court on Government Aid to Parochial Schools*, 79 *School Rev.* 325, 330 (May 1971); Flowers 63.

<sup>135</sup> Miller and Flowers, *supra* n.122 at 453.

<sup>136</sup> Brief for the Governor of Oregon in *Pierce v. Society of Sisters* at 38-40, reprinted in 23 *Landmark Briefs and Arguments of the Supreme Court of the United States* 3, 45-47 (Philip B. Kurland and Gerhard Casper eds., 1975).

<sup>137</sup> See *Meyer v. Nebraska*. The First Amendment had not yet been applied to the states, and no reference to the First Amendment was made anywhere in the Court's opinion. Kurland, *supra* n.134 at 330.

<sup>138</sup> John Courtney Murray, *Law or Prepossessions*, 14 *Law and Contemporary Problems* 23, 35 (Winter 1949); 268 U.S. 510, 534-36 (1925); Kurland, *supra* n.134 at 330; Miller and Flowers, *supra* n.122 at 453.

<sup>139</sup> *Id.*

<sup>140</sup> John. T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 *J. Am. Hist.* 97, 107 (June 1997).

<sup>141</sup> *Id.*

<sup>142</sup> Douglas Laycock, *Why the Supreme Court Changed its Mind About Government Aid to Religious Institutions*, *B.Y.U. L. Rev.* 275, 280 (2008). Extended analysis of connections between Catholicism and fascism appeared throughout the liberal press in the late 1930s, including a six-part series in the *New Republic*. McGreevy, *supra* n.140. Evidence came from Quebec, where the church seemed the "primary source of fascistic politics," South America, and the Philippines. *Id.* "In Austria, fascism is completely clerical and in Italy it has made a cynical bargain with the church." *Id.* Niebuhr's conclusion "that the Catholic Church has cast its lot with fascistic politics" echoed Lewis Mumford's regret that "the Church has chosen to ally itself with democracy's chief enemy, fascism." Reinhold Niebuhr, *The Catholic Heresy*, *Christian Century*, Dec. 8, 1937, p. 1524; Lewis Mumford, *The Call to Arms*, *New Republic*, May 18, 1938, p. 41. Catholic support for fascist regimes such as Franco's Spain, Vichy France, and Mussolini's Italy caused unease among American intellectuals. McGreevy, *supra* n.140. "We cannot help being disturbed by the fact that no leaders of the Catholic Church in America have raised their voices in repudiation of the position taken by the Spanish hierarchy." Max Lerner, *Ideas for the Ice Age: Studies in a Revolutionary Era* (New York, 1941), 230.

<sup>143</sup> McGreevy, *supra* n.128 at 175-82; See Winfred Ernest Garrison, *Catholicism and the American Mind* 14-15, 141, 200 (Willett, Clark & Colby, Chicago: 1928) ("The real conflict is not between a Church and State or between Catholicism and Americanism, but between a culture which is based on absolutism and encourages obedience, uniformity and intellectual

subservience, and a culture which encourages curiosity, hypotheses, experimentation, verification by facts and a consciousness of the process of individual and social life as opposed to conclusions about it.”)

<sup>144</sup> Gilbert E. Smith, *The Limits of Reform: Politics and Federal Aid to Education, 1937-1950* (New York, 1982), 52-56, 138; McGreevy, *supra* n.140 at 121. Even opponents of aid for parochial schools acknowledged that “the Catholic[s] must pay an enormous bounty to protect [their] children from the secular influence of the public school,” because they paid school taxes like other residents but generally did not use public education. Sarah Barringer Gordon, *Free Religion and Captive Schools: Protestants, Catholics, and Education*, DePaul L. Rev. 1177, 1183 (2007).

<sup>145</sup> Blanshard *supra* n. 56.

<sup>146</sup> Zucker *supra* n.1.

<sup>147</sup> Jeffries and Ryan, *supra* n.1 at 284.

<sup>148</sup> Zucker *supra* n.1.

<sup>149</sup> Jeffries and Ryan, *supra* n.1 at 315.

<sup>150</sup> *Id.* at 315-16; Joseph Martin Dawson, *Separate Church and State Now* (New York, 1948), 199-213.

<sup>151</sup> Gordon, *supra* n.144 at 1193.

<sup>152</sup> *Id.* at 1193-94.

<sup>153</sup> *Id.*

<sup>154</sup> See Paul Blanshard, *The Catholic Church and Democracy*, Nation, June 5, 1948, at 630; Paul Blanshard, *The Catholic Church and Democracy*, Nation, May 29, 1948, at 601; Paul Blanshard, *Roman Catholic Science*, Nation, May 22, 1948, at 574; Paul Blanshard, *Roman Catholic Science*, Nation, May 15, 1948, at 521; Paul Blanshard, *Roman Catholic Censorship*, Nation, May 8, 1948, at 499; Paul Blanshard, *The Catholic Church as Censor*, Nation, May 1, 1948, at 459; Paul Blanshard, *The Catholic Church and Fascism*, Nation, Apr. 24, 1948, at 432; Paul Blanshard, *The Catholic Church and Fascism*, Nation, Apr. 17, 1948, at 416; Paul Blanshard, *The Roman Catholic Church and Fascism*, Nation, Apr. 10, 1948, at 390; Paul Blanshard, *The Catholic Church and Education*, Nation, Nov. 15, 1947, at 525; Paul Blanshard, *The Sexual Code of the Roman Church*, Nation, Nov. 8, 1947, at 496; Paul Blanshard, *The Catholic Church in Medicine*, Nation, Nov. 1, 1947, at 466.

<sup>155</sup> Blanshard, *supra* n.56.

<sup>156</sup> Zucker *supra* n.1 at 2080.

<sup>157</sup> Calo, *supra* n.6 at 1044-45.

<sup>158</sup> Jeffries and Ryan, *supra* n.1 at 316.

<sup>159</sup> James B. Conant, *My Several Lives: Memoirs of a Social Inventor* (New York, 1970), 665-70; See also *The American Teacher*, Oct. 1947 (“the interests of the democratic community are best served where children of all component groups of American society are enrolled in a common public school.”); Jeffries and Ryan, *supra* n.1 at 316-17 (“Public support for parochial schools would divide the community into sectarian educational systems and destroy the unity essential as democracy faces the totalitarian threat to freedom.”)

<sup>160</sup> John Dewey, 15 *The Later Works, 1925-1953*, at 284-285 (Jo Ann Boydston ed., 1989).

<sup>161</sup> Basset, *supra* n.13 at 252.

<sup>162</sup> Jeffries and Ryan, *supra* n.1 at 280.

<sup>163</sup> Jeffries and Ryan, *supra* n.1 at 296.

<sup>164</sup> Jeffries and Ryan, *supra* n.1 at 296-297; Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965), 4; See Lewis B. Namier, *Conflicts: Studies in Contemporary History* 69-70 (1942) (“[W]hen discoursing or writing about history, [people] imagine it in terms of their own experience, and when trying to gauge the future they cite supposed analogies from the past: till, by double process of repetition, they imagine the past and remember the future.”).

<sup>165</sup> Jeffries and Ryan, *supra* n.1 at 297.

<sup>166</sup> *Id.*

<sup>167</sup> Feldman, *supra* n.51 at 232.

<sup>168</sup> Calo, *supra* n.6.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Everson*, 330 U.S. 1; *Locke v. Davey*, 536 U.S. at 686-87 (Souter, J., dissenting).

<sup>172</sup> *Everson*, 330 U.S. at 3 n.1; Jeffries and Ryan, *supra* n.1 at 285.

<sup>173</sup> Kurland, *supra* n.134 at 330-31.

<sup>174</sup> *Everson v. Bd. of Educ.*, 44 A.2d 333 (1945); Jeffries and Ryan, *supra* n. 1 at 285.

<sup>175</sup> Feldman, *supra* n.51 at 238; *Everson* was but the most recent quarrel between Protestants and Catholics over public support of parochial education. Zucker *supra* n.1 at 2075.

<sup>176</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 689 (200) (Souter, J., dissenting); *Everson*, 330 U.S. at 16.

<sup>177</sup> *Everson*, 330 U.S. at 16.

<sup>178</sup> *Id.* at 18.

<sup>179</sup> Bassett, *supra* n.13 at 250; Justice Jackson complained in his dissent that the Court's holding reminded of "of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent,' - consented.'"

<sup>180</sup> *Everson*, 330 U.S. at 24; Kurland, *supra* n.134 at 333.

<sup>181</sup> *Everson*, 330 U.S. at 45.

<sup>182</sup> *Everson*, 330 U.S. at 54 n.47 (noting that similar programs had been struck down in six States, upheld in eight, and amicus curiae briefs were filed by three religious sects, one labor union, the American Civil Liberties Union, and the states of Illinois, Indiana, Louisiana, Massachusetts, Michigan and New York); *Zelman*, 536 U.S. at 689-90 (Souter, J., dissenting).

<sup>183</sup> Zucker *supra* n.1 at 2077.

<sup>184</sup> *Everson*, 330 U.S. at 22.

<sup>185</sup> *Everson*, 330 U.S. at 24 (Jackson, J., dissenting).

<sup>186</sup> *Id.* at 23.

<sup>187</sup> *Id.* at 24.

<sup>188</sup> John F. Wilson, *Religion, Government, and Power in the New American Nation*, in *Religion and American Politics*, ed. Mark Noll (New York: Oxford University Press, 1990), p. 78.

<sup>189</sup> *Everson*, 330 U.S. at 18.

<sup>190</sup> McGreevy, *supra* n.140 at 98.

<sup>191</sup> Calo, *supra* n.6 at 1071.

<sup>192</sup> Fey, *supra* n.82 at 38; Notes, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 Columbia L. Rev. 1463, 1477 (May 1971).

<sup>193</sup> *Everson*, 330 U.S. at 28.

<sup>194</sup> Notes, *supra* n.192 at 1475.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> Jefferson was not greatly concerned about harm to religious institutions as such. He wrote in a letter late in his life: “If, by religion, we are to understand sectarian dogmas, in which no two of them agree, then your exclamation is just, that this would be the best of all possible worlds, if there were no religion in it.” Letter to John Adams, May 5, 1817, in 2 *The Adams-Jefferson Letters* 512 (L. Cappon ed., 1959). Jefferson thought that the effects of religion on the polity were largely deleterious. He saw an inherent inconsistency between an established religion and the natural right to equality that made democracy possible. *Id.*

<sup>198</sup> Laycock, *supra* n.51.

<sup>199</sup> Murray, *supra* n.138 at 27; *McCullum v. Board of Education*, 333 U.S. 203, 216 (1948) (“the deep religious feeling of James Madison is stamped upon the Remonstrance.”)

<sup>200</sup> Murray, *supra* n.138 at 30.

<sup>201</sup> Justice Rutledge in his dissent insisted that religious teaching was a matter “of private right and function,” that the religious “function [is] altogether private,” that religion “is exclusively a private affair,” and that religious training and belief “should be kept inviolately private”; Murray, *supra* n.138 at 31. According to John Courtney Murray, the *Everson* decision was rooted in “an irredeemable piece of sectarian dogmatism.” *Id.* at 30.

<sup>202</sup> *Lee*, 505 U.S. at 606 n.3.

<sup>203</sup> *Everson* at 39-40; McGreevy, *supra* n.140 at 98.

<sup>204</sup> *Lee*, 505 U.S. at 606.

<sup>205</sup> *Lee*, 505 U.S. at 607; *Engel*, 370 U.S. at 429; see also *Lemon*, 403 U.S. at 622-23; *Aguilar v. Felton*, 473 U.S. 402, 416 (1985) (Powell, J., concurring).

<sup>206</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 694 (1970). Sigmund Freud expressed the belief that “a religion, even if it calls itself the religion of love, must be hard and unloving to those who do not belong to it.” *Lee*, 505 U.S. at 607 n.10 (quoting S. Freud, *Group Psychology and the Analysis of the Ego* 51 (1922)). James Madison stated that “it degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority. Distant as it may be, in its present form, from the Inquisition it differs from it only in degree. The one is the first step, the other the last in the career of intolerance.” *Id.* The Court has since rejected the claim that some speculative potential for divisiveness bears on the constitutionality of educational aid programs. *Mitchell v. Helms*, 530 U.S. at 825 (“The dissent resurrects the concern for political divisiveness that once occupied the Court but that Aguilar cases have rightly disregarded”); *Lee*, 505 U.S. at 587-88 (“Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State’s attempts to accommodate religion in all cases”).

<sup>207</sup> *Fey*, *supra* n.82 at 38.

<sup>208</sup> Notes, *supra* n.192 at 1475.

<sup>209</sup> *Fey*, *supra* n.82 at 38.

<sup>210</sup> Notes, *supra* n.192 at 1475.

<sup>211</sup> Sen. Goldwater’s Speech, *NY Times*, Sept 16, 1981, at A1, col 5; Notes, *supra* n.192 at 1475-76.

<sup>212</sup> *Zucker supra* n.1 at 2084; *Laycock, supra* n.142 at 280-81.

<sup>213</sup> *Zucker supra* n.1 at 2084.

<sup>214</sup> Sidney Fine, *Frank Murphy: The Washington Years* 568 (1984). The Supreme Court always remained overwhelmingly Protestant; from the 1940s through the 1970s, no more than one Catholic and one Jew ever sat on the Court at any time. *Feldman, supra* n.51 at 232.

<sup>215</sup> *McGreevy, supra* n.128 at 184-185; *Feldman, supra* n.51 at 234; *Zucker supra* n.1 at 2084.

<sup>216</sup> *McGreevy, supra* n.140 at 123; *McGreevy, supra* n.128 at 185; *Feldman, supra* n.51 at 234; *Zucker supra* n.1 at 2085-86.

<sup>217</sup> *Zucker supra* n.1 at 2084; *McGreevy, supra* n.128 at 184 (2003). Justice Harold Burton had been the national moderator for the American Unitarian Association just prior to his 1945 appointment to the Court, at the same time the association’s publishing arm began publishing numerous books arguing for a strict separation of church and state, including Paul Blanshard’s bestselling “American Freedom and Catholic Power.” *McGreevy, supra* n.140 at 124; *McGreevy, supra* n.128 at 166, 185; *See also* Athern Park Daggett, *Introduction to The*

*Occasional Papers of Mr. Justice Burton*, at xi-xii (Edward G. Hudon ed., 1969). Following the *Everson* decision, the American Unitarian Association sponsored an event at the Jefferson Memorial to celebrate Jefferson's religious views. With four Supreme Court Justices in attendance, a Unitarian leader offered a veiled criticism of Catholicism when he called for a Christianity "free of all autocratic ecclesiastical control over the mind and conscience of its individual members." McGreevy, *supra* n.128 at 184 (2003); McGreevy, *supra* n.140 at 121. Additionally, Justice Burton was known to greatly admire his Washington D.C. pastor who frequently used the pulpit to warn of the danger posed to American society by aggressive Catholicism. *Id.* at 124.

<sup>218</sup> Basset, *supra* n.13 at 251.

<sup>219</sup> *Id.*

<sup>220</sup> *W. Va. St. Bd. of Educ. v. Barnette* (1943) (Frankfurter, J., dissenting); *See generally* McGreevy, *supra* n.140.

<sup>221</sup> Felix Frankfurter, note, Jan. 22, 1944, cited in Gerald T. Dunne, *Hugo Black and the Judicial Revolution* (New York, 1977), 266.

<sup>222</sup> *Lemon*, 403 U.S. at 628 (Douglas, J., concurring).

<sup>223</sup> *Lemon*, 403 U.S. at 635 n.20 (Douglas, J., concurring)(quoting L. Boettner, *Roman Catholicism* 360 (1962)).

<sup>224</sup> *Id.* at 640.

<sup>225</sup> McGreevy, *supra* n.140 at 124.

<sup>226</sup> *Id.*

<sup>227</sup> Zucker *supra* n.1 at 2084-85; McGreevy, *supra* n.128 at 185.

<sup>228</sup> New York Times, Aug. 18. 1937, p. 6; McGreevy, *supra* n.128 at 185.

<sup>229</sup> Hugo T. Black, *My Father: A Remembrance* (New York, 1975), 104.

<sup>230</sup> Feldman, *supra* n.51 at 239.

<sup>231</sup> McGreevy, *supra* n.140; Wiley B. Rutledge, "Memo after Conference," [1946], *Everson* file, box 143, Wiley B. Rutledge Papers (Library of Congress, Washington, D.C.)

<sup>232</sup> *Berkey v. Third Avenue R. Co.*, 244 N.Y. 84, 94 (1926).

<sup>233</sup> See *Abington*, 374 U.S. at 309 (Stewart, J., dissenting).

<sup>234</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970).

<sup>235</sup> *Wallace v. Jaffree*, 472 U.S. 38,107 (1985)(Rehnquist, J., dissenting); *Lemon*, 403 U.S. at 614; *Tilton v. Richardson*, 403 U.S. 672, 677-78 (1971); *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984); *Roemer v. Board of Public Works*, 426 U.S. 736, 747 (1976) (“The state must confine itself to secular objectives, and neither advance nor impede religious activity. Of course, that principle is more easily stated than applied.”); *Abington* at 309 (Stewart dissenting).

<sup>236</sup> *Mitchell*, 530 U.S. at 869 (Souter, J., dissenting); *Regan*, 444 U.S. at 671.

<sup>237</sup> *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970); See *Wolman v. Walter*, 433 U.S. at 265 (differentiations between direct and indirect aid, or between books and maps, cannot be determinative of constitutional policy).

<sup>238</sup> *Mitchell*, 530 U.S. at 869 (Souter, J., dissenting).

<sup>239</sup> *McCullum v. Bd. of Educ.*, 333 U.S. at 213 (Frankfurter, J., concurring).

<sup>240</sup> *Bd. of Educ. v. Allen*, 392 U.S. 236, 243 (1968); *Mitchell*, 530 U.S. at 875-6 (Souter, J., dissenting).

<sup>241</sup> *Allen*, 392 U.S. at 245.

<sup>242</sup> *Id.*

<sup>243</sup> See generally *McCullum v. Bd. of Educ.*, 333 U.S. 203, 237-38 (1948) (Jackson, J., concurring) (noting that the Constitution does not tell judges “where the secular ends and the sectarian begins in education).

<sup>244</sup> See *Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971) (striking down program supplementing salaries for teachers of secular subjects in private schools); *Zelman*, 536 U.S. at 691 (Souter, J., dissenting).

<sup>245</sup> *Wallace*, 472 U.S. at 110; *Everson* Revisited 131.

<sup>246</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>247</sup> *Wallace*, 472 U.S. at 110 (Rehnquist, J., dissenting).

<sup>248</sup> *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).

<sup>249</sup> *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education v. Regan*, 444 U.S. 646 (1980).

<sup>250</sup> *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman*, 433 U.S. 229.

<sup>251</sup> See *Board of Education v. Allen*, 392 U.S. 236 (1968).

<sup>252</sup> Compare also *Meek v. Pittenger*, 421 U.S. 349, 367 (1975) (finding that speech and hearing “services” conducted by the State inside the sectarian school violate Establishment Clause), with *Wolman*, 433 U.S. at 241 (holding that the State may conduct speech and hearing diagnostic testing inside the sectarian school)

<sup>253</sup> The School District had administered the remedial education program on the premises of parochial schools, during regular class hours, and in classrooms that had been stripped of all religious materials and symbolism. The public school teachers and clinicians were volunteers, specially trained both in advance and periodically during their service. This training was in necessary comportment while in the schools, that is, it did not involve wandering into other parts of the buildings, talking with the teachers, or taking notice of religious observances. Even supplies and materials provided by the government were locked up so they could not be used by the school itself. Measures of poverty and underachievement were developed to certify students and their families for eligibility for the supplementary assistance. The city superintendent had created a detailed compliance manual for the volunteers precisely to avoid any semblance of overstepping perceived Establishment Clause prohibitions.

<sup>254</sup> Bassett, *supra* n.13 at 259.

<sup>255</sup> A plurality of the Supreme Court has since taken explicit notice at least in its historical antecedents, the constitutional ban against aid to sectarian schools was indeed a doctrine “born of bigotry.” *Mitchell v. Helms*, 530 U.S. 793, 828 (finding that “hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow”); See also *Kotterman v. Killiam*, 972 P. 2d 606, 624 (“The Blaine amendment was a clear manifestation of religious bigotry, part of a crusade manufactured by the contemporary Protestant establishment to counter what was perceived as a growing “Catholic menace”).

<sup>256</sup> See *Wallace*, 472 U.S. at 106, 107 (“Whether due to its lack of historical support or its practical unworkability, the *Everson* ‘wall’ has proved all but useless as a guide to sound constitutional adjudication.”).

<sup>257</sup> Laurence H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988), 1160.

<sup>258</sup> *Wallace*, 472 U.S. at 99.

<sup>259</sup> *Id.*

<sup>260</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 236 (1963)(Brennan, J., concurring); Chopper, *supra* n.48 at 264; Will Herberg, *Religion, Democracy, and Public Education, in Religion in America* 118, 142 (J. Cogley ed. 1958).

<sup>261</sup> C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 123-42 (1964).

<sup>262</sup> Chopper, *supra* n.48 at 264.