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Imagining the Past and Remembering the Future: The Supreme Court's History of the Establishment Clause

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IMAGINING THE PAST AND REMEMBERING THE FUTURE: THE SUPREME COURT'S HISTORY OF THE ESTABLISHMENT CLAUSE

*by Gerard V. Bradley**

I. INTRODUCTION

What people believe to be ultimately true forms the core of their "religion" and affects, if it does not control, every significant decision they make.[1] Moreover, the perception of an ultimate truth begets a personal moral code that determines how people treat other individuals and how they define their social duties. Whether it be through the Ten Commandments,[2] the Golden Rule,[3] or some other tenet of faith, personal morality often supplants society's own assignment of duties through its law. Religion thus stands in a superior relation to positive law. Indeed, even the Supreme Court has made this primacy of conscience the sine qua non of its definition of religion as "a faith, to which all else is subordinate or upon which all else is ultimately dependent."[4]

The political significance of religious belief does not end, however, with the public repercussions of these individual private decisions.

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1. Besides directing purely spiritual life and governing sundry matters of lifestyle, religion influences such decisions as choice of a spouse, how many spouses one may have, how marital obligations are defined, the size of a family, selection of a profession and selection of schools for one's children. *See* P. TILLICH, DYNAMICS OF FAITH 1-2 (1957); P. TILLICH, THE COURAGE TO BE (1952). This is effectively the definition of "religion" adopted by the Supreme Court. *See* Torcaso v. Watkins, 367 U.S. 488, 495 & n.11 (1961) (neither state nor federal government "can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"). *See also* United States v. Seeger, 380 U.S. 163, 185 (1965) (The task of local draft boards in reviewing applications for conscientious objector status is "to decide whether the beliefs professed by a registrant are sincerely held and whether they are, *in his own scheme of things*, religious.") (emphasis added).

2. The Ten Commandments is an enumeration of rules of law given in the Old Testament by God to Moses. *See Exodus* 20:1-17 (King James).

3. "Therefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets." *Matthew* 7:12 (King James).

4. United States v. Seeger, 380 U.S. 163, 176 (1965).

Many contemporary societies understand themselves and their relationship to the world in almost exclusively religious terms.[5] Even the great twentieth-century movement of atheism confirms the public importance of faith through the continuing efforts of communist states to capture or annihilate religion. Thus, just as the solitary religious adherent perceives his fate through the interpretive medium of faith, religious belief can contribute to a collective social consciousness.

In America, collective political activity has been an intensely religious enterprise. Americans have traditionally joined political parties and voted for public officials according to church membership and religious belief.[6] It is impossible to disentangle great nonpartisan political movements such as abolition,[7] the creation of a free public school system,[8] prohibition,[9] and the civil rights and antiwar movements of the 1960s[10] from their religious underpinnings. More recently, the participation of clergy and religiously motivated lay persons in the controversies surrounding the issues of abortion, sanctuary for illegal aliens, and apartheid highlights how religion can become entangled with public policy.[11]

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5. Israel and various Islamic states such as Iran and Saudi Arabia are obvious examples of the more conventional or traditional theistic accounts of religion. Properly added to these mainstays are countries with state churches (such as Ireland) and countries such as Lebanon, where competing religious sects vie for the political identity of the country. More important is the observation of Langdon Gilkey that if religion is conceived (as in *Seeger*) as simply a set of symbols connoting ultimate values, then *all* coherent societies see themselves as religious operatives in history. *See* L. GILKEY, SOCIETY AND THE SACRED 15-25 (1981).

6. *See* R. KELLEY, THE CULTURAL PATTERN IN AMERICAN POLITICS 31-46 (1979); P. KLEPPNER, THE THIRD ELECTORAL SYSTEM, 1853-1892 at 143-97 (1979); McLoughlin, *The Role of Religion in the Revolution: Liberty of Conscience and Cultural Cohesion in the New Nation*, in ESSAYS ON THE AMERICAN REVOLUTION 197 (S. Kurtz & J. Hutson eds. 1973).

7. *See* C. GRIFFIN, THEIR BROTHERS' KEEPERS: MORAL STEWARDSHIP IN THE UNITED STATES, 1800-1865, at 152-97 (1960).

8. *See* V. LANNIE, PUBLIC MONEY AND PAROCHIAL SCHOOLS *passim* (1968); D. TYACK & E. HANSOT, MANAGERS OF VIRTUE: PUBLIC SCHOOL LEADERSHIP IN AMERICA, 1820-1980 *passim* (1982).

9. *See* KLEPPNER, *supra* note 6, at 336-49.

10. The leadership of clerics such as Martin Luther King, Jr. (in the civil rights struggle) and the Berrigan brothers (in the antiwar protests) illustrates the centrality of religious beliefs to those struggles.

11. The Catholic Church's involvement in the pro-life movement has even been noted by the Supreme Court. *See* Harris v. McRae, 448 U.S. 297, 319-20 (1980). For clerical involvement in the "sanctuary" movement (itself a religious concept), see the N.Y. Times, April 18, 1986, at 10, col. 1. Defendants in the chief government prosecution so far include two Catholic priests, a nun and a Protestant minister. Furthermore, Anglican Archbishop Desmond Tutu, for example, is the leading black opponent of apartheid in South Africa, and Reverend Leon Sullivan is perhaps his leading ally in the United States.

It may be assumed that when people associate politically for their common good, they will consider religious beliefs, customs and practices as proper subjects of legislation.[12] Indeed, America's founding generation, which commonly interpreted its political experiences through Christian theology,[13] is no exception to this rule. Thus, it is not intuitively apparent why the Supreme Court maintains that the framers intended to erect a "wall of separation between church and state"[14] that forbids encouragement and support of religion by either the states or the federal government.[15] The Court's assertion that these conclusions are mandated by the first amendment's establishment clause [16] is

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12. Indeed, this is what people have almost universally done. The notion of a "separation of church and state" is possible only in societies that: (1) have clearly demarcated the "sacred" from the "profane," and therefore have defined religion as something that embodies only the former, over and above everyday occurrences; (2) have a "state" in the Western sense that is clearly distinguished from "society" and "culture," a concept of state which begins only in the sixteenth century, *see* C. GEERTZ, NEGARA 121-22 (1980); and, (3) have institutionalized religion into something called a "church." These notions converge only in recent Western history. Such a separation has only been thought desirable since the advent of twentieth century Western secularism.

13. *See infra* notes 36-44 and accompanying text.

14. Everson v. Board of Educ., 330 U.S. 1, 16 (1947). The notion of a "wall" between church and state was articulated in a letter from Thomas Jefferson to the Danbury Baptist Association in 1802 and first used by the Supreme Court in Reynolds v. United States, 98 U.S. 145, 164 (1878) ("I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make not law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state."). *Reynolds* involved a polygamy prosecution of a Mormon. The defendant unsuccessfully claimed that such a prosecution was prohibited by the first amendment's free exercise clause. *See infra* note 16. *Everson* was the first case under the first amendment's establishment clause to employ the "wall" metaphor, and the first since *Reynolds* to use it at all.

15. *Everson*, 330 U.S. at 15. (Justice Black's opinion for the Court held that the establishment clause "means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid religion, aid all religions, or prefer one religion over another.").

16. The religion clauses of the first amendment to the Constitution provide that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. Justice Frankfurter wrote fourteen years after *Everson* that the establishment clause

> [w]ithdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a State may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served, or because a majority of its citizens holding that belief, are offended when all do not hold it.

McGowan v. Maryland, 366 U.S. 420, 465-66 (1961). *See also* Lemon v. Kurtzman, 403 U.S. 602, 625 (1971) ("[The Constitution] decrees that religion must be a private matter for the indi-

no less obscure.

Despite this doctrinal confusion, the Court's prohibition of aid to religion is unquestionably the cornerstone of the modern American constitutional law of church and state. First formulated in the landmark case of *Everson v. Board of Education*,[17] this prohibition on any aid to religion, even if the aid does not discriminate among religious groups, is purportedly based on historical evidence.[18] But the doctrine of *Everson* is inconsistent both internally and with other establishment clause cases. Although all nine of the justices in *Everson* agreed that the establishment clause prohibits aid to religion, a majority of the Court decided that publicly funded transportation of parochial school children to classes did not "aid" religion.[19] Later cases presenting similar factual scenarios are almost impossible to reconcile with this result in *Everson*.[20] This inability, or unwillingness, of the Court consistently to apply its own doctrinal conclusions suggests that its church-state doctrine is either incompatible with reality, ill-conceived or both.[21] But the

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vidual, the family, and the institutions of private choice, and that while some involvement and entanglement may be inevitable, lines must be drawn."). *See also Everson*, 330 U.S. at 15.

17. 330 U.S. 1 (1947).

18. *Id.* at 8-14. Since *Everson*, some members of the Supreme Court have conceded that the case relied on some "analytical untidiness," Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring), and have admitted that the wall of separation has become a "blurred, indistinct and variable" barrier. Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

19. *Everson*, 330 U.S. at 17. This irony prompted Justice Jackson to observe in his dissent: "The case which irresistably comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent,'—consented.'" *Id.* at 19.

20. The result in *Everson* is particularly difficult to reconcile with a later case that held that publicly funded transportation of parochial school children on field trips *did* aid religion. Wollman v. Walter, 433 U.S. 229, 255 (1977). It thus seems that the "no-aid" theory has come to mean "some aid" in practice. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (allowing a publicly funded Nativity scene); Mueller v. Allen, 463 U.S. 388 (1983) (allowing tuition tax credits for parents of parochial school children); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (allowing direct student grants for church-related colleges); Hunt v. McNair, 413 U.S. 734 (1973) (allowing tax-exempt bond assistance for construction at church-related colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (allowing federal construction grants for church-related colleges); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (allowing real property tax exemption for religious organizations); Board of Educ. v. Allen, 392 U.S. 236 (1968) (allowing textbook loans). In *Wolman*, the Court also allowed public funding of parochial schools of standardized tests and scoring services; speech and hearing diagnostic services; medical, dental, and optometric services; remedial education services; programs for the handicapped; and guidance and counseling services. *Wolman*, 433 U.S. at 238-51.

21. At least eight of the nine current justices have expressed dismay and exasperation with the Court's church-state doctrine. *See* Wolman v. Walter, 433 U.S. 229, 255-66 (1976) (where five justices entered separate concurrences or dissents). "Our decisions in this troubling area draw lines that often must seem arbitrary." *Id.* at 262 (Powell, J., concurring in part, concurring in the

Court continues to subscribe to the broad teachings of *Everson* as evidenced by the emergence of the test articulated in *Lemon v. Kurtzman*[22] as *the* relevant inquiry in establishment clause jurisprudence. Thus, the Court's entire church-state doctrine embodies a single unifying norm that is simply a restatement of the *Everson* injunction: that it is judicial business to keep the public realm of law separate from the private world of religion.[23]

This article subjects the Court's justification for a general prohibition on aid to religion, as formulated in *Everson*, to the test of historical truth. After examining historical evidence, the article concludes that the rationale of *Everson* is fatally flawed and that the first amendment was ratified at a time when "the general, if not the universal sentiment in America was that Christianity ought to receive encouragement from the state, so far as was compatible with the private rights of

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judgment, and dissenting in part). *See also* Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring); Meek v. Pittenger, 421 U.S. 349 (1975) (Rehnquist, J., concurring in the judgment in part and dissenting in part); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 813 (1973) (White, J., dissenting).

The Supreme Court's cases from 1982 to 1984 contributed to the sense of confusion and futility surrounding the current doctrine of church and state. For more than a decade of establishment clause litigation, the Court had unfailingly applied the three-pronged test of Lemon v. Kurtzman, 403 U.S. 602 (1971). That test creates a series of requirements that any legislative enactment must meet in order to satisfy the establishment clause. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive entanglement with religion." *Lemon*, 403 U.S. at 612-13. Then, in a series of cases from 1982 to 1984, the Court seemed to waiver in its commitment to the *Lemon* test. *Compare* Marsh v. Chambers, 463 U.S. 783 (1983) (eschewing the *Lemon* formula) *and* Larson v. Valente, 456 U.S. 228 (1982) (ignoring the *Lemon* test) *with* Mueller v. Allen, 463 U.S. 388 (1983) (ostensibly applying *Lemon* while approving a tuition tax credit scheme) *and* Larkin v. Gretel's Den, 459 U.S. 116, 123 (1982) (noting that "this Court has consistently held that a statute must satisfy [the] three [*Lemon*] criteria to pass muster under the establishment clause"). The tax credit scheme approved in *Mueller* seems indistinguishable from that struck down under *Lemon* a decade earlier in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Finally, the majority in Lynch v. Donnelly, 465 U.S. 668 (1984), the Rhode Island Nativity scene case, was unwilling to be confined by any particular establishment clause analysis, remarking only that it was often "useful to inquire" into secular purpose, primary effect, and entanglement. *Lynch*, 465 U.S. at 679. The wall of separation had become nothing more than "a useful figure of speech probably deriving from the view of Thomas Jefferson." *Id.* at 674. In each of the more recent 1984-1985 term cases, however, the Court has unequivocally affirmed the continued vitality of the *Lemon* criteria. *See, e.g.*, Aguilar v. Felton, 105 S. Ct. 3232 (1985); Grand Rapids v. Ball, 105 S. Ct. 3216 (1985); Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985); Wallace v. Jaffree, 105 S. Ct. 2479 (1985).

22. *See supra* note 21. The doctrine of *Everson* is particularly apparent in the *Lemon* test's command that no law shall have the primary effect of "advancing" religion.

23. *See* Bradley, *Dogmatomachy: A Privatization Theory of the Religion Clause Cases*, 30 ST. LOUIS U.L.J. 275 (1986).

conscience and the freedom of religious worship."[24] The article asserts that, rather than envisioning a general prohibition on any aid to religion, the founders simply intended to assure that religion would be aided only on a nondiscriminatory, or sect-neutral, basis.[25]

II. *Everson*'s Account of the Framers' Intent

Professor Sutherland wrote in 1962 that *Everson v. Board of Education* has "become the most influential single announcement of the American law of Church and State."[26] The truth of that assessment has become increasingly apparent.

The various opinions in *Everson* are steeped in historical detail, each traversing the same path and drawing the same doctrinal conclusions.[27] Justice Black, writing for the majority, began by recounting the religious intolerance and persecution the colonists carried with them from Europe to America.[28] These attitudes became so commonplace, he said, that the people were driven to outlaw "assist[ance] [to] any or all religions" through passage of the first amendment.[29] Although conceding that "no one group" could claim a monopoly on the creation of the first amendment, Justice Black essentially reduced the religion clauses to a federal codification of Thomas Jefferson's "Bill for Establishing Religious Freedom," the denouement of the 1784-85 Virginia controversy over public stipends for Protestant clergymen.[30] The "no-aid" stricture of *Everson* is thus firmly grounded in, if not directly modeled on, Jefferson's statute. Justice Rutledge, dissenting, pursued the Vir-

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24. 3 J. Story, Commentaries on the Constitution of the United States § 1868 (Da Capo ed. 1970).

25. *See* G. Bradley, Church-State Relationships Today (Greenwood Press, forthcoming in 1987).

26. Sutherland, *Establishment According to Engel*, 76 Harv. L. Rev. 25, 31 (1962).

27. Justices Jackson and Rutledge dissented in *Everson*. Although Justice Rutledge generally agreed with the majority's version of the historical origins of the establishment clause, he dissented because

> the matter is not one of quantity, to be measured by the amount of money expended. Now as in Madison's day it is one of principle, to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents.

Everson, 330 U.S. at 63.

Rutledge believed that the first amendment "forbids any appropriation, large or small, from public funds to aid or support any and all religious exercises." *Id.* at 41.

28. *Id.* at 8-10.

29. *Id.* at 11.

30. *Id.* at 11-13. Jefferson's bill was in opposition to the renewal of Virginia's tax for the support of its established church.

ginia analogy with still more vigor, and differed from the majority historically only by assigning Jefferson a lesser role in the larger scheme. Justice Rutledge ostensibly broadened the inquiry to include the proceedings of the first Congress, and concluded that the amendment was the "compact and exact" summation of the views of its author, James Madison.[31]

The historical *Everson* analysis is pivotal because of the Court's ultimate conclusion that the original intent behind the establishment clause was a general prohibition on aid to religion. The plain language of the clause was certainly no ally of the justices in their endeavor. The Court has resolutely, even proudly, rejected the most accessible and reasonable definition of the words "respecting an Establishment of religion." [32] As Blackstone said, "By establishment of religion is meant the setting up or recognition of a state church, or at least the conferring upon one church of special favors and advantages which are denied to others."[33] The *Everson* Court expressly eschewed such a "narrow interpretation," however, and instead found an intention to uproot and extinguish all traces of religion in politics and all connection between church and state.[34] Whatever the validity of their handiwork, it is at least clear that the plain and truly original meaning of nonestablishment has long since ceased to exist.

III. THE FOUNDERS' WORLD VIEW

Despite the *Everson* Court's analysis, what the congressional framers and state ratifiers intended through the establishment clause was that no religious group or sect should be preferred over another. In fact the founders intended that the establishment clause, together with the free exercise clause, would tolerate nondiscriminatory aid and support

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31. *Id.* at 37. Justice Rutledge even appended to his opinion the complete text of both Madison's *Memorial* and the proposed taxing bill to which it was opposed. *Id.* at 63-74 app. *See also supra* note 30 and accompanying text for a discussion of Jefferson's opposition to the bill.

32. 330 U.S. at 15 ("There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause.").

33. 1 BLACKSTONE'S COMMENTARIES 296 (Tucker ed. 1803 & reprint 1969). Even modern dictionaries define "establishment" as a state church, such as the "Church of England" or "Church of Scotland." *See, e.g.*, III THE OXFORD ENGLISH DICTIONARY 298 (1933); WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 778 (3d ed. unabridged 1981).

34. *Everson*, 330 U.S. at 15 ("Neither a state nor the federal government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another."); *Id.* at 31-32 ("The Amendment's purpose . . . 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.") (Rutledge, J., dissenting).

of religion. That the first amendment merely conditioned the manner in which government could aid religion, rather than banning all aid, is a distinction that has unfortunately eluded the Supreme Court. It did not elude Justice Story, who realized that, at the time of the adoption of the Constitution, "[a]n attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."[35]

The "general, if not the universal sentiment" of the country, as perceived by Justice Story,[36] was rooted in a pair of related premises that produced an indelible fusion of nondenominational Protestantism and republican government in the early American mind. First, early Americans perceived Protestantism as the consummation of religious development. In the eighteenth century, "most Americans believed that Protestant Christianity had gathered up within itself the excellences of the Old Testament and, having cleansed itself of the corruptions of Roman Catholicism, now englobed the 'great fundamental principles' of religion."[37] Perhaps the most appealing characteristic of Protestantism was its individualism in matters of conscience.[38] This spiritual individualism combined with the political republicanism of the era to generate a single public philosophy. The belief was that "Protestantism, in religion produc[ed] republicanism in government."[39]

Second, religion was at the heart of the framers' search for what Madison called a virtuous citizenry.[40] The experimenters in liberty knew that virtuous habits and traits were essential to self-government. As Justice Story put the question: "It yet remains a problem to be solved in human affairs, whether any free government can be permanent where the public worship of God, and the support of religion, con-

35. J. STORY, *supra* note 24.

36. *See supra* note 24 and accompanying text.

37. E. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 50 (1972).

38. A Protestant criticism of Catholicism was that conscience, "the court of God, was usurped by pope and priest." *Id.* at 102-03.

39. H. BUSHNELL, *Crisis of the Church*, in 1 HORACE BUSHNELL PAMPHLETS 1, 11 (1835) (*quoted in* SMITH, *supra* note 37, at 104). Benjamin Rush of Pennsylvania, signer of the Declaration of Independence and zealous social reformer, once wrote that "[r]epublican forms of government are the best repositories of the Gospel. I therefore suppose they are intended as prelude to a glorious manifestation of its power and influence upon the hearts of men." 1 LETTERS OF BENJAMIN RUSH 611 (L. Butterfield ed. 1951) (letter of Rush to Elhanan Winchester of November 12, 1791). Similarly, a newspaper correspondent wrote in 1789 that Protestantism was the "Bulwark of our Constitution." Gazette of the United States, May 6, 1789, at 1. In short, eighteenth century Americans viewed the United States as party to a national covenant with God. This cultural hegemony of "republican Protestantism" did not end until the twentieth century.

40. *See* THE FEDERALIST No. 55, at 456 (J. Madison) (Mentor ed. 1961).

stitute no part of the policy or duty of the State in any assignable shape."[41] It is certain that Madison and others in the founding generation saw religion as a unifying force in government. It is literally expressed in countless legislative acts, including the Northwest Ordinance passed by the first Congress.[42] Just as certain is that most of the framers individually could not separate "virtue" and "morality" from "religion."[43]

This intellectual infrastructure demonstrates why the Supreme Court's interpretation of the framers' intent is not only incorrect but implausible. Where Protestantism and Americanism were conjoined in the popular mind, a wall of separation—what Paul Freund defined as the "mutual abstention of the religious and political caretakers"[44]—was simply impossible. If one recognizes the framers' belief that liberty depended on faith, one cannot say that they erected a constitutional barrier against promoting religion.

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41. R. BAIRD, RELIGION IN AMERICA 116-18 (1844) (*quoted in* SMITH, *supra* note 37, at 107). One commentator sees this as *the* theoretical question posed by the creation of the American republic. *See* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 428-29 (1969).

42. "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 52 (1789).

43. In his farewell address in 1796, George Washington said:

> Of all the dispositions and habits which lead to political prosperity, Religion and morality are indispensable supports . . . And let us with caution indulge the supposition, that morality can be maintained without Religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle.

35 WRITINGS OF WASHINGTON 229 (United States George Washington Bicentennial Commission ed. 1940). Reasoning almost precisely the same as Washington's induced Richard Henry Lee to support the 1785 Viriginia general assessment for the support of the established church. 2 THE LETTERS OF RICHARD HENRY LEE 304 (1914) (letter of Lee to James Madison of Nov. 26, 1784). *See supra* notes 30-31 and accompanying text for a discussion of this assessment. John Adams thought that "religion and virtue are the only foundations, not only of republicanism . . . but of social felicity under all governments and in all the combinations of human society." 9 THE WORKS OF JOHN ADAMS 635, 636 (C. Adams ed. 1854) (letter of Adams to Benjamin Rush of Aug. 28, 1811). Jefferson feared a future America shorn of Christian morality. W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 31 (1976). Finally, the Rev. Isaac Backus, endorsing the animating impulse of Puritan establishments, said that religion "keeps alive the best sense of moral obligation. . . . The fear and reverence of God, and the terrors of eternity are the most powerful restraints upon the minds of men. And hence it is of special importance in a free government. . . ." ISAAC BACKUS ON CHURCH, STATE, AND CALVINISM 353 (W.G. McLoughlin ed. 1968) (quoting Phillips Payson) (*quoted in* SMITH, *supra* note 37, at 20).

44. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1684 (1969).

IV. THE FRAMERS' VISION REFLECTED IN EARLY LEGISLATION

The framers' vision is reflected in two great early American legislative traditions. First, given the identification of Protestantism with republican government, Roman Catholics were often objects of discrimination. The Church of Rome was not only viewed as a grand spiritual conspiracy against Protestantism, it was seen as politically subversive as well.[45] The perception was not without foundation.[46] One solution to the Catholic problem was to do everything possible to keep Catholics out of the United States. A more moderate approach was instead adopted by virtually all of the states: exclude Catholics from public office, the franchise, or both.[47] Another response was to admit Catholics to the body politic in full confidence that they would not long remain Catholic. Formal conversion was not important, so long as the individual Romanist was sufficiently indoctrinated.[48] The common un-

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45. Roger Sherman's biographer records his subject's "abhorrence" of the Catholic Church as partly a product of his faith in the new republic, which was founded on Christianity as he understood it. R. BOARDMAN, ROGER SHERMAN SIGNER AND STATESMAN 103 (1938). *See also* J. PRATT, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 85 (1967). Indeed, for both Sherman and Rufus King, the identity of Christianity—as they understood it—and America produced hostility to Anglicanism as well. *See* R. BOARDMAN, *supra* at 319; 1 THE LIFE AND CORRESPONDENCE OF RUFUS KING 95 (C. King ed. 1894) (letter of Rufus King to Elbridge Gerry of May 9, 1785). Upon hearing of Bishop Seabury's appointment to the American Episcopacy, King wrote to Elbridge Gerry in critical terms that no doubt would have applied to the Roman Catholic Church. "I never wished to see the lawn sleeves in America. . . I never liked the hierarchy of the Church—an equality in the teachers of Religion, and a dependence on the people, are Republican sentiments. . . ." *Id.* Paine Wingate, a delegate to the Fourteenth Continental Congress under the Confederation and Senator from New Hampshire in the first and second Congress under the Constitution, recalled a lecture given by Professor Wigglesworth while he was a student at Harvard:

> [The Catholic] church is a restless, incroaching and implacable enemy to Protestants of every denomination. It is indefatigable in its endeavors, compassing land and sea to make proselytes. It utterly denies salvation to any out of its communion. And its heresies, superstitions, cruelties, idolatries, and other crying wickednesses are such, that you will find it no very easy matter to persuade yourselves that there can be any salvation in it.

1 C. WINGATE, LIFE AND LETTERS OF PAINE WINGATE 62 (1930).

46. An 1832 encyclical letter of Pope Gregory summarized the Church's teaching on, or more precisely, its disdain for, religious freedom: "From that polluted fountain of indifference flows that absurd and erroneous doctrine," liberty of conscience. J.F. BERG, CHURCH AND STATE: OR ROME'S INFLUENCE UPON THE CIVIL AND RELIGIOUS INSTITUTIONS OF OUR COUNTRY 30 (1851). From that statement, one American, Reverend J.F. Berg of Philadelphia, concluded that "[t]he pontiff is clearly committed against the first principles of American freedom and regards them as unmitigated abominations." *Id.*

47. *Id.* at 169-70.

48. Reverend Lyman Beecher articulated the American response to Catholics in terms that have since dominated this country's historical treatment of immigrant groups:

> Let the Catholics mingle with us as Americans and come with their children under the

derpinning of the various alternatives was the "indelible fusion" of Protestantism and republican government; thus the obvious dissonance between Catholicism and Protestantism implied incompatibility between American citizenship and Catholic devotion.

The second great legislative attempt to perpetuate the prevailing Protestantism of America's founding generation was the establishment of post-Revolutionary "common" (or primary level) schools. In the period immediately after the War of Independence, the importance of education in fostering religious and republican values was second perhaps only to that of the family.[49] Public education not only inculcated reading, writing, and arithmetic, but fostered religious and moral virtue; the educator was critically significant in shaping and inspiring the new American heart. At the core, this vision embodied a belief that religion had: (1) social utility—the preservation of republican order through brotherly love; and (2) importance for the individual—the salvation of the soul through union with God achieved by reading of the scriptures.[50] The notion of a pious, literate population imbibed with the light of both gospel and reason, and vigilant of its freedom of conscience in the new republic, was well articulated by 1780.

Public statements and legislative pronouncements by the lawmakers of the era make it clear that electoral success demanded recognition of religion and morality as cardinal elements in a proper education.[51] The purposes of higher education were similarly defined.

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full action of our common schools and republican institutions and the various powers of assimilation and we are prepared cheerfully to abide the consequences . . . If they could read the Bible . . . their darkened intellect would brighten and if they dared to think for themselves, the contrast of Protestant independence with their thraldom, would awaken the desire of equal privileges and put an end to an arbitrary clerical dominion over trembling superstitious minds.

L. BEECHER, PLEA FOR THE WEST 63, 128 (1835).

49. L. CREMIN, AMERICAN EDUCATION: THE NATIONAL EXPERIENCE, 1783-1876 at 116 (1980). In Cremin's view:

The republican style in American education was compounded of four fundamental beliefs: that education was crucial to the vitality of the Republic; that a proper republican education consisted of the diffusion of knowledge, the nurturance of virtue (including patriotic civility), and the cultivation of learning; that schools and colleges were the best agencies for providing a proper republican education on the scale required; and that the most effective means of obtaining the requisite number and kind of schools and colleges was through some system tied to the polity.

Id. at 148.

50. *See* M. SAVELLE, SEEDS OF LIBERTY: THE GENESIS OF THE AMERICAN MIND 267-73 (1965). *See also* CREMIN, *supra* note 49, at 107-14, 116-211.

51. For example, the Massachusetts legislature in 1789 codified its views in "An Act to provide for the Instruction of Youth, and for the Promotion of good Education." I LAWS OF MASS.

This was a time when almost all of the great private colleges—Harvard, Yale, and Princeton among them—were publicly supported and were still primarily true seminaries. But state universities also had a religious mission.[52]

Both the practice and theory of education thus conformed to the framers' vision. Public schools—those wholly funded and administered by the state—were concentrated in New England and bore the stamp of Congregational hegemony.[53] There, the early national Puritan tradition meant that children needed literacy both to read the Bible and to run commerce. Massachusetts, for example, mandated in 1789 that every town of fifty households or more was required to provide a

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469, 473 (1780-1805) ("it shall be the duty of such Master . . . to instill in their minds a sense of piety and virtue, and to teach them decent behaviour."). *See also* CREMIN, *supra* note 49, at 153. Georgia Governor Lyman Hall, in his 1783 Message to the Legislature, said:

> Every encouragement ought to be given to introduce religion and learned clergy to perform divine worship in honor of God and to cultivate principles of religion and virtue among our citizens. For this purpose it will be your wisdom to lay an early foundation for endowing seminaries of learning: nor can you, I conceive, lay better than by a grant of land that may, as in other governments, hereafter, by lease or otherwise, raise a sufficient revenue to support such valuable institutions.

H. WHITE, ABRAHAM BALDWIN at 154 (1926).

Newspaper accounts for the years 1789-1790 further reveal a reading and voting public interested in the sectarian purposes of education. A letter to the editor of the Columbia Centinel described the utilitarian value of instructing Negro children at government expense; schooling in the principles of religion and morality was "the best security for their industry and honesty." Columbia Centinel, June 26, 1790. The Pennsylvania Observer advised in 1790 that public support of schools for "children of poor people" would insure that "they will never be the instruments of injuring mankind." Pennsylvania Observer, Jan. 27, 1790. The printer of a newly published Independent Catechism heralded it in a long Boston Gazette advertisement as an instructional book for both home and schools. The printer declared that such a catechism was especially desirable under the new republican form of government in that "particular attention ought to be paid to the religious education of youth—without virtue and piety we never can look for a good administration of government, or for happy and prosperous times." Boston Gazette, Feb. 24. 1789. *See also* R. MOHL, EDUCATION AS SOCIAL CONTROL IN NEW YORK CITY, 1784-1825 (1111); 51 NEW YORK HISTORY 219 (1970).

52. In establishing a "State University" in 1785, the Georgia legislature declared that a free government

> can only be happy where the public principles and Opinions are properly directed and their manners regulated. This is an influence beyond the Stretch of Laws and punishments and can be claimed only by Religion and Education. It should therefore be among the first objects of those who wish well to the National prosperity to encourage and support the principles of religion and morality, and early to place the Youth under the forming hand of security, that by Instruction they may be molded to the love of Virtue and good order."

R. STRICKLAND, RELIGION AND THE STATE IN GEORGIA IN THE 18TH CENTURY 178 (1939).

53. *See* C. KINNEY, CHURCH & STATE, THE STRUGGLE FOR SEPARATION IN NEW HAMPSHIRE, 1630-1900, at 152 (1955); R.J. PURCELL, CONNECTICUT IN TRANSITION, 1775-1818, at 192-95 (1918).

schoolmaster, certified by the town selectman and a local minister, and authorized all parishes and precincts to raise taxes to carry out this duty.[54] New Hampshire also passed a comprehensive school act in 1789 requiring that schoolmasters be certified by what amounted to the local clergyman.[55] The law authorized town selectmen to tax residents for school purposes, and the assessment was clearly intended to serve religious ends.[56] In Connecticut[57] and Rhode Island,[58] schools were appar-

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54. *See supra* note 51. The town of Boston adopted a proposal in 1789 for the creation of a System of Education open to all students who possessed the ability to read and spell. The Bible and other texts were specifically listed for use in the Reading classes. S. SCHULTZ, THE CULTURE FACTORY: BOSTON PUBLIC SCHOOLS, 1789-1860, at 13-15 (1973). The School Committee of Boston determined four weeks after passage of the school plan that the schoolmasters had "the indispensable duty . . . daily to commence the duties of their office by prayer, and reading a portion of the sacred scriptures, at the hour assigned for opening the School in the Morning; and close the same in the evening with prayer." Massachusetts Centinel, Jan. 9, 1790, at 1. The same committee two weeks later enacted a measure that was an apparent attempt to assure parents that the particular doctrines of the Congregational Church would not be foisted on children of other Protestant denominations. The committee voted that "the several School-Masters instruct the Children under their care, or cause them to be instructed in the Assemblies' Catechism, every Saturday, unless the parents request that they be taught any particular Catechism of the religious Society to which they belong; and the Masters are directed to teach such children accordingly." *Id.* At stake was not "religion" in the public schools, for it was inconceivable that religion should not be there; religion was a *raison d'etre* of the schools in the first place. "Sectarianism" was the issue. With Massachusetts as a case study, one can see how the fight to keep preference of any sect out of the public schools was compatible with and even propelled by a desire to keep religion in the schools. In the process one can see the reflection of disestablishment; sectarian squabbles and preferences had no place in public America, but public support of nondenominational religion was vital to the country's survival. In 1827, Massachusetts passed a comprehensive school code providing "that said [district school] committee shall never direct any school books to be purchased or used, in any of the schools under their superintendence, which are calculated to favor any particular religious sect or tenet." LAWS OF MASS. ch. 143, § 7 (1827).

55. LAWS OF NEW HAMPSHIRE, V, 449 (Batchellor 1776-1835). *See also* KINNEY, *supra* note 53, at 152-53.

56. This was evident from an early description of the curriculum:

> The text-books for many years were few in number and scarcely any two like, except the Testament and the Psalter, which were used for reading and spelling in the more advanced classes. The New England Primer was about the only book used by the younger pupils. They contained . . . the Shorter Catechism, "Prayers for the Young," general rules to incline children to lead pious lives, and religious verses like the "Cradle Hymn" of Dr. Watts . . . . The Catechism was the most distinguishing feature of the book. A preface to the reprint . . . says: "Our Puritan Fathers brought the Shorter Catechism with them, across the ocean, and laid it on the same shelf with the family Bible. They taught it diligently to their children every Sabbath."

J. LYFORD, HISTORY OF CONCORD, NEW HAMPSHIRE II, at 1218 (1896).

57. *See* R.J. PURCELL, *supra* note 53, at 914-95.

58. In libertarian Rhode Island, Providence public school teachers in 1820 received the following injunction from the governing school committee:

> That they endeavor to impress on the minds of the scholars a sense of the Being & Providence of God & their obligations to love & reverence Him,—their duty to their

ently structured in a very similar fashion to their Puritan neighboring states.

Of the middle colonies, New York was the most active proponent of public education in the early national period.[59] The educational practices of the period in New York make it clear that common, or primary, schools were used for the dissemination of religion and morality, and that the Bible and Christian moral principles were the instructional vehicles.[60] At the same time, sectarianism had no place in public education.[61] In the remaining middle colonies—Pennsylvania, New Jersey, and Delaware—very few public schools existed in 1789. The extant primary schools were usually charity schools run by parishes as part of their duty for orphans.[62] Pennsylvania, however, was quite busy establishing and supporting various sectarian colleges.[63]

Education further south was largely a haphazard affair.[64] The sit-

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parents & preceptors, the beauty & excellency of truth, justice & mutual love, tenderness to brute creatures, the happy tendency of self government and obedience to the dictates of reason & religion; the observance of the Sabbath as a sacred institution, the duty which they owe to their country & the necessity of a strict obedience to its Laws, and that they caution them against the prevailing vices.

W. DUNN, WHAT HAPPENED TO RELIGIOUS EDUCATION? 71 (1958).

59. 1782 LAWS OF N.Y. ch. 22, art. 7, 432, 435. *See also* G. MILLER, THE ACADEMY SYSTEM OF THE STATE OF NEW YORK 27-28 (1982) (reserving four hundred acres of frontier land for schools: four hundred were also reserved for "support of the gospel"). The statute was supplemented by further acts in 1786 LAWS OF N.Y., ch. 67, 334, 339; 1790 LAWS OF N.Y., ch. 38, 162; 1801 LAWS OF N.Y., ch. 126, 299; and 1813 LAWS OF N.Y., ch. 187, 290.

60. G. CHEEVER, RIGHT OF THE BIBLE IN OUR PUBLIC SCHOOLS 201-13 (1854). Griffin notes that the "Bible-in-the-Schools" movement was part of the anti-Catholic movement in the mid-nineteenth century. GRIFFIN, *supra* note 7, at 140-42.

61. In 1854, an educational theorist contended that the King James Bible was nonsectarian, although the burgeoning Catholic population disagreed. CHEEVER, *supra* note 60, at 201-13. George B. Cheever prefaced this claim by declaring that "while it is essential to forbid sectarianism in the public schools, it is as essential to bring them under the teachings and power of true religion; that religion should not be driven out under cover of repelling sectarianism." *Id.* at 37-38. Cheever's statements reflected what enlightened New Yorkers had believed since the Revolution: that the fostering of Protestantism without sectarian particulars was an inevitable activity of any government, even one that had disestablished religion. SMITH, *supra* note 37, at 108.

62. N. BURR, EDUCATION IN NEW JERSEY 1630-1871 at 240-245 (1942). The exception was western New Jersey. Quakers there operated common schools supported by local taxation similar to the New England model. Some towns in eastern New Jersey apparently were empowered to operate tax supported schools if they so chose; yet little or no evidence can be found that these townspeople did so. D. SLOAN, EDUCATION IN NEW JERSEY IN THE REVOLUTIONARY ERA 7 (1975).

63. I PENNSYLVANIA LAWS 474 (Nov. 27, 1779); II PENNSYLVANIA LAWS 500 (Sept. 9, 1793); *Id.* at 398 (March 10, 1787).

64. Maryland had long ago established Protestant common schools. P. CLARKSON AND R.S. JETT, LUTHER MARTIN OF MARYLAND 19-21 (1111). Schooling in pre-Revolutionary North Carolina was essentially a church affair. Conklin, *The Church Establishment in North Carolina*, 42

uation in Virginia is particularly instructive, because the history of public education in that state presents an incongruous combination of disestablishment policy on the one hand and religious entanglement on the other. After control of the charity schools had been wrested from the Episcopal Church,[65] the legislature in 1796 passed an act that enabled counties to establish tuition-free schools.[66] Nevertheless, by 1809 no county had opened a free school under the 1796 enabling legislation.[67] Instead, the local citizenry sought charters from the state for the funding of private schools[68] such as the Hampden-Sidney Academy. Although the Academy received an incorporating charter in 1783 that dissolved all connection between the school and the parent presbytery, the predominant influence in the school continued to be Presbyterian.[69] Similarly, Protestant Episcopalians remained active in education during the period, serving as instructors and trustees in at least three state-chartered academies.[70] The Methodists also maintained three schools, all of which apparently had a highly religious orientation.[71]

This historical evidence demonstrates that the nonestablishment home of Jefferson and Madison supported and subsidized sectarian schools. Given the heavy reliance in *Everson v. Board of Education* on the situation in Virginia,[72] this evidence should rebut the conclusion in that case that public education was independent of religion during the founding era. Rather, the truly vast extent of the religious influence on public education in the early national period should prove that the framers simply did not intend to erect a "wall of separation" between church and state.

N.C. HIS. REV. 20 (1955) and the few academies chartered after disestablishment suggest a continued "religious" presence in the school. *Id.* at 20-21. *See* 4 DOCUMENTARY HISTORY OF EDUCATION IN THE SOUTH 12-15 (E. Knight ed. 1953). South Carolina did not enact a significant statewide education bill until 1811. 2 DOCUMENTARY HISTORY OF EDCUATION IN THE SOUTH BEFORE 1860 at 156 (E. Knight ed. 1953). Schools in Georgia were more often than not run by clergy. *See supra* note 51.

65. *See* S. BELL, THE CHURCH, THE STATE, AND EDUCATION IN VIRGINIA 159 (1930).

66. *Id.* at 167.

67. *Id.* at 169.

68. *See id.* at 210-43.

69. *Id.* at 221.

70. *Id.* at 210-14.

71. *Id.* at 214-20. Further evidence of state involvement in religious education is the Virginia Sunday School movement of the 1820s. *Id.* at 246. Sunday Schools were non-denominational Protestant enterprises designed to impart a "Christian education" to their pupils. *Id.* at 249. Direct financial aid was provided through a state-established fund. The state also set up a Literary Fund intended to promote state-wide education. *Id.* at 248-49.

72. *See supra* notes 26-33 and accompanying text.

CONCLUSION

What the framers intended to achieve through the establishment clause was that no one religious sect should ever be preferred by government over another. The Supreme Court, however, through the doctrine of *Everson*,[73] has eschewed the plain and universally understood meaning of the clause, and has created a general prohibition on any nondiscriminatory aid to religion.

In developing the *Everson* doctrine, the Court has certainly not bolstered such first amendment values as "neutrality,"[74] "separation,"[75] or "voluntarism."[76] Nor have they achieved fidelity to the framers by focusing on the perceived evils of religious establishment.[77] While such a focus is vital to an accurate interpretation of the words of the establishment clause, the framers' remedy for whatever evils might exist was equal treatment of all religious sects. The Court has not seen fit to implement that solution. Rather, the Court has "carved out what [it has] deemed to be the most desirable national policy governing various aspects of church-state relations."[78]

Whether or not the Court will someday decide to adopt the framers' view of nonestablishment is pure conjecture. We may at least hope that the Court will give the plain meaning of the establishment clause a fairer hearing than it did in *Everson*. The Court might well consider the counsel of Jefferson, who stressed that the meaning of the Constitution is "to be found in the explanations of those who advocated it, upon which the people relied in adopting the Constitution."[79] Or perhaps

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73. *See supra* notes 17-33 and accompanying text.

74. *See* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1684 (1969); Van Alstyne, *Comment: Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on* Lynch v. Donnelly, 1984 DUKE L. J. 770, 774-76 (1984); Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 975 n.12 (1982).

75. *See Everson*, 330 U.S. at 16-18. *See also* Lynch v. Donnelly, 465 U.S. at 698 (1984) (Brennan, J., dissenting); Van Alstyne, *supra* note 74, at 776-78; Comment, Mueller v. Allen: *Do Tuition Tax Deductions Violate the Establishment Clause?*, 68 IOWA L. REV. 539 (1982).

76. *Everson* 330 U.S. at 18; *Lynch*, 465 U.S. at 698 (1984) (Brennan J., dissenting); Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963); Van Alstyne, *supra* note 74.

77. The Court's perception of these evils is evident in the adoption and continued application of the three-pronged establishment clause test of Lemon v. Kurtzman, 403 U.S. 602, 622 (1971). *See supra* notes 21-22 and accompanying text.

78. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting). *See supra* note 21 and accompanying text.

79. 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446 (2d ed. 1836); *see also* R. BERGER, EXECUTIVE PRIVILEGE 138 (1974).

Madison should have the last word after all. For he said that if the "sense in which the Constitution was accepted and ratified by the Nation . . . be not the guide in expounding it, there can be no security for a consistent and stable government, more than for a faithful exercise of its powers."[80]

80. 4 J. MADISON: LETTERS AND OTHER WRITINGS 191 (Lippingott ed. 1865-1867). *See also* BERGER, *supra* note 79, at 138 n.104.