JUSTICE RUTLEDGE'S APPENDIX

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

This article seeks to clarify the much disputed meaning of the Establishment Clause of the First Amendment. It sets about doing this by going back to basics, by examining the relation of establishment, equality and *Everson* in the administrative state. The modern Establishment Clause era began with the *Everson* decision by the Supreme Court in 1947. That case wrestled with issues of equality, evenhandedness, and separation between church and state, providing the model, for better or worse, for subsequent church/state litigation. *Everson* was also influential in setting the historical tone of much Establishment Clause argument and, within that, a sharp focus on James Madison and his role in the religious freedom arguments in Virginia during the 1780’s in the years preceding the drafting of the United States Constitution and its early amendments. Justice Rutledge appended Madison’s *Memorial and Remonstrance Against Religious Assessments* to his *Everson*

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1. James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785), in 5 THE FOUNDER’S CONSTITUTION 82, 82 (Philip B. Kurland and Ralph Lerner eds., 1987), quoting Articles 1 and 16, respectively, of the Virginia Declaration of Rights (1776) (emphasis in original).
3. Justice Rutledge, though a dissenter in the case, did much to frame the terms of the debate, not just in this case, but in the entire debate that ensued. On the importance of history in determining the meaning of the clause, he says, “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison’s authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination.” *Id.* at 33 (citations omitted).
dissent, thereby making it the central historical document in the subsequent debate as to the meaning of the Establishment Clause.4

Almost as common in the literature as affirmations of the importance of history to Establishment Clause doctrine are complaints that the history has too often been gotten wrong5 and that the Court has made a conflicted mess of the doctrine.6 Altogether too much writing in the area has a harshly negative and polemical tone and purpose. Much heat, but little light, has come from this venting.

This article has a different, more reconciliatory aim. That aim is to explain what it is about that history that has led us to this point and how both the constitutional history and doctrine can be made better. The blame here belongs not to Madison, the Everson judges, or to later participants in the debate. The difficulties they labored under arose mainly from changes in historical circumstances and in the nature and scope of American government since the 1780's. Under the conditions of that era Madison and others strongly believed that foundational natural rights of citizens, especially free exercise rights,7 compelled government to take a separationist, no aid posture toward religion. This was to be done,

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4 *Everson*, 330 U.S. at 66-72. Hence, the title of this article.
5 For example, then-Justice Rehnquist wrote in 1985, “It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson’s misleading [wall of separation between church and state] metaphor for nearly 40 years.” *Wallace v. Jaffree*, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).
6 Perhaps the most emphatic statement of this kind comes from Leonard Levy, who says, “[T]he Court has managed to unite those who stand at polar opposites on the results that the Court reaches; a strict separationist and a zealous accommodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the Justices.” LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 163 (1987).
7 As if to demonstrate the truth of Levy’s assertion, Michael McConnell quotes the statement and then adds, “I stand at the pole opposite to Levy on most of these issues, but I agree with that assessment.” Michael W. McConnell, *Religious Freedom at the Crossroads*, 59 U. CHI. L. REV. 115, 115 (1992).
8 See supra note 1.
they thought, for the benefit of both religion and government and also for the preservation of free exercise rights of all.

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

The role played by history in this process, unfortunately, has been more to provide ammunition for polemical disputes than it has been to light the path to resolution of the conflict. This article suggests a different role for a different approach to history, one that can explain how the modern Establishment Clause dilemma might be resolved. In this approach not all history is equally important or relevant to current cases. But unlike law office history which values history based upon which side in the disputes it favors, an approach which has led to the current impasse, this approach introduces a distinction between underlying principles or rights (e.g., natural equal rights and liberties) on the one hand and applications of those principles (e.g., separation of church and state in the framers’ era) on the other hand. This view opposes approaches on both sides of the

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8 Madison’s gives as a reason against establishment of religion, “Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation.” James Madison, supra note 1 ¶ 7, at 83.
Establishment Clause debate that mechanically plug in to contemporary situations framers’ injunctions from the 1780’s.\(^9\) Changed conditions between that time and our own may well, as they do in this area, call for different applications of the same principles and, also for a recognition of what is underlying principle and what is application of principle in a necessarily limited historical context.

In the remainder of this article I will flesh out this admittedly abstract thesis concerning Establishment Clause interpretation and doctrine by going back to its origins in two senses—in the framing debates of the 1780’s and in the treatment of those debates in *Everson*, the founding case of modern establishment Clause doctrine. I will look at the role of Madison’s *Remonstrance* in the spirited debate among the justices in the *Everson* case (itself a 5-4 decision by the Court), who despite their differences in the case, largely agree on the importance of the founding history in general and Madison and the *Remonstrance* in particular in determining the meaning of the Establishment Clause. I will argue that equality of natural right, especially free exercise of religion, as argued by Madison in the *Remonstrance*, justifies the result the court reached in that case, although this is not the rationale that Justice Black, writing for the Court, in fact gives and that the separationist doctrine that both sides amazingly argue for presents a stunted and wooden understanding of the Establishment Clause, an understanding which will, when followed, lead to the violation of the very principles of equal religious liberty Madison strove to protect.

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\(^9\) I agree, for example, with Justice Stewart’s statement about the Establishment and Free Exercise Clauses that, “It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of ‘separation of church and state,’ which can be mechanically applied in every case to delineate the required boundaries between government and religion.” School District of Abington Tp., PA v. Schempp, 374 U.S. 203, 308-09 (Stewart, J., dissenting) (1963).

Stewart’s sentiment is shared by a Justice who otherwise held the opposite concerning religion and Establishment, Justice Brennan, who said in that same case that, “A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons[.]” *Id.* at 237 (Brennan, J., dissenting).
**MADISON, EVERSON AND THE REMONSTRANCE**

*Everson* began the modern Establishment Clause era. It also set the tone for subsequent Establishment Clause litigation by making the framing history of the clause the leading issue in Establishment Clause argument. In addition, it put Madison and the *Remonstrance* at the center of that argument, thus leading to the doctrinal conflict and standoff that has ensued. Some later critics have challenged this choice and the quality of the Court’s historical analysis and even presented alternative Establishment Clause histories.\(^\text{10}\) Without entering into this debate, this article assumes that it is too late in the day to hit the reset button in Establishment Clause doctrine and argument, which for better or worse, has been established in the frame that the *Everson* Court gave it. Constitutional interpretation, like other precedent-constrained legal forms, is path dependent. What has gone before necessarily effects, even when it does not fully determine, what can be decided now and how it can be justified. It does so here, then, within the terms of debate given by *Everson*, by attempting to describe, analyze and clarify the doctrinal conflict that has arisen out of that decision.

In this part of the article, I will examine the use made of Madison’s arguments, especially those in the *Remonstrance*, by Justice Black writing for the *Everson* majority and by Justices Jackson and Rutledge writing in dissent. My aim here is to identify the

\(^{10}\) Carl Esbeck, for example, begins a recent comprehensive analysis of the use of text and history in Establishment Clause argument by saying, “The text and original meaning of the Establishment Clause as drafted by the First Federal Congress was diminished in its importance when the United States Supreme Court handed down its decision in *Everson v. Board of Education of the Township of Ewing* in 1947. Instead of looking to the record of the debates and minutes of the First Congress, the *Everson* Court adopted the principles animating the disestablishment struggle in Virginia…to give substantive content to the Establishment Clause.” See, e.g., Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation* 1,3, [http://ssrn.com/abstract=1663829](http://ssrn.com/abstract=1663829) (citations omitted).
underlying causes of doctrinal conflict here in order to determine how they can be rectified.

With all the discussion of Everson and the Remonstrance in the Establishment Clause literature, it is surprising how little attention has been paid to this issue. This is unfortunate, since such attention will be repaid by doctrinal and analytic illumination.

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

After disposing of the due process objection to the reimbursement plan and turning to the Establishment Clause issue, Justice Black begins his opinion of the Court with an immigration narrative emphasizing the religious persecution related reasons why people came to America and how, ironically, they repeated the religious discrimination they came here to escape after they got here. Eventually, though, Black tells us, Americans came to

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11 For the Court’s rendition of the facts of the case, see Everson, 330 U.S. at 3.
12 Transportation to for-profit private schools was not included in the board of education reimbursement plan, but this was part of neither the taxpayer’s constitutional challenge to the plan nor the Court’s decision in the case. See id. at 5.
13 I will focus in this article only on the second ground.
14 Justice Black introduces the topic, saying, “A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches.” Everson, 330 U.S. at 8. A paragraph later he adds, “These practices of the old world were transplanted to and began to thrive in the soil of the new America.” Id. at 9.
oppose establishments of religion, concluding that, “It was these feelings which found expression in the First Amendment.” Black finds the religious liberty struggle in Virginia in the 1780’s, and especially the efforts of James Madison and Thomas Jefferson, as the culmination of this effort. Black concludes that Jefferson and Madison’s Virginia efforts also illuminate the meaning of the Establishment Clause.

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

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

The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for

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

16 Id.

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

18 He says, “This Court has previously recognized that the provisions of the First Amendment in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against government intrusion on religious liberty as the Virginia statute.” Id. at 13 (citations omitted).
entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa. In the words of Jefferson, the clause against the establishment of religion was intended to erect ‘a wall of separation between Church and State’.”

It is not at all clear here how all these conclusions flow from the foregoing historical narrative that Black presents, except perhaps as a summary of what Jefferson and Madison sought to make the rule in Virginia in the 1780’s. In any event, one might be forgiven from anticipating that even the board of education’s modest school bus fare reimbursement program stood no chance of being upheld after this lead up—but one would be wrong in this conclusion!

For shortly after the long list of “thou shalt nots” quoted above, Black says, “But we must not strike the statute down if it is within the state’s constitutional power even though it approaches the verge of that power.” Citizens have a right to freely exercise their religion and this means, according to Black, that they cannot be excluded from public benefits because of that free exercise of religion. He later adds that the constitution requires religious neutrality from government.

Several puzzling conclusions follow from the juxtaposition of this neutrality language with the equally categorical separationist language that precedes it. No historical support for the neutrality language is given by Black. In fact, no authority of any kind is proffered

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19 Id. at 15-16 (citation omitted).
20 Id. at 16.
21 He says, “On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude… the members of any… faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.” Id. (emphasis in original).
22 “That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used to handicap religions, than it is to favor them.” Id. at 18.
to back up these statements of law. This is in quite marked contrast to the historical narrative discussed above that Black gives to underpin his list of “thou shalt nots.” A yet bigger problem is that these two positions point to contrary results in the case. All the more the surprise among the dissenters when Justice Black uses this relatively brief and ahistorical public welfare/neutrality argument to hold the bus fare reimbursement program in the case constitutional in contradiction to the longer historical separationist argument that precedes it.

In dissent, not surprisingly, Justice Jackson finds the opinion of the Court to lead in one direction before, at the last minute, reaching the opposite conclusion.23 Moreover, according to Jackson, “The New Jersey Act in question makes the character of the school, not the needs of the children determine the eligibility of parents to reimbursement.”24 Echoing Black’s words and turning them against him, Jackson asserts that, “The state cannot maintain a church and it can no more tax its citizens to furnish free carriage to those who attend a church. The prohibition against the establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.”25 He then concludes that, “It seems to me that the basic fallacy in the Court’s reasoning, which accounts for its failure to apply the principles it avows, is in ignoring the essentially religious test by which the beneficiaries of this expenditure are selected.”26

23 “In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.” Id. at 19.
24 Id. at 20.
25 Id. at 24.
26 Id. at 25.
Justice Jackson also joins in Justice Rutledge’s dissent (as do Justices Frankfurter and Burton). Unlike Jackson’s solo dissent, this opinion is deeply based on an interpretation of Jefferson and Madison’s views on religious establishment, especially as expressed in the religious liberty struggles in Virginia in the 1780’s.\(^27\) In this it is like the first, main portion of Justice Black’s majority opinion, but its conclusion is, of course, quite different. Let us inquire as to why this is so, since both opinions have the same historical focus.

Justice Rutledge’s analytic aim in his Everson dissent is to define an establishment of religion\(^28\) in order to then determine the scope of the clause’s prohibition. He asserts, “Not simply an established church, but any law respecting an establishment of religion is forbidden.”\(^29\) He extends this broad interpretation to the meaning of the word “religion” itself in the clause.\(^30\) The combination of Justice Rutledge’s description of what constitutes an establishment of religion with his expansive definition of religion gives his understanding of the meaning of the Establishment Clause an exceedingly wide prohibitory scope.

He further emphasizes the importance of this issue and ties it to the constitutional founding, saying that, “For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general.”\(^31\) The political conflict over the Assessment Bill in Virginia in 1784-85 was the most important and meaningful event in the battle for

\(^{27}\) Justice Rutledge says, “No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summary of that history. The history includes not only Madison’s authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination.” \textit{Id.} at 33-34 (citation omitted).

\(^{28}\) “This case forces us squarely to determine for the first time what was ‘an establishment of religion’ in the First Amendment’s conception[.]” \textit{Id.} at 29.

\(^{29}\) \textit{Id.} at 31. He continues, “But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.” \textit{Id.} at 31-32.

\(^{30}\) “The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details.” \textit{Id.} at 33.

\(^{31}\) \textit{Id.}
religious freedom for Rutledge. Madison played a pivotal role in the debate over the bill and his views on that subject and on the establishment of religion generally are most clearly and comprehensively stated, Rutledge holds, in his Memorial and Remonstrance Against Religious Assessments. He says that, “[T]he Remonstrance is at once the most concise and the most accurate statement of the views of the First Amendment’s author concerning what is ‘an establishment of religion’.”

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

From this historical exploration, Justice Rutledge concludes that, “New Jersey’s action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck.” It remains for him to refute Justice Black’s public welfare argument in order to avoid Black’s decision upholding the constitutionality of the New Jersey bus

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32 “The climax came in the legislative struggle of 1784-1785 over the Assessment Bill.” Id. at 36.
33 Id. at 37.
34 “As the Remonstrance discloses throughout, Madison opposed every form and degree of official relation between religion and civil authority.” Id. at 39. And again, “With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom.” Id. at 40.
35 Id.
36 Id. at 41.
37 He says, “By contrast with the Virginia history, congressional debates on consideration of the Amendment reveal only sparse discussion, reflecting the fact that the essential issues had been settled.” Id. at 42 (citation omitted).
38 Id. at 46.
transportation reimbursement program. Justice Rutledge’s rhetorical strategy in answering Black is to cast the decision here as a stark either/or choice: either we prohibit all relation with and aid to religion by government or else we cannot prevent their complete commingling and a full place for religion in public welfare expenditures by government. Rutledge is confident that neither the clause’s history nor the popular will can support the second option.

He turns to potential line drawers who would permit some, but not all aids to religion based upon whether or not they are direct or indirect, large or small, essential or not important, and so on. We cannot, Rutledge suggests, meaningfully distinguish among different aids to parochial school education.\(^{39}\) In his mind, a dollar given for one form of aid to religion is functionally, and therefore constitutionally, indistinguishable from a dollar given for any other form of aid to religion. The two are fungible.

With this foundation, Justice Rutledge next asserts that, since no constitutional distinction can be made between different forms of aid to religion, acceptance of Justice Black’s public welfare argument is tantamount to the constitutional permissibility of any and all governmental aid to religion.\(^{40}\) Putting the issue and the alternatives in the starkest terms, Justice Rutledge asserts,

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

\(^{39}\) He says, “Payment of transportation is no more, nor is it any less essential to education, whether religious or secular, than payment for tuitions, for teachers’ salaries, for buildings, equipment and necessary materials. Nor is it any less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but no more necessary, items and payment for transportation.” \textit{Id.} at 48.

\(^{40}\) He says, “If the fact alone be determinative that religious schools are engaged in education, thus promoting the general and individual welfare, together with the legislature’s decision that the payment of public moneys for their aid makes their work a public function, then I can see no positive basis, except one of dubious legislative policy, to the state’s refusal to make full appropriation for support of private, religious schools, just as is done for public instruction.” \textit{Id.} at 49-50.
religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones.\footnote{Id. at 51.}

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

In truth this view contradicts the whole purpose and effect of the First Amendment as heretofore conceived. The “public function”—“public welfare”—“social legislation” seeks in Madison’s words, to “employ Religion [that is, here, religious education] as an engine of Civil policy.” Remonstrance, Par. 5. It is of one piece with the Assessment Bill’s preamble, although with this vital difference that it wholly ignores what that preamble explicitly states.\footnote{Id. This passage cites the Assessment Bill preamble, which reads in part, “Whereas the general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers…it is judged that such provision may be made by the Legislature, without counteracting its liberal principles heretofore adopted and intended to be preserved by abolishing all distinctions of pre-eminence amongst the different societies of communities of Christians[.].”}

In this way Rutledge identifies New Jersey’s bus transportation reimbursement program with the Assessment Bill’s provision for the payment of Christian teachers and ministers in the 1780’s. The upshot of this argument is that government may not aid religion in any way.\footnote{Rutledge says, “Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, large or small. “ Id. at 52-53.}

Although not “unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children,”\footnote{Id. at 58.} Rutledge insists that, “we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for
Rather than being unfair, Rutledge insists, “it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship[.]” For Rutledge, this command is not merely one of prudence or good sense, but one of constitutional principle.  

EQUAL FREE EXERCISE OF RELIGION

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

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45 Id at 59 (Rutledge cites to paragraphs 8 and 12 of the Remonstrance in support of this assertion).
46 Id.
47 He says, “This 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[.]” Id. at 63.
the meaning of the Establishment Clause and insufficient, on balance, to justify the conclusion it is employed to support.

These appearances change markedly, however, if we also consider what the justices do not say about Madison’s views, especially those in the Remonstrance, concerning religious freedom and equal rights of citizens. Recall Justice Rutledge’s statement that, “For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general.”48 He is here talking about the political and historical struggle and not about the underlying philosophical debate about the natural rights of citizens. One would not know from the quotations from the Remonstrance in these opinions that Madison rises above the political and rhetorical level to give a philosophical justification for his immediate political arguments or that this justification was one based on equal rights and freedom of conscience.49

Madison emphasizes freedom of conscience and equality of rights throughout the Remonstrance. In the very first paragraph, he proclaims that, “The religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.”50 He is also emphatic that this individual right of conscience is an equal right of all.51 He complains of the Assessment Bill that, “It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the legislative authority.”52 Madison sums his argument up in the last paragraph of the Remonstrance in this way,

48 Everson, 330 U.S. at 33.
49 See, e.g., James Madison, supra note 1 and accompanying text.
50 Id. ¶ 1, at 82.
51 In the fourth paragraph of the Remonstrance he says that, “[T]he bill violates that equality which ought to be the basis of every law[.]” Id. ¶ 3, at 82.
52 Id. ¶ 9, at 83.
Because, finally, “the equal right of every citizen to the free exercise of his Religion according to the dictates of conscience” is held by the same tenure as all other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the Declaration of those rights which pertain to the good people of Virginia, as the “basis and foundation of Government,” it is enumerated with equal solemnity, or rather studied eminence.53

From this we can see the basis for Madison’s view on religious liberty. He grounded his opposition to the Assessment Bill not in his personal preferences or political strategies, but on a natural rights philosophy which he shared with his fellow Virginians (as his quotation from the Virginia Declaration of Rights indicates) and fellow Founders. This philosophy underpins and illuminates not just his views on religious liberty and the Establishment Clause, but the Constitution generally. This approach has the virtue of showing the unity of constitutional rights and structures through basic shared values and underlying purposes.

This is not a claim that can be accurately made about the separationist views of the three Everson justices I am discussing here or of modern Establishment Clause doctrine generally. This is not an issue that is simply of historical importance, however. It also has a very important impact on the doctrinal dispute here. Recall that Justices Black and Rutledge both claim that Madison’s role in the Virginia religious liberty disputes of the 1780’s and, above all, Madison’s Remonstrance support, yea compel, strict separation between church in the modern day.54 Recall further that Black offers no historical support for his public welfare argument in favor of the New Jersey bus fare reimbursement program.

If we look at both the religious liberty struggle in Virginia in the 1780’s and the bus fare program in New Jersey in the 1940’s in the light of Madison’s equal liberty arguments in

53 Id. ¶ 15, at 84 (quoting from the Virginia Declaration of Rights).
54 See supra notes 14-19 and 31-36 and accompanying text, respectively, for the arguments of Black and Rutledge on the “unrelentingly absolute” views of Madison on the issue.
the *Remonstrance*, important contrasts and differences emerge. Madison’s objections to the Assessment Bill flow from the violations of equal rights and freedom of conscience it will cause. The Bill does not present a truly equal benefit to all—some Christian groups and all non-Christian and non-religious groups are excluded—so Madison and the others in the debate are simply not confronted with the question of a truly neutral, generally available public benefit. So, “the equal rights of every citizen to the free exercise of his Religion according to the dictates of conscience” are violated by this unequal scheme. It is the right of equality which is absolute and not separationism.

Circumstances are different in *Everson*, at least as the Court sees the relevant facts. A neutral, generally available public welfare benefit, such as the bus fare reimbursement program enforces, rather than violates, equality of rights and citizenship. No class or group of citizens is subordinated to any other. On the other hand, enforcement of the no-aid separationist “principle” would mandate discrimination against religion and violation of freedom of conscience; it would not guarantee equality here. Thus, Justice Black correctly links his public welfare theory to the Free Exercise Clause. But he fails to link this argument up with the clause’s framing history in contrast to what both he and Rutledge do with the separationist argument.

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55 It is fair here to note that neither is the Court actually confronted with such a benefit in *Everson*—transportation to for-profit private schools is not included in the bus fare reimbursement plan. See supra note 5. The Court, however, treats the program as if it were a neutral, generally available benefit.

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

57 Recall that Justice Rutledge calls this a matter of principle. See supra note 45-47 and accompanying text.

58 This is the “burden” Rutledge admits that the application of separationist doctrine imposes upon religious scruple. See supra note 44 and accompanying text.

59 See supra notes 20-22 and accompanying text.
Two criticisms of Rutledge’s account of separation flow from what I have argued here. First, it confuses a principle (equality of rights and citizenship) with an application of that principle in a particular historical setting (separation in the Virginia religious liberty debate in the 1780’s). In this way, it reduces establishment doctrine to a mechanical rule that sometimes subverts rather than protects the equality it was created to serve. Second, it creates a needless conflict with the Free Exercise Clause. For if, as Justice Black argues, the Free Exercise Clause prohibits government from excluding citizens from general public welfare benefits because of their religion, while the Establishment Clause, as Justice Rutledge argues, requires such an exclusion, “the Establishment Clause is said to require what the Free Exercise Clause forbids.”60 Both these shortcomings are avoided if we start from the basic philosophical premises of Madison’s Remonstrance, i.e., equal religious liberty and freedom of conscience, rather than from the application of this principle in the context of Virginia in the 1780’s.

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

This change complicates the application of the principles of the Remonstrance to contemporary cases in at least two ways. First, it requires a more nuanced determination of what bears upon, in either a positive or a negative manner, equality of religious liberty. Separation of church and state is not the default setting. Instead, the determination must be

made contextually. But the more significant complication is the rarely mentioned fact that the administrative state is not merely unanticipated by Madison, but that it contradicts his basic understanding of the nature and scope of the American republic. The man who wrote in *The Federalist* that, “The powers delegated by the proposed Constitution to the federal government, are few and defined.”61 neither contemplated nor approved of the broad powers possessed by the modern administrative state. The President who vetoed the Internal Improvements Bill,62 which would have funded roads and other public works, would not have accepted the constitutionality of independent agencies and broad federal regulatory powers.

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

62 In his veto message, President Madison says, “The legislative powers vested in Congress are specified and enumerated in the eighth section of the first article of the Constitution, and it does not appear that the power proposed to be exercised by the bill is among the enumerated powers, or that it falls by any just interpretation with the power to make laws necessary and proper for carrying into execution those or other powers vested by the Constitution in the Government of the United States.” James Madison, *Veto Message*, march 3, 1817, in 1 A COMPILATION OF THE MESSAGE AND PAPERS OF THE PRESIDENTS 584-85 (James D. Richardson ed., 1896).
enforcing separation regardless of the effect on equality of rights and conscience, the principle of equality of rights should prevail.

CONCLUSION

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