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I. Introduction

In 1925 in *Pierce v. Society of Sisters*,[1] the United States Supreme Court affirmed the right of religious schools to exist and of parents to enroll their children in them. In a series of cases since 1947, however, the Court has also held that any form of direct public financial assistance to such schools is forbidden by the establishment clause of the first amendment. Consequently the proponents of state assistance to religious schools have had to devise forms of aid that are sufficiently indirect to survive Supreme Court scrutiny. Over time approved aid has taken the form of textbook loans to parochial school students,[2] diagnostic and therapeutic services to such students performed by public employees off the grounds of the nonpublic school,[3] state reimbursement to parochial schools for expenses incurred in performing various testing and reporting services required by state law,[4] and, most recently, state tax deductions from gross income for tuition and other school expenses.[5] Current debates in Congress focus on a variety of tax credit and tax deduction plans which would offset at least partially the out of pocket expenses of parents in sending their children to private schools.

These attempts by Congress and the states to find permissible forms of *indirect* aid to parochial schools have been predicated upon Supreme Court decisions declaring *direct* aid to be unconstitutional. What I will argue in this article is that the Court's decisions disallowing direct aid are inadequately supported by the Court's own opinions. Those decisions are

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[1] 280 U.S. 510 (1925).

[2] Board of Education v. Allen, 392 U.S. 236 (1968).

[3] Wolman v. Walter, 433 U.S. 229 (1977).

[4] Committee for Public Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

[5] Mueller v. Allen, ___ U.S. ___, 103 S. Ct. 48 (1983).

based ultimately on the Court's belief that direct public financial support of religious schools will naturally and inevitably lead to serious, even fatal political division along religious lines, and that the establishment clause of the first amendment is designed to protect against just such an evil.

Yet the religious divisiveness argument so crucially relied upon by the Court is both historically and empirically doubtful. Judicial interpretation of the first amendment as forbidding all direct aid to religion oversimplifies, if it does not actually distort, the early history of the establishment clause. Further, the divisiveness argument is undermined by the experiences of other countries which have extended direct financial aid to religious schools and experienced none of the dire consequences forecast if such aid were made available in this country. Either the United States is singularly different from other countries in this regard or the political divisiveness argument is wrong. The evidence at this point, I suggest, indicates that the divisiveness argument is simply wrong.

II. First Amendment Interpretation

The establishment clause of the first amendment, made applicable to the states through the fourteenth amendment, states simply that "congress shall make no law respecting an establishment of religion . . . ."[6] As interpreted by the Supreme Court, however, these ten words mean this:

> Neither a state nor the Federal Government can set up a church. Neither can they pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. 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 the state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa. In the words of Jefferson, the clause was intended to erect a "wall of separation" between Church and State.

The words are Justice Hugo Black's. The case is *Everson v. Board of Education*,[7] decided in 1947 and the Court's first important pronouncement on the issue of aid to religious schools. *Everson* remains the leading precedent on establishment clause cases, and the histories of the first amendment put forward in that case by Justice Black and Justice Wiley Rutledge dominate establishment clause interpretation to this day.

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[6] U.S. CONST. amend. I, cl. 1.

[7] 330 U.S. 1, 15-16 (1947).

Everson involved a challenge to a New Jersey law and a school board policy passed pursuant to it which authorized reimbursement to parents of money spent for transporting children on public buses to Catholic as well as to public schools. The Court in a five to four decision, Justice Black writing for the majority, held that the law did not violate the establishment clause since the benefits extended to Catholic school students were part of a general program extending benefits to all school children regardless of their religious beliefs. In dissent, Rutledge argued that the prohibition on an establishment of religion "broadly forbids state support, financial or other, of religion in any guise, form or degree," including even the indirect aid authorized by the New Jersey statute.[8]

Despite reaching different conclusions on the merits of the case before them, Black and Rutledge agreed on one point—a point which commanded unanimous assent from the nine members of the Court and which has become crucial to all subsequent establishment clause analysis by the Court. The meaning and purpose of the establishment clause, they held, were properly to be found in the views of Thomas Jefferson and James Madison, particularly as these views were expressed in the struggle in Virginia which culminated in 1786 in the disestablishment of the Anglican church and the enactment of Jefferson's Bill for Establishing Religious Freedom.

The Black/Rutledge history of the establishment clause reads like this.[9] This country was largely settled by Europeans seeking to escape religious persecution at the hands of established sects. Despite this, religious establishments were erected in most of the original colonies, and dissenters here as earlier in Europe were hounded and persecuted and forced to pay taxes to support the established faith. These practices so shocked the "freedom-loving colonials,"[10] however, that they eventually took the necessary actions to protect the religious liberty of all persons.

While the sentiment to protect religious liberty was widespread throughout the colonies, the great stimulus and leadership for the movement came from Virginia. There in 1785-86 Thomas Jefferson and James Madison led a successful fight in the Virginia Assembly to defeat the renewal of a tax to support the established Anglican church.[11] At the height of that struggle James Madison published his famous "Memorial

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[8] *Id.* at 33.

[9] What follows is a greatly condensed summary of the histories offered by Justice Black, *id.* at 8-13, and Justice Rutledge, *id.* at 33-43.

[10] *Id.* at 11.

[11] "Conflicts in other states, and earlier in the colonies, contributed much to the generation of the Amendment, but none so directly as that in Virginia or with such formative influence on the Amendment's content and wording." *Id.* at 33-34, n. 11. Rutledge, J., dissenting.

and Remonstrance Against Religious Assessments."[12] In it he inveighed against any form of official connection between state and religion. The inevitable results of government established religions were cruel persecutions, religious strife, and the suppression of religious liberty.[13] Any official support of religion, financial or otherwise, and however slight, gravely endangered religious liberty for all persons.

As a result of Madison's efforts, the tax bill was defeated in committee. In its stead the Virginia Assembly enacted Jefferson's Bill for Religious Liberty, the preamble of which held that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical. . . ." The statute itself mandated "[t]hat no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief. . . ."[14]

From this history, Black and Rutledge reached similar conclusions. Black:

> [T]he 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 designed to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.[15]

Rutledge:

> 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. . . . That 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. In the documents of the times, particularly of Madison . . . (and) Jefferson . . . is to be found irrefutable confirmation of the Amendment's sweeping content. . . . 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.[16]

One other point needs to be mentioned about Black's and Rutledge's histories. The first amendment contains two religion clauses. In full they

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[12] ". . . the Remonstrance is at once the most concise and most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" *Id.* at 37. Rutledge, J. dissenting. The Remonstrance was so central to Rutledge's views on nonestablishment that he had the full text of that work appended to his opinion. *See id.* 63-72.

[13] In the Remonstrance, Madison in a famous phrase referred to the "torrents of blood . . . spilt in the old world" as established sects tried to maintain their supremacy. The phrase can be found *id.* at 69 (Rutledge, J., dissenting).

[14] Quoted by Black, J., *id.* at 13.

[15] *Id.* at 13.

[16] *Id.* at 33-34, 41 (Rutledge, J., dissenting).

read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Both Black and Rutledge interpreted these clauses as essentially coextensive, each designed to secure the same end—the preservation of individual religious liberty. Black, after citing previous decisions of the Court interpreting the free exercise clause as broadly protecting the religious freedom of individuals from infringement by actions of the state, stated with no further elaboration that "[t]here is every reason to give the same application and broad interpretation to the 'establishment of religion' clause."[18] Similarly Rutledge: "'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."[19]

For both Black and Rutledge, then, the point of the establishment clause was to safeguard individual religious liberty. Since any form of direct state support of religion was held by them *necessarily* and *inevitably* to threaten that liberty, such support was to be banned and barred forever.[20]

Everson *Examined: The History of the Religion Clauses*

There is substantial and persuasive scholarly opinion that Black and Rutledge, in relying almost exclusively on Madison's and Jefferson's actions in Virginia in interpreting the first amendment, and in collapsing the two religion clauses into one, have radically oversimplified the history and meaning of those clauses.[21] In particular Black and Rutledge ignore Madison's and Jefferson's actions in support of religion while each was a member of the federal government, choosing instead to focus exclusively on Madison's and Jefferson's actions while each was a member of state government. Black and Rutledge also overlook the evidence that the first amendment erected not one, but two only partially overlapping "walls of separation": one, the establishment clause, between the federal government and each of the states; the other, the free exercise clause, between

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[17] U.S. CONST. amend. I, cl. 1.

[18] *Id.* at 15.

[19] *Id.* at 40 (Rutledge, J., dissenting).

[20] "With Jefferson, Madison believed that to tolerate any fragment of establishment would be by so much to perpetuate restraint upon that freedom. Hence he sought to tear out the institution not partially but root and branch, and to bar its return forever." *Id.* at 40 (Rutledge, J., dissenting).

[21] In what follows, I have drawn on the following works: J. STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, §§ 1871-79 (1891); HOWE, THE GARDEN AND THE WILDERNESS (1965), especially chapter 6; W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1964); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371; W. BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY chs. 1 and 2 (1976); J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION (1971). I have drawn particularly heavily on the recent work by R. CORD, SEPARATION OF CHURCH AND STATE (1982), especially chapters 1-3.

the federal government and each individual citizen. In this interpretation the establishment clause embodies a principle of federalism. By it Congress was forbidden to establish a national religion or to disestablish any state religion. If Congress had no power to disestablish any state religion, it certainly had no power to interfere with state actions which aided religious enterprises generally. Finally, there is substantial evidence that neither clause was understood, either at the time of the adoption of the first amendment or long thereafter, to forbid direct nonpreferential public support of religion even by the federal government, despite Justice Black's claim to the contrary.

In support of each of these claims, consider the following:

1. In 1775 nine of the thirteen colonies had established churches: the Anglican Church in Virginia, Maryland, South Carolina, Georgia, parts of New York and nominally in North Carolina; the Congregationalist Church in Massachusetts, Connecticut and New Hampshire. By the time of the Constitutional Convention in 1787, Virginia, Maryland, New York and North Carolina had, through their own political procedures, peacefully disestablished their churches. Georgia and South Carolina got rid of their establishments in 1790. Connecticut held on to its establishment until 1818, New Hampshire until 1819, and Massachusetts until 1833. There was never any suggestion after the adoption of the first amendment that any of these establishments were unconstitutional. The first amendment simply did not apply to them.

2. Several state ratifying conventions, in calling for a Bill of Rights to be added to the Constitution, urged in particular that religious freedom be guaranteed. The specific language of these proposals is telling. Maryland proposed the following amendment: "That there be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."

Virginia proposed this: ". . . all men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others."

And New York: "That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion, according to the dictates of conscience; and that no religious sect or society ought to be favored or established by law in preference to others."[22]

North Carolina and Rhode Island passed similar resolutions. It is worth noting here that Virginia, New York and North Carolina had just recently disestablished their churches, and Rhode Island never had a state

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[22] *See* R. CORD, *supra* note 21 at 6-7. Cord's citation is to J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION (1901), various volumes and pages.

establishment. Yet none of these states framed their proposals in terms that would deny to the newly created federal government all power to aid religions. What was explicitly denied to the federal government in these proposals was only the power to *prefer* one religion over another.

3. Consistent with the proposals from the various states, Madison's original wording of the religion clauses was this: "The Civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of Conscience be in any manner, or on any pretext, infringed."[23]

During the course of the debates in the First House of Representatives, Roger Sherman of Connecticut questioned the necessity of a religion clause "inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishments." Madison is recorded as having responded in the following way:

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the Laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the language would admit.[24]

Madison's own interpretation of the meaning of the establishment clause, then, expressed while a member of Congress and as recorded in *The Annals of Congress*, shows that it was intended by its author only to prevent the establishment and forced observance of a *national* religion.[25] Furthermore Madison claimed that his amendment accurately reflected the proposals of the state ratifying conventions. Given the explicit wording of those proposals, Madison's amendment can be interpreted only to

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[23] 1 ANNALS OF THE CONGRESS OF THE UNITED STATES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 434 (J. Gales, Sr., comp. 1834).

[24] ANNALS OF CONGRESS, *supra* note 23, at 730.

[25] In the debates in the House, Madison defended his motion to include an explicit prohibition against a "national religion" in this way. "He believed that the people feared one sect might obtain pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word 'national' was introduced, it would point the amendment directly to the object it was intended to prevent." Elbridge Gerry, however, objected that this phrasing suggested that the government was a national, not a federalist government. Madison withdrew his motion, but only after observing that the words "no national religion shall be established by law" were not meant to imply that the government was a national government. I ANNALS OF CONGRESS *supra* note 23, at 731.

forbid Congressional aid which *preferred* one religion or religious sect to another.[26] It cannot be interpreted broadly to forbid nondiscriminatory, nonpreferential federal aid without doing serious violence to Madison's own words.

4. The same first House of Representatives, the day after it recommended the first amendment in its current wording to the states for ratification, proposed a resolution asking President Washington for a Thanksgiving Day Proclamation. The resolution asked that the president ". . . recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity peaceably to establish a Constitution of government for their safety and happiness." Madison is not recorded as having ob-

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[26] The debates in the Senate on the religion clauses appear to be inconsistent with the "no preferential aid" theory. The version sent to the Senate by the House in August 1789 read "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." On September 3, 1789, the Senate debated and defeated a series of amendments to the House-passed version. It first defeated a motion striking the words "religion, or to prevent the free exercise thereof," and inserting "one religious sect or society in preference to others." If then defeated a substitute amendment "Congress shall not make any law, infringing the rights of conscience, or establishing any religious sect or society." If defeated "Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed." It voted down the amendment as it had been received from the House. Finally the Senate passed the House version after deleting the final phrase "or to infringe the rights of conscience."

On September 9, however, the Senate entertained and passed a motion to consolidate several of the amendments received from the House. The motion recommended the following: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances." It was this version which was finally sent to a House-Senate conference committee. *See* JOURNAL OF THE SENATE, Volume I, 1st Congress, 1st Session 1789 (1977) at 116-17, 129.

Unfortunately there is no record of the reasons and arguments offered by the members of the Senate for these various actions. Neither the I ANNALS OF CONGRESS, nor the I JOURNAL OF THE SENATE, records the debates on the religion clauses in the Senate in the same kind of detail as the debates in the House are recorded. No firm conclusions can therefore be drawn from the actions of the Senate, though their *possible* inconsistency with the "no preferential aid" theory should be noted.

The following, however, muddies even further the issue with regard to the Senate. In 1853 the military chaplaincy programs established by the First Congress came under attack in the Senate as a violation of the establishment clause. A report of the Senate Judiciary Committee, however, concluded that the phrase "an establishment of religion" referred only to:

> the connexion with the state of a particular religious society, by its endowment, at the public expense, *in exclusion of, or in preference to*, any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship, or religious observance. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely provided. S. Rep. No. 376, 32d Cong., 2d Sess. (1853) (emphasis supplied).

jected to the resolution. As president he himself issued four similar Thanksgiving Day proclamations.[27]

5. In one of its first acts the first House of Representatives elected a chaplain. The first House also authorized the president to appoint and support chaplains for the military. Madison again is not recorded as having objected to either.[28]

6. Thomas Jefferson, while president, refused to issue presidential proclamations of thanksgiving to God on the grounds that the Constitution gave to the federal government "no power to prescribe any religious exercise, or to assume authority in religious discipline. . . ." Such power said Jefferson, "must then rest with the States, as far as it can be in any human authority."[29]

Although he refused to issue Thanksgiving Day proclamations on the grounds that the federal government had no such authority delegated to it by the Constitution to do so, Jefferson was apparently under no such felt constraint when it came to providing federal support for the missionary activities of particular churches. In 1803 Jefferson sought Senate ratification of a treaty with the Kaskaskia Indians. Most of the Kaskaskia tribe were Catholics and "much attached" to their religion. One of the conditions for the transfer of Kaskaskia land to the federal government was that:

> [T]he United States will give annually for seven years one hundred dollars towards the support of a priest of that religion, who will engage to perform for the said tribe the duties of his office and also to instruct as many of their children as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in the erection of a church.[30]

Displaying admirable impartiality, Jefferson also approved three extensions of an act first passed in 1796, during the presidency of George Washington, "regulating the grants of land appropriated for . . . the society of the United Brethren for propagating the gospel among the heathen." By this act the United Brethren were given in trust tracts of land in Ohio in order to spread Christianity among the Indians. Jefferson saw nothing unconstitutional in the act or in its several extensions, just as he saw nothing unconstitutional in the Kaskaskia treaty.[31]

7. What of Jefferson's famous "wall" metaphor? On 1 January 1802

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[27] R. CORD, *supra* note 19, at 51-53.

[28] *Id.* at 53-55.

[29] Jefferson broke with the tradition of Washington and Adams in issuing Thanksgiving Day proclamations for reasons he expressed in 1808 in a letter to a clergyman. The letter is reprinted *id.* at 40.

[30] As cited *id.* at 38.

[31] *Id.* at 41-45.

Jefferson wrote the following in his famous letter to the Danbury Baptists:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church and State.[32]

Given Jefferson's actions as president in extending direct federal financial assistance to both Catholic and Protestant missionary activities, what he says in the Danbury letter cannot be interpreted to mean that Jefferson would prohibit such aid. If it is so interpreted then Jefferson is guilty of a flagrant self-contradiction. But such an interpretation is unnecessary. We know from Jefferson's later writings that he considered "the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." Religious exercises, especially prayer, should be determined, said Jefferson, by each religious society "according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it."[33]

The Danbury Letter, then, must be understood to emphasize the free exercise of religion, that the government may not force a man's conscience in matters of faith and worship. It cannot without distortion of Jefferson's actions as president be interpreted, as Justice Black did in *Everson*, to prohibit aid, direct or indirect, financial or otherwise, to religions or religious sects, as long as that aid is given nondiscriminatorily.

These actions of Madison and Jefferson as members of the federal government suggest a historically more accurate interpretation of the religion clauses, one which also helps to make greater sense of the way in which the fourteenth amendment is said to incorporate religious liberty and protect it from violation by the states. First, the historical evidence is consistent only with an interpretation of the establisment clause as prohibiting the federal government from establishing a national religion or from extending preferential treatment to one religion or religious sect over another. Further the ban on laws "respecting an establishment of religion" left the federal government without power to affect *state* actions which either established or preferred one religion over another. In effect the clause gave to each state a right enforceable against the

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[32] Quoted in L. PFEFFER, CHURCH, STATE AND FREEDOM, (rev. ed. 1967) at 133. Original source: PADOVER, THE COMPLETE JEFFERSON (1943) at 518-19.

[33] *See supra* note 15.

national government to make its own laws respecting religion, consistent with the requirements of its own constitution. The establishment clause, as Madison and Jefferson clearly recognized, was a recognition of the principle of federalism. Religion was a matter the federal constitution reserved to the states.

Second, the free exercise clause gave to individual *persons* a right enforceable against the national government to be free from coercion in matters of belief and conscience. But that clause, again in recognition of the principle of federalism, did nothing to protect the individual from religious coercion or stigma by the states. It created no personal right enforceable against the state.

It is this distinction between the establishment and free exercise clauses that is crucial to a proper understanding of the doctrine of incorporation. In 1940 the Supreme Court in *Cantwell v. Connecticut*[34] held for the first time that the free exercise and establishment clauses were applicable to the states by way of the word "liberty" in the due process clause of the fourteenth amendment. That clause reads ". . . nor shall any State deprive any person of life, liberty or property without due process of Law." In *Cantwell* the only type of establishment that was incorporated by the fourteenth amendment was "compulsion by law of the acceptance of any creed or the practice of any form of worship"[35] —that is, actions by the state or any agency acting under color of state law which directly interfered with the *religious liberty of persons*. In *Everson*, however, the Court went well beyond the *Cantwell* interpretation to hold that *any* state action aiding religion was unconstitutional. There was no need to *show* a clear effect on the liberty of persons. That effect was simply taken for granted. Recall Justice Black's words: "cruel persecutions are the inevitable result of government established religions," which echoed the words of the "Memorial and Remonstrance," in which Madison referred to the "torrents of blood . . . spilt in the old world" because of the relationship of church and state.

If the establishment clause is understood as embodying a federalist principle by giving each *state* an enforceable right against the federal government, the fourteenth amendment simply cannot incorporate it *per se*. To do so would mean that each state would have an enforceable right not only against the federal government, but also somehow against itself. Moreover, the language of the fourteenth amendment refers to the rights of *persons*; it gives to persons the same rights against the states that they had been given against the federal government by the first amendment. And those include the right to be free from government-imposed coer-

[34] 310 U.S. 296 (1940).
[35] *Id.* at 303.

cion or stigma on account of religious beliefs. Properly understood, then, the fourteenth amendment forbids only *liberty-infringing* acts of the states. It does not forbid acts which aid religious enterprises *but do not violate individual religious liberty.*

Everson, however, asserts that all acts which aid religion will inevitably result in violations of the religious liberty of persons. Is that assertion true, or even reasonable? It is to that inquiry I now wish to turn.

III. The Political Divisiveness Argument

In the course of its establishment clause decisions, the Court has formulated a set of criteria or tests to be applied to legislation which bears on religion. What has come to be known as the "tripartite test" was formally announced in *Lemon v. Kurtzman*: "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.'"[36]

The first two parts of the test derive from orthodox establishment clause interpretation beginning with *Everson*. These two parts of the test are based on the assumption that while the first amendment erected a "wall of separation" between church and state, it did not forbid incidental aid to religion as a consequence of, for example, legitimate public welfare legislation as in *Everson*. The third part of the test, that of nonentanglement, was first introduced in *Walz v. Tax Commission*,[37] a Supreme Court case which upheld the constitutionality of tax exemptions for churches. In announcing the decision of the Court, Chief Justice Burger stated: "Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree."[38] This was followed by a vague allusion to the "hazards of government supporting churches," and there Burger let the matter lie. In his concurring opinion Justice Harlan picked up on the entanglement issue also, noting that "[w]hat is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point."[39]

In *Lemon* Chief Justice Burger used the nonentanglement test for the first time to strike down legislation benefiting parochial schools. At issue

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[36] 403 U.S. 602, 612-13 (1971).

[37] 397 U.S. 664 (1970).

[38] *Id.* at 674.

[39] *Id.* at 694.

were Rhode Island and New York statutes which provided direct financial assistance to such schools. In his opinion for the Court, Burger quickly concluded that the purpose behind these statutes was not to advance religion but rather to enhance the quality of secular education afforded students in church-affiliated schools. He then skipped over the second part of the test, that of primary effect, saying it was not needed to resolve the cases before the Court, "for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[40]

In dictum Burger then elaborated at length on the nonentanglement test. He first noted the extensive state surveillance of school records and curriculum content required by the statutes. This surveillance, he said, created "a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[41] Of equal if not greater concern, however, was "the divisive political potential of these programs:"

> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have states or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The histories of many countries attest to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.[42]

Burger cited no countries where such "hazards" were apparent. Instead he concluded his analysis of entanglement by saying: "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."[43]

The inevitability of political division along religious lines has become

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[40] 403 U.S. at 613-14.

[41] *Id.* at 620.

[42] *Id.* at 622-23.

[43] *Id.* at 623.

an article of faith for the contemporary Court. The belief that "cruel persecutions are the inevitable result of government established religions" (*Everson*), that church-state relations are "pregnant with dangers" (*Lemon*) that will "strain a political system to the breaking point" (*Walz*)—these are articles of faith for those who advocate a strict institutional separation of church and state. The apocalyptic language of the modern Court is solidly in the "torrents of blood" tradition begun by Madison in the "Memorial and Remonstrance."

But the divisiveness argument should not be simply a matter of faith. As stated by the Court it embodies a claim—any state support of religion, including support of religious schools, will lead to serious political division along religious lines—to which empirical evidence is relevant. And the available evidence establishes a strong presumption that this argument, despite the tenacity with which the Court clings to it, is false.

Given the particular relevance of the historic experience of Europe—it was the situation in Europe, especially in England, to which Madison was referring in his "torrents of blood" passage—a look at current church-state relations in the field of education there seems particularly appropriate. Those relations are, as we shall see, thoroughly unconstitutional according to orthodox establishment clause interpretation in this country. As we shall also see, the political outcomes of such "unconstitutional" arrangements lend no support to that orthodoxy.

State Aid to Church Schools in Europe

On 3 September 1953 the European Convention on Human Rights came into force. Eighteen nations of Europe are signatories (France and Switzerland are the major non-signers). Article 9 of the Convention guarantees each person's "freedom of thought, conscience and religion," subject only to such limitations as are necessary "in the interests of public safety, for the protection of public order, health or morals, or for protection of the rights and freedoms of others." Article 2 of the First Protocol (or addition) to the Convention, states the following:

> No person shall be denied the right of education. In the exercise of any functions it assumes in relation to education and to teaching, the State shall protect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

In accordance with this requirement of the Convention, the states of western Europe provide extensive direct aid to religious schools. What follows is a brief survey of state aid programs in Europe. The following table presents the information in even briefer form.[44]

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[44] The data are taken from Rust, *Public Funding of Private Schooling: European Respectives*,

WESTERN EUROPEAN PRIVATE SCHOOLS:
FINANCIAL SUBSIDIES, TEACHERS' SALARIES, AND TEACHER COMPETENCE REQUIREMENTS
FOR SCHOOL RECEIVING STATE FINANCIAL AID

Country	Percentage of Running Costs in Relation to Public Schools	Teachers' Salaries in Relation to Public Schools	Teacher Competence Requirements	Percentage of Private School Enrollment
Belgium	100%	Must be equivalent	Must be certified	54.2
Denmark	85%	Must be equivalent	None	6.1
England	85-100% depending on degree of state control over curriculum and teachers	Must be equivalent	Must be certified	21.0
France	Up to 100% depending on degree of state control over curriculum and teachers	Must be equivalent	Teachers must be equally competent	16.2
Italy	Subsidies given to schools and pupils	Those of equal status must be equivalent	Equal status schools must be certified	6.7
Netherlands	100%	Must be equivalent	Must be certified	70.6
Norway	85%	Must be equivalent	Must be certified	1.5
Spain	36-100% depending on whether school serves working class, middle class or upper class children			41.7
Sweden	School by school decisions	Must be equivalent	Must be certified	1.5
West Germany	77-98% depending on laender	Must be equivalent	Must demonstrate equivalent competence	3.8

Norway and Denmark currently provide private schools with 85 percent of their running costs. Sweden has resisted universal funding but still provides substantial support to most private schools. In each of these countries the public schools reflect the dominantly Lutheran religious orientation of the people, and religious groups are disinclined to establish their own schools. Only an estimated 1.5 percent of students attend private schools in Norway and Sweden. In Denmark the figure is 6.1 percent.

The two countries with the highest percentages of private school enrollment are Belgium and the Netherlands with 54 percent and 70 percent of their respective school populations in private schools. Since 1959 Belgium, which is 90 percent Catholic, has required that a "neutral" (i.e. public) school and a Catholic school be available to each child. The child's family may then choose which school the child will attend. Since 1920, the Netherlands has financed private education on the same basis as public education, requiring, as does Belgium, only that private groups put up 15 percent of the cost of building a proposed school. Neutral schools now enroll about 29 percent of Dutch children, Protestant schools 27.5 percent, Catholic schools 39.6 percent, and other private schools 3.5 percent.

The picture is similar in other Western European countries. In West Germany, with four percent of its enrollment in private—mostly Catholic—schools, the amount of public aid to these schools varies from 77 to 98 percent of operating costs. Spain, with 41.7 percent of its students in private, again mostly Catholic, schools, subsidizes these schools on a sliding scale: working class schools receive 100 percent of costs, middle class schools 68 percent, elite schools 36 percent.

France, despite refusing to sign the Human Rights Convention, tailors the amount of aid to private schools to the amount of control the state exercises over teachers and curriculum. Approximately 16 percent of French children attend private, predominantly Catholic, schools. Currently 98 percent of French Catholic schools have entered into what are called "Contracts of Partnership" with the state.

England, like France, varies the amount of aid according to how much control the state exercises over curriculum and teachers. Approximately 21 percent of pupils in England attend church-affiliated schools. Of this number slightly more than half attend Church of England schools, 41 percent attend Catholic schools, with the rest attending Jewish, Methodist and other church-affiliated schools. Depending on the amount of state control, aid to these schools runs from 85 to 100 percent of oper-

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PRIVATE SCHOOL QUARTERLY 11-34 (Winter 1982). This table reproduces information contained in tables 1 and 5 of Rust's essay.

ating costs. The Education Laws of Wales, Scotland and Northern Ireland make similar provisions for state financing of religious schools.

As this brief survey indicates, the governments of western Europe provide substantial direct aid to religious schools. Over time the trend had been to increase the levels of support in exchange for increased state control over curriculum and teachers. Direct public financial support for religious schools, however, is not limited to the states of Western Europe. In Canada the provinces of Saskatchewan, British Columbia, Manitoba, Quebec, and Alberta provide public financial support through grants to private schools, with such grants becoming quite substantial in Quebec, Alberta and Saskatchewan.[45] Similarly Australia, despite article 116 of its constitution which states "[t]he Commonwealth shall not make any law for establishing religion, or for imposing any religious observance, or for prohibiting the free exercise of religion . . . ," provides extensive direct public support for private denominational schools, treating all such schools equally.

The subvention plans in these countries have brought in their train varying degrees of state control of teachers, salaries, teacher certification requirements and curriculum standards, thereby blurring the traditional distinctions between public and private schooling. That distinction is not, however, erased. Parents and private groups still retain substantial control over day-to-day operations within the guidelines established by the state. More important for our purposes here, these programs of direct aid to church-affiliated schools have not resulted in the dreaded political divisiveness along religious lines so feared by Justice Black and others who have accepted the *Everson* line of reasoning. Certainly whatever divisiveness may have been introduced by the issue of direct aid to church schools has proved to be manageable through ordinary political procedures. No "torrents of blood" have been spilled in any of these countries over this issue.

Direct public financial support of religious schooling in other Western countries, then, simply has not resulted in the intractable religious divisiveness and political strife so taken for granted by those united for separation of church and state in the United States. On the basis of this evidence, it seems reasonable to draw one of two conclusions: either the United States is singularly different from other countries in regard to matters of church and state (perhaps we are simply a more contentious people?), or the religious divisiveness/political incompetence argument is wrong. At a minimum, the empirical evidence appears to establish a strong presumption *against* the divisiveness/incompetence argument.

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[45] *Private Schools in Canada*, 11 EDUCATION CANADA 4 (1981).

This means that the burden of proof must be heavily on those who hold that argument to be true to *demonstrate* its truth on the basis of contemporary evidence, to demonstrate that the United States really is different from other countries which extend direct public aid to religious schools. Reiterated appeals to religious persecution in seventeenth century England or eighteenth century America will not do. "It is time enough for the rightful purposes of civil government," said Jefferson in the Virginia statute for religious freedom, "for its officers to interfere when religious principles break out into overt acts against peace and good order."[46] The occurrence of such "overt acts," at least in this period of our history, cannot simply be taken for granted in advance.

To summarize, the United States Supreme Court has since 1947 used two kinds of arguments to strike down legislation providing direct aid to religious schools. First, it has argued that such aid is contrary to the meaning and purposes of the establishment clause as definitively expressed by Madison and Jefferson. Second, it has argued that such aid will necessarily and inevitably lead to fatal political division along religious lines. The available evidence supports neither argument. And in the absence of such supporting evidence, the Court is not justifed in striking down such legislation. Alternatively stated, such legislation must be presumed constitutional unless and until the Court comes up with better arguments than it has to date.

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[46] THOMAS JEFFERSON, 1743-1826 (A. Bishop ed. 1971) at 57.