Beyond Original Intent:
The Reinvention of the *Everson* ruling by Constitutional Historians

By

Kalah A. Paisley

Senior Seminar
Professor John Rector
Western Oregon University
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Readers:
Professor Max Geier
Professor Ed Dover

Introduction

The debate over Church-and-State relations in the United States is full of conflicting interpretations. In 1947, with the 5-4 ruling of *Everson v. Board of Education*, the Supreme Court linked the Establishment Clause of the First Amendment with the enforcement powers the Fourteenth Amendment extended to the federal government.[1] This linkage extended the power of the Establishment Clause to include local and state governments. This case, therefore, restructured subsequent debate about the separation of Church-and-State.

The *Everson* case was part of a larger pattern of Constitutional incorporation in mid-20th century. The Court did not dispute the extension of the Establishment Clause to include all governments of the United States through the enforcement power of the Fourteenth Amendment. The Supreme Court's authority to incorporate different parts of the Constitution for the betterment of the public welfare also was not disputed. At issue, in this particular case, and in the whole Church-State issue, was the Supreme Court's interpretation of the Establishment Clause as part of the First Amendment. The *Everson* decision was a landmark case. An analysis of the pressures that led to this decision is critical to a true understanding of the Church-State issue. An analysis of these pressures will give evidence of the events surrounding the decision and help to create the historical context under which this decision was made, which will clarify the meaning of the role that this decision has played in Church and State issues.

In the *Everson* case, the Court reaffirmed that the First Amendment provided for a clear and distinct separation between the powers of Church and State. The Court was

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[1] Maureen Harrison and Steve Gilbert, eds. Freedom of Religion Decisions of the United States Supreme Court. (San Diego: Excellent Books: 1996), i

comprised of seven appointees from the Roosevelt administration, and two new appointees by President Truman.[2] Despite the agreement that the First Amendment clearly separated the Church and State, the Court was split on the extent of this separation and what exceptions to this separation existed, if any.

Two main schools of historical thought emerged after 1947, as legal historians explored the Establishment Clause and the effect of *Everson.* The non-preferentialist school advanced a narrow view of the Establishment Clause as merely prohibiting one faith from receiving preferential treatment from the government.[3] The strict-separationist school viewed the Establishment Clause in a broader sense. They saw the Establishment Clause as clearly establishing absolute separation between Church and State.[4]

These two schools of thought built on the premise of original intent. Authors in each school found documents written by the writers of the Bill of Rights to try and prove the original meaning of the Establishment Clause. Due to the diversity of sources, and disparate opinions of the "the Founders," authors in each school found evidence to support their interpretations of the Establishment Clause in these "original" sources. This traditional debate, however, ignores the larger issue of why this landmark case emerged in 1947 and why it was so influential then and later. They both ignored political pressures that encouraged the Court to consider this case, including such things as the

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[2] The Justices presiding over the 1947 Everson case, and the date which they were appointed: Chief Justice: Fred Vinson, June 24, 1946. Associate Justices: Hugo Black, August 19, 1937, Stanley Reed, January 31, 1938, Felix Frankfurter, January 30, 1939, William Douglas. April 17, 1939, Frank Murphy, February 5, 1940, Robert Jackson, July 11, 1941, Wiley Rutledge, February 15, 1943, and Harold Burton October 1, 1945. With the exceptions of Chief Justice Vinson and Justice Burton the Court was entirely appointed by President Franklin Roosevelt. Chief Justice Vinson and Justice Burton were appointed by Truman. www.supremecourtus.gov accessed 5/25/03

[3] Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction (New York:Lambeth Press, 1982)

[4] Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (New York: Macmillan Publishing Co: 1986)

continual struggle for power between the branches of government, as well as the incorporation of the Bill of Rights, including the religious clauses, through the power of the Fourteenth Amendment.[5]

A more promising line of inquiry for understanding the significance of the Everson decision builds from the historical context in which this case was decided. Legal historians cannot resolve the question of original intent. Historians can, however, restore the context in which the Court acted in 1947. This paper examines the social and political pressures at work in the late 1940s, when the Supreme Court heard and decided the *Everson* case, and it addresses an area previous historians largely avoided in their analysis of this case. To understand what the Supreme Court did in its 1947 *Everson* decision, it is imperative to understand the "why" behind the decision. Political tensions between the Executive and Judicial branches of government, as well as internal tensions on the Court, helped propel the *Everson* case and related Church-State issues onto the Court's docket at that particular juncture in time. The Court addressed these issues at an important time in the nation's history, in the beginning of the Cold War, during the reign of McCarthyism. This context makes it imperative to consider the case in relation to its in time if we hope to truly understand the case.

The *Everson* Case

[5] The two schools of historical thought surrounding the Church-State issue are addressed later in the section entitled The Two Schools of Thought. Two main sources of this Church-State debate are Robert L. Cord, whose book, Separation of Church and State: Historical Fact and Current Fiction, outlines the view of non-preferentialists, while the book The Establishment Clause: Religion and the First Amendment by Leonard W. Levy outlines the opposing view arguing for a broader interpretation of the Establishment Clause.

The court case *Everson v. Board of Education* stemmed from a New Jersey state law. The law required School Boards to use tax revenues to reimburse parents for the cost parents incurred using public transportation for transporting their children to and from school. This law applied to the parents of students who attended public schools, as well as those who attended parochial schools. The Board of Education for the Township of Ewing authorized a total of $8,034 to compensate parents for the cost of their children's transportation to school, of which $357.74 was paid to the parents of parochial school children.[6]

Arch Everson, a taxpayer of Ewing Township (near Trenton) denied, on Constitutional grounds, the right of the Board of Education to reimburse the parents of Catholic school children for the costs of transportation. The grounds under which Everson filed suit were that the taxes being paid to individuals violated the due process clause of the Fourteenth Amendment. He also argued that the law violated the First Amendment in its provision prohibiting any "law respecting an establishment of religion."[7] The New Jersey State Court supported Everson's contention, ruling that the State law was in violation of the Constitution. The New Jersey Court of Errors and Appeals reversed the lower court, stating that the law was in fact constitutional and did not violate the Establishment Clause. The Federal Supreme Court confirmed this reversal in its February 11, 1947 ruling *Everson v. Board of Education.*[8]

The Federal Supreme Court ruled 5-4 that the New Jersey statute did not violate the Constitution. Beyond that narrow finding, however, the majority of the Court

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[6] Wood, Lewis, "High Court Backs State Right to Run Parochial Buses." New York Times. February 11, 1947. pg. 31

[7] Everson v. *v. Board of Education for the Township of Ewing*. 330 U.S. 1, 5-18

[8] Wood, 31

affirmed that the Establishment Clause did indeed erect a barrier between the Church and the State that should not be violated. The Court ruled, however, that in this instance, the New Jersey law did not violate that separation. Justice Hugo Black wrote the majority opinion. Black argued that the Establishment Clause meant more than the traditional view that the government could not establish an official church. He argued that members of any faith cannot be excluded from enjoying the common benefits of public society no matter what their religion. According to the Court, to limit the reimbursement by the School Board to only those parents whose children attended public schools would be, in essence, a true violation of the Establishment Clause. If the State imposed such limits, Black argued, it would breach the wall of separation imposing prejudicial restraint on a member of a certain faith.[9]

Justice Wiley Rutledge wrote a dissenting opinion that the entire minority supported. His opinion stressed the minority's view that they were in agreement with the majority in recognizing a clear and high wall separating Church and State, but they believed that the actions of the New Jersey law clearly and definitively violated the Establishment Clause. Black's majority opinion, however, argued, "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[10]

Justice Black quoted one of the nation's founding fathers, citing Thomas Jefferson's famous phrase "a wall of separation between Church and State."[11] Though

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[9] *Everson* 16
[10] Ibid, 18
[11] Thomas Jefferson, "Letter to the Danbury Association," January 1, 1802; from Andrew Lipscomb and Albert Bergh's, The Writings of Thomas Jefferson Vol. 16.

the Court affirmed the decision of the lower court, ruling that the law was indeed constitutional, it also reconfirmed that a distinct wall separated the two great powers of Church and State. This concept established *Everson* as the foundation for future Supreme Court interpretations of the Establishment Clause.

The Debate Over Church and State

The First Amendment of the Constitution included two components of religious freedom: the Free Exercise Clause and the Establishment Clause. The Establishment Clause states simply, "congress shall make no law respecting an establishment of religion."[12] Historians continue to debate whether or not the Supreme Court, in its *Everson* decision, contradicted the original intent of those who initially drafted the Establishment Clause as one component of the First Amendment.[13]

The debate over the relationship between Church and State has a deep-rooted history. Between 1787, when the Constitution was penned, and 1789, when the First Congress sent the first twelve amendments to the states for ratification, the framers were involved in a contentious debate over the proper relationship between government and religion. Those involved in the ratification process were fearful that a government-backed religion might secure the power to persecute those who did not subscribe to their particular doctrine.[14] Individuals involved in the creation of the new government and of the First Amendment, including James Madison and Thomas Jefferson, hoped to separate

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[12] *Federal Constitution*, First Amendment

[13] For further discussion concerning this battle, see later section on the historiographic debate entitled, The Two Schools of Thought.

[14] *Everson v. Board of Education*, 9-10

these powers, thereby preventing the conglomeration of power found in England and many of the thirteen colonies.

The debate over Church and State did not end with the inclusion of the Establishment Clause in the First Amendment. The debate continued in the form of a dispute over what the founders intended by the Establishment Clause, and in the present circumstances, whether or not the Supreme Court, in the 1947 *Everson* case, adhered to the original intent of the First Amendment in its interpretation of the Establishment Clause.

This pre-occupation with original intent has blinded many historians to a deeper significance of the *Everson* case, and it has also prevented scholars from considering this case from within its own historical context. The pointed fight between two opposing sides has diverted attention from why the *Everson* decision was itself originally written. In their pre-occupation with the original intent of the Founders, historians have neglected the original intent of the 1947 Court, which was concerned with political and social pressures such as the doctrine of selective incorporation, as well as factionalism within the Court, that led to the *Everson* decision.

The Two Schools of Historical Thought

In the debate over the meaning of the Establishment Clause, the non-preferentialist school narrowly construes the meaning of the Establishment Clause. Subscribers to this approach argue that the authors of the Establishment Clause intended only to prevent the government from bestowing preferential treatment upon one particular church or religious sect, and no more. The non-preferentialists, such as Robert

Cord and John Coughlin, argue that any further application of the Establishment Clause is a gross exaggeration of the original intent.[15] Scholars of the strict-separationist school of thought hold a broader view, arguing that the Establishment Clause created a barrier between religion and government that could not be penetrated by any relationship between these two groups. This latter group argues that the *Everson* case finally put into correct perspective the original intentions of the writers of the First Amendment. This argument appears in the writings of Leonard Levy, Frank Swancara, and Leo Pfeffer.[16]

One non-preferentialist of note is Historian Robert L. Cord, who has argued that the Establishment Clause was intended to prevent preferential treatment among religions and that historical evidence supports the view that the *Everson* decision took the Establishment Clause out of context.[17] In Separation of Church and State: Historical Fact and Current Fiction, Cord argued that the interpretation of the Establishment Clause by the Supreme Court in 1947 directly contradicted the intentions of the writers of the First Amendment. Cord argued that the "high and impregnable wall" described by Justice Hugo Black in the Court's opinion in *Everson*, had no grounding in the original intent, and that it contradicted the true objectives of the Establishment Clause.

Cord's work relied on the remote past, presenting evidence that refuted the 1947 ruling by the Supreme Court. The book did not address the political and social pressures involved in the Supreme Court ruling of 1947. The historical evidence of letters and records written during the Constitutional debates informed Cord's conclusions about the intentions of the writers. Cord used evidence from the first American Presidents, those

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[15] Cord, 5

[16] Frank Swancara. The Separation of Religion and Government: The First Amendment, Madison's Intent, and the McCollum Decision: A Study of Separationism in America. (New York: Truth Seeker Company: 1950), 1

[17] Cord

that helped to write the amendments as well as those who served in office shortly after the amendments were made, in their management of religious issues. Cord argued that the actions and interpretations of Presidents such as George Washington, John Adams and James Madison do not match the later interpretations of the 1947 Court.[18] Their actions, Cord concluded, clearly indicated that the Establishment Clause was not intended to abolish all connection between religion and government, but merely to prevent the Federal Government from bestowing preferential treatment on one particular religion. Cord noted that Presidents George Washington, Thomas Jefferson, James Madison, John Quincy Adams, Andrew Jackson, and Martin Van Buren all "established" religious schools in the form of subsidizing missionary work among Native tribes.[19]

Cord, however, accorded these Presidents an authority not granted in the Constitution: why do the interpretations of the Presidents hold more legitimacy than Supreme Court decisions? On occasion, the actions of Presidents have been ruled unconstitutional by the Federal Supreme Court. Cord used the actions of these Presidents as evidence of what their views of the Establishment Clause were, and what their goal was in the First Amendment. The Court considers only its own precedent, not the actives of past Presidents, in its decisions. Whether correct or misguided, the actions of these Presidents therefore are completely irrelevant to the deliberations of the Court.

Cord used the example of the Presidents as well as the literature associated with the amendment-writing processes to conclude that the *Everson* decision veered sharply from the intentions of the First Amendment. By looking at how these individuals viewed their own amendment and their subsequent actions, Cord argued that one can understand

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[18] Cord, 52-53

[19] Ibid, 59. (For a comprehensive review of the connections between early Presidents and the establishment of religious schools, see Chapter 3, Revelations.)

what they thought when they wrote it, thereby clearly establishing the goals of the Establishment Clause.[20] According to Cord, the prohibitions of the Establishment Clause, according to Black's majority opinion, were complete fiction and in direct contradiction to the true meaning and intention of the First Amendment as illustrated by the historical evidence provided by primary historical documents, such as letters written by the Framers of the Constitution as well as those involved in the ratification process, and the recorded events of American history.[21]

Cord argued his non-preferential interpretations of the Establishment Clause in 1982. Nine years later, another non-preferentialist, John J. Coughlin, argued that the Supreme Court erred in its broad, sweeping interpretation of the Establishment Clause. Coughlin argued that to correctly adhere to the original Constitution, the Supreme Court and historians need to look back to the "true" intentions of the framers and the implications of their frame of mind when they penned the First Amendment.[22] This search is a very lofty goal, given the many conflicting views of what the Establishment Clause meant, even among those who wrote it.

Coughlin's work, like Cord's, focused entirely on the intentions of the authors of the First Amendment. He focused his rejection of the *Everson* decision partly on the relationship between society and religion in the late 18th century. The influence of religion on many of the authors of the Bill of Rights, argued Coughlin, is undisputed. It was an integral part of society and education, and those who penned the Establishment Clause accepted that fact; therefore, Coughlin argued, to consider any relationship

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[20] Cord, xiv

[21] Ibid, 111.

[22] John J. Coughlin. "Religion, Education and the First Amendment." America. Volume 168, Issue 17. May 15, 1993, pg. 12-16

between religion and government as prohibited by the First Amendment is a grievous error.[23] According to Coughlin, "the Framers never intended the Constitution to defile the religious understanding of the human person that prevailed in U.S. education."[24] Over the years, historians who embraced the views of non-preferentialism, among them Cord and Coughlin, argued that the *Everson* case, in its deviation from original intent, had this exact, heinous effect.

In stark contrast to the analysis of original intent by Cord and Coughlin, strict-separationist scholars such as historian Leonard Levy argued that the interpretation of the Establishment Clause by the *Everson* Court was true to the original intentions of the First Amendment. Levy contended that the preponderance of historical evidence supports this broad, sweeping interpretation of the Establishment Clause.[25] Levy wrote The Establishment Clause: Religion and the First Amendment, in 1986, four years after Cord published Separation of Church and State. Among historians of Constitutional Law there was an internal battle over the interpretation of the Establishment Clause, and Levy named Cord as his target. Levy lambasted non-preferentialists, among them Cord, who questioned the Court's reasoning in the *Everson* interpretation.[26] According to Levy, the Establishment Clause had always been interpreted in a manner according to the true intentions of the Founders of the First Amendment. To him, the only important aspect of *Everson* was that it incorporated the First Amendment, through the power of the Fourteenth Amendment, and therefore expanded the protection of the "wall of

[23] Ibid, 13
[24] Ibid
[25] Levy
[26] Ibid, xvii

separation" to include the governments of states and localities.[27] On this point, Levy followed Cord's strategy of arguing from the foundation of original intent, but Levy paradoxically faulted the non-preferentialists for relying too heavily on the original intent of the authors of the Establishment Clause. The Constitution, he argued, is not a document preserved completely in its original nature with an interpretation fixed for all eternity with no change in meaning. It is a "living document" that changes over time, as evident in the amendments made to it, and by the judicial interpretations of the original wording.[28] Despite his adamant refutation of the doctrine of original intent, Levy relied on that doctrine as much as the non-preferentialists.

The strict-separationist school originated long before Levy wrote in 1986. In 1950, three years after the *Everson* ruling, Frank Swancara wrote, The Separation of Religion and Government: The First Amendment, Madison's Intent, and the McCollum Decision: A Study of Separationism in America. According to the forward written by Godfrey Von Hoffe, the book's purpose was to defend separatism from an assault by those who wished to see the powers of the State and the Church fused.[29]

Swancara's book clearly defended the position of strict-separation and the dissenting opinion written by Justice Rutledge for the *Everson* case. To Swancara, Rutledge's view that the First Amendment erected a high wall that would be violated by any connection between the Church and the State accurately reflected past interpretations of the Establishment Clause by the Supreme Court.[30] With Swancara writing so soon after the ruling and within the context of McCarthyism, his view of public reaction is

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[27] Ibid, 149
[28] Ibid
[29] Swancara, iv
[30] Ibid, 1

important to this study. According to Swancara, the average citizen was in agreement with the Supreme Court decisions that upheld a strict wall, and they endorsed this view of the Establishment Clause.[31]

Swancara also argued that the Court's purpose in *Everson* was merely to expand the freedoms of the Establishment Clause and extend its protections to the states as well as the federal government. Because *Everson,* in essence, changed nothing on the national level, Swancara argued it was not in need of defending. This is important to the analysis of this historiographic debate: shortly after *Everson*, legal scholars argued that the *Everson* case changed only the incorporation of the freedoms defined under the Fourteenth Amendment. Though Swancara brought original intent into his argument, it was not the crux of his defense. His primary focus was that a defense of *Everson* and *McCollum*(1948)[32] was unwarranted, because the actions of the Court were in agreement with their previously held view of the Establishment Clause, and that *Everson* merely expanded the powers of that clause to the states.

Two years after Swancara's insistence that strict-separation was the true meaning of the Establishment Clause, Leo Pfeffer published Church State and Freedom.[33] Pfeffer looked at the broader issue of Church-and-State separation. He looked at how other countries had dealt with the issue as well as the history of the issue, within the United States.[34] He then examined the actual religious clauses of the First Amendment. He considered original intent, not in light of Everson, but on a broader scale. According to

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[31] Ibid, 18

[32] *McCollum v. Board of Education* 333 U.S. 203.(1948) This 1948 decision about religious instruction upheld the Everson view of a high impregnable wall of separation between Church and State.

[33] Leo Pfeffer. Church State and Freedom, (Boston: Beacon Press: 1953)

[34] Ibid, vii

Pfeffer, "in the minds of the fathers of our Constitution, independence of religion and government was the alpha and omega of democracy and freedom."[35]

Pfeffer followed Swancara's argument that the true issue and impact of *Everson* was that it incorporated the Establishment Clause with the enforcement power of the Fourteenth Amendment. He also stressed that the decision reaffirmed the Court's view that the First Amendment "prohibited the government from making laws that aid all religions as much as laws that aid one religion."[36] In this analysis, Pfeffer grasped the crux of the matter. Pfeffer and Swancara, writing shortly after the *Everson* decision, seemed clear on the meaning and power of the Establishment Clause, and the *Everson* decision. Historians in the 1980s, however, returned to original intent and lost sight of these earlier arguments.

Later Supreme Court decisions also help clarify the significance of *Everson* and the context in which it evolved into a landmark case after 1947. Through the decades of the 50s and 60s, majority opinions frequently cited the *Everson* case, as did dissenting opinions. In these opinions, the Court maintained that *Everson* merely defined the separation already present between the Church and the State, and they often sought to expand that definition. In the 1952 Supreme Court decision, *Zorach v. Clauson*, Justice Douglas acknowledged *Everson* in the majority opinion and wrote,

> There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' or religion are concerned, the separation must be complete and unequivocal.[37]

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[35] Ibid, 127
[36] Ibid, 564
[37] *Zorach v. Clauson*, 343 U.S. 306, 312

Beyond the majority opinion in *Zorach*, the dissenting opinion by Justice Black, with Justices Frankfurter and Jackson concurring, also fully recognized the effect and power of *Everson*. Justice Black wrote, "I mean also to reaffirm my faith in the fundamental philosophy expressed in *McCollum* and *Everson*."[38] The general philosophy of *Everson* was their agreed standard for defining separation of Church and State.

Chief Justice Earl Warren wrote a dissenting opinion in the 1958 Supreme Court decision *Beilan v. Board of Public Education*, in which he recognized that *Everson* established freedom of religion as a clearly guaranteed liberty.[39] In this manner, Warren substantiated and affirmed the decision of the Court ten years before. Four years later, in the 1962 decision of *Engel v. Vitale*, Justice Black wrote a majority opinion that linked the *Everson* view of the Establishment Clause with earlier arguments by James Madison and Thomas Jefferson affirming the clear prohibition of any connection between the Church and the State.[40]

The view that *Everson* affirmed separation between Church and State dominated the Court opinions throughout the second half of the century. Often, the Supreme Court seemed unsure of exactly how clearly the *Everson* case defined that separation. In the 1971 decision of *Lemon v. Kurtzman,* the Supreme Court laid the groundwork for the separation identified in *Everson*.[41] Chief Justice Warren Earl Burger wrote in that 1971 opinion, "Candor compels acknowledgement, moreover, that we can only dimly perceive the lines of

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[38] Ibid, 317-318
[39] *Beilan v. Board of Public Education, School District of Pennsylvania.* 357 U.S. 399, 412
[40] *Engel v. Vitale* 370 U.S. 421, 428
[41] Lemon v. Kurtzman 403 U.S. 602

demarcation in this extraordinarily sensitive area of constitutional law."[42] With this in mind the Court expanded *Everson* and created the Lemon test to measure whether or not relations between Church and State violated the First Amendment.

Though the Justices that made up the Court changed through the years, the Court continued to support the *Everson* decision. The Court recognized *Everson* as the landmark case that defined the separation between Church and State through the 1970s. In the *per curiam* decision of *Buckley v. Valeo* in 1975, the Court cited *Everson*, recognizing that, "the government may not aid one religion to the detriment of others or impose a burder on one religion that is not imposed on others, and may not even aid all religions."[43] These later views by the Court, citing the *Everson* precedent, clarify the intentions of the 1947 decision. The Supreme Court clearly recognized the wall of separation which prohibited interactions between Church and State, but later Courts continued to recognize the debate, unsure of how absolute that separation was. These later Courts began to redefine and expand *Everson*.

The Blinding Obsession with Original Intent

Both non-preferentialists and strict-separationists view original intent as the primary measure of the 1947 *Everson* ruling. However, to evaluate *Everson* only in the context of documents written around the time of the ratification of the Constitution

[42] Ibid, 612
[43] *Buckley v. Valeo* 424 U.S. 1, 92

ignores the nature of the Supreme Court and the contemporary context of its decisions. Regardless of the original intent of the Framers, the Court acted in the context of contemporary concerns in 1947. The authors of the Constitution recognized the important need for adaptation and therefore included a mechanism for amendments in the document itself. The Court also acknowledged the animation of the Constitution in its doctrine of Judicial Review, beginning in 1803 with *Marbury v. Madision*.[44] With the doctrine of judicial review, the Court assumed a direct role in adapting the Constitution to contemporary circumstances.

To fully grasp the issue of the relationship between Church and State in the latter part of the twentieth century, therefore, historians must step back from the narrow focus on original intent to consider the context of the decade of the 40s and the Supreme Court decision that transformed the meaning of the Establishment Clause of the First Amendment as interpreted in the Supreme Court rulings since *Everson*.

Politics of 1947

The overall context of 1947, including the makeup of the Supreme Court, political changes that had recently occurred, the postwar economy, the social implications of liberalism, and the beginnings of the Cold War all influenced the 1947 *Everson* decision. The Second World War had ended less than two years before, and President Truman was still adjusting to the governing legacy FDR had left behind. The Court that Truman's administration faced was a remnant of Roosevelt's Administration, complete with their internal bickering. This vestige of Roosevelt's legacy was a Court focused on selective incorporation and civil rights, important focuses of the *Everson* decision.

[44] *Marbury v. Madison*. 1 Cranch 137 (1803)

During the Great Depression, the Roosevelt Administration reconstructed the American government and its Courts, dramatically shifting the relationship of the government within the great society. The New Deal built on the premise that the state had a duty to encourage social and economic justice in the interest of the public, with an emphasis on promoting stability and harmony among conflicting interests.[45] Young idealistic lawyers flocked to Washington to join the fight for this "new liberalism", and FDR found support in many areas. This did not, however, include the Federal Courts, especially the Supreme Court. FDR found great opposition within the Supreme Court.[46]

By 1936, the Supreme Court had struck down or significantly limited the power of the majority of New Deal legislation, rendering the New Deal utterly ineffective.[47] To counteract the power of the Supreme Court to limit New Deal programs, the Roosevelt Administration proposed a “judiciary reorganization bill”, which would have changed the makeup of the Supreme Court, increasing the number of justices on the Court.[48] This “Court packing” bill never had much chance of being passed, but it had a great impact on the role of the Supreme Court in the following decades, in that it changed the direction and focus of the Supreme Court. As the judicial and executive branches struggled for power, the Supreme Court turned its focus to civil liberties, while the Roosevelt administration focused on economic issues.

FDR's reorganization bill prompted the Court to move more in the direction of considering social issues, such as Everson, rather than the economic issues of Roosevelt's programs. Constitutional historians refer to this shift as the Supreme Court revolution of

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[45] Kermit L. Hall, William M. Wiecek and Paul Finkelman, American Legal History: Cases and Materials. (New York: Oxford University Press: 1991), 457

[46] Ibid, 483

[47] Ibid

[48] Ibid

1937.[49] The cases involved in this revolution began with the case of *West Coast Hotel v. Parrish*, where the Court made it known that their focus would shift away from the constitutional question of economic regulation and focus instead on the protected guaranteed rights of individuals; those rights that were granted to all citizens through the Fourteenth Amendment.[50] This new focus on civil liberties was intended by the Court to shift the influence away from the Executive branch and to bring more power and control to the Supreme Court in their continuing struggle against the Roosevelt Administration. The Supreme Court thereafter avoided directly confronting FDR and began to focus on the issue of personal liberties, which had become increasingly more important since World War I. The Supreme Court's shift in this era is vital to an understanding of the *Everson* decision. The *Everson* decision was merely the Court's continuance of selective incorporation.

In the 1937 Supreme Court decision *Palko v. Connecticut,*[51] Justice Benjamin Cardoza wrote for the Court saying that any fundamental right guaranteed by the Bill of Rights was incorporated under the power of the Fourteenth Amendment to include the regulation of States, not just the Federal Government. He defined a fundamental right as that which is essential to the maintenance of 'ordered liberty.'[52]

The Supreme Court gained power in this era with the doctrine of selective incorporation. According to historian Melvin Urofsky, the Constitution did not give definitive provisions in what should be applied to states. The judges had to determine

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[49] Sheldon Goldman, Constitutional Law and Supreme Court Decision-Making: Cases and Essays. (New York: Harper and Row: 1982), 322

[50] Hall, 492

[51] *Palko v. Connecticut* 302 U.S. 319 (1937)

[52] Hall, 492

what they viewed, and what legal historians viewed to be a fundamental right.[53] With this new focus, the Supreme Court embarked on a quest, which continued into the era of the Vinson Court, for "total justice": the protection of individual liberties.[54] It was this quest, not a misguided interpretation of the First Amendment that led directly to the Court's decision in *Everson*.

Selective Incorporation and Supreme Court Strife

The Supreme Court's doctrine of "selective incorporation" began a new era of jurisprudence. Some opponents of the Court viewed incorporation as an over extension of the Court's role. Conservatives of political and legal circles argued that the Court had usurped power that justly belonged to the States, and that it had turned itself into a legislating body, by which they exceeded their Constitutional authority.[55] According to legal historian Kermit Hall, some law professors of the time saw the extension of civil liberty protection as the Supreme Court's attempt to, "usurp legislative power, with distorting the meaning of federalism, and with substituting their values for the original intentions of the Framers."[56] Who were these men who some argued were undermining the very nature of the federalist system?

Between the Supreme Court of 1937 and the *Everson* ruling one decade later, the makeup of the Court changed drastically. By the time Roosevelt died in 1945, he had filled the vacancies of the Supreme Court with people sympathetic to his political philosophies. He appointed an entirely new Supreme Court, with the solitary exception

[53] Urofsky, 86
[54] Hall 497
[55] Hall, 497
[56] Hall, 510

of Chief Justice Harlan Stone. Stone had served on the Court since 1925, having been appointed by President Coolidge.[57] Chief Justice Stone died on April 22, 1946. This left President Truman in the unique position of having to appoint a Chief Justice to a Court made up almost exclusively of Roosevelt appointees. Truman was an inexperienced foreign diplomat, and though this is seemingly unrelated to the Supreme Court it had a great deal to with the political and social undercurrents of the decade.[58] The uneasiness of Truman's presidency had a great impact on the Court and the decisions it made. He ultimately appointed Fred Vinson, a member of both Roosevelt's and Truman's cabinets, who presided over the Court that heard the *Everson* case.[59]

There was great internal strife on the Supreme Court in 1946. This internal strife had a great influence on Truman's appointment of Vinson, as well as the Court's decision in *Everson*. FDR had wanted to appoint Robert Jackson as Chief Justice following the death of Chief Justice Hughes, prior to World War Two. Justice Felix Frankfurter, however, convinced FDR to appoint a more conservative man than Justice Jackson, to serve as Chief Justice, given the impending war and their need for support. FDR appointed Harlan Stone Chief Justice, and gave Stone's seat as Associate Justice to Jackson. FDR promised Jackson the Chief Justiceship at the retirement of Stone. This was clearly a point on the mind of the Court when it came time for Truman to appoint the new Chief Justice. However, FDR was dead, and Truman did not feel that Jackson could unite the splintered court. [60]

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[57] Harrison, 14

[58] William H. Chafe. The Unfinished Journey: America Since World War II, fourth edition. (New York: Oxford University Press: 1999), 55

[59] Urofsky, 148

[60] Urofsky, 143

The strife within the Court was a huge issue. A reporter for the Washington Star reported the internal contentions of the Court on May 16th. She reported that the Court had been fractured since Black and Jackson's fight over Jewell Ridge. She reported that if Truman appointed Jackson as Chief Justice, both Justices Black and Douglas would retire.[61] One month later, Truman named Fred Vinson as Chief Justice.

Beyond the splintered Court, lingered the liberal legacy of Roosevelt. The liberal tendencies of the justices continued long after FDR, and were replayed on the Vinson Court and, subsequently, in the 1947 ruling of *Everson*. However, the question arises, if this court was so liberal, why did the decision uphold the New Jersey State Law requiring the reimbursement of bus fares paid by parents to get their children to parochial schools?

There are several possible reasons for the Supreme Court's decision to hear this case. In 1946, when the *Everson* case was heard, the Supreme Court had already determined that its primary purpose was to incorporate federally guaranteed liberties to be applicable to local and State governments. This movement of selective incorporation was intended to extend the Supreme Court's power. Given this context, it is apparent that it was not the issue of Church-and-State, but the incorporation of the guaranteed right against government-established religion. This is a vital point that is sorely missing from most historical analyses of the Everson decision.

The Supreme Court, in 1947, followed the policies of selective incorporation and furthered the protection of individual rights while advancing the power of the Court itself. Justice Felix Frankfurter supported Cordozo's position of incorporation, while Justice Hugo Black argued that the Fourteenth Amendment actually incorporated all of the Bill

[61] Urofsky, 143

of Rights.[62] Justice Black and Douglas developed a view of jurisprudence that privatized First Amendment rights. They argued extensively for an "absolutist" interpretation of the Bill of Rights protections, saying that the Bill of Rights barred all government interference.[63] These "absolutist" views extended to the First Amendment especially the Establishment Clause.

These were the issues dividing the fractured Court that sat in judgment of the *Everson* case. Agreement and solidarity were far from the minds of the justices as they considered the reach of the Establishment Clause; however, they all agreed there was a clearly defined barrier between the Church and the State. The majority opinion stated, "The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have several times been elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth."[64] Rutledge argued a similar view in the minority dissenting opinion. In the first paragraph of his dissenting opinion, Rutledge argued, "Neither so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia's great statute o religious freedom and the First Amendment, now made applicable to the states by the Fourteenth."[65]

This internal conflict over what should be incorporated by the Fourteenth Amendment was the issue that consumed the Court in the *Everson* case. The Court did not debate the "original intent" of the Constitution's Establishment Clause. The Justices

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[62] Urofsky, 36
[63] Urofsky, 37
[64] *Everson*, 14-15
[65] *Everson*, 29

all agreed that the Clause erected what they termed, "a wall of separation between Church and State." The simply disagreed on whether this protection was incorporated by the Fourteenth Amendment, and if it was protected, how intense was the protection, or "how high the wall".

Social Implications of *Everson*

Public reactions to the *Everson* case are important because the decision actually enhanced the government's ability to interfere with religion. This view is contradictory to the usual explanation of Everson, which argues that the Supreme Court single-handedly erected a large wall of separation. The magazine U.S. News and World Reports wrote about the case ten days after the decision was handed down.[66] The article argued that the case, as described by the majority's opinion, maintained religious separation by providing that the government could not discriminate based upon a person's faith. The article then went through the background of Supreme Court decisions that set up the relationship between Church and State.[67] According to the article, the decision blatantly supported the government's interaction with and interference in religious affairs, violating the Establishment Clause.[68]

Time Magazine reported a much different view of the *Everson* decision. According to this magazine, the Court was unable to solve anything in regard to the long-standing issue of the Church-State issue. The most interesting point in this magazine

[66] "Help to Church-School Pupils: Trend Set by Supreme Court: Ruling That Students Shouldn't Be Denied Assistance Because of Faith." U.S. News and World Reports. February 21, 1947, 18
[67] Ibid
[68] Ibid

article was the author's view that the Supreme Court was incapable of solving anything and had only proved that the issue of Church and State was far from resolved. The article predicted correctly, that the issue would be before the people for a long time to come.[69] This report also discussed the impact that this decision had on states, recognizing the incorporation of the Establishment Clause under the Fourteenth Amendment.[70]

Though these articles show two varying representations of the social comprehension of the Church-State issue and the power of the Establishment Clause, they help to explain the future trouble with the interpretation. These two different views, presented in two very prominent magazines, showed that there was no unifying view of the impact or power of the *Everson* decision. These socially constructed views of the decision help to put this vital case into the proper contemporary context.

Conclusion

What is clear from any analysis of the Everson decision and the overall scope of the Establishment Clause, is that over the years this issue has been hotly debated. What has been missing from the general analysis of the Everson case has been the contemporary issues surrounding the decision and influencing judicial priorities. The *Everson* case cannot be looked at only in terms of the original intent of the framers of the First Amendment.

What is more important than whether or not the Court's decision in *Everson* adhered to the intentions of the First Amendment, is the fact that the Supreme Court did make a decision with *Everson*. Why did they choose to make this decision? Was it their

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[69] Time Magazine. "Church and State" February 24, 1947. 49: pgs. 25
[70] Ibid, 26

intention to forever change the meaning of the Establishment Clause? The evidence, taken in context, suggests not. The intentions of the Supreme Court are found in the historical context surrounding the actual decision.

President Franklin Roosevelt's Court packing bill of 1936 had a direct impact on the state of politics in 1947 and the role of the Supreme Court. The Court changed its focus in 1937 to move away from their focus on Roosevelt's economic issues, and to focus more on social issues and Civil Rights. This Supreme Court Revolution of 1937 led to the social and political conditions present in the *Everson* case.

The Supreme Court had gained significant power as it began to interpret the extent of the Bill of Rights through the doctrine of selective incorporation. This focus on incorporating fundamental rights under the Fourteenth Amendment was a critical factor in the Court's decision to consider *Everson* in 1947. The Court was only marginally interested in the meaning of the Establishment Clause. The Court, however, wished to apply the Establishment Clause to the States, thereby extending the Court's power in the face of a Constitutional challenge from FDR and Truman. They were merely continuing on the pattern of incorporation when they ruled as they did in Everson. The majority opinion, as well as that of the dissenters, clearly indicates that the issue was incorporation and not the fundamental principle of the Church-State issue. Later historians erroneously reached back to original intent in an effort to explain this case, but it was the political and social context of the decision that held the true meaning and influence of the *Everson* decision.

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