Essays

"Engines of the Ruling Party": The Establishment Clause and the Power Politics of "Managing Diversity"[1]

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"Constitutional lawsuits are the stuff of power politics in America. The Court may be, and usually is, above party politics and personal politics, but the politics of power is a most important and delicate function, and adjudication of litigation is its technique."

– Attorney General Robert H. Jackson (1941)[2]

1. The phrase "engine of the ruling party" refers to the "test oaths" (loyalty oaths) used by Pennsylvania's "Constitutionalists" to "defend the state constitution of 1776 with its all-powerful, unicameral legislature that had been the vehicle for their ascent to power." OWEN S. IRELAND, RELIGION, ETHNICITY AND POLITICS: RATIFYING THE CONSTITUTION IN PENNSYLVANIA (2004). The phrase was coined by a "Citizen of Philadelphia," who asserted in the *Pennsylvania Gazette* of January 12, 1785, that test oaths "are as often made use of as engines of a ruling party, to entrap and punish such people as they suppose inimical to themselves." *Id.* at 225.

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2. ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS 287–88 (1941).

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INTRODUCTION

This Essay argues that the Supreme Court's Religion Clauses jurisprudence since *Everson v. Board of Education*[3] is best understood as part of an ongoing effort by the Court to "manage" the racial, religious, and cultural politics of the nation. Since its infamous decision in *Dred Scott v. Sandford*,[4] the Court's race and sex discrimination jurisprudence offers equally compelling examples of the ways in which the Justices have sought to sought to control—or "manage"[5]—the racial, ethnic, and cultural *composition* of the nation's major culture-forming institutions (i.e., to "manage diversity"). Its Religion Clauses jurisprudence, by contrast, offers the clearest examples of how it has utilized its Article III power to adjudicate to manage the *content* of the cultural "politics of power."[6]

The analysis begins with the Court's decision in *Everson* to "incorporate" the Establishment Clause and apply it to the states. The Justices had two options for approaching the incorporation question. The first was to view the Establishment Clause through a "doctrinal" lens and hold that the Fourteenth Amendment empowers the Court to assert preemptive judicial control over the religious environment of common spaces, such as parks, public buildings, and public squares, and common endeavors—including state and federally controlled or funded civic, educational, economic, and political institutions.

In this view, the Due Process Clause of the Fourteenth Amendment is a grant of "jurisdiction to prescribe"[7] (or to develop) a set of rules that permits trial courts to manage the outcomes of factional struggles within local, state, and federal political communities pertaining to matters "touching religion."[8] The "doctrinal" model of the Establishment Clause can be summarized as follows: "An 'establishment of religion' is government action that assists, approves,

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3. 330 U.S. 1 (1947).

4. 60 U.S. (19 How.) 393 (1857).

5. *See, e.g.*, David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., https://hbr.org/1996/09/making-differences-matter-a-new-paradigm-for-managing-diversity (last visited Aug. 23, 2023); Joan C. Williams, Rachel M. Korn & Asma Ghani, *To Build a DEI Program That Works, You Need Metrics*, HARV. BUS. REVIEW, https://hbr.org/2022/10/to-build-a-dei-program-that-works-you-need-metrics (last visited Aug. 23, 2023).

6. *See Everson*, 330 U.S. at 29 n.2 (Jackson, J., dissenting).

7. RESTATEMENT (THIRD) OF FOREIGN RELATIONS L. OF THE U.S. § 401 (AM. L. INST. 2022) ("The foreign relations law of the United States divides jurisdiction into three categories: (a) *jurisdiction to prescribe*, i.e., the authority of a state to make law applicable to persons, property, or conduct; (b) *jurisdiction to adjudicate*, i.e., the authority of a state to apply law to persons or things, in particular through the processes of its courts or administrative tribunals; and (c) *jurisdiction to enforce*, i.e., the authority of a state to exercise its power to compel compliance with law." (emphasis added)).

8. The phrase "touching religion" is drawn from New Hampshire's proposal that the Constitution be amended, as follows: "Congress shall make no laws touching religion, or to infringe the rights of conscience." *See* Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 518 (citing THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 202 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996)).

endorses, inculcates, supports, or in any way promotes any public or private expression of individual or communal religious commitments."[9]

The second option—the subject of this Essay—is the "cultural power-politics" model. It views the incorporation question through the lenses provided by the Fourteenth Amendment's Citizenship, Privileges and Immunities, Due Process, and Equal Protection Clauses.[10] It can be summarized as follows:

> An "establishment of religion" is a legally privileged group of citizens who use the power of the state to advance or defend their common interests in maintaining authority, influence, and control over the religious aspects and environment of a community's shared spaces and its culture-forming economic, educational, and political institutions.

Drawn from social anthropology, history, and politics, the power-politics model allows us to focus on the ways in which political factions use the power of the state, including that of the Court itself, to advance their common interests pertaining to matters "touching religion." Outside the Establishment Clause

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9. The *Everson* Court was unanimous on the doctrinal point; their disagreement was over how to apply it to the problem at hand: i.e., whether reimbursing parents for school bus transportation to private, nonprofit schools violated the Establishment Clause. The most succinct statement of the position summarized in the text is found in Justice Rutledge's dissent:

> The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed, or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Everson, 330 U.S. at 31–32, 33 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting). "Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form, or degree. It outlaws all use of public funds for religious purposes. Justice Jackson wrote separately to underscore the point:

> [T]he effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

Id. at 26–27 (Jackson, J., dissenting). The majority opinion in *Everson* held:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go 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 non-attendance.

Id. at 15–16 (majority opinion).

10. U.S. CONST. amend. XIV, § 1.

context, it is far more common to use the phrase "the establishment" in its cultural sense; that is, "a top elite with a largely homogeneous outlook on life, [and] quite similar cultural standards."[11]

An "establishment" can be religious in character, but it can also be social, economic, ethnic, racial, or cultural.[12] In James Madison's famous formulation, it is a faction; that is, "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."[13]

Factional politics were at the heart of the Constitutional Convention, central to the debates over the adoption of the Bill of Rights, and equally important in the debates over the adoption of the Civil War Amendments, including the Fourteenth Amendment. Since it is the Fourteenth Amendment that provides the jurisdictional basis for the Court to incorporate the First Amendment and apply it to the states, the political dynamics of these factional struggles is relevant not only to our understanding of the Establishment Clause, but also to our understanding of the incorporation doctrine itself.

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11. Erwin K. Scheuch, *The Structure of the German Elite Across Regime Changes*, *in* ELITE CONFIGURATIONS AT THE APEX OF POWER 91, 92 (Mattei Dogan ed., 2003). ("Currently, Germany does not have an 'establishment'—if we mean by this term a top elite with a largely homogeneous outlook on life, quite similar cultural standards, a limited pool from which members are recruited, and comparabel [sic] career lines."); *see* OWEN JONES, THE ESTABLISHMENT AND HOW THEY GET AWAY WITH IT 2 (2015) ("'The Establishment' is a term that is often loosely used to mean 'those with power who I object to.' This book will indeed suggest that there are groups of mostly unelected and unaccountable people who really do rule the roost, not simply through their shared wealth and power, but because of the ideas and mentalities that govern the way they behave. But you don't have to go far to find strongly held and wildly differing opinions about what the 'Establishment' is: what it represents, who constitutes it—and who is excluded from it."); LILY WOODRUFF, DISORDERING THE ESTABLISHMENT: PARTICIPATORY ART AND INSTITUTIONAL CRITIQUE IN FRANCE, 1958-1981, at 2 (2020) (noting that the French phrase *établir le désordre*, "to establish disorder," is "an apparently paradoxical proposition as, conventionally, the purpose of 'establishing' is to create a system, a set of laws, [or] a fund . . . so as to guarantee stability and order"; that she "invert[ed] Cadere's coupling so as to bring out another meaning that is contained within the concept of the original phrase"; and that "'Disordering the Establishment' calls attention to what is established at the official level").

12. The *Oxford English Dictionary* uses the term "the establishment" to refer to the following:

> 8(a). The ecclesiastical system established by law; more fully *Church Establishment*. Hence *the Establishment* often occurs as a distinctive name for the established church (esp. of England, Scotland, formerly Ireland), in contradistinction to the non-established churches or sects.
>
> 8(b). Esp. as *the Establishment*: a social group exercising power generally, or within a given field or institution, by virtue of its traditional superiority, and by the use esp. of tacit understandings and often a common mode of speech, and having as a general interest the maintenance of the *status quo*. Also *attributive*. . . .
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> 9(a). An organized body of men, maintained at the expense of the sovereign or of the state for a specific purpose; *originally* said of the military service, but applied also to the naval and civil.

Oxford Univ. Press, OED ONLINE, https://www-oed-com.proxycu.wrlc.org/view/Entry/64536?rskey=HP9WwT&result=2&isAdvanced=false (last visited Aug. 23, 2023).

13. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 1961).

The Framers of the Bill of Rights and the Fourteenth Amendment were politicians. They supported (or at least did not oppose) these amendments because it made *political* sense for them to do so. Seeking to understand the "original public meaning"[14] of the words used by those who framed and ratified these amendments is undeniably important, but so too is an understanding of the factional power politics during the drafting and ratification periods.

Properly understood, each clause in the Constitution was the means to a political end. Those who framed the Bill of Rights had political promises to keep. They understood that the task before them *as politicians* was (among other things) to quell the fears of factions who had well-founded fears that Congress would use its authority to define or impose preemptive rules defining the relationships of religious believers and the communities in which they live.[15]

The role of the Court as the "manager" of those factional power dynamics is the "power question" that serves as the focal point of this Essay.[16] Unpacking the "power question" requires two separate lines of inquiry. The first explores the jurisdictional basis for the Court's claim in *Everson* that the judiciary has preemptive authority under the Constitution and civil rights laws[17] to manage the outcomes of factional political infighting over matters touching religion. The second explores the source (or sources) available from which it might derive the rules of law that govern such disputes.

Part I explores *how* the Supreme Court has used the incorporation doctrine to convert the Establishment Clause from a limitation on federal power over matters "touching religion" to a source of preemptive federal authority to manage both the role and place of religion in society and the outcomes of factional power politics on issues of importance to political factions divided on such issues. Part II explores the "deep structure"[18] of the original Constitution.

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14. *See, e.g.*, Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 FEDERALIST SOC'Y REV. 26, 28 (2021) ("If the Constitution had granted to the federal government power over religion in any plenary sense, that could easily have prevented agreement in Philadelphia, and it certainly would have stirred enough trouble to prevent ratification of the Constitution by the designated minimum of nine states."); Stephanie H. Barclay, Brady Earley & Annika Boone, *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 507 (2019); Andrew Koppelman, *Phony Originalism and the Establishment Clause*, 103 NW. U. L. REV. 727, 728 (2009).

15. Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 881 (1986) (arguing that "[i]t is religion generically that may not be established").

16. The "power question" posed in the text concerns the power of the Court. It is distinguishable from the "power theory" then professor, now Circuit Judge Jay S. Bybee elaborated in Jay. S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 260 (2000) ("First Amendment rights are unique among those included in the Bill of Rights. . . . When government prohibits the free exercise of religion or abridges the freedom of speech or the press, it has acted outside of its authority; it has exercised power that is neither delegated to the federal government nor reserved to the states. The action is ultra vires, and the law is void.").

17. 42 U.S.C. § 1983.

18. The concept of "deep structure" is drawn from linguistics. *See* NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 16–17 (1969).

It argues that the Qualifications, Oath or Affirmation, and No Religious Test Clauses are guarantees of equal citizenship and protection. Each clause eliminates the one component of the hated religious conditions used by religiously motivated factions to ensure that they retain operational and ideological control of government operations and government-sponsored programs.[19] Like other explicit guarantees of equal citizenship and protection embodied in the text of the Constitution,[20] they provide a powerful lens through which to view the Court's jurisprudence[21] interpreting the specific guarantees of the Bill of Rights and the Fourteenth Amendment.[22] Part III takes a closer look at how *Everson*, a case that the Court itself viewed as little more than a garden-variety political dispute over the distribution of local tax dollars,[23] became one

19. *See infra* notes 138–46.

20. *See infra* notes 110–20.

21. I have argued this proposition elsewhere as applied to matters "touching religion." *See* Robert A. Destro, *By What Right?: The Sources and Limits of Federal Court and Congressional Jurisdiction over Matters "Touching Religion,"* 29 IND. L. REV. 1, 36–48 (1995). If, as I suggest in this Essay, principles of equal citizenship and equal protection are built into the structure of original Constitution, the Court's "reverse incorporation" of the Equal Protection Clause with respect to matters of race and other forms of discrimination is just as problematic as its current reading of the Establishment Clause. *See* Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 1015 (2002) (quoting Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 157 (1976) (arguing that the Equal Protection Clause prohibits laws and any official practices that "aggravates (or perpetuates?) the subordinate position of a specially disadvantaged group")) (discussing the difference between the "antidiscrimination" principle embodied in the Court's jurisprudence and the "antisubordination" principle that permits preferential treatment as a remedy for past discrimination notwithstanding federal legislation to the contrary); Jim Chen, *Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law*, 59 WASH. & LEE L. REV. 1203, 1204 (2002) (arguing that the Court has claimed power under the incorporated Equal Protection Clause at the expense of that granted to Congress); Eugene Doherty, *Equal Protection Under the Fifth and Fourteenth Amendments: Patterns of Congruence, Divergence and Judicial Deference*, 16 OHIO N.U. L. REV. 591, 620–35 (1989) (arguing that the Court has "treated differently the guarantee of equal protection as found in the fifth amendment from that of the fourteenth," and reviewing the federalism and separation of powers issues raised by that differential treatment); Bradford Russell Clark, Note, *Judicial Review of Congressional Section Five Action: The Fallacy of Reverse Incorporation*, 84 COLUM. L. REV. 1969, 1969 (1984) ("[R]everse incorporation is illegitimate in instances where its operation conflicts with the text, history, and structure of the Constitution.").

22. Professor Akhil Reed Amar observes:

> [T]he Fourteenth Amendment itself often seems to drop out of the analysis [of the Bill of Rights]. We appear to be applying the Bill of Rights directly; the Civil War Amendment is mentioned only in passing or not at all. Like people with spectacles who often forget they are wearing them, most lawyers read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what they see.

Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136–37 (1991).

23. The *Everson* majority frankly admitted that, from the perspective of the parties involved, *Everson* was a garden variety political dispute between local taxpayers over the use of local tax money. Everson v. Bd. of Educ., 330 U.S. 1, 6 (1947) ("The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need."). The dissenting opinion of Justices Rutledge, Frankfurter, Jackson, and Burton expressly rejects that proposition. *Id.* at 57 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting) ("This is not therefore just a little case over bus fares. In paraphrase of Madison, distant as it may be in its present

of the most significant cases in American constitutional history.[24] Part IV explores the Court's use of the "economic weapon" as its preferred method for "curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects."[25] The Court's post-*Everson* case law encourages political factions to view money as the weapon of choice in their efforts to acquire or achieve cultural and social control of the content and environment of the nation's most important culture-forming institutions and public spaces.

The Essay concludes by observing that *Everson* "is bad constitutional law . . . because it is not constitutional law and gives almost no sense of an obligation to try to be."[26] The lines drawn in Establishment Clause cases since *Everson* are "blurred, indistinct, and variable"[27] because they are pristine examples of the Court's penchant for aligning itself with the attitudes of powerful factions that set—and enforce—our nation's attitudes toward the contentious issues of race, religion, ethnicity, sex, and national identity.

The challenge facing the Court today is to renounce its claims that Article III and the Due Process Clauses of the Fifth and Fourteenth Amendments authorize it to "manage" the cultural "politics of power" to which Robert Jackson referred in the quotation that introduces this Essay.

The Court can begin that process by overruling *Everson*'s implicit, but central, holding. The Supreme Court has no authority to control (or "moderate") the nature and content of religious expression in our major culture-forming institutions and public spaces. It has no authority to hold that anyone suffers a statutory or constitutional injury when exposed to the individual or organized religious ideas, symbols, or beliefs of their fellow citizens.[28] "Unwanted exposure" to *any* message about religion—or about any other legitimate subject in the public marketplace of ideas, for that matter—does not, and cannot, create a "demonstrate[d] psychological injury in fact."[29]

Like Congress, the executive, and the states, the Court is bound by the equal citizenship and equal protection principles embedded in the "deep structure" of the Constitution. It is also bound by the Fourteenth Amendment, as

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form from a complete establishment of religion, it differs from it only in degree; and is the first step in that direction.").

24. Paul G. Kauper, Everson v. Board of Education*: A Product of the Judicial Will in Symposium: Pivotal Decisions of the Supreme Court*, 15 ARIZ. L. REV. 307, 314 (1973) ("*Everson* was important, first of all, because it squarely determined that the first amendment's establishment of religion limitation was applicable to the states. Never before had an issue of state law been resolved by reference to the establishment clause.").

25. THE FEDERALIST NO. 10, *supra* note 13, at 72.

26. John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973).

27. Lynch v. Donnelly, 465 U.S. 668, 679 (1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

28. *See* Matal v. Tam, 582 U.S. 218, 244 (2017).

29. ACLU of Ohio Found. v. DeWeese, 633 F.3d 424, 429 (6th Cir. 2011) (citing ACLU of Ohio Found. v. Ashbrook, 375 F.3d 484, 490 (6th Cir. 2004)); *see, e.g.*, Suhre v. Haywood, 131 F.3d 1083, 1086 (4th Cir. 1997); ACLU v. Rabun Chamber of Com., 698 F.2d 1098, 1105 (11th Cir. 1983).

well as by every other provision of the Constitution that translates those lofty principles into prohibitions designed to eliminate specific abuses of power, especially those embodied in the First Amendment.

In sum, Article III gives the Court no power to mediate the cultural "politics of power" to which Robert Jackson referred.

I. *EVERSON* AND THE POLITICS OF DIVERSITY MANAGEMENT

This Part examines *how* the Court exercises the powers it has claimed under the First Amendment in religious freedom cases. In order to understand the present, we must, as the late Judge John T. Noonan, Jr. observed, first "immerse ourselves in history."[30]

The Court's Free Exercise Clause cases have long insisted that public officials owe *at least* the same duty to accommodate religiously motivated individuals and institutions as they do to others.[31] Its Establishment Clause cases rest on a very different premise: that the purpose of the Establishment Clause is to empower the federal judiciary to serve as "content moderators."[32] As Justice Breyer observed in *Espinoza v. Montana Department of Revenue*, it is the Court's obligation "to promote and assure the fullest scope of religious liberty and religious tolerance for all and *to nurture the [social] conditions which secure the best hope of attainment of that end*."[33]

A. SUBSTANTIVE DUE PROCESS AND JUDICIAL POWER POLITICS

This Essay began with a quote from Robert Jackson's account of the power struggle that ensued when the Court resisted President Franklin D. Roosevelt's efforts to use federal power to restructure the economy. The details of that struggle do not concern us here, but the *title* of Robert Jackson's book, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics*,[34] points us in the right analytical direction.

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30. Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355, 391–92 (1995) (quoting JOHN T. NOONAN, JR., THE BELIEVER AND THE POWERS THAT ARE xiii (1987)).

31. *See, e.g.*, Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 439 (2006); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993); Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 890 (1990); Sherbert v. Verner, 374 U.S. 398, 409–10 (1963). *Compare* Groff v. DeJoy, 143 S. Ct. 2279 (2023) (clarifying the meaning of the phrase "undue hardship" in Title VII, 42 U.S.C. § 200e(j)), *with* 303 Creative, LLC v. Elenis, 143 S. Ct. 2298 (2023).

32. *See generally* James Grimmelmann, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 47 (2015) (defining "moderation" as "the governance mechanisms that structure participation in a community to facilitate cooperation and prevent abuse"); Evelyn Douek, *Content Moderation as Systems Thinking*, 136 HARV. L. REV. 526, 528–32 (2022).

33. 140 S. Ct. at 2289–91 (2020) (Breyer, J., dissenting) (emphasis added) (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., joined by Harlan, J., concurring); Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring)).

34. JACKSON, *supra* note 2.

One place to start would be *Permoli v. Municipality No. 1*,[35] which involved an 1842 city ordinance that made it "unlawful to carry to and expose in any of the Catholic churches of this municipality any corpse, under the penalty of a fine of fifty dollars."[36] The ordinance had all the hallmarks of both a free exercise and a non-establishment violation. It regulated a religious ritual (a funeral) that requires the presence of the body of the deceased,[37] it singled out a specific religious group (Catholics) for special treatment, and it imposed a clearly excessive fine (nearly $4,820.77 in 2022 dollars).[38] The Court nonetheless dismissed the case, noting that "[i]n [its] judgment, the question presented by the record is exclusively of state cognizance."[39]

Permoli does not work at the source of Justice Breyer's claim that the judiciary has a unique "obligation . . . to nurture the [social and political] conditions which secure the best hope of attainment of [religious liberty]."[40] As odious as New Orleans's rule was in both intent and application, the Court

35. 44 U.S. (3 How.) 589, 609 (1845).

36. *Id.* at 590.

37. *See* CODE OF CANON LAW, tit. iii, canon 1176, § 2 ("Ecclesiastical funerals, by which the Church seeks spiritual support for the deceased, honors their bodies, and at the same time brings the solace of hope to the living, must be celebrated according to the norm of the liturgical laws."); *see also Catechism of the Catholic Church*, LIBERIA EDITRICE VATICANA § 1683, https://www.vatican.va/archive/ENG0015/__P5B.HTM (last visited Aug. 23, 2023) ("The Church who, as Mother, has borne the Christian sacramentally in her womb during his earthly pilgrimage, accompanies him at his journey's end, in order to surrender him 'into the Father's hands.' She offers to the Father, in Christ, the child of his grace, and she commits to the earth, in hope, the seed of the body that will rise in glory. This offering is fully celebrated in the Eucharistic sacrifice; the blessings before and after Mass are sacramentals." (citing *1 Cor.* 15:43-44)).

38. A $50 fine in 1842 dollars converts to approximately $4,820.77 in 2023 dollars. Such conversions are inexact. The U.S. Treasury's "inflation converter" begins in 1913. In order to do this calculation, it was necessary to convert the 1842 U.S. dollar into its equivalent in pure (0.999) gold. *See* Coinage Act of 1792, 1 Stat. 246. Section 9 of the Coinage Act provided:

> EAGLES—each to be of the value of ten dollars or units, and to contain two hundred and forty-seven grains and four eighths of a grain of pure, or two hundred and seventy grains of standard gold. . . . DOLLARS OR UNITS—each to be of the value of a Spanish milled dollar as the same is now current, and to contain three hundred and seventy-one grains and four sixteenth parts of a grain of pure, or four hundred and sixteen grains of standard silver.

Id. § 9, 1 Stat. at 248. Since a grain of pure (0.999) gold is equivalent to 0.065 grams ("g"), and a gold Eagle contained 247.6 grains, an Eagle contained 16.04g; the conversion formula is *0.065 x 247.6*. *See Gold Conversion*, TRADITIONAL OVEN, https://www.traditionaloven.com/metal/precious-metals/gold/convert-grain-gr-of-gold-to-gram-g-of-gold.html (last visited Aug. 23, 2023). At current spot prices (without premium), the value of the gold in each Eagle is approximately $1,009.00. *See Gold Price Calculator by Weight*, GOLDPRICE.ORG, https://goldprice.org/Calculators/Gold-Price-Calculators.html (last visited Aug. 23, 2023). Since a $50 fine (five Eagles) contained 80.2g of pure (0.999) gold, the current dollar value of that $50 fine is roughly equivalent to $5,172.00 in 2023.

39. *Permoli*, 44 U.S. (3 How.) at 610.

40. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2289–91 (2020) (Breyer, J., dissenting) (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (Goldberg, J., joined by Harlan, J., concurring); Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring)).

respected the distribution of powers over "matters touching religion"[41] that existed prior to the adoption of the Fourteenth Amendment.[42]

The political paradigm shift came in *Dred Scott*.[43] In a power move that eclipses even John Marshall's remarkably astute (and arguably unethical[44]) political maneuvering in *Marbury v. Madison*,[45] the Court under Roger Taney used its Article III power to control the "adjudication of litigation" to gut the cooperative federalism of Article IV and transfer to itself power *expressly* reserved to Congress and the states.[46] *Marbury*, by contrast, effected no actual change in the distribution of authority among the branches.[47]

Viewed from the perspective of factional power politics, the Court's decision in *Dred Scott* to close the federal courts to persons of African descent was far more than a decision to intervene in the contentious politics of slavery; it was a claim that the Court had exclusive and preemptive power to "manage" our nation's most sensitive and divisive cultural *and* religious issue: race relations.[48] As the late Professor David P. Currie has written, *Dred Scott* "was

41. *See supra* note 8.

42. U.S. CONST. amend. XIV.

43. 60 U.S. (19 How.) 393 (1856).

44. *See* MODEL CODE OF JUD. CONDUCT r. 2.11(A)(1) (AM. BAR ASS'N 2020) (mandatory disqualification). *See generally* David Forte, *Who Was William Marbury?*, EXPERIENCE, Winter 2003; David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349 (1996).

45. 5 U.S. (1 Cranch) 137, 177 (1803).

46. By reading the scope of congressional power over the territories narrowly, the Court explicitly rejected the Missouri Compromise, 3 Stat. 545 (1820); rejected the concept of "popular sovereignty" that so stoked the passions engendered by the passage of the Kansas-Nebraska Act, 10 Stat. 277 (1854); and gutted the power of Congress under Article IV, Section 3 to adopt "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States," U.S. CONST. art IV, § 3. By permitting the Missouri Supreme Court to refuse to give effect to the law of Illinois governing the personal status and contractual capacity of those who resided in Illinois or entered into contractual relationships to be performed there, *see* Jarrot v. Jarrot, 7 Ill. 1 (1845) (manumission by operation of law if a slave owner employs the person in Illinois), the Court negated the cooperative federalism implicit in the Full Faith and Credit Clause. *See* Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 529–64 (1857) (McLean, J., dissenting), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

47. 5 U.S. (1 Cranch) at 177.

48. *See generally* Barry Friedman, *"The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*," 73 N.Y.U. L. REV. 333, 413–32 (1998). Friedman observes:

> What emerges from the extensive debate over supremacy is a critical point. Other than extremists, everyone had their vulnerability. Douglas and those who agreed with popular sovereignty could argue for acceptance of *Dred Scott* and judicial supremacy, though they really disagreed with the Court's decision. But those bitterly opposed like Lincoln and Seward were trapped as well by growing sentiment that judicial decisions were binding. In short, even while many were angry with the *Dred Scott* decision, the role of the Court was becoming a firmament of American democracy. It was not so established, and the times were not so populist, to give rise to countermajoritarian criticism. But rather than disregarding it, people were beginning to understand the need to find other ways to work around unpopular decisions. And they were beginning to understand their need for a Supreme Court.

Id. at 431.

at least very possibly the first application of substantive due process in the Supreme Court, and in a sense, the original precedent for *Lochner v. New York* and *Roe v. Wade*."[49] It is also the original precedent for *Everson*, for its pre-*Employment Division v. Smith*[50] free exercise cases, for nearly all of its equal protection jurisprudence,[51] for its crabbed understanding of informational privacy,[52] and for a host of other constitutional doctrines in need of serious rethinking.

1. The "Incorporation Doctrine" and Power Politics

Before turning to a detailed analysis of *Everson*, we must identify an equally bold, but far more subtle, way in which the Court has claimed the power to rewrite the Constitution: the "incorporation doctrine."

That analysis begins with *The Slaughterhouse Cases*,[53] decided in 1872, in which the Court rejected the proposition that the provisions of the Bill of Rights were among "the privileges or immunities of citizens of the United States,"[54] and thus binding on the states.[55] While Justice Field's dissent suggests that the Privileges and Immunities Clause of the Fourteenth Amendment includes (or "incorporates") rights "which are fundamental; which belong, of right, to the citizens of all free governments,"[56] the majority was unwilling to go that far. Its analysis was "structural": In this view, the "Privileges and Immunities of Citizens of the United States" are those that entitle citizens to equal protection in, and enjoyment of, federal activities and spaces, such as the right to use the navigable waters of the United States, the privilege of the writ of habeas corpus, and the right to peaceable assembly and petition for redress of grievances.[57]

By the mid-1880s, however, Justice Field's view had prevailed.[58] Writing for the Court in *Barbier v. Connoll*y, he held that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were "undoubtedly" grants of judicial authority to invalidate "arbitrary" deprivations of life, liberty, or

49. David P. Currie, *The Constitution in the Supreme Court: Article IV and Federal Powers, 1836-64*, 1983 DUKE L.J. 695, 735–36 & nn. 255–64.

50. 494 U.S. 872 (1990).

51. *See infra* Part II.

52. *Compare* Haley Plourde-Cole, *Back to* Katz*: Reasonable Expectation of Privacy in the Facebook Age*, 38 FORDHAM URB. L.J. 571 (2010), *with* Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 575 (2009).

53. 83 U.S. (16 Wall.) 36 (1872).

54. U.S. CONST. amend. XIV, § 1, cl. 3.

55. *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) at 77–78.

56. *Id.* at 97 (Field, J., dissenting) (quoting Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1825)).

57. *Id.* at 79–80 (majority opinion).

58. *See generally* Ilan Wurman, *The Origins of Substantive Due Process*, 87 U. CHI. L. REV. 815, 865–71 (2020) (tracing the historical development of substantive due process).

property.[59] The ensuing history is well known. From the 1890s to the mid-1920s (if not later), the Court was overtly relying on the Due Process Clause to manage economic policy,[60] to ensure that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the State,"[61] "and to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."[62]

But it was not until *Palko v. Connecticut*[63] that the Court began the process of rooting the generalities of due process in the text of the Bill of Rights—a process now called the "selective incorporation" doctrine. Selective incorporation rests on the Court's view that the "liberty" protected by the Due Process Clause of the Fourteenth Amendment incorporates the "fundamental rights" contained in the Bill of Rights and makes them applicable to the states.[64] Those the Court does not characterize as "fundamental" are simply rules governing the conduct of the federal government.

Palko was a criminal case,[65] so its specific holding is not relevant here, but the Court's opinion does raise at least three significant questions relevant to the present inquiry: (1) What is the source of the Court's asserted prescriptive authority to declare certain rights enumerated in the Bill of Rights "fundamental"? (2) What is the source of the Court's power to declare

59. 113 U.S. 27, 31 (1885) (upholding a San Francisco ordinance regulating the operating hours of laundries).

60. *See* Chi., Milwaukee & St. Paul Ry. Co. v. Minnesota, 134 U.S. 418, 458 (1890) (subjecting reasonableness of rate regulations set by state commissions to judicial due process scrutiny); Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429, 607–08 (1895) (striking down federal tax on income from real estate and municipal bonds); Champion v. Ames, 188 U.S. 321, 363–64 (1903) (upholding regulation of federal lottery sales on Commerce Clause grounds); *In re* Debs, 158 U.S. 564, 572 (1895) (upholding power of courts to enjoin strikes and boycotts). *See generally* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001).

61. Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 535 (1925).

62. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

63. 302 U.S. 319 (1937).

64. *See* Stephen A. Simon, *Rights Without a Base: The Troubling Ambiguity at the Heart of Constitutional Law*, 57 ST. LOUIS U. L.J. 101, 118–23 (2012). *See generally* Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253 (1982); Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) (discussing the history of the doctrine); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Stanley Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Judicial Interpretation*, 2 STAN. L. REV. 140 (1949).

65. Although the jury convicted him for second-degree murder and the judge sentenced him to life imprisonment, the State of Connecticut appealed and won a new trial for Palko. State v. Palko, 121 Conn. 669 (1936). That jury found him guilty of first-degree murder and sentenced him to death. Palko v. Connecticut, 302 U.S. 319, 321–22 (1937). Palko appealed, alleging that the Double Jeopardy Clause of the Fifth Amendment, U.S. CONST. amend. V, applies to the state via the Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, and thus limits the power of state courts to reopen jury verdicts. *Id.* at 322. The Supreme Court held for Connecticut. *Id.* at 322–28.

unenumerated rights "fundamental"? and (3) What is the source of the Court's authority to rank them?

The Court did not answer these questions in *Palko*, but its continued use of the selective incorporation approach implicitly adopted two further power-politics propositions: (1) that there is "an implied hierarchy of constitutional values"[66] and (2) that the Supreme Court of the United States has preemptive authority to rank or balance them whenever there is an apparent or "true" conflict between the constitutionally protected interests claimed by opposing factions.[67]

This claim of preemptive federal judicial authority is particularly problematic in religious liberty cases. As explained in Part II, protection for religious liberty is woven into the "deep structure" of the original Constitution.[68] The First Amendment adds breadth and depth to an existing guarantee by further restraining federal power,[69] and the explicit purposes of Sections 1 and 5 of the Fourteenth Amendment were to overrule *Dred Scott*, to return powers to Congress and the states, and to impose a legislative check on judicial authority.[70]

Due process incorporation, by contrast, rests on the proposition best expressed by Justice John Marshall Harlan II in *Poe v. Ullman*.[71] In this view, the Court's open-ended, due process–based power claim "has not been reduced to any formula," and "its content cannot be determined by reference to any code," including the text of the Constitution itself.[72] Due process incorporation is, as Harlan put it, "the balance" that the Court strikes between "the liberty of the individual . . . and the demands of organized society."[73]

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66. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479–82 (1991).

67. The term "true conflict" originated in Professor Brainerd Currie's governmental-interests-analysis approach to choice-of-law questions. *See generally* Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 9–10 (1958); Brainerd Currie, *On the Displacement of the Law of the Forum*, 58 COLUM. L. REV. 964 (1958). It is also applied in antitrust cases where parties are subject to contradictory obligations. *See* Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 IND. L.J. 719, 729 (2016) ("Herein lies the huge difference between 'true conflicts' and 'absolute conflicts' of law. With the vast majority of true conflicts of law, parties are able to comply with both laws simultaneously. Whatever one thinks about how best to resolve that choice of law, it is not inherently unfair to parties to look to the competing state interests at stake in choosing one state's law over the other. With absolute conflicts of law, however, it is impossible to comply with both laws simultaneously. This impossibility renders absolute conflicts qualitatively different from true conflicts and instantly imports powerful rule-of-law considerations that disfavor subjecting parties to contradictory legal commands in arbitrary fashion.").

68. *See infra* Part II.A.

69. *See infra* Part II.B.

70. *See infra* Part II.C; *see also* Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198–1203 (1992) (discussing the relationship between the general prohibitions of Article I, Section 9; the specific prohibitions of Article I, Section 10 (binding the states); and the First Amendment (binding Congress alone)); Amar, *supra* note 22, at 1138–41, 1146–62 (discussing the Federalist and Antifederalist critiques of the Constitution, as well as the federalism components of the proposals that evolved into the First Amendment as we know it today).

71. 367 U.S. 497, 522–55 (1961).

72. *Id.* at 542 (Harlan II, J., dissenting).

73. *Id.*

In *Everson*, the Court explicitly undertook to strike a balance between the religious liberty and equal protection rights of parents and children and the factional interests of those who sought to maintain exclusive control of public funds devoted to education.[74] For Justice Black, who wrote the majority opinion,[75] that balance favored the school children. In his view, Ewing Township "[did] no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[76] The dissenters, by contrast, argued that the balance favored those who assume "that, after the individual has been instructed in worldly wisdom, he will be better fitted to choose his religion."[77]

Even a cursory reading of the case law since *Everson* demonstrates that the balances struck in each case rarely depended on either the facts of the case or the lessons of history. Instead, they turned on each Justice's understanding of what Justice Sandra Day O'Connor called "Establishment Clause values."[78] The case law positively invites each Justice to read the "social facts"[79]—a concept best understood as the current "social consensus"[80]—in order to decide which

74. *See infra* Part IV.D.

75. Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947).

76. *Id.* at 18.

77. *Id.* at 24 (Jackson & Frankfurter, JJ., dissenting). Jackson read the Establishment Clause as if it were the only provision in the Constitution dealing with the topic of religion, arguing that "the Constitution sets up [a difference] between religion and almost every other subject matter of legislation." *Id.* at 31–32. He therefore concluded that the Establishment Clause is a categorical rule that empowers the Court "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.* He also argued, erroneously, that

> [t]his freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

Id. at 26. Separately, the First Congress proposed twelve amendments, not ten. *The Bill of Rights: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights-transcript (last visited Aug. 23, 2023). The first of the proposed amendments would have established how the House of Representatives would be apportioned. *Id.* It did not become law. *Id.* The second proposed amendment forbade congressional pay raises unless they took effect in the next Congress. *Id.* In 1992, it became the Twenty-Seventh Amendment. *Id.* What is now the First Amendment was the third proposal. *Id.*

78. Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

79. *Id.* at 693–94 ("Although evidentiary submissions may help answer [whether government activity communicates endorsement of religion], the question is . . . in large part a legal question to be answered on the basis of judicial interpretation of social facts.").

80. The phrase "social facts" was first coined by Emile Durkheim in the opening chapter of his 1895 book *The Rules of the Sociological Method*, in which he described "a category of facts which present very special characteristics: they consist of manners of acting, thinking, and feeling external to the individual, which are invested with a coercive power by virtue of which they exercise control over him," and "which he sometimes described as 'states of the collective mind.'" ROBERT ALUN JONES, EMILE DURKHEIM: AN INTRODUCTION TO FOUR MAJOR WORKS 60–81 (1986). The law literature is extensive. *See, e.g.*, William Baude, *Is Originalism*

"sensible balances"[81] to strike among the factional interests represented in religious liberty cases. Small wonder that the lines drawn in Establishment Clause cases are "blurred, indistinct, and variable."[82]

We now turn to some of the "social facts" on which the Court relies when it strikes such balances.

2. The "Most Famous Footnote in Constitutional Law"

The political hubris of the *Dred Scott* Court then, as now, is breathtaking.[83] Though it is tempting to recount in detail the cringe-worthy prose of the Justices on race relations,[84] on the role of women in professions,[85] and on the rationality of other citizens' religious beliefs and practices,[86] this Essay is about judicial power politics, not about the cultural elitism of Article III judges. Therefore, this Subpart turns to the decision in which the Court made its power claim explicit: *United States v. Carolene Products Co.*[87]

Our Law?, 115 COLUM. L. REV. 2349, 2364 (2015) (using the phrase "modern social facts" to describe the legal and social context in which constitutional law has developed since 1787); Gregory Mitchell, Laurens Walker & John Monahan, *Beyond Context: Social Facts as Case-Specific Evidence*, 60 EMORY L.J. 1109, 1118 (2011) (distinguishing "social fact evidence" from "social authority" and "social framework" evidence); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 571 n.32 (1987) (describing the "use [of] general research findings to create a context or background within which facts specific to a case can be determined"). So too is the literature in the social sciences. *See generally* MARGARET GILBERT, ON SOCIAL FACTS 408–45 (1989) (using the term to describe the conditions in which social groups are prepared to take joint action: "social groups are plural subjects, collective beliefs are the beliefs of plural subjects, and social conventions are the 'fiats' of plural subjects").

81. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

82. *Donnelly*, 465 U.S. at 679 (1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

83. The damage the Court did to the structure of federalism in *Dred Scott* did not go unnoticed. The late Professor Raoul Berger reported, for example, that Senator Charles Sumner of Massachusetts was so incensed by Taney's decision in *Dred Scott* that he "sought to bar the customary memorial, placement of Chief Justice Taney's bust in the Supreme Court chamber, and insisted that his name should be 'hooted down in the pages of history.'" RAOUL BERGER, GOVERNMENT BY JUDICIARY 246 (1977) (quoting DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 193 (1970)).

84. *Compare* Plessy v. Ferguson, 163 U.S. 537, 551 (1896), *with* Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954) ("*[I]n the field of public education*, the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." (emphasis added)), *and* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294 (1955) (refusing to provide the immediate remedial relief sought by the plaintiffs), *and* Brown v. Bd. of Educ. (*Brown III*), 978 F.2d 585 (10th Cir. 1992) (resolving the case after Linda Brown graduated from a segregated high school, ending thirty-seven years after the case was first litigated in 1954).

85. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 132 (1872) (refusing to overturn, on privileges and immunities grounds, a decision by the Illinois Supreme Court denying Ms. Bradwell admission to the bar because, among other reasons, "female attorneys at law were unknown in England").

86. Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 50 (1890) ("The state has a perfect right to prohibit polygamy, and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced.").

87. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). The respondents' briefing in an affirmative action case recently decided by the Court in its 2022 Term, *Students for Fair Admissions, Inc. v.*

At least four generations of American lawyers and judges have been taught that the Supreme Court has a unique obligation to "particular religious, or national, or racial minorities."[88] We also learn from this most "famous footnote"[89] that the Court not only has the power, but also the duty, to tip the scales of justice whenever it appears that the political culture harbors a "prejudice against discrete and insular minorities . . . [that] tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[90]

Given the Court's abysmal failure to enforce the Fourteenth Amendment in cases like *Plessy v. Ferguson*,[91] it is difficult to understand why this claim of preemptive authority[92] to "manage diversity"[93] was not met with derision. Indeed, the opposite occurred. Professor Owen Fiss called the footnote a "great and modern charter for ordering the relation between judges and other agencies of government."[94] Similarly, Professor Bruce Ackerman argued that the Court's declaration should be viewed as a "constitutional moment" in which "the ideals of the [New Deal's] victorious activist Democracy serve as a primary foundation for constitutional rights in the United States."[95]

University of North Carolina, 143 S. Ct. 2141 (2023), is a classic example of how these assumptions operate in practice. The case reexamined the Court's prior affirmative action jurisprudence. *See* Fisher v. Univ. of Texas at Austin, 136 S. Ct. 2198 (2016) (*Fisher II*). The lower court citations for the cases to which the Court granted certiorari are *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023), and *Students for Fair Admissions, Inc. v. University of North Carolina*, 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted before judgment*, 142 U.S. 896 (2022), *rev'd*, 143 S. Ct. 2141 (2023).

88. *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (citations omitted).

89. *See, e.g.*, WILLIAM B. LOCKHART ET AL., THE AMERICAN CONSTITUTION 17 (8th ed. 1996); Felix Gilman, *The Famous Footnote Four: A History of the* Carolene Products *Footnote*, 46 S. TEX. L. REV. 163, 165 (2004) ("When courts and commentators deal with some question about the role of the courts in democratic society, or the rights of minorities, they immediately turn back to *Carolene Products*. Almost no one cites it without paying tribute to its fame and influence. It has been called '[t]he great and modern charter for ordering the relation between judges and other agencies of government,' and if this is something of an optimistic overstatement, it is at least partly true.").

90. *Carolene Prods. Co.*, 304 U.S. at 152 n.4 (citations omitted); *see supra* note 87.

91. Plessy v. Ferguson, 163 U.S. 537, 551 (1896).

92. For a fascinating discussion of the problem of judicially imposed and implemented regimes requiring or permitting racial discrimination in the face of overwhelming evidence that there was no legal support for judicial efforts to impose a settlement, see generally DeVaughn Jones, *Judicial Racism and Judicial Antiracism: Retelling the* Dred Scott *Story*, 68 UCLA L. REV. DISC. 338 (2020).

93. Stephen M. Rich, *Whose Diversity? The Contest for Control over the Law and Culture of Work*, 39 BERKELEY J. EMP. & LAB. L. 177, 229 n.4 (2018) (citing R. Roosevelt Thomas, *From Affirmative Action to Affirming Diversity*, HARV. BUS. REV., Mar. 1990, at 108 (describing affirmative action as "an artificial, transitional intervention intended to give managers a chance to correct an imbalance, an injustice, a mistake")); *id.* at 112 ("What managers fear from diversity is a lowering of standards[,] . . . [but] [t]he goal is to manage diversity in such a way as to get from a diverse work force the same productivity we once got from a homogeneous work force, and to do it *without artificial programs, standards—or barriers*." (emphasis added)).

94. Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 6 (1979); Fiss, *supra* note 21.

95. Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 715 (1985).

The proposition that courts, which are controlled by lawyers and judges, "serve as a primary foundation for constitutional rights in the United States"[96] is, to say the least, "debatable," but I have argued the merits of that issue elsewhere.[97] My focus here is on the power politics of that narrative, and on the way in which it has been integrated into what the late Dean Roger C. Cramton described as "the unarticulated (and usually unexamined) value system of legal education."[98] He describes the process as follows:

> A sophisticated observer of the typical classroom in most American law schools would hear a variety of views, and see many differing methods. But he could also detect certain fundamental value assumptions unconsciously presupposed by most faculty and student participants. This intellectual framework is almost never openly articulated, but it lurks behind what is said and done. As [Albert North] Whitehead noted, fundamental assumptions "appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them." . . . The "ordinary religion of the law school classroom," of course, serves as a shorthand expression for this value system. . . . It includes not only the more or less articulated value systems of law teachers but also the unarticulated value assumptions communicated to students by example or by teaching methods, by what is *not* taught, and by the student culture of law schools.[99]

The next Subpart turns to one of those assumptions: that the Court has a unique role to play in identifying persons and groups it deems to be worthy of special protection.

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96. *Id.*

97. I have questioned the constitutional pedigree of the *Carolene Products* footnote elsewhere. *See, e.g.*, Robert A. Destro, *Federalism, Human Rights, and the Realpolitik*, 12 WIDENER L.J. 373, 373 (2003) ("[T]he Founders' vision of a 'compound' American republic was lost when the Supreme Court of the United States used the New Deal controversy over the limits of judicial review to accomplish one of the most far-reaching power grabs in the history of the Republic.").

98. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247 (1978).

99. *Id.* at 247. Dean Cramton acknowledges that the phrase "ordinary religion" is a "rhetorical device" and emphasizes that the "current intellectual framework of legal education is not a developed philosophy of life[,] much less a theology." *Id.* at 247 n.2. "Whitehead" refers to Alfred North Whitehead's book, *Science and the Modern World*. ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD (Cambridge Univ. Press 1926). In Whitehead's view:

> [T]he mentality of an epoch springs from the view of the world which is, in fact, dominant in the educated sections of the communities in question. There may be more than one such scheme, corresponding to cultural divisions. The various human interests which suggest cosmologies, and also are influenced by them, are science, aesthetics, ethics, religion. In every age each of these topics suggests a view of the world. In so far as the same set of people are swayed by all, or more than one, of these interests, their effective outlook will be the joint production from these sources. But each age has it dominant preoccupation . . . .

Id. at i.

B. OF "MINORITIES," "MARGINALIZED" PEOPLE, AND "MARGINALIZED" COMMUNITIES

The term "discrete and insular minorities" does not appear in the reported case law before 1938.[100] Since then, much time and printer's ink, not to mention trillions of pixels, have been devoted to figuring out what exactly it means. The Court offered the following clues:

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, *Pierce v. Society of Sisters* [Catholics], or national, *Meyer v. Nebraska*; *Bartels v. Iowa* [German-speaking Lutherans, Poles, and others]; *Farrington v. Tokushige* [Korean, Chinese and Japanese], or racial minorities[,] *Nixon v. Herndon* [race] . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[101]

As applied to individuals and communities, the adjective "marginalized" is of more recent vintage. It is also more explicitly "inclusive," as it takes historical, cultural, socioeconomic, and other political factors into account.[102]

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100. The first appearance of "discrete and insular minorities" is in *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938).

101. *Id.*

102. *See, e.g.*, Subin G. DeVar, *Equitable Community Solar: California & Beyond*, 46 ECOLOGY L.Q. 1017, 1030 (2019) ("[M]arginalized communities[] [are] communities at the frontline of pollution and climate change ('frontline communities') and those historically and presently disenfranchised by racial, economic, and social inequity."); Sunila Abeysekera, *Maximizing the Achievement of Women's Human Rights in Conflict-Transformation: The Case of Sri Lanka*, 41 COLUM. J. TRANSNAT'L L. 523, 524 (2003) ("As marginalized communities are compelled to define themselves by reference to the commonalities perceived to trigger the injustices they suffer—ethnicity, language, religion, caste, tribe, and so on—processes of exclusion and inclusion are set in motion."); D.A. Agyei, *Bridging the International Gap in the Protection of Folklore: Analysis of the Ghanaian Approach Against Comparative Experiences from Selected African Countries*, 28 TEX. INTELL. PROP. L.J. 393, 442 (2020) ("[The Constitution of Kenya] indicates that communities can be identified on the basis of 'ethnicity, culture or similar communities of interest [and] defines marginalized communities as inclusive of indigenous peoples, traditional communities, pastoral persons and communities, as well as communities living at the fringes of Kenyan society.'"). Section 260 of the Constitution of Kenya provides:

> "[M]arginalised community" means-
>
> a. a community that, because of its relatively small population or for any other reason, has been unable to fully participate in the integrated social and economic life of Kenya as a whole;
>
> b. a traditional community that, out of a need or desire to preserve its unique culture and identity from assimilation, has remained outside the integrated social and economic life of Kenya as a whole;
>
> c. an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or
>
> d. pastoral persons and communities, whether they are-
>
> i. nomadic; or

The point here is not to critique the use of either term. These terms do, after all, describe real social conditions relevant to public policy, to the adequacy of legal and equitable remedies to redress grievances, and to the social and economic welfare of individuals, communities, and the nation as a whole.[103] The question here is not *which persons* should be included in the enumeration of the "discrete and insular," but rather the power-politics question: *Why is the footnote there in the first place?*

The answer, of course, is "coalition building."[104] Among others, Robert Jackson himself observed that a majority of the Court "subdued the rebellion against their constitutional dogma by joining it."[105] During the 1930s, "more than 100 separate proposals were introduced to alter the balance of power between the Court and the political branches."[106] These included proposals to change the size of the Court, to increase the number of votes required to hold legislation unconstitutional, and to institute better retirement plans for aged Justices.[107] There were proposals to amend the Constitution as well.[108]

In short, the Court needed the support of the New Deal coalition to stave off efforts to completely destroy its independence. Not having learned its lesson before its confrontation with the political branches over the New Deal, the Court would simply continue its efforts to manage the culture, this time, with different coalition partners.

The next Subpart touches on how the Court's concern for "minorities" since 1937 expresses itself in the case law.

> ii. a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole;
>
> "marginalised group" means a group of people who, because of laws or practices before, on, or after the effective date, were or are disadvantaged by discrimination on . . . [the basis of race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth].

CONSTITUTION arts. 27, 260 (2010) (Kenya).

103. *See generally* Robert A. Destro, *Equality, Social Welfare and Equal Protection*, 9 HARV. J.L. & PUB. POL'Y 53 (1986).

104. *See generally* Symposium, *Is the Supreme Court Undoing the New Deal? The Impact of the Rehnquist Court's New Federalism*, 12 WIDENER L.J. 373 (2003).

105. JACKSON, *supra* note 2, at vi.

106. Stephan O. Kline, *Revisiting FDR's Court Packing Plan: Are the Current Attacks on Judicial Independence So Bad?*, 30 MCGEORGE L. REV. 863, 901 (1999).

107. *Id.* at 901–02.

108. *See* G. Edward White, *The "Constitutional Revolution" as a Crisis in Adaptivity*, 48 HASTINGS L.J. 867, 867 (1997).

C. OF "MINORITIES" IN THE JURISPRUDENCE OF THE SPEECH AND PRESS CLAUSES

It should come as no surprise that much of our understanding of the First Amendment[109] in general—and of the role of civil rights laws in particular—is framed by our concern for those who dissent, by word or deed, from the "conventional wisdom" (or *zeitgeist*) of the community. Because they are dissenters, those who refuse to accept "traditional" moral, social, or cultural norms have come to rely on the courts as the primary forum in which to seek redress of their grievances.

And this is as it should be. Whether the issue is flag burning,[110] profanity within the public space of a courthouse,[111] the in-your-face evangelical message of the itinerant missionary,[112] the publication of classified or sensitive data that will embarrass or indict the powers that be,[113] or the below-the-radar organizing of those who seek to "speak truth to power,"[114] the Court's free speech and free press cases focus—quite rightly—on the task of ensuring that individuals who set themselves apart have equal access to public spaces, to the public forum, to public employment, and to public benefits, whether acting alone or in coalition with their likeminded fellow citizens.[115]

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109. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

110. Texas v. Johnson, 491 U.S. 397, 399 (1989).

111. Cohen v. California, 403 U.S. 15, 26 (1971) (reversing the conviction of defendant for breach of the peace under a California statute prohibiting disturbance of the peace by offensive conduct, where defendant had walked through a courthouse corridor wearing a jacket bearing the words "Fuck the Draft" in a place where women and children were present).

112. *See, e.g.*, Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 150 (2002) (invalidating an ordinance regulating activities of solicitors and canvassers in a village, on the basis that the ordinance interfered with exercise of free speech and free exercise rights protected by First Amendment).

113. *See, e.g.*, Brief of Intervenors/Amici Curiae Public Citizen and California First Amendment Coalition in Opposition to Injunctive Relief and in Support of Dismissal for Lack of Subject Matter Jurisdiction at 10–12, Bank Julius Baer & Co. v. WikiLeaks, 535 F. Supp. 2d 980 (N.D. Cal. 2008) (No. 08-cv-00824).

114. NAACP v. Button, 371 U.S. 415, 415 (1963) (invalidating Virginia rules proscribing the practice of referring prospective litigants to particular attorneys and making it a crime for a person to advise another that his legal rights were infringed and to refer him to particular attorney or group of attorneys); NAACP v. Alabama, 357 U.S. 449, 466 (1958) (holding that an order requiring an association to produce records including names and addresses of all its members and agents was a substantial restraint upon the members' exercise of their right to freedom of association).

115. *See generally* THE FEDERALIST NOS. 10, 51 (James Madison) (Clinton Rossiter ed., 1961) (discussing the role of faction and the division of authority). Madison notes that the preservation of liberty depends upon the separation of powers that arises when the sovereign power of the People is divided among the three branches of the federal government, and among the states: "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." THE FEDERALIST NO. 51, *supra*, at 317–18.

II. OF FORM AND FUNCTION: RELIGION AND EQUAL CITIZENSHIP

A. THE "DEEP STRUCTURE" OF THE RELIGIOUS LIBERTY GUARANTEE

Writing in 1896, the famed architect Louis Sullivan observed that "form ever follows function."[116] In this Subpart we will explore how the forms adopted by the Framers in the Constitution and its amendments reveal their function. The function of the federal Constitution is to allocate power. The form chosen by the Constitutional Convention to accomplish that allocation—a republican form of government, separation of powers, and federalism—reflects its function: to control the power of political factions. In *The Federalist No. 51*, Madison explains:

> If men were angels, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. . . . This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.[117]

Had the delegates to the Convention followed the instruction of the Continental Congress and considered only uniformity and regulatory issues relating to "the trade and Commerce of the United States,"[118] it is doubtful that

116. Louis H. Sullivan, *The Tall Office Building Artistically Considered*, 1896 LIPPINCOTT'S MAG. 403, 408 ("Whether it be the sweeping eagle in his flight, or the open apple-blossom, the toiling work-horse, the blithe swan, the branching oak, the winding stream at its base, the drifting clouds, over all the coursing sun, *form ever follows function*, and this is the law. Where function does not change, form does not change. The granite rocks, the ever-brooding hills, remain for ages; the lightning lives, comes into shape, and dies, in a twinkling. It is the pervading law of all things organic and inorganic, of all things physical and metaphysical, of all things human and all things superhuman, of all true manifestations of the head, of the heart, of the soul, that the life is recognizable in its expression, that form ever follows function. *This is the law*.").

117. THE FEDERALIST NO. 51, *supra* note 115, at 319.

118. On February 21, 1787, the Continental Congress resolved that "it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several States be held at Philadelphia *for the sole and express purpose* of revising the Articles of Confederation." Proceedings of Commissioners to Remedy Defects of the Federal Government (Feb. 21, 1787), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 69-398, at 46 (1927) (emphasis added). In Congress's view, the Convention needed "to take into consideration the trade and Commerce of the United States, to consider how far an uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony." *Id.* at 42. It also explicitly *rejected* a proposal that would have permitted the Convention to consider how "far an uniform system

religious liberty would have become an issue at the Convention. The Articles of Confederation focused on the relationships among the states,[119] and Congress explicitly rejected a proposal that would have permitted the Convention to consider how "far a uniform system in . . . *other important matters*[] might be necessary to the common interest and permanent harmony of the several States."[120]

Since the Articles explicitly reserved to "[e]ach state . . . its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled,"[121] the only laws governing religious liberty at the start of the Constitutional Convention were those in force in the states.

When the delegates decided to go beyond their original instructions, they created a framework in which the federal government would have broad authority to create a "uniform system" of laws regarding "other important matters," such as immigration and taxation, that "might be necessary to the common interest and permanent harmony of the several States."[122] Under these circumstances, it was inevitable that religious liberty issues would arise.[123] It was equally inevitable that they would be controversial.[124]

If granting the Convention power to deal with *any* issue other than "commerce" was controversial, a revision of the Articles that would have granted the federal government any power explicitly "touching religion" would

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in . . . *other important matters*[] might be necessary to the common interest and permanent harmony of the several States." *Id.* (emphasis added).

119. ARTICLES OF CONFEDERATION OF 1781, art. III. The only mention of religion in the Articles of Confederation is in Article III. *See id.*

120. Proceedings of Commissioners to Remedy Defects of the Federal Government (Feb. 21, 1787), *reprinted in* DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, H.R. DOC. NO. 69-398, at 46 (1927) (emphasis added).

121. ARTICLES OF CONFEDERATION of 1781, art. II. The text of the Article III is worth quoting in full because it so clearly states that, like other attributes of sovereignty, matters of religion were to be decided by the states themselves:

> The said States hereby severally enter into a firm league of friendship with each other, for their common defense, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever.

Id. art. III.

122. *See* U.S. CONST. art. I, § 8 (discussing taxation, bankruptcy, immigration, and naturalization); *id.* art. II, § 2, cl. 2 (discussing executive appointments).

123. *See, e.g.*, An Act for the Relief of the Bible Society of Philadelphia, ch. 17, 6 Stat. 116 (1813) (remitting the duties on Bibles imported through the port of Philadelphia); An Act for the Relief of the Baltimore and Massachusetts Bible Societies, ch. 61, 6 Stat. 162 (1816) (remitting duties imposed on the importation of Bibles through the ports of Boston and Baltimore).

124. *See, e.g.*, S. MISC. DOC. NO. 43-14, at 185 (1874) (complaining that the District's Board of Commissioners had illegally imposed taxes on church properties in violation of the Act of June 17, 1870).

have been unthinkable.[125] A review of the debates and resolves adopted by the states to guide the deliberations of the Convention indicates that the states were determined to keep their delegates—and, by implication, the Congress and the newly created federal government—under tight control.[126] Had members of Congress or delegates to the Constitutional Convention been asked whether "religion, or the duty we owe to our Creator, and the manner of discharging it"[127] was one of those "other important matters" on which there should be uniformity across the system, the answer would have been an emphatic "no."[128]

The next Subpart examines the text produced by the Convention to see what evidence it contains that sheds light on the delegates' understanding of the nature of religious freedom in a pluralistic society.

1. Article VI, Paragraph 3: The No Religious Test Clause & the Option to Swear or Affirm (1787)

The only explicit mention of religion in the Constitution of 1787 is found in the third paragraph of Article VI:

> The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.[129]

Viewed against the backdrop of state constitutions that included religious tests for public office,[130] Article VI is an explicit affirmation of the principle of

125. Esbeck, *supra* note 14, at 28 ("If the Constitution had granted to the federal government power over religion in any plenary sense, that could easily have prevented agreement in Philadelphia, and it certainly would have stirred enough trouble to prevent ratification of the Constitution by the designated minimum of nine states.").

126. *See generally Vol. I: Constitutional Documents and Records, 1776-1787*, *in* THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., digital ed. 2009), https://rotunda.upress.virginia.edu/founders/.

127. 1 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 296–97 (Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter ST. GEORGE TUCKER VOL. 1]; 2 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA 3–11 (Philadelphia, William Young Birch & Abraham Small 1803) [hereinafter ST. GEORGE TUCKER VOL. 2].

128. *See* THE FEDERALIST NO. 69, at 421 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the President "has no particle of spiritual jurisdiction"); 1 ANNALS OF CONG. 729–31 (1789) (documenting the House version of the text of what later became the First Amendment, which provided: "Congress shall make no laws *touching religion*, or infringing the rights of conscience" (emphasis added)).

129. U.S. CONST. art. VI.

130. *See e.g.*, N.C. CONST. of 1776, § 32 ("That no person who shall deny the being of God, or the truth of the Protestant religion, or the divine authority of either Old or New Testaments, or who shall hold religious

political equality and equal citizenship. The command that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States" ensures that no future Congress, President, judge, or administrator can *openly* enforce such tests.[131]

The command that all federal and state officials, including the President, must bind themselves "to support this Constitution," but may do so either by oath or affirmation, is an explicit affirmation that the choice belongs to the individual; their status as political equals and equal citizens is unaffected by the choice made or the reasons on which it was based. The option to swear accommodates the religious sensibilities and traditions of persons who believe it appropriate to call upon the assistance of the Almighty as they undertake a religiously significant commitment. The option to affirm accommodates the beliefs and traditions of those who, for religious, personal, or philosophical reasons, cannot or will not take an oath. It also ensures that those who are otherwise eligible by age, experience, and political qualifications to serve as America's political leaders, judges, administrators, military officers, and public contractors will not be excluded on the basis of faith or lack thereof.[132]

2. The Qualifications Clauses

Since the word "religious" appears only once in the text of the Constitution, we must also consider the significance of the Framers' *omission of* references to

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principles incompatible with the freedom and safety of the State, shall be capable of holding any office, or place of trust or profit, in the civil department, within this State."); PA. CONST. of 1776, § 10 ("And each member, before he takes his seat, shall make and subscribe the following declaration, viz: I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testament to be given by Divine inspiration. And no further or other religious test shall ever hereafter be required of any civil officer or magistrate in this State."); VT. CONST. of 1777, ch. II, § 9 ("And each member, before he takes his seat, shall make and subscribe the following declaration, viz. 'I ____ do believe in one God, the Creator and Governor of the Diverse, the warder of the good and punisher of the wicked. And I do acknowledge the scriptures of the old and new testament to be given by divine inspiration, and own and profess the protestant religion.' And no further or other religious test shall ever, hereafter, be required of any civil officer or magistrate in this State.").

131. The key word here is "openly." Article VI abolishes the "formal" religious tests, such as test oaths, that were used as a proxy by the factions controlling the political levers of power in order to ensure religious and political conformity. *See generally* Jim Wedeking, *Quaker State: Pennsylvania's Guide to Reducing the Friction for Religious Outsiders Under the Establishment Clause*, 2 N.Y.U. J.L. & LIBERTY 28 (discussing the Pennsylvania experience with test oaths as a means of maintaining political control). *Implicit* religious tests—such as counting the number of Catholics, Jews, Protestants, and Muslims "represented" in Congress, the executive branch, or the judiciary—are common, generally accepted measures of religious "diversity." When such tests go beyond demographic data and begin to explore the actual beliefs of a candidate, it is arguable that such questions violate the No Religious Test Clause. *See, e.g.*, James Crump, *'The Dogma Lives Loudly in You': Dianne Feinstein's Grilling of Trump SCOTUS Frontrunner for Her Devout Catholicism Goes Viral*, THE INDEPENDENT (Sept. 22, 2020, 3:56 AM), https://www.independent.co.uk/news/world/americas/us-politics/amy-coney-barrett-supreme-court-diana-feinstein-ruth-bader-ginsburg-b512741.html.

132. *Accord* U.S. CONST. art. II, § 1, cl. 8 ("Before he enter on the Execution of his Office, [the President] shall take the following Oath or Affirmation . . . .").

religion or religious faith from those parts of the text that define the character of the federal government and the qualifications of its officials:

- The President must be at least thirty-five years old, a native-born citizen of the United States, and at least fourteen years a resident within the United States.[133]
- A member of Congress must be at least twenty-five years old, a citizen of the United States for at least seven years, and a resident of the state and district he or she seeks to represent.[134]
- A Senator must be at least thirty years old, a citizen of the United States for at least nine years, and a resident of the state he or she seeks to represent.[135]
- Religion is not a qualification to be a citizen of the United States or of any state,[136] or to serve as an "elector" (voter) in federal elections.[137]

3. The Political Equality of Citizens

Reading the Qualifications, Oath or Affirmation, and No Religious Test Clauses as a whole confirms Sullivan's insight that "form ever follows function."[138] Religious liberty and equal protection under the Constitution and laws of the United States are the most important *outcomes* of a structure that eliminates opportunities for a ruling faction to tie political status in the community to religious belief, practice, or affiliation, but they are not the only desired outcomes. Equal citizenship also emerges from these structural devices, and that principle paves the way for further efforts to drop other irrelevant characteristics such as race, sex, and ethnicity as political disabilities.

In 1787, the problem to be solved was simple in theory, but very difficult in practice: how to ensure that every citizen otherwise eligible to participate in the political process is eligible to participate in the governance of the Union. Though the aspiration was far larger than the reality at the time,[139] equal access by the citizens of the several states to the commercial, civic, and political

133. *Id.* art. II, § 1, cl. 4.

134. *Id.* art. I, § 2, cl. 2.

135. *Id.* art. I, § 3, cl. 3.

136. *Id.* amend. XIV, § 1.

137. *See id.* art. I, § 2, cl. 2, *amended by id.* amend. XV (eliminating race as a qualification for voting); *id.* amend. XIX (eliminating sex as a qualification for voting); *id.* amend. XXIII (permitting citizens of the District of Columbia to vote); *id.* amend. XXIV (forbidding poll taxes); *id.* amend. XXVI (setting the minimum age to vote at age eighteen).

138. Sullivan, *supra* note 116.

139. The struggle over equal access to the vote, and to full participation in the civic and political life of the community, is well documented and continues to this day. *See generally, e.g.*, Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV; The Civil Rights Cases, 109 U.S. 3 (1883); Shelby County v. Holder, 570 U.S. 529 (2013).

benefits conferred by the Union remains the organizing principle of the Constitution of 1787.[140]

In sum, the forms utilized by those who crafted the Constitution and Bill of Rights reflected their function: to create a political community that respects and accommodates the religious beliefs, rituals, practices, speech, and associations of its citizens, while maintaining that the official business and responsibility of government is to regulate temporal affairs.[141]

4. The Political Equality of Communities

The only "permanent" provision of the Constitution is the political equality of the states. Specifically embodied in the proviso that "[t]he Senate of the United States shall be composed of two Senators from each state"[142] and confirmed by Article V, Clause 5 ("No State, without its Consent, shall be deprived of its equal Suffrage in the Senate"[143]), it is reaffirmed throughout the Constitution.

As *communities*, the states are protected from congressional efforts to discriminate among them in commercial affairs,[144] to partition or reconfigure them without their consent and that of Congress,[145] and from efforts by their sister states to discriminate or otherwise threaten their boundary, security, or commercial interests.[146] States have an equal right to self-rule protected by the Full Faith and Credit and Extradition Clauses,[147] and a guarantee that the United States will intervene if the political community deviates from "a Republican form of Government," is invaded, or requests federal assistance in times of civil unrest.[148]

In sum, the Constitution is built around a series of structural mechanisms that protect the political equality of American citizens, both individually and collectively.

140. *See e.g.*, U.S. CONST. art. IV, § 2 ("The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); *id.* § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

141. THE FEDERALIST NO. 69, *supra* note 128, at 421 (noting that the President "has no particle of spiritual jurisdiction").

142. U.S. CONST. art. I, § 3.

143. *Id.* art. V.

144. *Id.* art. I, § 9, cl. 6–7.

145. *Id.* art. IV, § 3, cl. 1.

146. *Id.* art. I, § 10; *id.* art. IV, § 3; *id.* art. III, § 2.

147. *Id.* art. IV, §§ 1–2.

148. *Id.* art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . .").

B. THE BILL OF RIGHTS (1791)

The Bill of Rights, ratified in 1791, added both substantive and structural protections to the baseline provided by the No Religious Test, Oath or Affirmation, and Qualifications Clauses. There were extensive debates during ratification over the extent to which the federal government could use its powers to set policy regarding the religious freedom of individuals and communities. The adoption of the Bill of Rights ended the conceptual phase of that debate. The First, Ninth, and Tenth Amendments make explicit the position that neither Congress nor the President has authority to infringe upon either the religious liberty of individuals or the power of states to set what they consider to be the proper boundaries between church and state. The Court arguably has no such power, either.[149]

The interplay between these substantive and structural guarantees is explicit in the text of the First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The "structural" aspect of the First Amendment is embedded in its first word: "Congress."[150] Although it is "Congress" that "shall make no law," the amendment also implicitly limits the authority of the executive and judicial branches to act in a manner that would violate the amendment.[151] The "substantive" components of First Amendment—non-establishment, free exercise, speech and press, peaceable assembly, and petition for a redress of grievances—are explicitly placed beyond the regulatory power of Congress, and hence outside the scope of executive and judicial authority as well. The Ninth and Tenth Amendments are rules of construction for the Constitution and Bill of Rights.[152]

Each of these additions makes explicit that which is implicit in the text of the Constitution itself. The substantive rights enumerated in the amended Constitution do not necessarily preempt rights recognized in state law. Nor do they limit either the power of the states or of the people to recognize new ones.[153]

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149. Destro, *supra* note 21, at 93–98.

150. *See* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1157 (1986).

151. *See* Destro, *supra* note 30, at 392.

152. *See* U.S. CONST. amends. IX–X.

153. *Cf.* Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 133; 37 I.L.M. 56 (1998) ("The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States. The European Union equally respects the status of philosophical and non-confessional organisations.").

C. THE FOURTEENTH AMENDMENT (1868)

The Fourteenth Amendment does not specifically mention religious liberty, but it is relevant here for at least three reasons. First, the states may not inhibit citizens of the United States in the exercise of their federal privileges and immunities.[154] Second, the states are prohibited from denying to any person within their jurisdiction due process or equal protection of the laws.[155] Third, Congress has the power to assure that the states comply with otherwise valid laws adopted to "enforce" the Fourteenth Amendment.[156]

Viewed as a question of power allocation, the amended Constitution seems, at first glance, to deal only with questions of legislative overreach on matters of religious liberty; the First Amendment, by its terms, limits only the acts of Congress, and the Fourteenth only the acts of the states. But such a reading would be too narrow.

John Marshall cautioned early on that "[i]n considering [such] questions[,] . . . we must never forget that it is a constitution we are expounding."[157] Not only does the text clearly delineate what is permitted and prohibited, but it also contains important structural limitations that delineate the authority of the states and federal government, respectively, and define the powers of the legislative, executive, and judicial branches of the federal government.

The Fourteenth Amendment is also relevant for two additional "power-politics" reasons. First, Sections 1 and 5 overruled *Dred Scott*[158] by expressly redistributing powers to Congress and the states that the Court had claimed for itself.[159] Second, the Court did not get the message that the Fourteenth

154. U.S. CONST. amend. XIV, § 1, cl. 2.

155. *Id.*

156. *Id.* amend. XIV, § 5.

157. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

158. 60 U.S. (19 How.) 393 (1856).

159. The Citizenship, Privileges and Immunities, and Enforcement Clauses of the Fourteenth Amendment fill three gaps created by the Court's ruling in *Dred Scott*: they set a single standard for citizenship in the United States and in the several states; they confer unquestioned power upon the Congress to enact legislation designed to protect citizens of the United States; and, by conferring state citizenship as an incident of residency, they *restore* the power of the states to protect the civil and human rights of all persons who reside within their jurisdictions. *See* U.S. CONST. amend. XIV. Up to and including a lower court decision in the *Dred Scott* case itself, Missouri courts recognized the power of the federal government under Article IV to make laws governing federal territories, as well as the power of sister states to govern the rights, status, and obligations of persons residing within their borders. Emerson, Mr. Scott's former owner, had employed Mr. Scott when they lived in the Wisconsin and Minnesota territories and when they were residents in Illinois. Both federal law (the Missouri Compromise) and Illinois law provided that employment of a slave in the jurisdiction operated as a manumission. Under either law, Scott would have been a person sui juris and would have been entitled to invoke the diversity jurisdiction of an Article III court. The Missouri Supreme Court, in a break with precedent, refused to give full faith and credit to either federal or Illinois law. The dissenting opinion of Justice McLean contains a thorough discussion of the choice of law, comity, and sovereignty aspects of the decision. *Dred Scott*, 60 U.S. (19 How.) at 350–64 (opinion of McLean, J.).

Amendment is a limit on its power.[160] It persists to this day in reading the Amendment's Due Process and Equal Protection Clauses as an open-ended grant of prescriptive judicial authority.[161]

III. *EVERSON* AND FACTIONAL POWER POLITICS

A. THE POWER QUESTION

It is undisputed that the Continental Congress, the delegates to the Convention that assembled in May 1787, and the state-ratifying conventions would have rejected outright any suggestion that the plan for the proposed federal government should contain a preemptive power to create uniform rules regulating "religion, or the duty we owe to our Creator, and the manner of discharging it."[162] Though they certainly differed on significant points, there was broad agreement that human beings are not angels.[163] As delegates, their first and most "constant aim [was] to divide and arrange the several offices in such a manner as that each may be a check on the other that the private interest of every individual may be a sentinel over the public rights."[164]

Professor Gerard Bradley has observed that the Federalists "drew a non-establishment sum from the lack of federal jurisdiction over religion plus the test ban," and has asserted that "since the oath requirement was the only plausible power one sect might use to gain the upper hand," Article VI was "enough [of a religious liberty guarantee] for a federal government of specific enumerated powers."[165]

This was not enough for the Antifederalists (many of whom viewed the No Religious Test and Supremacy Clauses as threats to religious liberty). Nor was it enough for the states. Both factions wanted a written guarantee that the federal government would not use its delegated powers either to vex religious liberty directly or to set national policy on the subject. *The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents* (December 18, 1787) made the case as follows:

> We entered on the examination of the proposed system of government, and found it to be such as we could not adopt, without, as we conceived, surrendering up your dearest rights. We offered our objections to the convention, and opposed those parts of the plan, which, in our opinion, would

160. *See generally* Destro, *supra* note 21, at 36–48.

161. *See supra* note 7.

162. ST. GEORGE TUCKER VOL. 1, *supra* note 127; ST. GEORGE TUCKER VOL. 2, *supra* note 127.

163. THE FEDERALIST NO. 51, *supra* note 115, at 319.

164. *Id.*

165. Gerard Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 709 (1987).

> be injurious to you, in the best manner we were able; and closed our arguments by offering the following propositions to the convention.
>
> 1. The right of conscience shall be held inviolable, and neither the legislative, executive nor judicial powers of the United States shall have authority to alter, abrogate, or infringe any part of the constitution of the several states, which provide for the preservation of liberty in matters of religion.
>
> . . . .
>
> 6. That the people have a-right to the freedom of speech, of writing and publishing their sentiments, therefore, the freedom of the press shall not be restrained by any law of the United States.[166]

On what basis, then, would the Court assume jurisdiction to manage the role of religion in American public life? Its answer was to "incorporate" the Establishment Clause.[167]

B. "ELECTIONS HAVE CONSEQUENCES"

This Essay began by proposing that there are two ways to understand the command that "Congress shall make no law respecting an establishment of religion":

> (1) An "establishment of religion" is government action that assists, approves, endorses, inculcates, supports, or promotes any public or private expression of individual or communal religious commitments; or
>
> (2) An "establishment of religion" is a legally privileged group of citizens who use the power of the state to advance or defend their common interests in maintaining authority, influence, and control over the religious aspects and environment of a community's shared spaces and culture-forming economic, educational, and political institutions.

The first option is "doctrinal"; that is, it establishes (and I use the word deliberately) a preemptive national policy that asserts control over the religious aspects and environment of every community's shared spaces and culture-forming economic, educational, and political institutions. Part II analyzed the Supreme Court's efforts to confer such preemptive authority on itself. We will now use the "cultural power-politics model" (the second option) as the lens through which we can analyze the constitutionality of the doctrinal model.

Part II began with two observations. The first was that "form ever follows function." The second was that the function of the Constitution is to allocate power. If, as we have assumed up to this point, the Establishment Clause is a means to an end, we must ask: *To what end was the Establishment Clause*

166. THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 221 (Ralph Ketcham ed., 1986) (attributed to Samuel Bryan, the author of *Letters of Centinel*).

167. *See supra* Part I.A.

directed? James Madison's answer to that question was straightforward: "To secure the public good and private rights against the danger" that arises "[w]hen a majority is included in a faction."[168]

Factional politics is a structural element of representative democracy. In a democratic republic, the majority rules. As President Barack Obama once famously reminded former Virginia Representative, Eric Cantor: "Elections have consequences . . . and I won."[169]

The Founding generation was acutely aware of—and very good at playing—power politics. They were also acutely aware of the social tensions that arise when factions coalesce in an effort to control, or to defend control over, the means by which communities preserve and transmit the religious aspects of their culture. James Madison, whose *Memorial & Remonstrance Against Religious Assessments* ("*Memorial & Remonstrance*") serves as one of the foundational documents upon which the Court relied in *Everson*,[170] astutely and famously sounded the alarm about the tyranny of the majority in *The Federalist No. 10*:

> When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. *To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed*.[171]

He was explicit:

> If the impulse and the opportunity [to oppress] be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.[172]

He therefore suggested two *political* strategies to combat that very human tendency. The first was counter–coalition building. The second was to create structural mechanisms that render the faction that includes the majority "unable to concert and carry into effect schemes of oppression":

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168. THE FEDERALIST NO. 10, *supra* note 115, at 75.

169. Mackenzie Weinger, *Woodward Book Dishes on Debt War*, POLITICO (Sept. 5, 2012, 11:00 PM), https://www.politico.com/story/2012/09/woodward-book-dishes-on-debt-war-080809. In one passage in the book, Representative Eric Cantor presents a recovery draft that doesn't meet the demands of Obama and Democrats. Obama responds, "I can go it alone but I want to come together. Look at the polls. The polls are pretty good for me right now. . . . Elections have consequences and Eric, I won." *Id.*

170. James Madison is cited approximately seventy-eight times in *Everson*. *See generally* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

171. THE FEDERALIST NO. 10, *supra* note 115, at 75 (emphasis added).

172. *Id.* at 75–76.

> By what means is this object attainable? Evidently by one of two only. Either the existence of the same passion or interest in a majority at the same time must be prevented, or the majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression. If the impulse and the opportunity be suffered to coincide, we well know that neither moral nor religious motives can be relied on as an adequate control. They are not found to be such on the injustice and violence of individuals, and lose their efficacy in proportion to the number combined together, that is, in proportion as their efficacy becomes needful.[173]

In keeping with Louis Sullivan's rule that "form follows function," the structural non-establishment guarantees built into the Constitution assure not only that members of religious communities and traditions are free to participate freely in politics, but also to participate in any federal government office or public trust that might become available to them by virtue of their political activism. Then, once ensconced within the political system, Americans of every religious tradition (or none) would be free to do that which comes naturally—form factions and get to work accomplishing their political goals, one of which will often be to stymie the tyranny of the majority.

> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution.[174]

The function of the First Amendment, as a whole, is to ensure that the people of the several states have precisely the same protections and opportunities when the federal government seeks to limit their ability to participate in the public goods generated by the actions of the federal government. Congress, freshly armed with the enormous powers granted by the Constitution, was and remains the officially sanctioned federal forum in which factional power politics is not only to be played with gusto, but also openly—for precisely the reasons James Madison flagged in *The Federalist No. 10*.[175]

From a power-politics perspective, it was not only possible, but also likely, that *congressional* factions would be tempted to use the powers enumerated in the Constitution to impose religious terms, political limitations,[176] and monetary

173. *Id.*

174. *Id.* at 75.

175. *See generally id.*

176. The Sedition Act prohibited "publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of Congress . . . or the President . . . with intent to defame . . . or to bring them . . . into contempt or disrepute." Sedition Act of 1798, ch. 74, § 2, 1 Stat. 596, 596–97 (1798). The Alien Act permitted the President "at any time during the continuance of this act, to order all

sanctions on the states,[177] the territories,[178] and their people.[179] Were the President to join or acquiesce in such a factional power play by signing the bill, *all* of the guarantees of the First Amendment and the rest of the Bill of Rights would be necessary to resist the onslaught. So too would be access to a federal judiciary willing to exercise its powers under Article III. This is precisely what happened when Congress adopted, and President Adams signed, the Alien and Sedition Acts.[180]

How then has the Court managed to become the self-appointed mediator of the factional power politics of culture? It permits *certain* factions, but not all, to convert their *political* grievances into constitutional questions.

C. STANDING IN ESTABLISHMENT CLAUSE CASES: *WHAT'S THE HARM?*

Critics of the Court's Establishment Clause jurisprudence have long questioned the legitimacy of the Court's efforts to resolve factional political disputes over the place that religious believers and their beliefs, practices, and symbols should have in public life and institutions. As might be expected, most of the criticism to date has been to the effect that the Court's approach since *Everson* is inconsistent and makes no sense.[181]

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such aliens as he shall judge dangerous to the peace and safety of the United States, or shall have reasonable grounds to suspect are concerned in any treasonable or secret machinations against the government thereof, to depart out of the territory of the United States." Alien Act of 1798, ch. 58, § 1, 1 Stat. 571, 571 (1798).

177. U.S. CONST. amend. XI. The Eleventh Amendment was adopted in response to the Supreme Court's decision in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm*, a contract action against the State of Georgia, the Court held that section 13 of the Judiciary Act authorized unconsented suits against states in the original jurisdiction of the Court. *Id.*; *see* New York v. United States, 505 U.S. 144, 153–55 (1992) (invalidating a provision of federal law that required the states to provide for the disposal of low-level radioactive materials generated within their borders, with failure to comply resulting in a state being forced to take title to the waste and becoming responsible for all damages caused by improper disposal).

178. U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 1–2.

179. *See infra* Part V. The Sedition Act also permitted the imposition of fines from $2,000 to $5,000 and for imprisonment for up to five years. § 2, 1 Stat. at 596–97. Based on current spot prices for the 16.2g of gold in each Eagle ($964.00), a $2,000 fine (200 Eagles at $10 each) in the 1798 value of the dollar would be the rough equivalent to $192,000 in 2023 dollars (*200 Eagles x $964*), and a $5,000 fine (500 Eagles at $10 each) would be the rough equivalent of $482,000 (*500 Eagles x $964*). The calculations and the source of the spot price of gold are detailed *supra* note 38.

180. *See* Library of Congress, *Alien and Sedition Acts: Primary Documents in American History*, LIBRARY OF CONG., https://guides.loc.gov/alien-and-sedition-acts (last visited Aug. 23, 2023).

181. *See, e.g.*, William M. Janssen, *Led Blindly: One Circuit's Struggle to Faithfully Apply the U.S. Supreme Court's Religious Symbols Constitutional Analysis*, 116 W. VA. L. REV. 33, 34 (2013) ("Because so tiny a number of cases each year are chosen to be . . . [the Court's] 'teaching vehicles,' . . . one might presume that the Court teaches marvelously well . . . . In the Establishment Clause context, this is far from true. Here, the Court teaches not only infrequently, but often with the bumbled fluster of one who just earned a K-to-12 certificate by redeeming box-tops."); Jeffrey Shulman, *Making Sense of the Establishment Clause*, 10 ENGAGE 4, 4–6 (2009) ("While the jurisprudence of the Establishment Clause may not make much sense (common or otherwise) as a substantive legal matter, it does make sense as a series of jurisprudential maneuvers by which the Court has sought to make more room for religion in civic life.").

If it is true that, as *Everson* and its progeny suggest, an "establishment of religion" is government action that assists, approves, endorses, inculcates, supports, or in any way promotes any public or private expression of individual or communal religious commitments,[182] the critics are correct. The dissenters in *Everson* argued for *absolute* separation,[183] but they never got it. What they got instead was a majority of the Supreme Court determined, in the words of Justice Sandra Day O'Connor, to strike "sensible balances"[184] between the religious liberty and equal citizenship interests of some factions and the competing "secular" (however defined) factional interests of others.

If, by contrast, an "establishment of religion" is understood as a legally privileged group of citizens who use the power of the state to advance or defend their common interests in maintaining control over the community's shared spaces and its culture-forming economic, educational, and political institutions, the Court's Establishment Clause jurisprudence makes perfect sense. And there is no better prism than the Court's Establishment Clause standing cases to bring its penchant for "the politics of power."[185]

There has been considerable debate over the years about the exact nature of the harm an individual allegedly suffers when a state or federal official "appear[s] to take a position on questions of religious belief."[186] Unlike those pressured or coerced to act in a manner inconsistent with their religious beliefs,[187] or those whom the state seeks to exclude from public programs or activities because their activities are, or can be perceived to be, religious in

182. Esbeck, *supra* note 8.

183. Everson v. Bd. of Educ., 330 U.S. 1, 31–32 (1947) (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting) ("The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.").

184. Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

185. JACKSON, *supra* note 2.

186. County of Allegheny v. ACLU, 492 U.S. 573, 594 (1989).

187. *See, e.g.*, Gallagher v. Crown Kosher Super Mkt. of Mass., Inc., 366 U.S. 617, 624 (1961) (upholding mandatory Sunday closing laws over the objection of a kosher supermarket, its Orthodox Jewish customers, and the rabbis who were obligated to inspect them for compliance with Jewish dietary laws); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (invalidating mandatory flag salutes).

character,[188] neither a taxpayer[189] nor an "offended observer"[190] suffers a diminution of personal liberty—the touchstone of due process incorporation.[191] Trying to find an answer in the Court's "doctrinal" approach to the Establishment Clause simply does not work.

If, on the other hand, we approach the injury-in-fact question from the perspective of factional, "cultural power politics," the overtly political nature of the Court's Establishment Clause jurisprudence comes into sharp relief. "Observers" who perceive that government action "supports," "endorses," or "favors" religion and who take offense at (or dissent from) such action are, by definition, members of a political faction. So too are their fellow "observers"

188. *See, e.g.*, Shurtleff v. City of Boston, 142 S. Ct. 1583, 1593 (2022) (holding that refusal to permit an individual and religious group to participate on equal terms in a Boston program permitting private individuals and groups to raise their flags on one of the three flagpoles outside Boston City Hall violated the Free Speech Clause); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 895 (1995) (holding unconstitutional selective refusal to pay printing costs for a student publication because it "primarily promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality").

189. Generally speaking, taxpayers do not have standing in the federal courts to challenge expenditures they believe to be either constitutionally infirm or fiscally unwise. *Commonwealth of Massachusetts v. Mellon* rejects the proposition that taxpayers suffer a personal injury in fact because "the effect of the appropriations complained of will be to increase the burden of future taxation and thereby to take [their] property without due process of law." 262 U.S. 447, 486 (1923). The Court concluded that Mrs. Frothingham lacked standing under Article III because she could not show that she had "sustained or [wa]s in immediate danger of sustaining some direct injury as a result of [the statute's] enforcement, and not merely that [s]he suffer[ed] in some indefinite way in common with people generally." *Id.* at 488. Moreover, the Court rejected the Commonwealth's attempt to litigate the same question as *parens patriae* for its citizens. *Id.* at 483. In doing so, Justice Sutherland observed:

> In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent, and it is plain that that question, as it is thus presented, is political, and not judicial, in character, and therefore is not a matter which admits of the exercise of the judicial power.

Id. As we shall see in the detailed discussion of *Everson* below, Mr. Everson's claim to have suffered a constitutional injury in fact was even more dubious than Mrs. Frothingham's. Like Mrs. Frothingham, Mr. Everson sued in his capacity as a taxpayer, arguing that the New Jersey legislature was "without power [under the state constitution] to authorize . . . payments" for bus transportation costs incurred by parents whose children were enrolled in religiously affiliated high schools. Everson v. Bd. of Educ., 330 U.S. 1, 2 (1947). The New Jersey Court of Errors and Appeals not only rejected his state-constitutional argument, but it also held that "[a] meticulous examination of the record shows an absolute lack of any . . . proof" that "any part of the State School Fund" was used to pay for the bus fares he found so objectionable. Everson v. Bd. of Educ., 44 A.2d 333, 336 (N.J. 1945), *aff'd*, 330 U.S. 1 (1947).

190. A Westlaw search of all state and federal cases using ("offended observer" & "Establishment Clause") produced fourteen federal cases. The term "offended observer" first appears in *ACLU v. Mercer County*, 219 F. Supp. 2d 777, 787 (E.D. Ky. 2002). The first secondary source using the term identified by that search was a 2003 ALR annotation discussing the *Mercer County* case. William M. Howard, Annotation, *First Amendment Challenges to Display of Religious Symbols on Public Property*, 107 A.L.R. 5th 1 (2003).

191. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098 (2019) (Gorsuch & Thomas, JJ., concurring) (arguing that "offended observer" standing has no basis in law). The issue of taxpayer standing also divided the state courts prior to *Everson*. *See, e.g.*, Chance v. Miss. State Textbook Rating & Purchasing Bd., 200 So. 706, 713 (Miss. 1941) (Smith, C.J., dissenting); Borden v. La. State Bd. of Educ., 123 So. 655, 659 (La. 1928) (observing that the Court divided 4–3 on the issue).

who either take no offense or who actively support the challenged policy or action.[192] *Both* sides of the political dispute "are united and actuated by some common impulse of passion, or of interest, adverse to the rights of . . . other citizens."[193] This is the nature of factional politics.

In *Everson*, the dissenting Justices frankly acknowledged that the growing political power of the parents and children who "in conscience . . . desire a different kind of training others do not demand"[194] was such a great political threat to the control of both the public schools and the funds that supported them.[195] In their view, preemptive federal judicial intervention was required to prevent systemic *political* injury.[196] In the name of "promot[ing] and assur[ing] the fullest scope of religious liberty and religious tolerance for all and to nurture the conditions which secure the best hope of attainment of that end,"[197] the Court would claim the authority to manage both the factional politics and the outcomes of political battles over control of the nation's major culture-forming institutes and public spaces.

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192. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 671–72 (1984) (pitting objecting taxpayers, the ACLU and religious objectors, against resident taxpayers, members of the Coalition for Religious Liberty, and supporters of the display). In fact, Professor Ira Lupu and this Author appeared opposite one another in the trial court. Donnelly v. Lynch, 525 F. Supp. 1150, 1153 n.* (D.R.I. 1981), *aff'd*, 691 F.2d 1029 (1st Cir. 1982), *rev'd*, 465 U.S. 668 (1984) (expressing gratitude for the amicus briefs we filed on opposite sides of the case).

193. THE FEDERALIST NO. 10, *supra* note 115, at 72.

194. *Everson*, 330 U.S. at 58 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting).

195. *Id.* ("But if those feelings [of the parents denied access to tax funds] should prevail, there would be an end to our historic constitutional policy and command.").

196. Though much has been written about the holding in *Flast v. Cohen*, 392 U.S. 83 (1968), the Court has never really explained how a taxpayer suffers a "direct injury" to his or her personal interests when children enrolled in religiously affiliated schools are permitted to participate in neutral or generally applicable congressional or state spending programs. Based on my own overview of the literature as a whole, there are several possibilities:

- Hypothesis #1: Normal requirements for jurisdiction and standing can, and should, be set aside when the matter is one of great public interest.
- Hypothesis #2: The Establishment Clause is a unique limitation on the power of Congress and the states and, by its nature, is not subject to the normal rules governing Article III standing.
- Hypothesis #3: Public schools are entitled to an exclusive claim on the public treasury, and any attempt by the state to limit or eliminate the financial incentive to attend free public schools harms public education and puts students enrolled in the public schools at a competitive disadvantage.
- Hypothesis #4: The injury to individual taxpayers whose taxes are spent to support instruction in religions to which they do not adhere is uniquely personal, and should be recognized by the Court as a "direct injury" notwithstanding the impossibility of the taxpayer making a showing that his or her taxes had increased.

197. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2289–91 (2020) (Breyer, J., dissenting) (citing Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 305 (1963) (Goldberg, J., joined by Harlan, J., concurring); Van Orden v. Perry, 545 U.S. 677, 698 (2005) (Breyer, J., concurring)).

D. AMERICA'S CULTURE WAR OVER EDUCATION AND OVER THE ROLE OF RELIGION IN PUBLIC LIFE

The state-level institutions over which the Court asserted preemptive regulatory jurisdiction in *Everson*—educational programs at the elementary, secondary, and (to a lesser extent) college level—are, by its own admission,[198] the Nation's most powerful culture-forming institutions. In fact, the majority and dissenting opinions in *Everson* provide a lengthy discourse on why the federal government *must* have the power to monitor and control the content, perspective, and cultural environment of publicly funded education, and why the Supreme Court must provide the final word on the topic.[199]

Properly understood, "culture is, first and foremost, a normative order by which we comprehend others, the larger world, and ourselves and through which we individually and collectively order our experience."[200] Professor James Davison Hunter, the University of Virginia's LaBrosse-Levinson Distinguished Professor of Religion, Culture, and Social Theory, advises that culture

> is not just our view of what is right or wrong or true or false but our understanding of time, space, and identity—the very essence of reality as we experience it.
>
> This is so because the frameworks of knowledge and understanding (and thus culture, in this sense) are largely coterminous with language. Language, the most basic system of symbols, provides the primary medium through which people apprehend their conscious experience in the world. Through both its structure and its meaning—its syntax and semantics—it provides the categories through which people understand themselves, others, and the larger world. To acquire language is to see the world and oneself in it, meaningfully.[201]

Formal and informal education programs are thus an integral component of the cultures in which they develop. The most basic "informal" education program is, of course, the family. In order to create learning environments in which it is possible to convey the knowledge, skills, and values the culture

198. Wisconsin v. Yoder, 406 U.S. 205, 219 (1972); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 510, 515–16 (1925); Meyer v. Nebraska, 262 U.S. 390, 402–03 (1923).

199. The *Everson* Court was unanimous on this point. The majority opinion concludes: "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." *Everson*, 330 U.S. at 18. Justice Rutledge, writing for the four dissenters, agreed, arguing that the Court's role was

> to keep separate the separate spheres as the First Amendment drew them; to prevent the first experiment upon our liberties; and to keep the question from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

Id. at 63 (Rutledge, Frankfurter, Jackson & Burton, JJ., dissenting).

200. JAMES DAVISON HUNTER, TO CHANGE THE WORLD 32 (2010).

201. *Id.*

deems important, parents and communities begin by making a series of value judgments about what children need to learn.[202] Only after those judgments are made does it become possible to choose books and teaching materials, to establish a curriculum, to set teacher qualifications, to select teachers,[203] to develop attendance and grading policies, to allocate costs, and to determine the degree to which parental input is encouraged. Over time, these choices define both the substantive content of the educational experience, and the philosophical and moral perspectives that will be presented as normative.

In Virginia, where both Thomas Jefferson and James Madison played significant roles in the process of education reform, factional infighting over the nature, content, and control of funds set aside for education was (and remains) a staple of political life. Jefferson understood not only the importance of education in the formation and maintenance of culture, but also the essential role that factional competition in the educational "marketplace of ideas" plays in the preservation of representative government.

> When Jefferson wrote Bill 79 in 1779 for the Virginia legislature proposing public schools, there were no public schools in Virginia, and higher education was the domain of private colleges with largely ecclesiastical curricula. Jefferson's ideas were considered radical by current educational standards, as can be seen by statements of the president of Trinity College. John Kilgo, the president of Trinity Duke University, denounced Jefferson as an "atheistic monster" and warned every Methodist to stay away from the newly founded University of North Carolina, and he called the University of Virginia "a bold enterprise and deistic daring of enormous proportions."
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> Jefferson's ideas not only led to the establishment of competing state universities, but also . . . were similar to his political ideas on the need for a separation of church and state. In order to reform curricula, he felt that state universities needed to be separate from church counsel, and he wanted to add to a largely ecclesiastical faculty and curriculum professorships in civil history, mathematics, medicine, rural economy, pharmacy, surgery, political economy, law, and fine arts. With these radical ideas for reform, small wonder that his ideas were seen as a threat by some current educators.
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> . . . .
>
> The merging of opposites and the positing of countervailing forces are necessary in a conceptualization of Jefferson's education reforms. "Are these opposing forces operating today?" is a necessary question. When his particular

202. *See, e.g.*, David Nyberg, *Teaching Values in School: The Mirror and the Lamp*, 91 TCHRS. COLL. REC. 595, 595 (1990) ("[A]ll education is—whatever else it is—in some ways moral."). *See generally* Carl Bereiter, *Schools Without Education*, 42 HARV. EDUC. REV. 391 (1972).

203. *See, e.g.*, MD. CODE ANN., EDUC. § 6-202 (West 2018) (permitting dismissal of teachers on grounds of, among other things, immorality, misconduct in office, insubordination, incompetency, or willful neglect of duty).

> proposals are used to analyze American education without adequate conceptualization, then they are of little use in assessing the substantially changed society of the 20th century. Yet with adequate conceptualization, they become quite relevant. In Jefferson's view, education must encompass opposing purposes and synthesis of opposites. Educating intellectual elites and the general public; educating for professional, as well as general, knowledge will never be easy. However, Jefferson's vision of a synthesis of what appears to be goals that are not easily reconciled is as compelling today as it was when Jefferson first proposed it.[204]

James Madison also understood the value of competition—and the danger of concentrating too much power in the hands of the few. Read in the political context in which it was written, his *Memorial & Remonstrance* is one of the most politically astute, masterful, and *successful* factional coalition-building efforts in American history.[205] The general assessment bill never became law, but the debate over the nature, content, *and financing* of both public and private education in Virginia and other states continued throughout the 1800s.[206]

In their efforts to use the "Virginia Experience" to support the Court's jurisdictional power grab in *Everson*, any Justice who relies on Madison to support a claim that education must be controlled by the factions who comprise a majority of the political class not only misses his point, but also inverts his political message. Religious liberty is the inalienable right "of every man to exercise it as these may dictate,"[207] but its protection is an outgrowth of the respect that the political community owes to each of its members. For Madison, the protection of religious liberty is a natural outgrowth of an enlightened public

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204. Gordon E. Mercer, *Thomas Jefferson: A Bold Vision for American Education*, 68 INT'L SOC. SCI. REV. 19, 20, 25 (1993) (quoting MERILL D. PETERSON, THE JEFFERSON IMAGE IN THE AMERICAN MIND 243 (1960)).

205. *See generally Memorial and Remonstrance Against Religious Assessments, [ca. 20 June] 1785*, NAT'L ARCHIVES, https://founders.archives.gov/documents/Madison/01-08-02-0163 (last visited Aug. 23, 2023) (discussing the factional politics of religion in Virginia in the 1780s). Nineteenth-century debates on the role of religion and religious accommodation in the common schools took place on several levels. "For at least the first half of the nineteenth century there was a consensus that necessary republican skills could not be divorced from their moral and religious foundations." Steven K. Green, *The Insignificance of the Blaine Amendment*, 2008 BYU L. REV. 295, 305. The concept of "non-sectarian" education developed from that consensus: "[C]itizens assumed that Americanism and Protestantism were synonyms, and that education and Protestantism were allies." Timothy L. Smith, *Protestant Schooling and American Nationality, 1800-1850*, 53 J. AM. HIST. 679, 680 (1967). Professor Green points out that the "no-funding principle" developed from "several complementary rationales": (1) "to prevent the division of school funds in order to secure the financial stability of the nascent common schools," (2) to standardize education and ensure financial accountability, and (3) to effectuate religious non-establishment. Green, *supra*, at 310.

206. Virginia did not create a public school system until 1870. *See* Herbert C. Bradshaw, *The Development of Public Schools in Virginia, 1607–1952*, 62 VA. MAG. HIST. & BIOGRAPHY 137, 137 (1954) (reviewing J.L. BLAIR BUCK, THE DEVELOPMENT OF PUBLIC SCHOOLS IN VIRGINIA (1952)).

207. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS para. 1 (1785), *reprinted in* 8 THE PAPERS OF JAMES MADISON 298, 300 (Robert A. Rutland & William M.E. Rachal eds., 1973).

policy that protects "every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property."[208]

The "Pennsylvania experience," which, to my knowledge, has never been referenced by the Supreme Court, shows just how nasty factional power politics over control of state institutions can be.[209] The *entire* Virginia experience (not just the Snapchat version we see in the cases) is, like Pennsylvania's, an extended struggle to free children, parents, and local communities, first from the clerical elites who were the targets of *Memorial & Remonstrance*, and later (and to this day) from the narrow-minded elitists and bureaucrats who favor centralized, state-level control.[210]

1. Follow the Money: Compulsory Education and the Power of the Purse

Before 1947, the Supreme Court had addressed the meaning of the ban on laws "respecting an establishment of religion" on only two occasions.[211] In both cases, the Court refused to exclude identifiably religious institutions, or the individuals who prefer the religious and the environments they offer, from participating in public programs or benefits.

If the Bill of Rights is really about the protection of "minorities" (and I do not believe that it is so limited), the Supreme Court's first post-1937 foray into Establishment Clause analysis should have been easy. Catholics were unquestionably a "minority" in the United States in 1947, and there was a long and well-documented history of discrimination *and violence*[212] against

208. *Id.* at para. 8.

209. *See* Wedeking, *supra* note 131, at 32. Just as Jim Wedeking acknowledged my input in his excellent article, I am honored to acknowledge his much appreciated addition to the literature.

210. *See* Robert Orvis Woodburn, Historical Investigation of the Opposition to Jefferson's Educational Proposals in the Commonwealth of Virginia (Dec. 17, 1974) (Ph.D. dissertation, American University) (on file with author); John J. Holder, *The Political and Educational Philosophy of Benjamin Rush*, 24 TRANSACTIONS CHARLES S. PEIRCE SOC'Y 409, 418 (1988).

211. *Bradfield v. Roberts* was a challenge by dissenting taxpayers to an appropriation by Congress for the construction of "an isolating building or ward for the treatment of minor contagious diseases" on the grounds of Providence Hospital in Washington, D.C. 175 U.S. 291, 298 (1899). The Court rejected the Establishment Clause challenge by concluding that the hospital's legal charter made it a secular corporation and that the fact that the hospital was operated by a religious organization did not make it a religious corporation. *Id.* In *Reuben Quick Bear v. Leupp*, the Court rejected a claim by members of the Sioux Tribe that the Establishment Clause and federal statutes forbade the payment of tribal funds held in trust by the Bureau of Indian Affairs for the education of Sioux children to a religiously affiliated school, where the children enrolled there were otherwise eligible to benefit under the trust fund. 210 U.S. 50, 82 (1908).

212. The story of the Philadelphia Bible Riots is, from this Author's perspective, conveniently omitted from the Court's selective reading of the American history of religious freedom. *See* Zachary M. Schrag, *The Nativist Riots of 1844*, THE ENCYC. OF GREATER PHILA., https://philadelphiaencyclopedia.org/essays/nativist-riots-of-1844/ (last visited Aug. 23, 2023). Popular images at the time tell a story that few, if any, Americans have heard. *Id.* at fig.3; *see Early Catholics in the City Endured Persecution, Riots*, WHYY (Sept. 18, 2015), https://whyy.org/articles/early-catholics-in-the-city-endured-persecution-riots/.

Catholics, both generally and in public schools. Orthodox Jews, Evangelical Lutherans, Muslims, and others who prefer to run their own educational programs are, and continue to be, "minorities"—however that term is defined. They too are excluded because this factional battle's purpose is to assert and maintain political control of public institutions, public programs, public spaces, and the funds that support them.[213]

From the Civil War onward, "Catholics in many parts of the Northeast and Midwest opened a campaign to eliminate the Protestant tinge that Bible-reading gave to the public schools, to secure for their own parochial schools a share of the funds that the states were providing for education."[214] The furious political response to this campaign was a classic example of factional power politics.

At the most fundamental level, the early contests were among factions that favored political control and financing through general taxation, and those who preferred that control of both the educational programming and the money allocated for its support; the latter believed it should rest primarily with the parents.[215] Control of the schools became a galvanizing issue in the 1876 presidential campaign, with both Rutherford B. Hayes and Ulysses S. Grant railing against the nefarious plot by Catholics and others to destroy the ideal of "of a good common school education, unmixed with sectarian, pagan or atheistical dogmas."[216]

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213. *See supra* note 9 and accompanying text; *infra* Part III.D.2.

214. JOHN HIGHAM, STRANGERS IN THE LAND: PATTERNS OF AMERICAN NATIVISM 28 (2d ed. 2002).

215. Speaking on the Senate floor on August 11, 1876, Senator Theodore Fitz Randolph of New Jersey argued:

> The present issue as to where secular education ends and religious teaching begins is mainly between Protestants and Catholics. Agreeing in the main proposition, they are at irreconcilable difference as to the means. Most Protestants urge taxation for the support of public schools, in which they would have limited religious instruction. Catholics would have no general taxation for the purpose; or if any be had, then an equitable distribution of the moneys raised. The Catholic preference is for an education dependent upon the will of the parent, or the zeal of rival religious organizations. They contend that in the advanced position of the cause of education in the United State the wide-spread knowledge of the premium which society gives to intelligence will ever insure fair education to the masses. Protestants assert that history does not sustain this view.
>
> Many even claim that the security of the state hinges upon the education of its people; that ignorance is the instrument of despotism, as intelligence is its foe. Thus it is argued the free state can only maintain its integrity through the education of its citizens. If this be strictly true then education must be compulsory. Then if you may compel my child to hear the lessons the state deems best, and those lessons be what a majority of the state, through temporary rulers, agree upon, what becomes of the priceless guarantee of liberty of conscience?

4 CONG. REC. 5455 (1876) (statement of Sen. Theodore Fitz Randolph).

216. ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 68 (1950).

In 1875, Grant and James G. Blaine, another potential candidate in the 1876 election, proposed what is now known as the "Blaine Amendment,"[217] which sought to federalize "the question of common school finance in much the same manner as the Supreme Court has done since *Everson*.[218] Though the proposed amendment failed in the Senate in 1876, the primary issue it raised—federal control of at least some aspects of the content, perspective, environment, and financing of elementary and secondary education—remain with us today.

Three proposals authored by Senator Henry W. Blair of New Hampshire are also worthy of mention here. His first, proposed in 1881 and passed three times by the Senate before its ultimate failure in the Senate in 1890,[219] became known as the "Blair Education Bill."[220] Though Blair's Education Bill was not the first to propose federal aid to education,[221] it marked the beginning of Senator Blair's efforts to mandate federal and state funding of primary and secondary education. Its plan to distribute those funds on the basis of relative illiteracy were both immensely popular[222] and widely viewed as an effort to accomplish "educational Reconstruction" in the South.[223]

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217. The version of the Blaine Amendment adopted in the House of Representatives (H.R. 1: 180 yeas, 7 nays, 98 abstained) read:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, not any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations. This article shall not vest, enlarge, or diminish legislative power in Congress.

4 CONG. REC. 5190 (1876).

218. After extensive debate in the Senate, H.R. 1 failed to garner the requisite two-thirds majority (28 yeas, 16 nays, 27 abstained). 4 CONG. REC. 5595 (1876); *see also* 4 CONG. REC. 5453 (1876) (containing the text of the Senate Judiciary Committee's Report suggesting a substitute text). For a comprehensive review of the history and factional politics of the debate over the Blaine Amendment, see Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38, 41 (1992).

219. 13 CONG. REC. 21 (1881); 15 CONG. REC. 2724 (1883); 17 CONG. REC. 2105 (1886); 19 CONG. REC. 1223 (1888); 21 CONG. REC. 2436 (1890). It was never taken up in the House of Representatives.

220. *See generally* Jeff Jenkins, *The Blair Education Bill*, BROADSTREET BLOG (Aug. 24, 2020), https://broadstreet.blog/2020/08/24/the-blair-education-bill/.

221. *See* Gordon B. McKinney, *Origin of the Education Bill*, *in* HENRY W. BLAIR'S CAMPAIGN TO REFORM AMERICA: FROM THE CIVIL WAR TO THE U.S. SENATE 77, 82 (2013).

222. *See generally* Willard B. Gatewood, *North Carolina and Federal Aid to Education: Public Reaction to the Blair Bill, 1881-1890*, 40 N.C. HIST. REV. 465, 467 (1963); Allen J. Going, *The South and the Blair Education Bill*, 44 MISS. VALLEY HIST. REV. 267, 267 (1957) (noting the relative advantage of the illiteracy provisions to the southern states, and that the former Confederate states would have received almost two-thirds of the total funding allotted).

223. The role of factional power politics in efforts to codify official discrimination on the basis of race and religion in the period after the adoption of the Fourteenth Amendment (1868–1890) is a topic worth exploring, but is beyond the scope of this Essay. For a discussion of the importance of the Blair Education Bill in Reconstruction efforts, see, for example, Hilary Green, *Epilogue: The Blair Education Bill and the Death of Educational Reconstruction, 1890*, *in* EDUCATIONAL RECONSTRUCTION: AFRICAN AMERICAN SCHOOLS IN THE URBAN SOUTH, 1865-1890, at 185–86 (2016); Daniel W. Crofts, *The Black Response to the Blair Education Bill*, 37 J.S. HIST. 41, 43–44 (1971).

Blair's second major proposal, a constitutional amendment introduced on May 25, 1888 ("Blair Christian Education Amendment"), proposed that "[e]ach State in this Union shall establish and maintain a system of free public schools adequate for the education of all the children living therein between the ages of six and sixteen years, inclusive, in the common branches of knowledge, and in virtue, morality, and the principles of the Christian religion" [224] of the then-dominant Protestant majority.[225] It also proposed that "the United States shall guaranty to every State and to the people of every State and of the United States the support and maintenance of such a system of free public schools."[226]

The last of Blair's proposals, and the only one to become law, was contained in the Enabling Act, which divided Dakota into two states and authorized the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and state governments and be admitted to the Union.[227] The Act mandated that "provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control."[228]

The supporters of the Blaine Amendment and of Blair's constitutional and legislative proposals were far from unanimous in their own "sectarian" religious views, but they were united with regard to political control of the religious and cultural environment of the common schools: prayers, Bible reading, teacher qualifications, curriculum, and funding. Their opponents, largely but not exclusively Catholic, saw in these proposals an effort to create and maintain cultural and religious control.[229]

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224. S. Res. 86, 50th Cong. § 2 (1888).

225. Professor Steven Green has argued that evidence of anti-Catholic bias was not nearly as pervasive as some authors have suggested. *See* Green, *supra* note 205, at 331 (citing GAINES M. FOSTER, MORAL RECONSTRUCTION: CHRISTIAN LOBBYISTS AND THE FEDERAL LEGISLATION OF MORALITY, 1865-1920, at 39–42 (2002)) (discussing Blair's religious background and his ties to religious reform groups); ANSON PHELPS STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 566 (1964) (discussing Blair's associations with conservative religious causes). From a power-politics perspective, however, Professor Green misses the point. While he correctly identifies several factors relevant to the "control" issues that are the focus of this Essay, he does not explore the religious components of the factional battle over these issues. Rather, he considers whether the Blaine Amendment "established or advanced a principle of constitutional significance" in the constitutional framework established by *Everson* and its progeny. Green, *supra* note 205, at 296–97.

226. S. Res. 86, § 3.

227. Enabling Act, Pub. L. No. 50-189, § 1, 25 Stat. 676, 676–77 (1889).

228. *Id.* § 4, 25 Stat. at 676–77.

229. Catholic leaders in the early 1870s not only saw anti-Catholicism as a problem, but they were also keenly focused on efforts by the Protestant majority to assert and maintain content control of education. Writing in April 1871, the editors of the magazine *Catholic World* condemned "the consolidation of all the powers of the government in the general government, and the social and religious unification of the American people by a system of universal and uniform compulsory education, adopted and enforced by the authority of the united or so consolidated states, and not by the states severally." *Unification and Education*, 13 CATHOLIC WORLD 1, 2 (1871).

Their fears were confirmed when, in the early 1920s, the State of Oregon attempted to close all private schools,[230] arguing that "sectarian" schools (a euphemism for Catholic schools) were a "pretext" to divide "our children . . . based upon money, creed or social status . . . into antagonistic groups, there to absorb the narrow views of life, as they are taught."[231]

2. Arch Everson's Test Case

Arch Everson, the plaintiff in *Everson*, appears to have shared those views. In 1942, Mr. Everson challenged a town resolution authorizing reimbursements for bus fares paid by parents to send their children to public and private high schools in Trenton.[232] He did not object to the payments to parents whose children attended public schools, but only to those made to parents who had chosen schools that were not controlled by the state—Catholic and Methodist.[233]

In order to understand the legal and cultural dimensions of the case, one must first examine the New Jersey statute that authorized the payments:

> Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.[234]

As originally drafted, the New Jersey law applied only to "schoolhouses" operated by the public schools.[235] A 1941 amendment broadened its coverage to include *any* schoolhouse and any child attending nonprofit, private schools.[236] Because Ewing Township, New Jersey (a suburb of Trenton) had no high school at the time, it was inevitable that *all* of the township's public school children

230. In *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court had relied on a generalized concept of religious liberty rather than the Free Exercise Clause to invalidate Oregon's attempt to close religious schools and Nebraska's attempt to stop religious schools from teaching foreign languages. Since *Everson*, the litigation of religious liberty cases in federal courts has become "a continuation of cultural politics by other means." Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303, 340 (1986)).

231. Brief of Appellee at 97, Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary, 268 U.S. 466 (1925) (No. 583).

232. Ewing Township, New Jersey, is adjacent to Trenton. In 1944, when the case was filed, its public school did not extend beyond the eighth grade. Everson v. Bd. of Educ., 39 A.2d 75, 75–76 (N.J. 1944), *rev'd*, 44 A.2d 333 (N.J. 1945), *aff'd*, 330 U.S. 1 (1947).

233. Pennington High School was founded in 1838 as the Methodist Episcopal Male Seminary, whose mission was to secure "the education of the physical, the training of the mental, and the grounding of the soul in character." *Pennington's Story*, PENNINGTON SCH., https://www.pennington.org/admission/new-history (last visited Aug. 23, 2023).

234. N.J. REV. STAT. § 18:14-8 (1941).

235. The development of New Jersey law is summarized in the opinion by the Supreme Court of New Jersey. *Everson*, 39 A.2d at 75–76.

236. Statement as to Jurisdiction of Arch R. Everson, Appellant at 3, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52).

would be commuting into Trenton to attend high school.[237] The only question was: Who would pay the bill?

On September 21, 1942, the township trustees adopted the following resolution:

> The Transportation Comm. recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted.[238]

The record in *Everson* does not tell us much about the factional politics that led to the adoption of this resolution by the township trustees, but it certainly does tell us about the factions who opposed it.[239] Even though Trenton High was a public school and Pennington High was affiliated with the Methodist Episcopal Church,[240] Mr. Everson's "Jurisdictional Statement" told the Supreme Court that "[a]ll of the said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curricula in each of said schools. A priest of the Catholic Church is the Superintendent of said schools."[241]

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237. *See Everson*, 39 A.2d at 75–76.

238. Statement as to Jurisdiction of Arch R. Everson, Appellant, *supra* note 236 (quoting Resolution of the Ewing Township Board of Trustees, Sept. 21, 1942).

239. The briefs in the superior court, and its citations to similar cases cropping up around the country, were a good indicator that this was a test case. The following amici curiae filed in support of the transportation program. *See* Brief of the Commonwealth of Massachusetts as Amicus Curiae, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52); Brief & Argument of Illinois & Indiana as Amici Curiae, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52); Brief of Attorney General of Michigan as Amicus Curiae, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52); Motion of the State of New York for Leave to File as Amicus Curiae & Brief of Amicus Curiae, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52); Brief Amici Curiae of National Council of Catholic Men and National Council of Catholic Women, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52). The following amici opposed the school board: Brief of ACLU as Amicus Curiae, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52); Brief of the General Conference of Seventh-Day Adventists & the Joint Conference Committee on Public Relations Representing the Southern Baptist Convention et al. Amici Curiae, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52); Brief of State Council of the Junior Order of United American Mechanics of the State of New Jersey, as Amicus Curiae, Everson v. Bd. of Educ., 330 U.S. 1 (1947) (No. 52). All of the parties knew that the political stakes were high—and said so in their briefs. The Junior Order of the United American Mechanics raised the "slippery slope" argument:

> On the other hand, a decision in favor of Appellees would have far-reaching effects. States now permitting transportation of sectarian-school pupils at public expense would be encouraged to provide other services to children attending sectarian schools. States which do not now furnish transportation of sectarian-school pupils would see the way to justify a move in that direction. Eventually, the country would develop two school systems, one so-called public, the other sectarian, but publicly supported. That result could not fail to weaken our public school system, and the weakening of our public school system would unquestionably curtail the vast flow of strength which it has brought to our nation's progress.

Brief of State Council of the Junior Order of United American Mechanics of the State of New Jersey as Amicus Curiae, *supra*, at 12.

240. *See Trenton Central High School*, WIKIPEDIA, http://en.wikipedia.org/wiki/Trenton_Central_High_School (May 14, 2023, 4:09 PM); *Pennington's Story*, *supra* note 233.

241. Statement of Jurisdiction of Arch R. Everson, Appellant, *supra* note 236, at 4.

The religious character of Pennington High, however, was proudly Methodist:

> Founded by the Methodist Church in 1838, The Pennington School has long been a place of inclusion and innovation. Early on, the founders identified three guiding principles for the School: "the education of the physical, the training of the mental, and the grounding of the soul in character." These principles reflected the vision of John Wesley, the founder of Methodism, who envisioned schools as places that cared for the whole individual, with the real purpose of education not just to fill students with information, but to enable them to think.[242]

Everson's claim before the New Jersey courts was that state payments to a private transportation company violated article IV, section 7, paragraph 6 of the New Jersey Constitution:

> The fund for the support of free schools, and all money, stock and other property, which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested, and remain a perpetual fund; and the income thereof, except so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the state; and it shall not be competent for the legislature to borrow, appropriate or use the said fund or any part thereof, for any other purpose, under any pretense whatever.[243]

The trial court ruled against the school board, over a dissent by Justice Heher, on the ground that the limitation requiring that school funds be used

> to the support of public free schools, for the equal benefit of all the people of the state . . .
>
> . . . .
>
> w[as] designed as an insurmountable barrier to giving free state aid, and to donations to private or sectarian schools, and should be rigidly enforced, but . . . w[as] not intended to narrow or circumscribe the legislative power to furnish facilities by general laws for public education under its own supervision.[244]

The Court of Errors and Appeals reversed. In its view, there was a significant difference between expenditures drawn from "the fund for the support of free schools," which could only be spent for the benefit of public schools, and the use of "general state funds or . . . the use of local funds for the

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242. *Pennington's Story*, *supra* note 233.

243. Everson v. Bd. of Educ., 39 A.2d 75, 76 (N.J. 1944), *rev'd*, 44 A.2d 333 (N.J. 1945), *aff'd*, 330 U.S. 1 (1947) (quoting N.J. CONST. art. IV, § 7).

244. *Id.* at 76–77 (quoting Trs. of Rutgers Coll. v. Morgan, 57 A. 250, 255 (N.J. 1904), *modified per curiam*, 71 N.J.L. 663 (1905)).

transportation of pupils to any school."[245] Since there was no evidence in the record regarding the source of the disputed $357.74 (the equivalent of $6,422.97 in 2022[246]), the court assumed that the board had followed the law. It remanded with instructions to dismiss the writ.[247]

Everson lost this particular battle, but he clearly won the first and most important rhetorical battle of the ongoing culture war over factional control of public funds for education. His message was clear: Catholics are a threat, and education is a purely "private enterprise" if it is "not under the control of the town authorities"[248] allied with the dominant religious culture. Like the majority in *Everson* and the supporters of Senator Blair's Christian Education Amendment, he wanted a guarantee that the factions that dominate the local school board did not see the role of religion in education the same way that he did. *Kiryas Joel* would have been unimaginable.[249]

Stripped to its essentials, Everson's claim was that the Establishment Clause makes parents and children *ineligible* to participate in publicly funded educational programs unless they submit to control of their entire educational experience by the state, or by institutions that convey state-endorsed messages concerning required subjects.

E. THE POLITICS OF INCORPORATION—OR WHY THE ESTABLISHMENT CLAUSE "RESISTS INCORPORATION"

Although *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*[250] and *Meyer v. Nebraska*[251] are now generally understood as early examples of "First Amendment" case law because the controversies resolved in those cases were integrally bound up with the issue of religious freedom and education, the process of defining the "incorporated" norms of the First Amendment actually began in *Cantwell v. Connecticut*.[252] The federal

245. Everson v. Bd. of Educ., 44 A.2d 333, 336–37 (N.J. 1945), *aff'd*, 330 U.S. 1 (1947).

246. *See* US INFLATION CALCULATOR, https://www.usinflationcalculator.com/ (last visited Aug. 23, 2023).

247. *Everson*, 44 A.2d at 337.

248. Statement of Jurisdiction of Arch R. Everson, Appellant, *supra* note 236, at 7 (quoting Curtis v. Whipple, 24 Wis. 350 (1869)) (invalidating a local levy for the construction of a nonreligious school that was, in the court's view, "a private educational institution, controlled exclusively by the stockholders[] through a board of trustees" rather than the local school board).

249. Bd. of Educ. v. Grumet, 512 U.S. 687, 690–96 (1994).

250. 268 U.S. 510 (1925).

251. 262 U.S. 390 (1923)

252. 310 U.S. 296, 303 (1940). The process actually began much earlier and has its roots in the Court's conception of substantive due process. *See* Gilbert v. Minnesota, 254 U.S. 325, 337–38, 343 (1920) (Brandeis, J., dissenting); Gitlow v. New York, 268 U.S. 652, 666 (1925). The incorporation of the Religion Clauses follows a similar pattern. *Compare* Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245, 265–68 (1934) (Cardozo, Brandeis & Stone, JJ., concurring), *and* Lovell v. City of Griffin, 303 U.S. 444, 449–50 (1938) (declining to address the Religion Clauses, and choosing instead to place its reliance on the incorporated Speech and Press Clauses), *with* Emp. Div., Dep't of Hum. Res. v. Smith, 494 U.S. 872 (1990).

constitutional law of religious liberty has thus been "in process" for approximately seventy-five years, but the Court has yet to articulate clearly the precise nature and content of the religious liberty guarantee "incorporated" via the Fourteenth Amendment. Rather, it is an amalgam of rules that are, to put it mildly, confusing.[253] By the Court's own admission, its current jurisprudence is a "blurred, indistinct, and variable" set of rules "depend[ent] on all the circumstances of a particular relationship."[254]

But that situation is changing. Though the Court has yet to explain exactly what the nature of an Establishment Clause injury is, at least some of the Justices are beginning to question why the Establishment Clause "incorporates" *at all*. In *Espinoza*,[255] Justice Thomas, concurring with Justice Gorsuch, raised the question directly:

> This understanding of the Establishment Clause is unmoored from the original meaning of the First Amendment. As I have explained in previous cases, at the founding, the Clause served only to "protec[t] States, and by extension their citizens, from the imposition of an established religion by the *Federal* Government." Under this view, the Clause resists incorporation against the States.
>
> There is mixed historical evidence concerning whether the Establishment Clause was understood as an individual right at the time of the Fourteenth Amendment's ratification. . . . Even assuming that the Clause creates a right and that such a right could be incorporated, however, it would only protect against an "establishment" of religion as understood at the founding, *i.e.*, "'coercion of religious orthodoxy and of financial support by force of law and threat of penalty.'"[256]

As I explain in this Essay, and as Professor Amar pointed out years ago, the problem is not with the Establishment Clause or with the *idea* behind the "incorporation doctrine," but with the Court's reading of the Fourteenth Amendment. After a masterful review of the history of the Fourteenth Amendment, Professor Amar proposed a new "synthesis":

> This synthesis, which I call "refined incorporation," begins with Black's insight that *all* of the privileges and immunities of citizens recognized in the Bill of Rights became applicable against states by dint of the Fourteenth Amendment. But not all of the provisions of the original Bill of Rights were

253. The specific guidelines that courts have imposed have been so confusing and contradictory that virtually no one is satisfied with them. In *Murray v. City of Austin*, for example, Fifth Circuit Judge Myron Goldberg observed in dissent that "[a]nyone reading Establishment Clause precedent—the cases on non-purposeful, symbolic government support for religion—cannot help but be struck by the confusion that reigns in this area." 947 F.2d 147, 163 (5th Cir. 1991) (Goldberg, J., dissenting).

254. Lynch v. Donnelly, 465 U.S. 668, 678–79 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

255. Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (Thomas, J., concurring) (citing Town of Greece v. Galloway, 572 U.S. 565, 604 (2014)).

256. *Id.* at 2263–64 (Thomas & Gorsuch, JJ., concurring).

> indeed rights of citizens. Some instead were at least in part rights of states, and as such, awkward to incorporate fully *against* states. Most obvious, of course, is the Tenth Amendment, but other provisions of the first eight amendments resembled the Tenth much more than Justice Black admitted. Thus, there is deep wisdom in Justice Brennan's invitation to consider incorporation clause by clause rather than wholesale. But having identified the right unit of analysis, Brennan posed the wrong question: Is a given provision of the original Bill really a *fundamental* right? The right question is whether the provision really guarantees a privilege or immunity of individual citizens rather than a right of states or the public at large. And when we ask this question, clause by clause, we must be attentive to the possibility, flagged by Frankfurter, that a particular principle in the Bill of Rights may change its shape in the process of absorption into the Fourteenth Amendment. This change can occur for reasons rather different from those offered by Frankfurter, who diverted attention from the right question by his jaundiced view of much of the original Bill and by his utter disregard of the language and history of the privileges or immunities clause. Certain hybrid provisions of the original Bill—part citizen right, part state right—may need to shed their state-right husk before their citizen-right core can be absorbed by the Fourteenth Amendment. Other provisions may become less majoritarian and populist, and more libertarian, as they are repackaged in the Fourteenth Amendment as liberal civil rights—"privileges or immunities" of individuals—rather than republican political "right[s] of the people," as in the original Bill.[257]

Professor Amar's analysis is right on target, but the problem is even more basic. Ever since the Justices began their initial flirtation with the concept of "incorporation" around 1920,[258] the Court has assiduously avoided any discussion of how the Equal Protection Clause affects the analysis.

This should come as no surprise. Section 1 of the Fourteenth Amendment—the very provision on which the Court rested its "incorporation" project—reversed *Dred Scott and* was explicitly intended to limit the power of the Court to "manage" the country's poisonous history of race relations. It did so by restoring the powers the Court had taken from Congress and the states and reaffirming the power that Congress and the states had to ensure the equal citizenship and treatment of every person within their respective jurisdictions.[259]

The Court, of course, ignored that message, and set out (again), *in Plessy v. Ferguson*,[260] to act on behalf of the country's cultural elites to shore up their social capital and control. Firmly rooted in the "social facts" of its time and dripping with the condescension one expects (even today) from people who

257. Amar, *supra* note 70, at 1197.

258. *See supra* note 179 and accompanying text.

259. *See supra* notes 118–28 and accompanying text.

260. 163 U.S. 537 (1896).

consider themselves to be "the thoughtful part of the nation,"[261] it dismissed Homer Plessy's heroic (and historic) claim that state-enforced racial segregation was a violation of the Constitution. It only *looked that way* to Mr. Plessy "solely because the colored race chooses to put that construction upon it."

> We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. The argument necessarily assumes that if, as has been more than once the case, and is not unlikely to be so again, the colored race should become the dominant power in the state legislature, and should enact a law in precisely similar terms, it would thereby relegate the white race to an inferior position. We imagine that the white race, at least, would not acquiesce in this assumption. The argument also assumes that social prejudices may be overcome by legislation, and that equal rights cannot be secured to the negro except by an enforced commingling of the two races. We cannot accept this proposition. If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits, and a voluntary consent of individuals. As was said by the court of appeals of New York in *People v. Gallagher*, 'This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law, and equal opportunities for improvement and progress, it has accomplished the end for which it was organized, and performed all of the functions respecting social advantages with which it is endowed.' Legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.
>
> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a difference of opinion in the different states; some holding that any visible admixture of black blood stamps the person as

261. The words of Justice Bradley, writing in *The Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, of Mormon beliefs and practices are equally revealing: "The state has a perfect right to prohibit . . . all . . . open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced." 136 U.S. 1, 50 (1890); *see* Planned Parenthood v. Casey, 505 U.S. 833, 864 (1992) (O'Connor, Kennedy & Souter, JJ., concurring) ("In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty. Because the cases before us present no such occasion it could be seen as no such response.").

> belonging to the colored race; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths. But these are questions to be determined under the laws of each state, and are not properly put in issue in this case. Under the allegations of his petition, it may undoubtedly become a question of importance whether, under the laws of Louisiana, the petitioner belongs to the white or colored race.[262]

F. THE COURT REASSERTS THE POWER TO "MANAGE DIVERSITY"

We now reconsider, briefly, "the most famous footnote in constitutional law"[263]: Footnote four in *United States v. Carolene Products*[264] and the Court's explicit signal in *Palko v. Connecticut*[265] that it was prepared to hold that the First Amendment was one of the "immunities that are valid as against the federal government by force of the specific pledges of particular amendments . . . found to be implicit in the concept of ordered liberty[] and thus, through the Fourteenth Amendment, become valid as against the states."[266] For present purposes, however, we need not consider the facts of the cases, the law announced, the meaning of the words and phrases of the footnote, or the implications of either case for the future of judicial review. Rather, the *only* relevant fact in this Essay's analysis is the political context, and the only relevant question is: *To whom was the Court speaking*?

The answer is that the Court was speaking to the members of the political coalition who supported the "[New Deal's] victorious activist Democracy" program and who had been clamoring for legislation "to alter the balance of power between the Court and the political branches."[267] As Robert Jackson observed, the Justices were signaling that they had got the message and were prepared to "subdue[] the rebellion against their constitutional dogma by joining it."[268] Henceforth, they would be open to using the Bill of Rights and the open-ended character of the Due Process Clause of the Fourteenth Amendment as a "great and modern charter for ordering the relation between judges and other agencies of government,"[269] state and federal. Small wonder that Professor Ackerman described it as a "constitutional moment."[270]

By this point in the discussion, it should be obvious that footnote four has nothing whatsoever to do with devising any sort of enduring remedy for

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262. *Plessy*, 163 U.S. at 551–52 (citations omitted).
263. *See supra* note 58 and accompanying text.
264. 304 U.S. 144, 152 n.4 (1938).
265. 302 U.S. 319 (1937).
266. *Id.* at 324–25 & n.2. *Palko* was overruled by *Benton v. Maryland*, 395 U.S. 784, 794 (1969).
267. Ackerman, *supra* note 95, at 715; Kline, *supra* note 106, at 901.
268. JACKSON, *supra* note 2; *see* Kline, *supra* note 106, at 932–40.
269. Fiss, *supra* note 94, at 6.
270. Ackerman, *supra* note 95, at 715.

"discrimination" against "minorities" of any sort. Footnote four is about *power*—and about the Court's willingness to intervene whenever, in its judgment, the "operation of those political processes ordinarily to be relied upon to protect minorities" produces political outcomes unacceptable to the factions who, together, constitute America's "power elite." Any doubts on that score are quickly resolved by taking a look at its opinions reaffirming *Plessy* in three cases challenging state-sponsored racial discrimination decided in close temporal proximity to *Carolene Products*: *Grovey v. Townsend* (1935),[271] *Breedlove v. Suttles* (1937),[272] and *Missouri ex rel. Gaines v. Canada* (1938).[273]

And thus, we return to the question of why the Court assumed jurisdiction of the *Everson* case at all. The Court had twice rejected claims that the Establishment Clause prohibited federal payments to religious institutions that provide essential services.[274] What was the difference in *Everson*?

Justice Robert Jackson's dissent in *Everson* hits the cultural nail on the head:

> It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.
>
> Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. *It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.* The assumption is that after the individual has been instructed in worldly wisdom he will be better

271. 295 U.S. 45 (1935). *Grovey* held that a key member of the New Deal coalition, the Texas Democratic Party, committed no violation of the Fifteenth Amendment when it limited ballot access during Texas primaries on the basis of race. *Id.* at 55. The Court overruled *Grovey* in *Smith v. Allwright*, 321 U.S. 649, 666 (1944).

272. 302 U.S. 277, 284 (1937) (upholding the Georgia poll tax).

273. 305 U.S. 337, 344, 352, 354 (1938) (reaffirming its position in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that the states must provide "advantages for higher education substantially equal to the advantages afforded to white students" and that it was permissible to "fulfill that obligation by furnishing equal facilities in separate schools," but that Missouri must admit the petitioner to the University of Missouri Law School "*in the absence of other and proper provision for his legal training within the State*" (emphasis added)).

274. Bradfield v. Roberts, 175 U.S. 291, 292 (1899) (challenging financial expenditures for the construction of a hospital on the grounds that the hospital was Catholic); Reuben Quick Bear v. Leupp, 210 U.S. 50, 82 (1908) (rejecting claim that Establishment Clause forbids payment of tribal funds held in trust by the Bureau of Indian Affairs for education of Sioux children at religious schools).

> fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.[275]

The history of education in the United States shows, beyond a reasonable doubt, that political control of the schools has *always* been understood to be the primary means by which the state shapes the acculturation and thinking of children. When private school parents sought the assistance of the Ewing Township trustees, they unquestionably sought to increase the cultural *and* religious pluralism available in publicly supported education programs.[276] Rather than endorse the effort, the Court gave notice that it would stop future efforts in their tracks.

The same pattern holds true in cases where the Court has immersed itself in earnest discussions about the "proper" role of race in educational programs. Viewed through the cultural power-politics lens proposed in this Essay, the Court's commitment to "managing" racial and cultural pluralism is even more obvious in racial discrimination cases than it is in religion cases. Like *Everson*, *Brown v. Board of Education I* and *II*,[277] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*,[278] and *Students for Fair Admissions, Inc. v. University of North Carolina*[279] are about cultural control of the

275. Everson v. Bd. of Educ., 330 U.S. 1, 23–24 (Jackson, J., dissenting) (emphasis added).

276. Justice Jackson's dissenting opinion vehemently disagreed with the proposition stated in the text. In his view, the Township of Ewing was not furnishing transportation to the children in any form, operating school buses or contracting for their operation, or performing any public service of any kind with this particular taxpayer's (Everson's) money. All school children were left to ride as ordinary paying passengers on the regular buses operated by the public transportation system. What the Township did—and what Everson complained of—was reimburse parents at stated intervals for the fares paid, provided that the children attended either public schools or Catholic schools. *Id.* at 19–20. Everson did not, however, seek to stop reimbursement of *public* school parents for the costs of bus transportation; he sought to stop reimbursement of *Catholic* school parents. *Id.* at 21–22. He pointed out that the New Jersey statute in question made the character of the school, not the needs of the children, determine the eligibility of parents for reimbursement. *Id.* Jackson asked: "If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?" *Id.* at 21. The characterization of the constitutional issue is telling. The facts of the case indicate that *all* students enrolled in public and Catholic schools were eligible for reimbursement. We cannot tell from the opinion whether there were schools in Ewing Township that were run by other denominations or by private parties with no discernible religious beliefs. The Court thus had a choice: It could characterize the case as one involving "one specified denomination," or it could have characterized the issue as one involving the constitutionality of a decision by the Township to "provide equal subsidies for children enrolled in public and Catholic schools." It is clear, however, that the petitioner was not the parent of a child who was ineligible because of the school in which he or she was enrolled, but rather a taxpayer who objected when parents sought equal treatment for their children.

277. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954); Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 299–301 (1955).

278. 397 F. Supp. 3d 126 (D. Mass. 2019), *aff'd*, 980 F.3d 157 (1st Cir. 2020), *rev'd*, 143 S. Ct. 2141 (2023).

279. 567 F. Supp. 3d 580 (M.D.N.C. 2021), *cert. granted before judgment*, 142 U.S. 896 (2022), *rev'd*, 143 S. Ct. 2141 (2023).

educational environment.[280] The damage done to Louise Brown and the other children who were enrolled in the segregated public schools of Topeka, Kansas; the District of Columbia; and elsewhere was serious enough to warrant judicial intervention on their behalf, but apparently insufficient to warrant an immediate remedy.[281] *Brown* was filed in the district court in 1951.[282] It was not fully concluded for nearly forty-five years![283] And how did the plaintiffs in the combined cases collectively referenced as *Brown v. Board of Education* fare after all of the fanfare and self-congratulations had quieted down? Linda Brown continued to attend a segregated elementary school until enrolling in one of Topeka's integrated junior high schools.[284] The plaintiff children in *Davis v.*

280. The opinion in *Students for Fair Admissions, Inc. v. University of North Carolina*, which decided the fate of both Harvard's and the University of North Carolina's "diversity management" programs, contain extensive discussions of the characteristics of "an establishment" identified in *supra* note 11. *See*, *e.g.*, Students for Fair Admissions, Inc. v. Univ. of N.C., 143 S. Ct. 2141, 2197 (Thomas, J., concurring) ("Indeed, if our history has taught us anything, it has taught us to beware of elites bearing racial theories." (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 780–781 (Thomas, J., concurring))); *id.* at 2237–38 (Jackson, J., joined by Sotomayor & Kagan, JJ., dissenting) (noting the important role elitism played in building the reputations of Harvard and the University of North Carolina).

281. The Court in *Brown II* stated:

> The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

349 U.S. 294, 301 (1955).

282. *See* Complaint at 1, Brown v. Bd. of Educ., 98 F. Supp 797 (1951) (No. T-316).

283. *See* Brown v. Unified Sch. Dist. No. 501, 56 F. Supp. 2d 1212, 1213–14 (D. Kan. 1999) (determining that the district's good-faith compliance with judicially imposed "guidelines which have prevented any school from being identified as a majority or minority school on the basis of the race of its faculty and staff," and which mandated that "the majority and minority student population at each elementary school, middle school and high school be within 15% of the majority and minority percentages for all elementary school, middle school, and high school students in the district" required the court to declare the district "unitary" and thus in compliance with the mandate of *Brown I* and *II*).

284. Kansas had integrated its high schools by statute in 1879, but specifically permitted segregation at the elementary school level until *Brown*. *See* Graham v. Bd. of Educ., 114 P.2d 313, 318 (Kan. 1941) (construing the term "high school" to include grades nine through twelve); *id.* at 319 (Harvey, J., concurring in part and dissenting in part). In *Graham v. Board of Education*, the plaintiff, Oaland Graham, was a twelve-year-old seeking to attend Topeka's Boswell Junior High School as a seventh grader, but was excluded on the basis of race. The Kansas Court ordered his admission:

> The school authorities of the city are not required to furnish the benefits of a departmentalized junior high school to its residents, but they cannot be furnished to white children residing within a particular district and be withheld from negro children residing in the same district and having equal qualifications because of their race.

Id. at 318 (majority opinion); *see, e.g.*, Vincent Omni & Cheryl Brown Henderson, *Leola Williams (Brown) (Montgomery), "All They Can Do Is Say No," in* RECOVERING UNTOLD STORIES: AN ENDURING LEGACY OF THE

County School Board, one of the companion cases in *Brown*, waited for nearly a decade.[285]

There is no need—and certainly not enough room—to multiply the examples here, but the pattern is striking. In case after case, we see the Justices explicitly seeking to be "carriers of the set of traditional values which command authority because they represent the aspirations of both the elite and the rest of the population."[286] Reading the cases through this "cultural power-politics" lens also shows us the classic indicators of a cultural, racial, *and religious* establishment that seeks to be "essentially traditional and authoritative" as it invokes the great principles that animated the Founding generation, rather than "coercive or authoritarian."[287] The outcomes, however, tell a very different story.

BROWN V. BOARD OF EDUCATION DECISION 2, 57–59 (2018) ("This victory, joyful though it was, did not prove a panacea for racial inequity. While Brown Montgomery notes that Topeka Public Schools began desegregation efforts shortly after the watershed Supreme Court decision, she observes that other aspects of public life in Topeka – restaurants, stores, hotels – remained segregated until the Civil Rights legislation ushered in changes during the 1960s."); *Linda Brown Thompson at the Brown v. Board of Education Anniversary* (C-SPAN television broadcast Jan. 12, 2004).

285. The plaintiff children in *Davis v. Prince Edward County* recount the impact of the far more hostile environment there in *Recovering Untold Stories*. *See* Alfred L. Cobbs, *The Impact of the Prince Edward County Closing on My Life*, *in* RECOVERING UNTOLD STORIES, *supra* note 284, at 76–78; Freddie Cobbs, *The Prince Edward County Schools Closing,* Davis v. Prince Edward County*, Farmville, Virginia*, *in* RECOVERING UNTOLD STORIES, *supra* note 284, at 79–80; Samuel A. Cobbs, *The Impact of the Prince Edward County Closing on My Life*, *in* RECOVERING UNTOLD STORIES, *supra* note 284, at 81–83.

286. E. DIGBY BALTZELL, THE PROTESTANT ESTABLISHMENT: ARISTOCRACY AND CASTE IN AMERICA 7–8 (1964). In colonial Virginia, the political and cultural establishment was traditional, authoritative, *and* authoritarian. Its members and political supporters operated as a classic "control faction" that aspired to be, and was, a de jure ruling class that was more than willing to enforce its own version of political correctness (orthodoxy) with both force and violence. *See* Jacob M. Blosser, *Pursuing Happiness in Colonial Virginia*, 118 VA. MAG. OF HIST. & BIOGRAPHY 209, 220 & n.12 (2010) ("It is important to note that Virginia's legal code contributed to the pervasive culture of crowded churches. Laws mandating bimonthly, and later monthly, church attendance were in place throughout much of the colonial period, and truancy from Virginia's established churches resulted in fines."). An article by Professor Rhys Isaac notes the important cultural components of the Virginia experience and their relationship to "assumptions concerning the nature of community religious corporateness that underlay aggressive defense against the Baptists." Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY Q. 345, 368 (1974). That the Revolution's republican ideology played a major role in rendering such assumptions illegitimate and led to the eventual adoption of a policy of "accommodation in a more pluralist republican society" in Virginia is significant for both a structural and substantive understanding of the Establishment Clause. *Id*. At the structural level, the concern for the maintenance of the integrity of individual political and faith communities was an important reason why the Antifederalists and the states were so insistent on the adoption of a bill of rights. The Civil War and later voting rights amendments make it clear at the substantive level that all citizens are members of those "pluralistic, republican communities," and each is entitled to equal protection of his or her civil and political rights. *See* Elizabeth Mensch, *Religion, Revival, and the Ruling Class: A Critical History of Trinity Church*, 36 BUFF. L. REV. 427, 429 (1987) ("Trinity began in the 1690s as the officially established Anglican Church in provincial New York, structured by the British expressly to quell democratic disorder and promote hierarchy and authority in the province.").

287. BALTZELL, *supra* note 286, at 7–8.

IV. THE ESTABLISHMENT CLAUSE AS AN "ECONOMIC WEAPON"

By the time the Supreme Court granted certiorari in *Everson*, the factional battle lines over control of the culture and content of education had been drawn for well over 150 years. Jefferson drafted his proposal (Bill 79) in 1779, nearly 170 years prior to *Everson*.[288] His purpose was to loosen the grip of Virginia's ecclesiastical establishment on the training of teachers (the complaint that prompted the drafting of *Memorial & Remonstrance*), to open educational opportunities for students who were not members of the landed gentry, and to provide students, parents, and local communities (counties, in Jefferson's time) with choices better suited to their abilities, interests, aspirations, and needs in 1779.

Similar battles over control were fought all over the country. Those who had political control strove mightily to keep it. The Philadelphia Nativist Riots of 1844, the failed Blaine Amendment, and Senator Blair's proposals attempted to assert control in the face of increasing demands that the public schools accommodate religiously based difference of opinion concerning the content and perspective of the state-controlled learning environment. When accommodations were refused, the aggrieved parents turned to courts and to state-level power politics.

The factional infighting continued into the early 1920s, when Oregon made the ultimate power move: its Ku Klux Klan–inspired effort to shut down all schools not controlled by the state.[289] Other states, including Ohio, Nebraska, Iowa, and then territory Hawaii, sought to control the culture—and protect the country from the disloyal—by forbidding foreign language instruction in schools.[290]

Viewed through the lens of cultural power politics, it was inevitable that the Supreme Court would be asked to take control over state and federal policy touching religion. *Pierce*[291] had protected the right of religious and other associations to teach; *Meyer*[292] guaranteed the religious and cultural associations, and individuals could operationalize their teaching mission as they

288. *See supra* notes 205–09 and accompanying text.

289. *See* Maldwyn A. Jones, *Putting a Lid on the Melting Pot*, N.Y. TIMES, Jan. 15, 1989; *The School and the "Standardized" Citizen*, AMERICA, April 26, 1924, at 40–41 ("[T]he opponents of freedom in education have been proposing for several years, not only in the lodges of the Ku Klux Klan and the Scottish Rite Masons, but even in the usually respectable pages of the Atlantic Monthly."); Mary Therese Osweiler Powers, The Ballot, the Bayonet, and the Schoolhouse: The Dynamics of Change in the Common Schools in Franklin County, Tennessee (1999) (Ph.D. dissertation, University of Dayton) (ProQuest).

290. *See* William G. Ross, *A Judicial* Janus*:* Meyer v. Nebraska *in Historical Perspective*, 57 U. CIN. L. REV. 125, 135–37 (1988). *See generally* G.A. Res. 2200 A (XXI), art. 27, International Covenant on Civil and Political Rights (Dec. 16, 1966).

291. 268 U.S. 510, 535 (1925).

292. 262 U.S. 390, 400 (1923).

saw fit; and *West Virginia State Board of Education v. Barnette*[293] had ensured that neither children nor their parents could be punished for religious or cultural nonconformity.

The next step, these factions feared, was that their opponents would ask for a share of the money, and that they would do so in the name of the children and parents who *also* pay into the school funds created by the constitution of every state. Known as the "child benefit theory," it proposed the unthinkable: give the parents access to the funds devoted by law to the education of the state's children.[294]

Writing as Publius in *The Federalist No. 58*, Madison observed:

> The House of Representatives cannot only refuse, but they alone can propose, the supplies requisite for the support of government. They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of

293. 319 U.S. 624, 642 (1943), *overruling* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) (upholding the expulsion of public school children who, in accordance with the teachings of Jehovah's Witnesses, refused to salute the American flag).

294. One of the most succinct statements of the child benefit theory is found in *Borden v. Louisiana State Board of Education*:

> One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. In fact, in view of the prohibitions in the Constitution against the state's doing anything of that description, it would be legally impossible to interpret the statute as calling for any such action on the part of the state, for where a statute is susceptible of two constructions, one of which makes it unconstitutional and the other constitutional, the interpretation making it constitutional must be adopted. What the statutes contemplate is that the same books that are furnished children attending public schools shall be furnished children attending private schools. This is the only practical way of interpreting and executing the statutes, and this is what the state board of education is doing. Among these books, naturally, none is to be expected, adapted to religious instruction.

123 So. 655, 660–61 (La. 1928). *Borden* was filed by a dissenting taxpayer. Its companion case, *Cochran v. Louisiana State Board of Education*, decided the same day, was filed by dissenting taxpayers and "patrons of the public schools." 123 So. 664, 664–65 (La. 1928). It is not clear why *Cochran* is cited as an example of the child benefit theory because the discussion actually appears in *Borden*. *See* Chance v. Miss. State Textbook Rating & Purchasing Bd., 200 So. 706, 713 (Miss. 1941) (following *Cochran* and rejecting contrary conclusions in other states in a unanimous opinion on the merits).

> the other branches of the government. *This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure*.[295]

Madison understood the power of money in factional power politics. There is much political commentary that decries the influence of money in politics.[296] There is also widespread agreement that "money follows power." Much of that commentary, however, looks primarily at the ways in which political factions use their own money to influence the choices of political decisionmakers.[297] This is the "demand side" of the money-in-power-politics equation. Put bluntly, the argument from the "demand side" is that money chases power.

Power also follows money. This is the "supply side" of the money-in-power-politics equation. In the economic marketplace, money is a medium of exchange, a store of value, and a unit of account. In the marketplace of "power politics," however, "*[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon*."[298]

A. THE POWER OF THE PURSE: THE ECONOMIC WEAPON

And thus, we return to the dilemma confronting the Court in *Everson*. The *only* way to stem the tide of increasing demands that the states and the federal government actively—or "affirmatively"—accommodate the needs of America's increasingly diverse racial, ethnic, religious, cultural, and other (including "special needs") communities was to employ what Professor Nicholas Mulder has dubbed, in the foreign policy context, "the economic weapon": positive, conditional assistance and negative financial sanctions.[299]

> The[] view [of the supporters of the League of Nations], still widespread today, is that the League lacked the means to bring disturbers of peace to heel. But this was not the view of its founders, who believed they had equipped the organization with a new and powerful kind of coercive instrument for the modern world. That instrument was sanctions, described in 1919 by U.S. president Woodrow Wilson as "something more tremendous than war": the threat was "an absolute isolation . . . that brings a nation to its senses just as suffocation removes from the individual all inclinations to fight. . . . Apply

295. THE FEDERALIST NO. 58, at 356–57 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

296. *See, e.g.*, *Reform Money in Politics*, BRENNAN CTR. FOR JUST., https://www.brennancenter.org/issues/reform-money-politics (last visited Aug. 23, 2023).

297. *See, e.g.*, *The Top 10 Things Every Voter Should Know About Money in Politics*, OPENSECRETS, https://www.opensecrets.org/resources/dollarocracy/ (last visited Aug. 23, 2023).

298. THE FEDERALIST NO. 58, *supra* note 295, at 356–57.

299. NICHOLAS MULDER, THE ECONOMIC WEAPON: THE RISE OF SANCTIONS AS A TOOL OF MODERN WAR 1–2 (2022).

> this economic, peaceful, silent, deadly remedy and there will be no need for force. It is a terrible remedy. It does not cost a life outside of the nation boycotted, but it brings a pressure upon that nation which, in my judgment, no modern nation could resist." In the first decade of the League's existence, the instrument described by Wilson was often referred to in English as "the economic weapon." In French, the Geneva-based organization's other official language, it was known as *"l'arme économique.*" Its designation as a weapon pointed to the wartime practice of blockade that had inspired it.[300]

The similarity is uncanny. In the pre–Civil War period, there were periodic outbreaks of violence against Catholics and other religious minorities.[301] In the 1870s, Blair's Christian Education Amendment sought not only to impose cultural and religious conformity on the common schools, but also to employ the economic weapon. It provided financial assistance to schools controlled by the majority and sought to embargo the use of funds for schools controlled by anyone else.[302]

By the early twentieth century, the State of Oregon's effort to shut down all nongovernment schools was, and was intended to be, a total government occupation of the environment in which the states educate the next generation.[303] When the Court thwarted those efforts in *Pierce* and *Meyer*, only the "economic weapon" was available. Just as supporters of the common schools movement had sought (and failed) to federalize the issue in the Blaine Amendment and in Blair's educational proposals, they prevailed on the Supreme Court to do it instead.[304]

At the time *Everson* was filed, there was only one federal-aid-to-education program: the 1944 "G.I. Bill."[305] Though Congress had imposed numerous conditions designed to ensure that it achieved its intended purposes, it imposed no religious restrictions on veterans or providers. Nor did the three federal education proposals enacted before *Flast v. Cohen* was decided in 1968.[306] If Arch Everson and his supporters were to restrict the use of education funds by or in religiously affiliated institutions, they would need a constitutional platform from which to launch the "economic weapon."

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300. *Id*. (quoting WOODROW WILSON, WOODROW WILSON'S CASE FOR THE LEAGUE OF NATIONS (Hamilton Foley ed., 1923)).

301. *See supra* notes 215–17 and accompanying text.

302. *See supra* notes 227–33 and accompanying text.

303. *See supra* notes 234–35 and accompanying text.

304. The entire line of school finance cases from *Everson v. Board of Education*, 330 U.S. 1 (1947), to *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020), has been a factional fight over access to funds dedicated by law to support elementary and secondary education.

305. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284.

306. 392 U.S. 83 (1968); *see* Vietnam Era Veterans' Readjustment Assistance Act, Pub. L. No. 82-550, 66 Stat. 663 (1952); National Defense Education Act, Pub. L. No. 85-864, 72 Stat. 1580 (1958); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219.

The Establishment Clause was to be that platform. In order to maintain economic and cultural control of education, Mr. Everson's factional allies urgently needed two rulings from the Court. The first, achieved in *Everson*, was for the Court to construe the Establishment Clause to require federal judges to serve as "content moderators" who must ensure that objectionable religious content and perspectives are not permitted in publicly funded educational environments. The second, achieved in *Flast*,[307] was for the Court to carve out a perspective-based exception to the general rule that federal taxpayers do not have standing, as taxpayers, to challenge government expenditures.[308] After *Flast*, "offended observers" who allege that they are harmed *as taxpayers*[309] can seek and obtain judicial decrees that deny money to otherwise eligible programs and recipients they find objectionable. Compelled exposure to content deemed objectionable is unnecessary.

The differential treatment of "offended observers" is striking. Not all federal taxpayers who have an "interest in being free of taxing and spending in contravention of specific constitutional limitations"[310] can use the Establishment Clause as an economic weapon. To date, it has been reserved for "offended observers" who object to the right of others to participate on an equal basis in publicly funded programs or forums.[311] "Offended observers" who object to public funding of educational environments that are demonstrably hostile to, or subversive of, *their* religious values (or those of their children) cannot use the economic weapon to stop the objectionable program.[312] For these "offended observers," standing exists only when they or their children are compelled to

307. 392 U.S. 83.

308. *See supra* note 196 (discussing *Flast*).

309. 392 U.S. at 102–03.

310. *Id.* at 105.

311. *Cf.* Shurtleff v. City of Boston, 142 S. Ct. 1583 (2022) (objection to privately funded organization's message); Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019) (objection to privately funded Latin cross on public property); Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753 (1995) (objection to unattended, privately funded Latin cross on state capitol grounds); Weinbaum v. City of Las Cruces, 541 F.3d 1017 (10th Cir. 2008) (objection to display of crosses on seal of City of Las Cruces, "city of crosses"); Ams. United for Separation of Church & State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) (objection to display of privately funded menorah on public property).

312. Doremus v. Bd. of Educ., 342 U.S. 429, 434 (1952) (requiring "a good faith pocketbook action"); *see, e.g.*, Alvarado v. City of San Jose, 94 F.3d 1223 (9th Cir. 1996) (holding that publicly funded, official city display of winged-serpent Aztec god Quetzalcoátl does not violate the Establishment Clause); Altman v. Bedford Cent. Sch. Dist., 245 F.3d 49 (2d Cir. 2001) (holding that there was no standing to challenge teaching materials utilizing Hindu images and incorporating rituals perceived as pagan); *see also* U.S. Dep't of State, Bureau of Democracy, Hum. Rts. & Lab. (DRL), *DRL FY20 IRF Promoting and Defending Religious Freedom Inclusive of Atheist, Humanist, Non-Practicing and Non-Affiliated Individuals*, U.S. DEP'T OF STATE (Apr. 21, 2021), https://www.state.gov/statements-of-interest-requests-for-proposals-and-notices-of-funding-opportunity/drl-fy20-irf-promoting-and-defending-religious-freedom-inclusive-of-atheist-humanist-non-practicing-and-non-affiliated-individuals/ (announcing grant opportunities for up to two $500,000 grants for atheist, humanist, non-practicing and non-affiliated individuals).

participate in the program or environment alleged to be hostile.[313] They must, moreover, litigate under the far more lenient free exercise standard, where the courts can, in the words of Justice O'Connor, "strike sensible balances" among the factional interests represented in religious liberty cases.[314] Those who challenged the right of others to participate on an equal basis in publicly funded programs got the categorical, "doctrinal" rule. The Court put the negative economic weapon in their hands.

With the advent of massive federal financial assistance to educational programs, opportunities to apply the positive economic weapon—conditional financial assistance designed to achieve precisely the same level of content control[315]—have multiplied exponentially. Today, both economic weapons are used in tandem; supplemented, on occasion, by brute, physical force.[316]

313. *See generally, e.g.*, *Altman*, 245 F.3d 49 (holding that taxpayers did not have standing to object to public school teaching and celebration of Hindu and pagan rituals, and dismissing case for lack of standing because plaintiffs' children were no longer enrolled in the school).

314. *Cf., e.g.*, John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., No. 22-2034, 2023 WL 5184844, at *5 (4th Cir. Aug. 14, 2023) (holding that parents lack standing to attack school board policies that preclude parental knowledge or input when schools actively assist and counsel students on "gender transition" issues); Parker v. Hurley, 514 F.3d 87, 105 (1st Cir. 2008) (declining to recognize a free exercise claim against curriculum without "direct coercion"); Mahmoud v. McKnight, No. 23-cv-01380, 2023 WL 5487218, at *31 (D. Md. Aug. 24, 2023) ("[T]he mere exposure in public school to ideas that contradict religious beliefs does not burden the religious exercise of students or parents."); Tatel v. Mt. Lebanon Sch. Dist., No. 22-837, 2023 WL 3740822 (W.D. Pa. May 31, 2023) (denying motion to dismiss action by parents alleging free exercise right to opt out of objectionable curricular content).

315. *See, e.g.*, Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637 (June 22, 2021) (interpretation of Title IX); Tennessee v. U.S. Dep't of Educ., No. 21-cv-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022) (enjoining enforcement of 86 Fed. Reg. 32637), *appeal filed*, No. 22-5807 (6th Cir. Sept. 13, 2022).

316. *Loudoun County Father Arrested at School Board Meeting Wants Court Venue Changed*, WJLA (Oct. 21, 2021, 3:44 PM), https://wjla.com/news/local/scott-smith-father-loudoun-county-public-schools-student-assaulted-stone-bridge-high-bathroom-board-meeting-arrest-case-title-ix-virginia; *see* Order at 3, 6, 8, *In re* Special Grand Jury Proceedings, No. CL-22-3129 (Loudoun Cnty. Cir. Ct. 2022), https://www.loudoun.gov/specialgrandjury (confirming that the father's complaint about his daughter's having been raped was justified, and accusing the superintendent of making false statements). The superintendent and former spokesman for the Loudoun County Schools have been indicted. The superintendent was charged with one count of misdemeanor false publication, one count of misdemeanor prohibited conduct, and one count of misdemeanor penalizing an employee for a court appearance. Rick Massimo, *2 Indicted, Including Former Superintendent in Loudoun Co. School Probe*, WTOP NEWS (Dec. 13, 2022, 1:10 PM), https://wtop.com/loudoun-county/2022/12/2-loudoun-co-school-officials-indicted/. Violence aimed at Catholic and pro-life Christian organizations is also on the rise in the wake of the "leak" of the Supreme Court's draft majority opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022). *See* Micaiah Bilger, *Leftist Attacks on Churches Have Almost Tripled in Four Years*, LIFENEWS.COM (Dec. 22, 2022, 5:45 PM), https://www.lifenews.com/2022/12/21/leftist-attacks-on-churches-have-almost-tripled-in-four-years/; Kate Anderson, *Catholic Churches Have Suffered 118 Attacks Since SCOTUS* Dobbs *Leak*, DAILYCALLER (Jan. 23, 2023, 12:28 PM), https://dailycaller.com/2023/01/23/catholic-churches-118-attacks-may-2022-dobbs-leak/.

B. WILLFUL BLINDNESS: SUBTLE COERCION, "CIVIL RELIGION," AND POLITICAL CORRECTNESS

Although there is no *official* "ruling class" that governs religious matters in the United States, the Supreme Court does enforce a series of legal and cultural norms that define the ways in which the members of a "polite," pluralistic society think and speak about controversial topics like religion and race. Part and parcel of what sociologists have called the American "civil religion,"[317] these norms seek to encourage social cohesiveness by fostering conformity and political "safe-thinking."

In a very helpful turn of phrase, the late sociologist John Murray Cuddihy referred to these norms as the core doctrines of a "religion of civility" that, "under cover of its prim title [is], in its rites and practices, activist, aggrandizing, subversive, intrusive, [and] incivil."[318] Drawing on the experience of former President Jimmy Carter's "encounter [with] the civil religion that Americans, more and more, practice, whatever they profess,"[319] Cuddihy observed that:

> This complex code of rites instructs us in the ways of being religiously inoffensive, of giving "no offense," of being *religiously* sensitive to religious differences. To be complexly aware of our religious appearances *to others* is to practice the religion of civility. Thus, civil religion is the social choreography of tolerance. It dances out an attitude.[320]

There are many such examples in religious freedom cases,[321] and even more in cases involving state-sponsored racial discrimination,[322] but these attitudes are most clearly on display in two recent cases: *Shurtleff v. City of Boston*[323] and *Espinoza*.[324]

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317. The classic definition is that of Robert Bellah, who defined "civil religion" as a construct "alongside of and rather clearly differentiated from the churches." Robert N. Bellah, *Civil Religion in America*, *in* BEYOND BELIEF: ESSAYS ON RELIGION IN A POST-TRADITIONAL WORLD 168, 168 (1970).

318. JOHN MURRAY CUDDIHY, NO OFFENSE: AMERICAN CIVIL RELIGION AND PROTESTANT TASTE 1–2 (1978).

319. *Id.* at 2.

320. *Id.*

321. The words of Justice Bradley, writing in *The Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, of Mormon beliefs and practices are equally revealing: "The State has a perfect right to prohibit . . . all . . . open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced." 136 U.S. 1, 50 (1890). In *Planned Parenthood v. Casey*, Justices Kennedy, O'Connor, and Souter wrote a concurrence stating:

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty. Because the cases before us present no such occasion it could be seen as no such response.

505 U.S. 833, 864 (1992) (Kennedy, O'Connor & Souter, JJ., concurring).

322. *See supra* notes 274–79 and accompanying text.

323. 142 S. Ct. 1583, 1584 (2022) (refusal violates the Free Speech Clause).

324. 140 S. Ct. 2246, 2249 (2020).

In *Shurtleff*, the City of Boston, Massachusetts refused to permit an individual and a religious group to participate on equal terms in a Boston program that allows private individuals and groups to seek permission to raise their flags on one of the three flagpoles outside Boston City Hall. It refused their request because, in city's view, the Establishment Clause requires the state to exclude overtly religious speakers from a public forum whenever those speakers seek to convey a message "deemed [by government officials] to be inappropriate or offensive in nature or . . . supporting discrimination, prejudice, or religious viewpoints," or when "the city wanted to celebrate only 'a particular kind of diversity.'"[325] The Court unanimously rejected Boston's argument.

In *Espinoza*, decided on free exercise grounds, the Court divided 5–4 over whether Montana could exclude children enrolled in a Christian school from the benefits of Montana's nondiscriminatory tax-credit scholarship program.[326] Read together, the opinions of Justices Alito, Thomas, and Gorsuch in *Espinoza* and *Shurtleff* lay the conceptual groundwork for the heavy lifting to come—a concerted effort to convince a majority that the Court should stop playing factional religious politics and return to the job of judging that it abandoned in *Everson*.[327]

The issue that ties these two cases together is the personal nature of the injury the complaining party claims to have suffered. In *Shurtleff* and *Espinoza*, the injured parties were religious believers whose eligibility to make a statement in a public forum (*Shurtleff*[328]) and to participate in a public welfare program (*Espinoza*[329]) were conditioned on the character of their religious opinions by political factions that view the public spaces and programs they administer *as their own*. Both cases are classic examples of how the "religious tests" condemned in 1785 by a "Citizen of Philadelphia" became exclusionary "engines of a ruling party to entrap and punish such people as they suppose inimical to themselves."[330]

Exclusionary policies such as these are, in both intent and effect, unconstitutional conditions. The political factions that design and employ them either suspect or reject the views of their fellow citizens, and use the power of

325. *Shurtleff*, 142 S. Ct. at 1608 (Gorsuch & Thomas, JJ., concurring) (internal quotation marks omitted).

326. *See* 2015 Mont. Laws 2168, § 7 (providing for "parental and student choice in education"); MONT. CODE ANN. §§ 15-30-3103(1), -3110, -3111(1) (2019) (granting tax credit of up to $150 to any taxpayer who donates to a participating "student scholarship program" or to the public schools); *id.* §§ 15-30-3102(7)(a), -3103(1)(c) (permitting scholarship organizations to award scholarships for tuition at a private school). Other restrictions and regulations on the program are summarized in the majority opinion. *Espinoza*, 140 S. Ct. at 2252–53.

327. *See generally Shurtleff*, 142 S. Ct. 1583; Everson v. Bd. of Educ., 330 U.S. 1 (1947).

328. *Shurtleff*, 142 S. Ct. at 1602.

329. *Espinoza*, 140 S. Ct. at 2251.

330. OWEN S. IRELAND, RELIGION, ETHNICITY AND POLITICS 227 (2005).

the state to suppress or eliminate them.[331] Justice Felix Frankfurter's majority opinion in *Minersville School District v. Gobitis*[332] made it clear that when an individual's "conception of religious duty [comes] into conflict with the secular interests of his fellow-men,"[333] the "secular"[334] interest in "the training [of] children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process" must prevail unless the science shows ascertainable harm.[335]

For those who have controlled the culture-forming institutions of the country since the first struggles over the selection of schoolmasters in New England, things have not changed much since the Court decided *Gobitis* in 1940. Those who have controlled the common schools and the money that supports them since the nineteenth century have very particular—and constantly evolving—views about how and when—if at all—children learn about religion. Justice Jackson's cultural point in *Everson* is worth repeating:

> Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. . . . *It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion*. The assumption is that after the individual has been instructed in worldly wisdom, he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.[336]

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331. In *303 Creative LLC v. Elenis*, the Court reversed the Tenth Circuit's holding in favor of the State of Colorado because the "very purpose" of the Colorado Anti-Discrimination Act was to "excis[e] certain ideas or viewpoints [about sexual orientation] from the public dialogue." 143 S. Ct. 2298, 2313 (2023) (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642 (1994)).

332. 310 U.S. 586 (1940) (upholding the expulsion of public school children who, in accordance with the teachings of Jehovah's Witnesses, refused to salute the American flag), *overruled by* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

333. *Id.* at 593.

334. One of the enduring questions in the Court's jurisprudence of the Religion Clauses is the definition of "secular." The Court simply assumes it means "not religious," but it is far more than that. The late Peter L. Berger (1929–2017), one of the most influential sociologists of the last century, defines "secularization" as "the process by which sectors of society and culture are removed from the domination of religious institutions and symbols." PETER L. BERGER, THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION 107 (1967). He goes on: "[I]n modern Western history, of course, secularization manifests itself in the evacuation by the Christian Churches of areas previously under their control or influence – as in the separation of church and state, or in the expropriation of church lands, or in the emancipation of education from ecclesiastical authority. *Id.*; *see* Titus Hjelm, *Peter L. Berger and the Sociology of Religion*, 18 J. CLASSICAL SOCIO. 231, 236.

335. *Minersville*, 310 U.S. at 598.

336. Everson v. Bd. of Educ., 330 U.S. 1, 23–24 (Jackson, J., dissenting) (emphasis added) (footnote omitted).

The explicit assumption is both cultural and religious: Religion is a matter of "choice." But is it? It depends upon whom you ask. The late Professor Robert Cover's description of Judaism explains:

> The basic word of Judaism is obligation or mitzvah. [Judaism], too, is intrinsically bound up in a myth—the myth of Sinai. Just as the myth of social contract is essentially a myth of autonomy, so the myth of Sinai is essentially a myth of heteronomy. Sinai is a collective—indeed, a corporate—experience. The experience at Sinai is not chosen. The event gives forth the words which are commandments. In all Rabbinic and post Rabbinic embellishment upon the Biblical account of Sinai this event is the Code for all Law. All law was given at Sinai and therefore all law is related back to the ultimate heteronomous event in which we were chosen-passive voice.[337]

Islamic Law (*Shari'a*) takes much the same position:[338]

> Parents' responsibilities for the care and upbringing of their children are mentioned in several verses of the Quran, as well as in the Hadeeth.
>
> Allah Almighty Says (what means): "O you who have believed, protect yourselves and your families from a Fire whose fuel is people and stones . . . ." [Quran 66:6]
>
> How do we ward off that fire from our families? We need to show to them the right way and to teach them the difference between right and wrong.

The point here is not to debate the merits of this thorny question. Justice Jackson was certainly correct when he questioned "[w]hether such a disjunction is possible, and if possible whether it is wise." He was most certainly wrong when he asserted that these "are questions I need not try to answer." Unless the Court was prepared to shut down all debate over diversity in education, which it was clearly not prepared to do, he could not avoid the question. In professing an inability to do so, he ignored the actual meaning of the political struggle over Virginia's assessment bill memorialized in *Memorial & Remonstrance*. It was an early debate in the ongoing culture war over the nature, content, environment, and purpose of publicly funded education, but it was neither the first, nor the last. It continues in Virginia and around the country today.[339]

CONCLUSION: WHITHER *EVERSON*?

We have now reached the point when we ask the ultimate question: *Should* Everson *be overruled?* My answer to this question is "yes," and for nearly the

337. Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65, 66 (1987).

338. *Responsibilities of Parents*, ISLAMWEB (Oct. 16, 2012), https://www.islamweb.net/en/article/150794/responsibilities-of-parents; *see* Syed Hasan Akhtar, *The Status of Parents in Islam*, ISLAMIC RSCH. FOUND. INT'L (May 8, 2022), https://www.islamicity.org/8603/the-status-of-parents-in-islam/.

339. *See supra* note 316 and accompanying text.

same reasons that led the Court to overrule *Gobitis*[340] in *Barnette*.[341] In my view, *Espinoza*[342] takes exactly the right approach. When an appropriate case is presented, the Court should first address the due process incorporation problem by eliminating any pretense that *any* agency of the federal government (including the Court itself), or any state, has the constitutional authority to declare that "unwanted exposure" to *any* message about religion—or about any other legitimate subject in the public marketplace of ideas, for that matter—"demonstrates psychological injury in fact."[343]

Then, and only then, will the Court be prepared to do the heavy lifting required to harmonize the structural components of religious freedom with those explicitly mentioned in the Constitution: the No Religious Test and Oath or Affirmation Clauses of Article VI, the First Amendment, and Sections 1 and 5 of the Fourteenth Amendment.

Returning to my opening thesis, if we assume that an "establishment of religion" is a group of citizens having sufficient political power to impose their views about the "proper" relationship of religious believers and the associations they form to the institutions that shape the community's culture and politics, our analysis of Establishment Clause cases would be much more focused than it is today. We would not need to concern ourselves with the application of "three-pronged" or "balancing" tests to books, maps, atlases, or special education programs.[344] There would be no need to use a tape measure to calculate the

340. 310 U.S. 586.

341. 319 U.S. 624, 642 (1943).

342. *See generally* 140 S. Ct. 2246 (2020).

343. ACLU of Ohio Found., Inc. v. DeWeese, 633 F.3d 424, 429 (6th Cir. 2011) ("[The plaintiff's] affidavit states that . . . the [religious public] display offends me personally, in that I perceive it as an inappropriate expression of a religious viewpoint . . . in a public building."); *see, e.g.*, Suhre v. Haywood County, 131 F.3d 1083, 1086 (4th Cir. 1997) ("The injury that gives standing to plaintiffs in these cases is that caused by unwelcome direct contact with a religious display that appears to be endorsed by the state."); ACLU v. Rabun Cnty. Chamber of Com., Inc., 698 F.2d 1098, 1108 (11th Cir. 1983) ("They have demonstrated the effect that the presence of the cross has on their right to the use of Black Rock Mountain State Park both by testifying as to their unwillingness to camp in the park because of the cross and by the evidence of the physical and metaphysical impact of the cross."). The reference in the text to the *public* marketplace of ideas distinguishes cases in which access to, or participation in, a forum or marketplace requires affirmation of another's messages or beliefs; compelled, personal association with such messages or beliefs; or subordination of one's own. *See generally, e.g.*, 303 Creative, LLC v. Elenis, 143 S. Ct. 2298 (2023) (compelled artistic expression as condition of access to economic marketplace); Janus v. AFSCME, 138 S.Ct. 2448 (2018) (compelled support of political positions as condition of entry to unionized workplace); EEOC v. Abercrombie & Fitch Stores, 575 U.S. 768 (2015) (exclusion from workplace based on religious expression); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (compelled affirmation as condition of student access to public school).

344. *Lemon v. Kurtzman* established a standard of review for Establishment Clause cases known as the "*Lemon* test." In order to pass muster against an Establishment Clause challenge, the state action (1) must have a secular purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it cannot result in an excessive government entanglement with religion. 403 U.S. 601, 601–02 (1971). Each of these factors is best understood as a synthesis of the "cumulative criteria developed by the Court over many years." *Id.* at 612.

distances among crèches, Santa Clauses, plastic reindeer, and other "seasonal" trappings that have become so ubiquitous in community "holiday displays."[345] Nor would we need to worry about offending the sensibilities of real or hypothetical "offended observers" hiking in the Mojave Desert;[346] strolling around Capitol Square in Columbus, Ohio;[347] or ambling on Maryland-National Capital park property.[348] The Court would focus instead almost exclusively on the intent or intended effect[349] of any policy or practice that would make a citizen's beliefs about religion, religious observance, or religious perspectives on issues of public interest relevant for admission to, or full participation in, any public space, public policy debate, public institution, or public program.[350]

Once the Court takes this step, it can formally renounce its unconstitutional efforts to utilize its Article III power to adjudicate[351] the cultural "politics of power."[352] If it is willing to do so, its Religion Clauses jurisprudence might actually make sense.

345. *See* Lynch v. Donnelly, 465 U.S. 668, 668 (1984) (examining the context in which the nativity scene appears); County of Allegheny v. ACLU, 492 U.S. 573, 580 (1989) (same).

346. Salazar v. Buono, 559 U.S. 700, 707 (2010) (deciding an Establishment Clause challenge to continued presence on federal land of a Latin cross placed there in 1934 to honor soldiers who died during World War I).

347. Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 781 (1995) (refusal by the board to grant a permit to the Ku Klux Klan to erect a temporary display that included a large Latin cross on the grounds surrounding the Ohio State Capitol).

348. Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2074 (2019) (holding that the Maryland-National Capital Park and Planning Commission was not required to dismantle a thirty-two-foot-tall Latin cross on public land that had been erected as a memorial to soldiers who died serving in World War I and did not violate the Constitution by continuing to own and maintain the memorial).

349. *Compare* Washington v. Davis, 426 U.S. 229, 246 (1976) (requiring proof of intent to establish an Equal Protection Clause violation, and holding that proof of "effects" alone is insufficient to do so), *with Lemon*, 403 U.S. at 601 (holding that the "purpose or primary effect" of law must neither advance nor inhibit religion).

350. These would include the public square in which we exchange goods, services, and ideas; the institutions of self-government, including the military; and the educational and cultural institutions on which we rely to gather, preserve, and transmit the community's historical memories and cultural values.

351. U.S. CONST. art. III.

352. JACKSON, *supra* note 2.