THE STRUCTURE OF THE RELIGIOUS LIBERTY GUARANTEE

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DEDICATION

I met John Noonan in the office of the late David W. Louisell in January, 1974, and remember to this day just how awestruck I was at being in the company of such great scholars. I find myself even more humbled as I pen this essay in honor of the birthday of my esteemed teacher, advisor, and friend. To be invited to join the *festschrift* is an extraordinary honor for a former student but it is also an immense challenge. The task of writing a coherent essay for one's professor usually ends upon graduation from law school. To write one *in honor of* a professor (and a favorite one at that) is an altogether new experience.

Because I write to pay tribute to a man whose manner of thinking has indelibly shaped the manner in which I teach my own students, my goal is to write an essay that builds upon the work he has done in the field of law and religion. And if, in the final analysis, it meets that standard, it will do so, in part, because of John Noonan's efforts as a teacher, scholar and role model.

INTRODUCTION

It has been apparent for nearly fifty years that, for all practical purposes, Federal judges claim the power to oversee both federal and state policy on the subject of religious freedom, including the sensitive topic of church-state relations. It seems largely to be assumed that this is simply the "way it is" or, perhaps more accurately, "the way it should be." But why? By what right does the Judicial Department of the federal government exercise controlling authority over matters of religious liberty?[1]

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1. The phrase is borrowed from Louis Lusky. Louis Lusky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* (Michie, 1975).

Like so many other questions of great import in our pluralistic, continental democracy, the Constitution and its amendments do not address this question directly. All we know for certain from the text of the Constitution is that the three branches of the federal government have been granted powers which, by their nature, are conducive to the preservation of the general welfare.[2] Pursuant to Articles I and IV, for example, Congress has the power to lay and collect taxes, to provide for the common defence and general welfare of the United States, and to establish uniform rules on matters relating to the growth and development of the Nation and its economy.[3] But there is no express power under the original Constitution which authorizes Congress to make laws respecting establishments of religion, or which would permit it to adopt laws designed to inhibit religious exercise, even if it could be argued that laws respecting religious establishments or limiting free exercise would be in the public interest. Legislation requiring a religious test "as a Qualification to any Office or public Trust under the United States" is expressly forbidden.[4]

The Amendments shed no greater light on the question of federal court authority to make national rules regarding establishments of religion or the permissible scope of free exercise. From the text of the First, Fifth, Ninth and Tenth Amendments we learn that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[5] that "[n]o person shall be deprived of life, liberty or property without due process of law,"[6] and that the enumerated powers of the federal government are not to be viewed as incompatible with the rights retained by the People and the States, respectively.[7] And from the Fourteenth Amendment we ascertain three points important to this inquiry: first, that the States may not inhibit Citizens of the United States in the exercise of their federal Privileges and Immunities; second, the States are prohibited from denying to any person within their jurisdiction due process or equal protection of the laws; and third, that Congress has the power to assure that the States comply.

2. US Const Arts I, IV, V.
3. See US Const Art I, § 8, cl (1-18), §§ 9-10; Art IV.
4. US Const Art VI, cl 3.
5. US Const Amend I (1791).
6. US Const Amend V (1791).
7. US Const Amends IX, X (1791).

How then, does the Court come to be "in charge" of such a critical topic? If Article III does not even *expressly* grant the power of judicial review, why should it be assumed that the implied (but necessary) power recognized in *Marbury v Madison*[8] leaves the federal courts in sole charge of what virtually all observers—especially those who lived during the Founding generation—viewed as one of the most exquisitely sensitive issues in all of public policy?[9] This is a question which admits of many answers, but has received comparatively little attention.

Because the issue is so very sensitive, it may be helpful to restate the question in constitutional terms: "To whom does the Constitution assign the twin tasks of protecting religious liberty and setting the boundaries between church and state?"

Because the ultimate answer under the Constitution is "the People" themselves,[10] the present inquiry will center on the nature and locus of the power over these topics which has been delegated or reserved by the Constitution and its amendments. Its goal is to lay a partial foundation for the development of a framework within which to review the substantive content of the constitutional law governing religious liberty.

Part I will discuss the structural device of separation of powers and its relationship to the First Amendment. Part II will discuss federalism, and the manner in which it too is a device to protect the First Amendment rights of the people. Forthcoming essays will build upon this framework, examining, in turn, the relationship of the structural aspects of the federal religious liberty guarantees to the Supreme Court's vision of its own role; the manner in which the Court's vision of its role affects its interpretation of the substantive dimensions of religious liberty; and the constitutionality of federal and State legislative efforts to define the scope of religious liberty.

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8. 5 US (1 Cranch) 137, 177 (1803).

9. During the debate of the House of Representatives, sitting as a Committee of the Whole on August 15, 1789 Congressman Daniel Carroll of Maryland is quoted as having noted that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand". Chester J. Antieau, Arthur T. Downey & Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* 126 (Bruce, 1964), quoting *Annals of Congress I.*

10. It has long been held that the Constitution is not the creature of the States, but of the People themselves, acting in Convention; for it was by the action of the Constitutional Convention and the State ratifying conventions that the delegation and reservation of powers and rights obtains its binding force. See US Const, Preamble, Art V; *McCulloch v Maryland*, 17 US (4 Wheat) 316, 403-06 (1819).

In many ways, this essay is also designed to lay the groundwork for asking a far more important question—a question which has been central to much of John Noonan's writing: "Has the power granted, implied, or assumed been exercised *responsibly* by those entrusted with it; that is in a manner consistent with the highest standards of constitutional law and professional ethics?"[11] This, I believe, is a far more interesting (and revealing) question than the rather pedestrian one addressed here, namely: *who* is authorized by the Constitution to assure the protection of religious liberty? Of necessity, however, that inquiry will have to wait.

Because inquiries of this type must include not only an examination of nature and extent of federal and state power (legislative, executive and judicial) over matters affecting religious liberty, but also the structural limitations federalism and separation of powers impose on those powers, it is important to emphasize at the outset that the present discussion presumes that active intervention on behalf of religious liberty by the State and federal governments is both legitimate as a matter of constitutional law and necessary as a matter of fact. The questions are: when?, by whom?, under what circumstances?, and to what end?

One final word about "structural" analysis is worth mentioning at the outset. The topics to be explored here are "structural" in the sense that their primary focus is on the text and structure of the amended federal constitution as an integrated whole.[12] The primary focus here will be on the allocation of power within the federal system rather than upon the specific normative content of the religious liberty guarantees. The provisions most clearly directed to the protection of religious liberty—the Test Clause of Article VI and the First and Fourteenth Amendments—are considered here only from that limited perspective. Due to space limitations, a

11. The Preamble to the ABAs *Model Rules of Professional Responsibility* states that the Model Rules define, for lawyers, "their relationship to our legal system." *ABA Model Rules of Professional Responsibility*, Preamble [12] in John S. Dzienkowski, ed, *Selected Statutes, Rules and Standards on the Legal Profession* at 7 (West, 1993).

12. See Stephen B. Presser, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* at 6-7 (Academic Press, 1991). Professor Presser suggests that the task is to determine the "plain meaning" of the document. Unlike theories of "original intent" which attempt to divine (usually unsuccessfully) the legislative intent of the framers on given issues, compare H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885 (1985), Presser argues that it is

> necessary for us to try to determine the political, linguistic, or cultural 'structure' which the Constitution implied, on which the drafters and first interpreters of the document would have been expected to rely, and on which their claims for an objective interpretation of the Constitution would have been staked.

"structural" review of the normative content of those guarantees, including the more "doctrinal" aspects of the current debate over religious liberty issues, will be developed in subsequent essays.[13]

I. THE STRUCTURE OF THE CONSTITUTION'S RELIGIOUS LIBERTY GUARANTEES

By all criteria relevant to constitutional analysis (save, some might argue, the Court's holding in *Employment Division v Smith*[14]), the preservation of religious liberty is an important constitutional concern.[15] The only mention of religion in the Constitution itself is an express prohibition of religious discrimination: the Test Clause of Article VI.[16] Though there was some dispute among the framers, the States, and the antifederalists concerning the extent to which the enumerated powers of the federal government could be utilized to set national policy respecting establishments of religion and religious liberty, there was little dispute among them about the core of the matter: the powers granted the federal government did not include a specific supervisory jurisdiction over either religious matters generally, or the relationship of religion and religious institutions to the political communities of the Nation.[17]

13. Among these are: the importance of a clearly-articulated vision of religious liberty in the formulation of public policy, the debate among advocates for religious liberty which has followed in the wake of the Supreme Court's decision in *Employment Division v Smith*, 494 US 872 (1990), and the substantive vision of religious liberty which can be derived from the Court's holdings.

14. 494 US 872 (1990).

15. At this point in the inquiry, it is not necessary to determine either the substantive content of the right protected, or the manner in which it should be characterized for purposes of constitutional analysis. The initial focus is on the text of the amended Constitution itself. This fact is underscored most forcefully by the Test Clause of Article VI. At the time of the Constitutional Convention, all of the States required religious tests for public office. The decision by the Convention that the federal government should have no religiously-based conditions for office-holding was, therefore, a significant advance for religious liberty at the federal level. Charles Warren, *The Making of the Constitution* at 425-26 (Little Brown & Co, 1937). The Test Clause is discussed at greater length in the text accompanying notes 36 to 62.

16. US Const Art VI, cl 3.

17. The dissenting members of the Pennsylvania ratifying convention were perhaps the most explicit on this point. Twenty-one of the twenty-three members of the minority signed a dissenting address which appeared in the *Pennsylvania Packet and Daily Advertiser* on December 18, 1787, six days after Pennsylvania's convention had voted (46-23) to ratify. The first of its "propositions to the convention" reads as follows:

> 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.

The Bill of Rights reflects that consensus. Whatever the extent of federal authority to legislate a national policy concerning religion or religious establishments under Article I, and in particular, the General Welfare and Necessary and Proper Clauses[18], there is no doubt that the First, Ninth and Tenth Amendments make explicit as to Congress that which the Federalists had argued all along: Congress has no power 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.[19]

"The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents" (December 18, 1787) (attributed to Samuel Bryan, the author of "Centinel"), in Ralph Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates* at 239 (Mentor, 1986). See also notes 157 to 186 and accompanying text.

18. See *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819). The debate over whether the Congress had the authority to "establish" a national religion or church is not unlike the question of whether Congress had the power to establish the Bank of the United States. Congressional power was given broad berth in *McCulloch*, where the Court held that Congress "would have some choice of means[, and] might employ those which, in its judgment, would most advantageously effect the object to be accomplished. That any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in themselves constitutional." Id, 17 US at 419. Given the federalist reading of the Constitution, both at the time of the Convention and in practice once it had been ratified, there is (or should be) little doubt that a plausible case could be (and was) made by the antifederalists that the prohibition with respect to matters of religion needed to be explicit.

19. See Akhil Reed 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 Art I, § 9, and the specific prohibitions of the Art I, § 10 (binding the States), and the First Amendment (binding Congress alone)] [hereafter, Amar, *The Fourteenth Amendment*]; Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131, 1138-1141, 1146-62 (1991) (discussing the Federalist and Anti-Federalist critiques of the Constitution, as well as the federalism components of the proposals which evolved into the First Amendment as we know it today) [hereafter, Amar, *The Bill of Rights*].

This reading of the enumerated powers is also supported by the lengthy list of enactments passed by the First and subsequent Congresses dealing with the subject of religion, including the Northwest ordinance of 1787, Statutes of 1789, c 8 (August 7, 1789) ("Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged."), and religious exemptions from laws of general applicability. See, for example 2 Stat 194 (adopting Virginia tax exemption for churches in a taxing plan for the County of Alexandria); Act of July 9, 1798, 8, 1 Stat 585 (requiring that all lands and dwellings in the federal district be appraised for tax purposes of federal taxes notwithstanding their exemption under state law); Act of July 14, 1798, 2, 1 Stat 598; Act of August 2, 1813, 4, 3 Stat 71; Act of January 9, 1815, 5, 3 Stat 166 (direct taxes levied by Congress which expressly or impliedly incorporated state exemptions for religious organizations). All of these are laws of general applicability and were adopted by Congress in a field clearly committed to it by the text of the Constitution. See also 6 Stat 116 (1813) and 6 Stat 162 (1816) (exempting plates for printing Bibles from import duties); 6 Stat 346 (1826) (same; exempting church vestments, furniture and paintings); 6 Stat 675 (1834) (same; exempting church bells); 12 Stat 717, c74 (37th Cong. 3d Sess 1863) ("exempting from duty [printing] plate belonging to religious societies").

To the extent that the Test Clause and Bill of Rights operate as an express limitation on the scope of federal authority to make rules governing religion, a thorough evaluation of the normative content of the religious liberty jurisprudence of the United States Supreme Court would be incomplete without a detailed exploration of the manner in which this limitation of federal political competence[20] is reflected in the language and structure of the amended Constitution. Of particular interest in this and subsequent essays is how the constraints of the Constitution and Bill of Rights apply to policy made by the "judiciary department" of the federal government in the course of its decision of cases or controversies involving religious liberty.

A. Structuralism and the "Judicial Department"

Since "we must never forget that it is a constitution we are expounding,"[21] I begin with Alexander Hamilton's observation concerning the role of the judiciary in our federal system. "[T]he courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority."[22] This intermediate role, according to Hamilton, was to be governed by a clear understanding on the part of the judges that "[a] constitution is, in fact, and must be regarded by [them] as, a fundamental law."[23]

From this perspective, judicial review does not "by any means suppose a superiority of the judicial to the legislative power. It

20. As used here, the phrase "limited political competence" is intended to convey the same sort of conceptual limitation on the policy-making function as the phrase "limited subject matter jurisdiction" does in the context of judicial decision-making. As applied to the federal government, the phrase refers to limits on the *authority* of federal officials to make, implement, enforce or interpret federal statutory and constitutional law which are derived either from the limited scope of the power granted, or explicit limits, such as the First Amendment. See *United States v Lopez*, — US —, 115 S Ct 1624 (1995); *Oregon v Mitchell*, 400 US 112 (1970) (opinion of Harlan). Justice Scalia's dissenting opinion in *Hartford Fire Insurance Co. v California*, 113 S Ct 2891, 2918 (1993) drew the distinction nicely when he stated, among other things, that jurisdiction to prescribe (such as to make the rule of decision) is "quite a separate matter from jurisdiction to adjudicate" as defined in § 231 of the Restatement of Foreign Relations. Compare *Restatement of the Law (3d) Foreign Relations Law of The United States § 401* (Categories Of Jurisdiction) [defining and distinguishing "jurisdiction to prescribe," "jurisdiction to adjudicate" and "jurisdiction to enforce"].

21. *McCulloch v Maryland*, 17 US (4 Wheat) 316, 407 (1819) (emphasis added).

22. Federalist 78 (Hamilton) in Clinton Rossiter, ed, *The Federalist Papers* 467 (Mentor, 1961).

23. Id.

only supposes that the power of the people is superior to both[.]"[24] Hamilton was explicit: judges "ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."[25]

Determining whether the judiciary have regulated their decisions "by the fundamental laws", however, is not an easy task. Because "it is emphatically the province and duty of the judicial department to say what the law is,"[26] the Court has the final word. Its holdings must be treated, for all practical purposes, as "infallible"[27] statements of constitutional law until they are modified or overruled.[28]

The initial task then is to translate the concept of *constitutional* supremacy into an analytical framework which can be utilized to "review"—rather than simply to justify or criticize—the rules developed by the United States Supreme Court to govern constitutional decisionmaking.[29] Such a framework should be broad enough to support a review of both the methodology the Court has developed to guide constitutional interpretation (standards of review), and the rules which reflect the Court's understanding of a particular phrase or clause of the Constitution itself (constitutional norms).

The only framework adequate to such a task is the Constitution as an integrated whole. The text, the structural framework, and interpretation of every provision of the amended Constitution which applies to the issues under scrutiny are critical components of a "structural" analysis of the Court's holdings.[30]

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24. Id at 467-68. The Preamble, US Const, Preamble (1787), the Supremacy Clause, US Const Art VI, cl 3 (1787), and the amendatory powers contained in Article V, US Const Art V (1787), are among the express affirmations of the sovereignty of the people.

25. Federalist 78 (Hamilton) at 468 (cited in note 22).

26. *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803).

27. The late Justice Robert Jackson coined the now-famous phrase: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v Allen*, 344 US 443, 540 (1953) (opinion concurring in result). The use of such imagery to describe the Court's work leads to quite a few misunderstandings concerning the nature of power in the federal system, and how, if at all, it is shared among all those who participate in its governance, including "the People". See Louis Fisher (cited in note 29).

28. For an extended, and illuminating, discussion of the rule of *stare decisis*, see *Planned Parenthood of Southeastern Pennsylvania v Casey*, 112 S Ct 2791 (1992). See also Charles L. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L Rev 401 (1988); William O. Douglas, *Stare Decisis*, 49 Colum L Rev 735 (1949).

29. See generally Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 Suffolk L Rev 85 (1991).

30. US Const Art VI, cl 2 (Supremacy Clause).

The interpretive goal is a lofty one: to maintain the Constitution's character as a succinct statement of the "consent of the governed."[31] The first part of the analytical task, thankfully, is a bit narrower. It presents two basic structural questions:

1. What express or implied power(s) respecting religious liberty questions are granted to the federal courts?; and

2. What constraints, express or implied, operate to limit judicial authority respecting religious liberty?

B. Substantive Limits on the Exercise of Federal Power: Legislative, Executive and Judicial

Most discussions of religious liberty are rather narrowly focused. The First Amendment is viewed as the primary source of the constitutional norms relevant to religious liberty, and the Fourteenth is viewed primarily as the conduit through which its norms are applicable to the States.[32] The non-discrimination norms embodied in the Test Clause do not get much attention,[33] even when

31. Compare Amar, 101 Yale L J at 1131-33 (cited in note 19) with Howard Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S Cal L Rev 295, 328-31, 379-81 (1981).

32. Nearly thirty years ago, Justice William Brennan described the "logical interrelationship between the Establishment and Free Exercise Clauses" as a "paradox central to our scheme of liberty." *School Dist. of Abington Township v Schempp*, 374 US 203, 247, 230, 231 (Brennan concurring). In *Texas Monthly v Bullock*, Justices Blackmun and O'Connor agreed with Justice Scalia's observation that the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them," and added their own impression that "The Press Clause adds yet a third hazard to a State's safe passage through the legislative waters. . . . We in the judiciary must be wary of interpreting these three constitutional Clauses in a manner that negates the legislative role altogether". *Texas Monthly v Bullock*, 489 US 1, 28 (Blackmun and O'Connor concurring in the judgment).

33. See *Torcaso v Watkins*, 367 US 488 (1961). See generally 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 (1987); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion* 103 Harv L Rev 1410 (1990). Professor Bradley notes that "one outstanding example of article VI neglect is Professor Tribe's relegation of his article VI discussion to a single footnote. He observes that it is 'now of little independent significance.' That's it." Bradley at 677-78 & n 19, citing Laurence Tribe, *American Constitutional Law* 813 n 1 (Foundation Press, 1978). In the second edition, Professor Tribe takes the same position. Laurence Tribe, *American Constitutional Law* 1155 n 1 (Foundation Press, 2d ed, 1988).

they are clearly relevant[34]. The Ninth and Tenth Amendments are largely ignored.[35]

Under a structural approach, all of these provisions and more must be considered, not only as potential warrants for the protection of individual liberty (the usual approach), but also as limitations on government power — including that of judges — to take action inconsistent with religious liberty.

1. The Test Clause

The Test Clause is quintessentially federal: "no religious test shall ever be required as a Qualification to *any* Office or public

34. The Congress long exempted itself from the civil rights laws it applied to everyone else, but the first bill reported out of the 104th Congress is legislation which ends those exemptions. Congressional Accountability Act of 1995, Pub L 104-1, 109 Stat 5, *codified at* 2 USC §§ 1301, 1302, 1317, 1351, 1361, 1381-85, 1405, 1408-15, 1438. Though House and Senate Rules forbade most forms of discrimination in employment, including discrimination on the basis of religion, there was, prior to the passage of the Accountability Act, no procedure for enforcement of these guarantees which is comparable to that afforded citizens who do not work for Congress. See *Title VII of the Civil Rights Act of 1964*, 42 USC § 2000e-16 (West, 1992); *Civil Rights Act of 1991* § 117, PL 102-166, 105 Stat 1071 (102nd Cong 1st Sess.) Compare *Davis v Passman*, 442 US 228 (1979); *Powell v McCormack*, 395 US 486 (1969). See generally Jacob Weisberg, *"Do As ISAY," The New Republic v 193*, at 12 (November 18, 1985); Daniel Rapoport, "The Imperial Congress—Living Above the Law," 11 *National Journal* at 911 (1979).

35. Extensive discussion of the Ninth and Tenth Amendments is beyond the scope of this essay. It is interesting to note, however, that neither the Court nor the academy quite know what to do with either of them. Though intended as a limit on federal power, there is an extensive literature on the Ninth Amendment as a justification for *expanding* it. See, for example, Randy E. Barnett, ed, *Symposium on Interpreting the Ninth Amendment*, 64 Chi-Kent L Rev 37-268 (1988); Lawrence Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth, But What on Earth Can You Do With the Ninth Amendment?*, Id at 239; Randy E. Barnett, ed, *The Rights Retained By The People: The History And Meaning Of The Ninth Amendment* (George Mason Press, 1989); Charles L. Black, *Decision According To Law* (W. W. Norton & Co, 1981). A notable exception is Professor Calvin Massey's article, *The Anti-federalist Ninth Amendment and Its Implications For State Constitutional Law*, 1990 Wis L Rev 1229. Not only is Professor Massey's thesis an interesting one, it contains an extremely useful collection of the literature. See Massey at 1229-39 & n 2 (discussing the academic literature).

The Tenth Amendment, by contrast, is conceded by the Court to provide some limit on federal authority, including its own, but the extent to which it will be exercised is not at all clear. Compare *New York v United States*, 505 US —, 112 S Ct 2408 (1992); *South Carolina v Baker*, 486 US 505 (1988); and *San Antonio Metropolitan Transit Authority v Garcia*, 469 US 547 (1985), with *National League of Cities v Usery*, 426 US 833 (1976). The United States Supreme Court did not address the Tenth Amendment issue in its recent decision in *United States v Lopez*, — US —, 115 S Ct 1624 (1995) (5-4 decision). Significantly, however, it did rest its holding that Congress did not possess a generalized police power on a structural analysis of the reach of the Commerce Clause. All of the opinions, save the separate dissent of Justice Stevens, address the jurisdictional question from that perspective.

Trust under the United States."[36] The President is the most obvious target of the prohibition; for it is the Chief Executive who exercises of the power to appoint "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law."[37]

Less obvious from the text, but equally certain from the structure, is that the Test Clause limits not only the legislative power of Congress, which might have imposed such tests as a legal qualification for federal office, but also the power of every other entity or official having power over "office[s] or public Trust[s] under the United States."

The clause is thus an express limitation on the power of the Judiciary and the heads of departments to appoint "inferior Officers" to assist them in their duties,[38] and binds each house of Congress when acting in its respective individual capacity.[39] It con-

36. US Const Art VI, cl 3 (emphasis added).

37. US Const Art II § 2, cl 2.

38. Id.

39. Though Professor Bradley believes that the Framers' discussions of Article VI indicate "that [it] was applicable to the entire lawmaking process, and occurred against a background of religious tests for precisely those high executive and legislative offices supposed to have been excepted by such technical distinctions[,]" neither his reading of the discussions, nor parsing of the Constitutional text, lead to a conclusion that they are "self-evident." See Bradley, 37 Case W Res L Rev at 718-19 (cited in note 33).

The interpretive problem is multi-faceted, and must be divided along federal-state lines; for the power of the States to set the qualifications for members of Congress remains a hotly disputed issue. See *US Term Limits Inc. v Hill*, 115 S Ct 1842, 63 USLW 4113 (US May 22, 1995) (5-4 decision). See generally Neil Gorsuch & Michael Guzman, *Will The Gentlemen Please Yield? A Defense Of The Constitutionality Of State-imposed Term Limitations*, 20 Hofstra L Rev 341 (1991); Linda Cohen & Matthew Spitzer, *Term Limits* in *Symposium: Positive Political Theory and Public Law* 80 Georgetown L J 477 (1992). The power of either House of Congress to "judge . . . the elections, returns and qualifications of its own members," Art I § 5, appears to allow for the possibility that such qualifications could, if either the House or Senate so chose, include some form of religious test or test oath. Neither Senators nor Representatives hold an "Office . . . under the United States" as that term is used in the Constitution. They are not "civil officers of the United States" subject to impeachment under Article II § 4, and may not hold such offices while serving in Congress. Art I § 5, cl 3. Legislators do, however, hold a "public Trust" as that term was understood in the late eighteenth century—that of the people of the State or district which elects them. See John Louis Lucaites, *Flexibility and Consistency in Eighteenth-Century Anglo-Whiggism: A Case Study of the Rhetorical Dimensions of Legitimacy* at 77-107 (PhD dissertation, University of Iowa, August 1984) (available through U Microfilms International Dissertation Information Services, Ann Arbor, Michigan). The precise nature of this "public trust" figures prominently in the Supreme Court's recent decision in *US Term Limits v Hill* (cited above). The majority opinion indicates that "representatives owe primary allegiance not to the people of a State, but to the people of the Nation. As Justice Story observed, each Member of Congress is 'an officer of the union, deriving his powers and qualifications from the constitution, and neither created by, dependent upon, nor con-

strains the Senate in the exercise of its power to choose its officers,[40] to advise and consent to the President's appointments,[41] and to choose a vice-president in the event that the Electors should fail to do so.[42] It also binds the House of Representatives in the exercise of their power to "choose their Speaker and other Officers"[43] and to elect the President should the Electors fail to do so.[44] It also restricts the discretion of individual Senators and Members of Congress, whose personal staff members hold offices of public trust under the United States.[45]

Notably, the Test Clauses limits the exercise of State authority as well. The office of Senator is unquestionably a "public Trust under the United States," and until the adoption of the Seventeenth Amendment,[46] the appointing authorities were the State

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trollable by, the states. . . . Those officers owe their existence and functions to the united voice of the whole, not of a portion, of the people.' 1 Story [*Commentaries on the Constitution*] § 627. Representatives and Senators are as much officers of the entire union as is the President." Id at 1853 (majority opinion, per Stevens). The majority's distinction between an "officer of the United States" and an "officer of the Union", while relevant to the distribution of power within the federal system, is not relevant to the duty imposed by the Test Clause. Compare *US Term Limits* at 1875 (Kennedy concurring) (recognizing "a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.") with id 1877 (Thomas, Scalia, O'Connor, and Rehnquist dissenting) (noting that "[t]he Constitution simply does not recognize any mechanism for action by the undifferentiated people of the Nation.").

40. US Const Art I § 3.

41. US Const Art II § 2, cl 3.

42. US Const Amends XII § 4 (1804); XX § 4 (1933).

43. US Const Art I § 2, cl 5.

44. US Const Amends XII (1804); XX § (1933).

45. Though there are no cases which hold that employment in the legislative branch is an "office or public Trust under the United States" under Article VI, there are two ways in which to support the conclusion made in the text. The first is statutory. Individuals who work for Congress are classified in a number of different ways for statutory purposes, see, for example, 5 USC § 2107 (defining the term "Congressional employee"), but all are engaged in "discharging . . . official function[s] under or in connection with the United States" as that phrase is used in 5 USC § 2105 (cited in note 34). The second is by reference to the concept of "public Trust" itself. If the personal staff members of Senators, Representatives or the leadership of House and Senate are not considered to be "Congressional employees", their close identification with the individual who employs them makes them administrators of the public Trust held by that individual.

There is a practical side to this question. Though it appears that the practice is less widespread today, religious discrimination in Senate and Congressional offices has been practiced openly for years. "In 1974 the Fort Worth Star-Telegram created a minor furor when it reported that the House placement office regularly removed stipulations like 'white only' and 'attractive, smart, young, and no Catholics . . .' from hiring orders sent by congressional offices." Jacob Weisberg, *Do As ISAY, The New Republic v 193*, at 12 (November 18, 1985). To the extent that the Test Clause itself protects Congressional employees from discrimination on the basis of religion, the civil rights exemptions Congress provided for itself were on flimsy ground indeed. (See note 34).

46. US Const Amend XVII (1913).

Legislatures.[47] Governors have the power to make temporary Senatorial appointments,[48] and the States appoint presidential Electors[49] and set their qualifications.[50]

The significance of the Test Clause is thus both structural and normative. Its language and structure differentiate between the powers of the newly-created federal government and those of the States, and foreshadow the structural limits contained in the First Amendment.[51] Article VI, clause 3 requires an oath or affirmation in support of the Constitution from all officials and legislators, both State and federal, but only the federal government was prohibited from utilizing the religious tests to determine fitness for public office. The States, by contrast, commonly applied such tests to those seeking State offices,[52] and at least one—Tennessee—felt free to do so as late as 1977![53]

Given that structure, the Federalists "drew a nonestablishment sum from the lack of federal jurisdiction over religion plus the test

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47. US Const Art I § 3, cl 1.

48. US Const Amend XVII cl 2 (1913).

49. US Const Art II § 1, cl 2.

50. US Const Art I § 2, cl 1. Though presidential electors act by the authority of the State and are not federal officials, *Ray v Blair*, 343 US 214, 224-225 (1952); *In re Green*, 134 US 377, 379 (1890), Article II's incompatibility clause, US Const Art II § 1, cl 2, recognizes not only the federal nature of their function, compare *Oregon v Mitchell*, 400 US 112 (1970), but also that the public trust which reposes in that office is incompatible with political, appointive or positions of "profit" under the United States. See generally 5 USC § 2105 (West, 1992). See also *Reservists Committee to Stop War v Laird*, 323 F Supp 833 (DC 1971), aff'd 495 F 2d 1075, 162 US App DC 19, rev'd on other grounds, 418 US 208.

51. Professor Bradley notes that just

> as in the voter qualifications actually left to state law by article I, the Framers *could* have cut into the comparatively 'illiberal' state orders had they wanted to. Put differently and largely as a matter of legal analysis and not political wisdom, an incision at this point could certainly have been justified as a necessary, limited protection of the federal regime, and not as a wholesale invasion of state autonomy. This reticence and the overall sparseness of the record at least plausibly confirm Pinckney's proposal as a matter of observation, both about the completed legal framework and the Framers' intentions: Congress should not regulate the 'subject of religion.' "

Bradley, 37 Cas W Res L Rev at 693(cited in note 33). See also text at notes 157 to 175.

For an informative discussion of Federalist and Anti-Federalist views concerning the allocation of legislative jurisdiction, including both jurisdiction to prescribe and enforce, see generally Saikrishna Bangalore Prakash, *Field Office Federalism* 79 Va L Rev 1957 (1993).

52. William G. Torpey, *Judicial Doctrines of Religious Rights in America* at 16 (UNC Press, 1948), quoting Sanford H. Cobb, *The Rise of Religious Liberty in America* at 501 (MacMillan, 1902) (compiling statistics "relative to religious qualifications for officeholders in the first thirteen state constitutions.")

53. *McDaniel v Paty*, 435 US 618 (1978), rev'g, *Paty v McDaniel*, 547 SW2d 897 (Tenn, 1977).

ban," and asserted that "since the oath requirement was the only plausible power one sect might use to gain the upper hand,"[54] Article VI was "enough [of a religious liberty guarantee] for a federal government of specific enumerated powers."[55] But this was not enough for either the anti-Federalists (many of whom viewed the Test and Supremacy Clauses as threats to religious liberty)[56] or the States; for it did not state explicitly that the federal government had no enumerated power either to vex religious liberty directly or to set national policy on the subject. That guarantee would have to await the ratification of the First Amendment. But the first steps had been taken, and the Test Clause was presented for ratification as a guarantee that the appointment powers granted the federal government—the powers which could be abused with the greatest ease—would not be turned against entire classes of the citizenry.[57]

At the normative level, the Test Clause prohibits the most personal kind of imposition on one's religious liberty which can occur at the hands of the federal government[58]—overt discrimination in federal appointment, employment and in the enjoyment of the

54. See Bradley, 37 Cas W Res L Rev at 709 (cited in note 33) quoting IV *Elliot's Debates on the Federal Constitution* at 196 (speech of James Iredell). This is a significant point, especially in light of the current Court's understanding of the Establishment Clause. See note 62. It seems to have been forgotten in contemporary church-state jurisprudence that an "establishment of religion" was a many faceted enterprise which included, in addition to the *preferential* treatment of and support for identifiable religious groups, there were also legal mechanisms designed to enforce the political and civil *subordination* of the disfavored religions and their adherents. Among these were test oaths, requirements of church membership and worship, and other civil disabilities. See generally William A. Blakely, ed. & The Religious Liberty Ass'n, *American State Papers and Related Documents on Freedom in Religion* 17-92 (Review and Herald, 1949).

55. Bradley, 37 Case W Res L Rev at 709 (Cited in note 33).

56. Id at 694-711.

57. Federalist 52, 57 (Madison), (cited in note 22). See generally Federalist 10, 51 (Madison) (cited in note 22). Professor Bradley writes that "[t]he no-test clause was sold as a constitutionalized Golden Rule with a Machiavellian spin to it: 'Constrain yourself as you would constrain others.' " Madison's views on the role factions should play in the protection of all forms of liberty are thus clearly in evidence here. Bradley, 37 Cas W Res L Rev at 702-707 (cited in note 33). The importance of Madison's views respecting the role of politics in disputes over the meaning of religious liberty is discussed in the text accompanying notes 157 to 183.

58. This statement presumes action by those exercising governmental authority derived from the federal constitution. At the time of the Convention in 1787, " 'non-Christians' could not hold public office anywhere in the states, except perhaps in Virginia, and there is no record of *that* actually occurring[, and] Catholics[,] . . . the only non-Protestant Christians around. . . were clearly eligible in Pennsylvania, Delaware and Maryland . . . Elsewhere only Protestants could hold office." Bradley, 37 Case W Res L Rev at 681-87 (cited in note 33)(emphasis in the original).

public trust.[59] Whether targeted on classes of believers or aimed at

59. There are only a few sources which shed light on the content of the phrase "any Office or public Trust under the United States." The first part—"office . . . under the United States"—is relatively clear given the language of Article I, § 6 (Incompatibility Clause) and Art, II, §§ 1, 2. It is arguable, though not by any means settled, that all persons who hold elective offices, federal appointments, or who perform a federal function of any sort, including members of the Armed Services and presidential Electors, are protected by the Test Clause. See 5 USC § 2104 (defining as an "officer" all Justices and judges, as well as appointees of the President, the courts, heads of executive branch and military departments and agencies, or any other person "engaged in the performance of a Federal function under authority of law or an Executive act"). This would arguably include federal civil servants; for even if they are not "inferior officers" under Article II, Congress has explicitly recognized that they are indeed officers, 5 USC § 2104, and "individual[s] holding an office of trust or profit or discharging an official function under or in connection with the United States." See 5 USC § 2105 (West 1992) ("employee" includes "officers" and civil service appointees).

The more interesting question is what constitutes a "public Trust under the United States." The phrase appears to be broader than the term "office," a construction supported by the phrase "office of trust or profit under the United States" which appears in the incompatibility clause of Article II, as well as by Congress' own distinction between individuals "holding an office of trust or profit" and those who may be "discharging an official function *under or in connection with* the United States". 5 USC § 2105(d) (emphasis added).

Federal case law sheds very little light on this question, but there are a number of State cases construing the phrases "office or public Trust" and "Office of Trust or Profit" which do provide some guidance on the meaning of the term "office of public trust or profit". Those terms are commonly found in the incompatibility provisions of state constitutions. See, for example, *Commonwealth of Pennsylvania v Dallas*, 4 US (4 Dall) 229 (1801) (US Attorney and Recorder of City of Philadelphia); *Begich v Jefferson*, 441 P 2d 27 (Alaska 1968) (position as state or federal legislator is incompatible with superintendent or teaching positions in state operated school districts); *Commonwealth ex rel Hancock v Clark*, 506 S W2d 503 (Ky, 1974) (postmaster of a fourth class post office was not exercising an office of trust or profit under the United States ineligible to hold or exercise any office of trust or profit under the Kentucky Constitution and so could serve as a member of a county school board); *Brown v Lillard*, 814 P2d 1040 (Okla 1991) [position of state judge (an office) is incompatible with compensated full or part-time teaching at a state institution (a position of "profit")]; *State v Turner*, 168 Wis 170, 169 NW 304 (1918) (acceptance by circuit court commissioner of the office of United States commissioner operated to vacate ipso facto his office of circuit court commissioner under Wisconsin Const, Art 13, § 3). See also *Maxey v Bell*, 41 Ga 183 (1870) (holding that the office of guardian is a "public trust" under the Georgia Constitution, and thus subject to the rule that religious tests may not be required). For a more generalized discussion of the term "public Trust" as the term was commonly used in the Eighteenth Century, see Lucaites, *Flexibility and Consistency* (cited in note 39).

Given the advent of the modern administrative state and laws which require federal contractors and grantees of federal funding to comply with federal law in their dealings with the public, see, for example, 42 USC § 2000d (Title VI of the Civil Rights Act of 1964); Civil Rights Restoration Act of 1987, Pub L 100-259, Mar 22, 1988, 102 Stat 28, 20 USC §§ 1681 note, 1687, 1687 notes, 1688, 1688 note; 29 USC §§ 706, 794; 42 USC §§ 2000d-4a, 6107, it is arguable that the explicit non-discrimination norm of the Test Clause applies not only to federal employment, but also to federal contracting and grant-eligibility considerations as well. Compare *Bowen v Kendrick*, 487 US 589 (1987); *Walz v Tax Comm'n*, 397 US 664 (1970) with *Bob Jones University v United States*, 461 US 574 (1983).

non-believers,[60] the imposition of a religious test or oath is one of the purest examples of intentional discrimination on religious grounds; for it involves inquiry into the substance of personal religious belief and practice itself.

Viewed more broadly, the Test Clause is one of the most critical of the religious freedom guarantees: an express prohibition of religious discrimination. It is clearly tied in spirit, if not in function, to the equal citizenship provisions of Article IV, and those provisions were themselves later echoed in the Privileges and Immunities Clause of the Fourteenth Amendment. The Test Clause thus underscores at the personal level that which the First Amendment later made reasonably explicit at the institutional one: federal attempts to assure what might now be termed "religiously-correct" patterns of speech, thought and institutional preference are forbidden. Viewed structurally, as either one of the privileges or immunities of citizens of the United States, or as an "incorporated" norm affecting the interpretation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[61] its implications are enormous.[62]

There is not much federal case law on the topic, but that which does exist seems to support a broad reading of the term. The Claims Court has stated that "[t]ransactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct." *Refine Construction Co. v United States*, 12 Cl Ct 56, 63 (1987) (government contracts). Environmental Protection Agency grants for the construction of certain public works projects also constitute a public trust. See 40 CFR §§ 30.120, 33.300; *Town of Fallsburg v United States*, 22 Cl Ct 633, 641 (1991). And finally, the grantee of broadcasting license is considered to be a public trustee, who must serve the broad goals of the public interest convenience and necessity. *Red Lion Broadcasting v. FCC*, 395 US 367, 383 (1969); *Office of Communication of the United Church of Christ v FCC*, 707 F2d 1413, 1427-28 (DC Cir 1983). This question is discussed at greater length in a forthcoming article.

60. See *McDaniel v Paty*, 435 US 618 (1978); *Torcaso v Watkins*, 367 US 488 (1961).

61. "*Torcaso*, if it is to be grasped at all, affects an "incorporation" of article VI as much as if the Court expressly said so." Bradley, 37 Case W Res L Rev at 718 (cited in note 33).

62. The point here is that intentional discrimination on the basis of religion is problematic not only under the First Amendment, but also under the Test, Fourteenth Amendment Privileges and Immunities, Citizenship, and Equal Protection Clauses as well. The Court has not been entirely consistent on this point. Compare, for example, 113 S Ct 2217 (1993) (indicating that discrimination is forbidden) with *State v Davis*, 504 NW2d 767 (Minn, 1993) *cert den*; sub nom *Davis v Minnesota*, 114 SCt 2120 (permitting religion-based peremptory strikes in jury selection).

2. The First Amendment

a) Congress

The First Amendment was necessary to assure the critics of the new Constitution that Congress would not use its express or implied powers (such as commerce, taxation or spending) to make laws infringing State or individual prerogatives regarding religion.[63] Necessarily included in this prohibition were federal attempts to establish a national religion or dis-establish the established religions of the States which had them,[64] and to enact or enforce laws which sought to burden religious belief or practice.[65] But what about the President and the Supreme Court?

Though the usual approach is simply to assume the application of the First Amendment to the Executive and Judicial branches, other approaches have been a bit more thoughtful. The first Justice Harlan argued in 1907 that the "reflex character" of the Amendment applies it to all levels of government.[66] More recently, Akhil Reed Amar, has argued that "any automatic *expressio unius* inference that citizens therefore lack analogous rights

63. For example, US Const Art I § 7, 8; Art IV § 3 (1787). See *The Federalist*, 32 (Hamilton), (cited in note 22).

64. See generally Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 Wash U L Q 371; Clifton B. Kruse, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Washburn L J 65 (1962); Donald A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 Harv L Rev 513 (1968); William K. Leitzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 De Paul L Rev 1191 (1990); Akhil Reed Amar, 100 Yale L J at 1157-62 (cited in note 19).

65. See *Larsen v Valente*, 456 US 228 (1982). Compare *Washington v Davis*, 426 US 229 (1976). See generally Donald Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv L Rev 1381 (1967). The question of whether or not the Free Exercise Clause operates to grant an exception for religious belief or practice burdened by otherwise constitutional laws of general applicability was answered in the negative in *Employment Division v Smith*, 494 US 872 (1990). Arguing from historical materials, Professor Michael McConnell has argued that the Court's conclusion is in error. Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409 (1990). Professors Gerard Bradley and Phillip Hamburger argue that McConnell is wrong. Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L Rev 245 (1991); Phillip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo Wash L Rev 915 (1992).

Federal laws which relieve specific burdens on religion, see, for example, 42 USC §§ 2000e(j), 2000e-2(e), or which encourage it as a general matter, see, for example, IRC § 501(c)(3), raise a number of interpretive questions which are beyond the scope of the present essay. The application of structural analysis to such questions will be addressed in a forthcoming essay.

66. *Patterson v Colorado*, 205 US 454, 464 (1907) (Harlan dissenting).

against the President or federal judges—or states—flies in the face of the Ninth Amendment."[67]

One need not, however, take either route; for a rather straightforward separation of powers analysis of the text and structure of the Constitution assures us that while the text of the First Amendment applies only to the legislative acts of Congress,[68] it operates as a structural restraint on the Executive and the Judiciary as well.

b) The President

The role of the President is "faithfully [to] execute" the law, and includes an independent responsibility to "preserve, protect and defend the Constitution of the United States."[69] The Chief Executive is thus obligated by the text itself to utilize the discretion vested in the office in a manner informed by the entire Constitution.

Since Congress may not pass laws "respecting an establishment of religion or prohibiting the free exercise thereof," legislation which, in the President's view, violates these religious liberty norms may (and arguably must) be vetoed.[70] To the extent the President considers it "necessary and expedient," legislation designed to protect religious liberty may be recommended for Congressional consideration,[71] and the President may decline to enforce laws which are of doubtful constitutionality.[72] Where legislation does not violate religious liberty norms and is otherwise valid, faithful execution by the President presumes compliance with its terms.[73]

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67. Amar, 101 Yale L J at 1274 (cited in note 19).

68. Congress makes "laws" only through the constitutionally ordained mechanism of bicameralism and presentment. *Immigration and Naturalization Service v Chadha*, 462 US 919 (1983).

69. US Const Art II, § 1, cl 8.

70. Art I, § 7, cl 3. Compare Andrew Jackson, *Veto Message of July 10, 1832*, relating to the Bank of the United States, James J. Richardson, ed, 3 *Messages and Papers of the Presidents* 1139 (Bureau of National Literature, Inc., 1896) with Daniel Webster, *Address of July 11, 1832* Concerning the Veto of the Re-Chartering of the Second Bank of the United States, Edwin P. Whipple, ed, *The Great Speeches and Orations of Daniel Webster* (Little Brown & Co., 1889).

71. US Const Art II, § 3, cl 2.

72. A discussion of the President's power to decline to enforce laws which have either become law without signature, Art I, § 7, cl 2, or which have been signed into law with "reservations," but without an objection having been made in proper form is beyond the scope of this essay. All such refusals are, of course, subject to judicial review.

73. US Const Art II § 1, cl 8. See *Youngstown Sheet & Tube Co. v Sawyer*, 343 US 579 (1952).

In fact, the only instances in which the President could make a plausible argument that the religious liberty guarantees of the First Amendment do not apply to executive action are those in which the chief executive is authorized by the Constitution to act independently of Congress.[74] And since the instances in which independent presidential action is authorized are few indeed[75] (to the extent that they exist at all),[76] the President is constrained by the text of the First Amendment in all instances except those where, in the words of the late Justice Robert Jackson, "he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[77]

This leaves the President very little "structural" room to claim authority unconstrained by the religious liberty guarantees, a point recognized by Alexander Hamilton's argument in *Federalist* 69 that the President "has no particle of spiritual jurisdiction."[78] Congress makes all laws governing matters within the jurisdiction of the federal government, including "rules for the government and regulation of the land and naval forces,"[79] and the Test Clause forbids religious discrimination in Presidential appointments.[80] Thus, of all the powers of the Executive, only two—the power to conduct for-

74. The first line of attack against a presidential directive restricting First Amendment rights would be that it is not authorized by law. If it is authorized, the focus is properly on the right of Congress to provide the authorization. If not, the action is valid only if the President has other constitutional authority to act. See *Youngstown Sheet & Tube Co. v Sawyer*, 343 US at 635-39 (Jackson concurring).

75. This, of course, is what Justice Jackson described as the "zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain." *Youngstown Sheet & Tube Co. v Sawyer*, 343 US at 637 (Jackson concurring).

76. Justice Jackson noted further that "Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system." *Youngstown Sheet & Tube Co. v Sawyer*, 343 US at 637-638 (Jackson concurring).

77. Id, 343 US at 637 (Jackson concurring).

78. *Federalist*, 69 (Hamilton) at 422 (cited in note 22).

79. US Const Art I, § 1 and § 8, cl 14. Compare *Goldman v Weinberger*, 475 US 503 (1986) with 10 USC § 774, PL 100-180, Div A, tit V, § 508(A)(2), December 4, 1987, 101 Stat 1086 (restricting the scope of command discretion to forbid the wearing of religious symbols by military personnel). See generally United States Department of Defense, *Joint Service Study on Religious Matters: Report of the Joint Study Group on Religious Practice* (March, 1985). See also *Katcoff v Marsh*, 755 F2d 223 (2d Cir, 1985) (rejecting a challenge to the Congressional practice of authorizing military chaplains).

80. The question of whether or not the Chief Executive (or, perhaps more importantly, the Presidential staff) respects the prohibition is another matter entirely. Compare note 85.

eign policy,[81] and the President's ability to command the "bully pulpit"[82] for an ostensibly religious purpose[83]—do not fit readily

81. The power to *conduct* foreign policy is often differentiated by courts both from the power to *make* it, see, for example, *Johnson v Eisentrager*, 339 US 763 (1950); *Greenham Women Against Cruise Missiles v Reagan*, 755 F2d 34 (2d Cir 1985) (per curiam); *Dickson v Ford*, 521 F2d 234 (5th Cir 1975), and the power to *implement* policies enacted by the Congress, including foreign assistance. There is broad agreement that the exercise of the former are inherently political questions for which exist "a 'textually demonstrable constitutional commitment of the issue to a coordinate political department.' " *Klinghoffer v S.N.C. Achille Lauro*, 937 F2d 44, 49 (2d Cir 1991), quoting *Baker v Carr*, 369 US 186, 217 (1962). See generally *Japan Whaling Ass'n v American Cetacean Soc'y*, 478 US 221 (1986); *Reid v Covert*, 354 US 1 (1957) (plurality opinion); *Oetjen v Central Leather Co.*, 246 US 297 (1918). The difficulty arises when courts attempt to distinguish "making" or "conducting" foreign policy from actions "implementing" it. See *Lamont v Woods*, 948 F2d 825, 843 (2d Cir 1991) (Walker concurring), ("the seemingly facile distinction between "implementation" and "policy" raises more questions than it answers.")

To the extent that the President's actions are expressly or impliedly authorized by Congress, the executive's actions are governed by a number of constitutional constraints, including the separation of powers mandate that the judiciary have a due concern for the "possible consequences of judicial action." *Lamont v Woods*, 948 F2d 825, 843 (2d Cir 1991) (Walker concurring), quoting *Baker v Carr*, 369 US at 211-212. United *States v Curtiss-Wright Export Corp.*, 299 US 304 (1936). In addition, the manner and degree to which the Bill of Rights applies extraterritorially is an unsettled question, not only because the status of the parties and the specific guarantees involved might point to differing results, see *United States v Verdugo-Urquidez*, 494 US 259 (1990), but also because it can be difficult to discern the precise nature of the right infringed. Where the courts perceive the issue to be clearly presented, however, they have intervened. See, for example, *Lamont v Woods*, 948 F2d 825, 830 (2d Cir 1991) (Establishment Clause challenge to foreign assistance to church related schools and hospitals); *Planned Parenthood Federation v AID*, 838 F2d 649 (2d Cir 1988) (challenge to executive decision banning aid to organizations which perform abortions held to be justiciable), *on remand* 915 F2d 59 (2d Cir 1991) (rejecting First and Fourteenth Amendment claims on the merits). Compare *Lujan v Defenders of Wildlife*, 505 US 555 (1992) (standing).

82. The term was coined by President Theodore Roosevelt. See generally James David Fairbanks, *The Priestly Functions of the Presidency: A Discussion of the Literature on Civil Religion and its Implications for the Study of Presidential Leadership,* 11 Presidential Studies Quarterly 214 (1981).

83. Whether Presidential proclamations, speeches or lobbying activity can violate either the First or the Fourteenth Amendments is a matter of some dispute which need not be addressed here. That the President's views concerning religious liberty issues are of considerable political importance is well-documented. See, for example, *Remarks of Senator John F. Kennedy Before a Meeting of the Greater Houston Ministerial Assn.*, Houston, Texas, September 12, 1960; J. Johnson, *A Born Again Style at the White House*, Washington Post, January 21, 1977, p A18, col 3; *Remarks of President Ronald W. Reagan to the Ecumenical Prayer Breakfast*, Dallas, Texas, August 23, 1984; *Remarks of Walter F. Mondale to the International Convention of B'nai B'rith*, Washington, D.C., September 6, 1984; Governor Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective* delivered to the Department of Theology, University of Notre Dame, South Bend, Indiana, September 13, 1984 (Governor of New York); Representative Henry J. Hyde, *Keeping God in the Closet: Some Thoughts on the Exorcism of Religious Values from Public Life*, delivered at the Thomas J. White Center on Law & Government, School of Law, University of Notre Dame, South Bend, Indiana, September 24, 1984; Senator Edward M. Kennedy, *Faith and Freedom*, delivered at Tavern on the Green, New York City, before the Coalition of Conscience, September 10, 1984. See generally Joseph Cardinal Bernardin,

into the model of structural constraints elaborated above. Not surprisingly, judicial review of either presents uniquely difficult problems (such as the President's own First Amendment rights when speaking from that pulpit) which are beyond the scope of this essay.[84]

c) *The Federal Judiciary*

A structural inquiry also demonstrates that the religious freedom guarantees also apply to exercises of the judicial power of the United States.

At the most basic level, federal judges and Supreme Court Justices are *supposed* to be chosen without regard to their religion (or lack thereof).[85] To the extent that Congress has authorized them to

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Role of the Religious Leader in the Development of Public Policy in *Symposium: The Religious Leader and Public Policy*, 2 J Law & Relig 367, 369 (1984); Edward M. Gaffney, *Biblical Religion and American Politics: Some Historical and Theological Reflections*, 1 J Law & Relig 171 (1983); Richard J. Neuhaus, *The Naked Public Square: Religion and Democracy in America* (Eerdmans, 1984); Oscar Handlin, *Al Smith and His America* (Little, Brown & Co., 1958); Gustavus Myers, *History of Bigotry in the United States* (Random House, 1943).

84. Justice Jackson wrote that the "actual test of power [in such circumstances] is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Youngstown Sheet & Tube Co. v Sawyer*, 343 US at 637 (Jackson concurring). The Court's approach in practice bears witness to the validity of his observation. The judicial doctrines of standing, justiciability, and political question are designed to limit judicial intervention when abstract theories of law are not adequate to the "imperatives of events and contemporary imponderables" which are entrusted by the Constitution to the political branches. Examples include: extraterritorial application of the Constitution to federal authorities acting in foreign nations, the degree to which the either separation of powers or the First Amendment itself protects the President from judicial or Congressional oversight of the contents of Presidential negotiations, speeches, correspondence, and proclamations, and decisions made by the President, with the advice and consent of the Senate, to grant official status to foreign governments and non-governmental organizations. See, for example, *Phelps v Reagan*, 812 F2d 1293 (10th Cir 1987) (appointment of ambassador to the Vatican); *Americans United for Separation of Church and State v Reagan*, 786 F2d 194 (3d Cir 1986), *cert denied* sub nom *American Baptist Churches v Reagan*, 479 US 914 (1986) (same). See generally James David Fairbanks, *Religious Dimensions of Presidential Leadership: The Case of Dwight Eisenhower*, 12 Presidential Quarterly Studies 261 (1982); Ronald B. Flowers, *President Jimmy Carter, Evangelicalism, Church-State Relations, and Civil Religion*, 25 Journal of Church & State 113 (1983); Albert J. Menendez, *Was Kennedy Sincere About Church-State Separation?*, Church & State (November, 1977) 12.

85. US Const Art VI, cl 3 (Test Clause). Politicians, however, sometimes forget that religion should not qualify or disqualify a judicial candidate—concerns about "balance" on the Court to the contrary notwithstanding. The comments of Virginia Governor Douglas Wilder, who suggested that Justice (then-nominee) Clarence Thomas should be examined by the Senators concerning his "allegiance to the Pope" were notable in that they disclose all too clearly that religious tests for public office are not a vestige of the past. The commentary which appeared after Wilder's comments was even more interesting, in that much of it assumed that a judicial candidate's religious views are legitimate cause for concern

hire individuals to assist them in their work (for example, law clerks, bailiffs, and clerks of court), the Test Clause expressly forbids religious discrimination by members of the judicial branch. Once in office, federal judges, like every other federal officer and State judge, are bound by "Oath or Affirmation, to support [the] Constitution."[86]

(1) The Power to Decide Cases and Controversies

The most significant structural limitation on judicial power can be found in Article III itself. The subject matter jurisdiction of the federal courts is limited to, among other things, the decision of "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority," and to those cases in which the federal judiciary is to serve as the impartial arbiter of public or private law controversies which arise under the law of admiralty, or of a State, foreign nation, or the law of nations.[87]

Because the Constitution expressly sets out to limit the power of the federal government to act in a manner inconsistent with either the religious freedom rights of individuals, or the reserved powers of the States, it provides no warrant for the judicial resolution of a case by reference to religious factors.[88] To the extent that

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when they may disagree with a publicly stated position of the United States Supreme Court. See Jim Cleardy, *Wilder on Defensive after Gaffe*, The Washington Times (Nov 4, 1991). See also Michael Posner, *Wilder, Descendent of Slaves, Has Major Mark in History Books*, Reuters (Jan 8, 1992). See George Kannar, *Thomas & Benedict: The Judge's Patron Saint; Clarence Thomas; Saint Benedict the Moor*, The New Republic (Oct 14, 1991). West Virginia Senator Robert Byrd, who voted against Thomas after noting approvingly that Hill's family "had belonged to the church and belong to the church today," and that she "was evidently reared by religious parents" provides another example. See Stephen Chapman, *The Odd Role Of Religion In The Hill-Thomas Uproar*, Chicago Tribune, October 20, 1991 (final ed), Perspective p 3, zone c. Why Ms. Hill's credibility was enhanced by her religious upbringing (identified by the news media as Baptist), but Judge Thomas' credibility was not, leads to either of two unsavory conclusions: 1) that Senator Byrd was looking for a political excuse that would sound good to the people of West Virginia (the more likely reason); or 2) that Senator Byrd actually believes that one can trust a Baptist to tell the truth more than one can trust a person raised as a Catholic. Both cases, Wilder's and Byrd's, stand as stark reminders that even public servants who believe themselves to be strong supporters of "civil rights" misunderstand (or ignore) the fact that religious liberty—in this case freedom from religious tests for public office—is also a "civil right".

86. US Const Art VI, cl 3, *Marbury v Madison*, 5 US (1 Cranch) 137 (1803).

87. US Const Art III § 2.

88. The notion that any court might consider the religious preference of the parties to a case to be a legitimate factor influencing its decision in a case where the issue was not directly relevant to the merits of the controversy is so outlandish as not to warrant further mention. It should be noted, however, that the potential for disparate treatment of finan-

the Court is interpreting laws and treaties, the express grants and limits confining the exercise of Congressional authority supply an implicit limit on the judicial power. Since Congress has no authority under the Constitution or the First Amendment to prohibit religious exercise, or to define (or confine) the "proper" relationship of religious institutions and their members with and in their respective state and local political communities, otherwise valid statutory rules of decision will not be religious in character.[89]

It is only in those relatively rare cases, where the power of Congress to legislate for the general welfare[90] is challenged as an infringement of religious liberty, will the Court be called upon to so much as consider the religious beliefs of the litigants.[91] And in those cases, which involve either the interpretation of a statute, or the meaning of the Constitution itself, the Supremacy Clause requires that the interpretation *itself* should be guided not only by the religious liberty norms of the Test Clause (to the extent they

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cial obligations to religious societies by the federal courts *was* a concern of Representative Huntington of Connecticut:

> If an action was brought before a Federal Court on any of these cases, he feared the person who had neglected to perform his engagements could not be compelled to do it; for support of ministers, or building of places of worship might be construed into a religious establishment.

Madison responded by underscoring the point of his proposal: to assure that the power of the federal government (he used the term "national") would not be utilized to "establish a [national] religion to which they would compel others to conform." Annals of Congress, I, 757-59. Compare *Jones v Wolf*, 443 US 595 (1979) ("neutral principles of law utilized to decide civil controversies arising from intra-church disputes).

89. The methodology utilized to decide cases like *Wallace v Jaffree*, 472 US 38 (1985) and *Edwards v Aguillard*, 482 US 578 (1987), 107 S Ct 2573 (1987), where the Court concluded that the statutes involved had no secular purpose, is distinguishable, both legally and politically, from the admittedly idealized proposition stated in the text. The Court's religious liberty jurisprudence, including the three-pronged test enunciated in *Lemon v Kurtzman*, 403 US 602 (1971) simply assumes that the Fourteenth Amendment empowers it to make such determinations. See notes 111-153 and 186-202.

90. The term here is used in both its constitutional and its "generic" sense. It includes, for example, the power of Congress, acting pursuant to the Commerce Clause, to forbid religious discrimination by private employers, see Title VII of the Civil Rights Act of 1964, as amended, §§ 701(j), 702, and 703(a-e), 42 USC §§ 2000e(j), 2000e-1, 2000e-2(a-e), as well as the power of Congress to legislate against the possession and distribution of controlled substances which move in interstate or international commerce. See, for example, *United States v Rush*, 738 F2d 497 (1st Cir 1984), cert denied, 470 US 1004 (1985) (rules applied to Ethiopian Coptic Church, which views marijuana as a sacramental object); *Olsen v Iowa*, 649 F Supp 14 (S D Iowa, 1986), aff'd, 808 F2d 652 (8th Cir, 1986) (same, as applied to a priest of the Church).

91. See, for example, *United States v Lee*, 455 US 252 (1982); *Reynolds v United States*, 98 US 145 (1878).

apply) and the First Amendment,[92] but also by all other constitutional norms which are relevant to the task at hand.[93]

Where the judicial task is to decide a case which does not arise under federal law, the structural task is a bit more difficult. If the rule of decision is not of federal origin, the First Amendment cannot operate as a direct constraint on the outcome unless some basis can be found for applying it to the sovereignty whose substantive law does supply the rule of decision. A proper structural analysis in cases where the First Amendment does not govern the rule of decision (for example, a claim arising under the law of a foreign country or religious tradition having a formal body of law such as Islam) will focus on that which *is* subject to federal scrutiny: the jurisdictional and procedural rules which define the nature and scope of the authority of the forum itself.[94]

(2) Interpreting the Constitution

When the power to interpret the Constitution is considered, a particularly difficult conceptual problem arises. In substance, it is not unlike the problem addressed by the Court in *Erie v Tompkins*:[95] by what right do the federal courts claim the power to "make" law, constitutional or otherwise?[96]

Mark DeWolfe Howe has written:

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92. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos*, 483 US 327 (1987); *Bowen v Kendrick*, 484 US 942 (1987); *N.L.R.B. v Catholic Bishop of Chicago*, 440 US 490 (1971).

93. US Const Art VI, cl 2 (Supremacy Clause) The most obvious examples are those setting forth the Court's jurisdiction, separation of powers, and federalism. See cases cited at note 84. Equally significant are the protection of free speech, press, the right to petition for redress of grievances, US Const Amend I (1791), and equal protection of the laws. US Const Amend V. See *Bolling v Sharpe*, 347 US 497 (1954).

94. In diversity cases, for example, federal courts apply State or foreign law to resolve the merits of the underlying controversy because the federal government may have no authority to supply the rule of decision. Compare *Erie v Tompkins*, 304 US 64 (1938)(statutory and decisional law) with *Swift v Tyson*, 41 US (16 Pet) 1 (1842). They nonetheless retain their character as federal tribunals, bound to perform their duty in a manner otherwise consistent with the Constitution and laws of the United States. *Hanna v Plumer*, 380 US 460 (1965) (Federal Rules of Civil Procedure); *Byrd v Blue Ridge Rural Electric Cooperative, Inc.*, 356 US 525 (1958) (Seventh Amendment). Judicial intervention in intra-religious disputes raises "jurisdictional issues of this type. See, for example, *Jones v Wolf*, 443 US 595 (1979); *Serbian Eastern Orthodox Diocese v Milivojevich*, 426 US 696 (1976); *Rayburn v General Conference of Seventh-day Adventists*, 772 F2d 1164 (4th Cir 1985).

95. 304 US 64 (1938). See text at note 27.

96. Compare Richard H. Fallon, Jr., Book Review, *Common Law Court Or Council Of Revision?*, 101 Yale L J 949 (1992) [reviewing Harry H. Wellington, *Interpreting the Constitution* (Yale U Press, 1990)].

> Among the stupendous powers of the Supreme Court of the United States, there are two which in logic may be independent and yet in fact are related. The one is the power, through an articulate search for principle, to interpret history. The other is the power, through the disposition of cases, to make it.[97]

The tough conceptual problem is how to distinguish the power to interpret the Constitution from the power to create constitutional law.[98] The power to interpret the law of the Constitution is necessarily implied from Article III's grant of judicial power to decide "case" and "controversies," but it is limited structurally not only by the Constitution's grant of specific areas of legislative jurisdiction to Congress,[99] but also by the Ninth and Tenth Amendments' reservation of all residual law-making power to the States and the People. The power of *constitution*-making was carefully reserved to the People themselves by the elaborate mechanisms of Article V.

When the issues before the Court are limited to interpretive questions arising under the enumerated powers of Congress, as they were in the pre-incorporation period,[100] the power "to say what the law is" with respect to matters of religious liberty (including church-state relations) is necessarily limited by the scope of those enumerated powers. Because the basic issue in those cases is the scope of the enumerated power in question, the power of judicial review implicit in Article III[101] is only as broad as the question presented; that is, the scope of Congress' power to make laws respecting religious establishments and the freedom of individuals and institutions to live in accordance with the dictates of their respective faiths.

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97. Mark DeWolfe Howe, *The Garden and the Wilderness* 3 (U Chicago Press, 1965).

98. An extensive discussion of this point is beyond the scope of this paper. A useful set of the distinctions is drawn in Louis Lusky's chapter entitled "Lawmaking and Constitution-making", in Lusky, *By What Right? A Commentary on the Supreme Court's Power to Revise the Constitution* at 59 (cited in note 1). *James B. Beam Distilling Co. v Georgia*, 111 S Ct 2439 (1991) is a recent example of the continuing debate among the Justices on the nature of the judicial lawmaking function. The case is discussed at note 103.

99. See US Const Art I §§ 1; 8; Art II, § 1, cl 4, § 2; Art III §§ 1-3; Art IV §§ 1, 3; Art V.

100. See, for example, *Bradfield v Roberts*, 175 US 291 (1899) (Art I, § 8, cl 17 [Seat of Government Clause] (was a grant to a District of Columbia hospital operated by an order of Catholic nuns a law respecting an "establishment of religion?"); *Rector of Holy Trinity Church v United States*, 143 US 457 (1892) (Art I, § 8, cl 4 [power to prescribe uniform rules of naturalization]; application of facially neutral immigration law to clergy immigrating from abroad to meet the religious needs of the faithful).

101. US Const Art III.

There is, of course, no question that the Court "makes" law when it resolves a controversy over the normative content of a disputed constitutional provision. But the role the Court plays in such a controversy is limited by the structural components of the question presented. Such a role is quite different from the role the Court might play were it sitting as the arbiter of cases arising under the common law, or in a Council of Revision such as that proposed—and rejected—by the Constitutional Convention.[102]

One way to illustrate the distinction is by comparison of the structural constraints which limit the judicial power to settle cases and controversies "arising under" the constitution and laws of the United States with those limiting the power of federal courts to supply the rule of decision in diversity cases, the most familiar class of cases which do not.[103]

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102. The "Virginia Plan" submitted to the Convention by Governor Edmund Randolph, but proposed by Madison himself, contained provisions for both a Congressional negative on State laws, and a Council of Revision comprised of the Executive and members of the judiciary which would pre-screen laws passed by Congress. Both were rejected. For the text of the Virginia Plan, see Ralph Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates* at 35-39 (Mentor, 1986). For a discussion of the fate of these proposals, see Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 The WM & Mary Q 215 (1979); Raoul Berger, *Government by Judiciary* at 300-312 (Harvard U Press, 1977); Raoul Berger, *Congress vs. The Supreme Court* at 47-119 (Harvard U Press, 1966).

103. Another good example is the debate among the members of the Court on the question of the retroactive effect of newly-announced constitutional rules. See, for example, *James B. Beam Distilling Co. v Georgia*, 501 US 529 (1991); *American Trucking Ass'n, Inc. v Smith*, 496 US 167 (1990); *Griffith v Kentucky*, 479 US 314 (1987). See also *Lampf, Pleva, Lipkind v Gilberton*, 501 US 350 (1991) (power to imply a statute of limitations governing and "implied" cause of action under the Securities Act of 1934). In *James B. Beam*, the Court was badly split (2-1-3-3) over the precise mechanism by which retroactivity issues are to be determined. The differences cast considerable light on their views concerning the role of the judiciary under Article III.

The six-member plurality in *James B. Beam* held that "when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." 501 US at 543. The concurring opinions of Justices Scalia, Marshall and Blackmun take the most "structural" approach to this question, viewing the issue of retroactivity as one of which involves "basic norms of constitutional adjudication." Id at 547 (Blackmun, Marshall and Scalia concurring in the judgment); id at 547-549 (Scalia, Marshall and Blackmun concurring in the judgment). In the view of these three Justices, prospectivity, (both "selective" and "pure") are unconstitutional assertions of a power to "appl[y] principles determined to be wrong to litigants who are in or may still come to court." Id at 547-548 (opinion of Blackmun, Marshall and Scalia), and the existence of such a power "render[s] courts substantially more free to 'make new law,' and thus to alter in a fundamental way the assigned balance of responsibility and power among the three Branches." Id at 549 (opinion of Scalia, Marshall and Blackmun). Justices Souter & Stevens, who announced the judgment of the Court in *James B. Beam*, view the issue of retroactivity as involving both a "choice-of-law" component (which law to apply—old or new), and a remedial question which arises when the choice is to apply the new ruling retroactively. Id at 534-535 (opinion of Souter & Stevens). Given their holding that once a

In constitutional cases (including those which turn on preemption grounds), both the controversy and its ultimate resolution turns on the relationship of the powers granted to those denied or retained under the terms of the Constitution itself. Judicial review is, in essence, the power to determine *whose* power is at stake by striking a balance between competing claims of authority.[104] To the extent that rules of law may be derived from a balancing process of this sort, they are necessarily limited by the scope of the constitutional norms from which they are derived.[105]

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constitutional rule has been altered, "[t]he applicability of rules of law are not to be switched on and off according to individual hardship." Id at 543, their rejection of "modified prospectivity" has strong Article III, Supremacy Clause, Due Process and Equal Protection components. Justices O'Connor, Kennedy, White, and Chief Justice Rehnquist, by contrast, view the judicial role as an active one, in which the Court must "determine the equities of retroactive application of a new rule" under the multi-factor "balancing of equities" analysis of *Chevron Oil Co. v Huson*, 404 US 97 (1971). In their view, the outcome of the choice of law decision determines "whether there is a constitutional violation" to be remedied "in the first place." *American Trucking Ass'ns, Inc. v Smith*, 496 US 167, 181 (1990) (opinion of O'Connor, White and Kennedy, and Rehnquist). Accord, *James B. Beam*, 501 US at 546 (White concurring in the judgment) (specifically rejecting the structural approach of Justices Scalia, Marshall and Blackmun as "unpersuasive" because judges do "in a real sense 'make' law" and everybody knows it.)

104. Justice Scalia has been the most articulate expositor of this position. See *Mistretta v United States*, 488 US 361, 413 (1989) (Scalia dissenting); *Midwesco v Bendix*, 486 US 888, 895 (1988) (Scalia, J. concurring in judgment); *CTS Corp. v Dynamics Corp. of America*, 481 US 69, 94, 107 S Ct 1637, 1652 (1987) (Scalia concurring in part and concurring in judgment). In *Midwesco*, for example, Justice Scalia distinguished between the balance struck between competing claims of authority, including those involving individual rights, and the more policy-oriented forms of balancing which characterize much of the jurisprudence under the Dormant Commerce Clause:

> Having evaluated the interests on both sides as roughly as this, the Court then proceeds to judge which is more important. This process is ordinarily called "balancing," *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970), but the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy. All I am really persuaded of by the Court's opinion is that the burdens the Court labels "significant" are more determinative of its decision than the benefits it labels "important." Were it not for the brief implication that there is here a discrimination unjustified by any state interest, (citation omitted), I suggest an opinion could as persuasively have been written coming out the opposite way. We sometimes make similar "balancing" judgments in determining how far the needs of the State can intrude upon the liberties of the individual, see, e.g., *Boos v. Barry*, [citation omitted], but that is of the essence of the courts' function as the nonpolitical branch. Weighing the governmental interests of a State against the needs of interstate commerce is, by contrast, a task squarely within the responsibility of Congress, see U.S. Const., Art. I, s. 8, cl. 3, and "ill suited to the judicial function.

CTS Corp. v Dynamics Corp. of America, 481 U.S. 69, 95, (1987) *Midwesco v Bendix*, 486 US 888 at 897 (Scalia concurring in part and concurring in judgment).

105. See, for example, *United States v Lopez*, — US —, 115 S Ct 1624 (1995); *New York v United States*, 112 S Ct 2408 (1992) (elaborating upon the relationship of the Tenth Amendment to the enumerated powers of Congress, and holding that to the extent that

A common-law judge, by contrast, is a policy-*maker* in the fullest sense of the word. The controversy in a common law case is focused on the substantive content of the rule of decision and its consistency with precedent. Because there is no "fundamental law" (in the Hamiltonian sense) which governs the resolution of such cases, the rule of decision is provided by the wisdom and learning of a judge steeped in the common law tradition. The common law is, by definition, "what the judges say it is."[106]

And thus we return to the point made above: that the limits of the judicial power of the United States to "make" law is limited structurally by the powers granted to Congress or reserved to the States and the People. Where neither the Constitution itself, nor an otherwise valid act of Congress supplies the substantive rule of decision, the bare grant of jurisdiction to resolve the controversy does not carry with it the power to supply the substantive rule which governs its outcome.[107] Simply stated, federal courts do not have the power to *create* substantive law.[108]

Why is this structural insight, gleaned from diversity (and, to a lesser extent, from Full Faith & Credit cases) important? The short answer is that without an explicit grant of authority to *make* policy "respecting an establishment of religion or prohibiting the free exercise thereof," the federal courts have precisely the same amount

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Congress decides to adopt unpopular policy choices, it must do so by exercising its enumerated powers directly. It may not, therefore, attempt to shift the blame for such decisions from itself to state and local politicians by compelling the States to exercise their sovereign powers in a manner dictated by Congress.) Five members of the Court appear to accept this proposition in *American Trucking Ass'ns, Inc. v Smith*, 496 US 167, 200 (1990) as well. Justice Scalia, concurring in the judgment, argued that both the obligations of the State, and hence the propriety of the exercise of Article III power, depend upon a proper understanding of the constitutional norms which govern the case or controversy. Though they reached a different conclusion on the merits of the case because they disagreed with Justice Scalia's view of the constitutional norm (in this case, the "Dormant Commerce Clause"), they clearly agreed with his analytical approach. See id, 496 US 205 (Stevens, Brennan, Marshall and Blackmun dissenting). The agreement among these members of the Court is even more explicit in *James B. Beam Distilling Co. v Georgia*, 501 US 529 (1991), discussed at greater length at note 103.

106. Speech of Chief Justice Charles Evans Hughes at Elmira, New York, May 3, 1907, in John Bartlett, *Familiar Quotations* at 700 (Little Brown & Co, 15th and 125th Anniversary ed, 1980).

107. See *Erie v Tompkins*, 304 US 64 (1938), rev'g *Swift v Tyson*, 41 US (16 Pet) 1 (1842).

108. Discussion of the concept of "federal common law" is beyond the scope of this paper. It should be sufficient to note that, to the extent that it is accurate to describe what is known as "federal common law" as "common law" as that term is commonly understood, its validity rests on powers clearly enumerated in, or necessarily implied from, the Constitution itself.

of authority to make national policy on these subjects as Congress does: None at all.

II. Substantive Limits on the Exercise of State Power: The Fourteenth Amendment and the Incorporation Doctrine

The ratification of the Fourteenth Amendment worked a fundamental change in the legislative jurisdiction of the federal government. Expressly designed to grant Congress control over matters affecting the liberty and equality of those formerly held in the bondage of slavery, the Fourteenth Amendment has become the conduit through which virtually all of the provisions of the Bill of Rights have been "incorporated" against the States.[109]

The incorporation of the Religion Clause via the Fourteenth Amendment has significant structural and substantive consequences. At the structural level, it raises the following questions:

> Does the Fourteenth Amendment grant to any branch of the federal government authority to make policy respecting an "establishment of religion" (however defined), or the power to define the permissible scope of the free exercise of religion?

If the answers to these questions are in the affirmative, two important substantive questions arise.

> First, of what relevance is the text of the First Amendment, which expressly denies Congress such authority? Second, of what relevance to the interpretation of the First Amendment are the specific provisions of the Fourteenth?

To date, these questions have largely been subsumed in the theory (such as it is) of incorporation.[110] And it is to a discussion of that doctrine that we must now turn.

A. The Incorporation Doctrine

The Incorporation Doctrine has been significant on a multitude of levels, but perhaps the most important one for initial pur-

109. See sources cited at note 111-112.

110. In *Lamont v Woods*, 948 F2d 825, 836 n 8 (2d Cir 1991), for example, Chief Judge Oakes opined that while "a corollary purpose of the Establishment Clause was to forbid the federal government from interfering with the religious establishments maintained by the States of the Union[, citations omitted] this purpose became irrelevant in 1947, when the Supreme Court applied the Establishment Clause to the states through the Fourteenth Amendment. See *Everson v Board of Ed.*, 330 US 1, 15-16 (1947)."

poses is the rhetorical one.[111] Akhil Reed Amar has observed (correctly) that, "because of the peculiar logistics of incorporation, the Fourteenth Amendment itself often seems to drop out of [incorporation] analysis. 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."[112]

Professor Amar's work on the incorporation doctrine demonstrates convincingly that a judicial holding that the Fourteenth Amendment "incorporates" the substantive commands of the First Amendment and "applies" them to the States is only the beginning of the inquiry, not its end. Though the existence of Congressional power to protect Fourteenth Amendment rights is explicit,[113] exploring the relationship between the power conferred on the federal government by the Fourteenth Amendment and the power denied it by the First is a far more complex task than appears from a reading of the early incorporation cases.

A systematic inquiry into the "application" of the First Amendment to the States via the Fourteenth Amendment would need to address not only the mechanism of incorporation itself, but also the structural and substantive implications which flow from it. Necessarily included in the latter inquiry would be an examination of the substantive meaning of the religious liberty guarantees themselves;[114] the manner in which those guarantees are related to each other; the language, history and intent of the Fourteenth Amendment; the relationship of the religious liberty guarantees to the liberty and equality norms of the Fourteenth Amendment,[115] including those "incorporated" from other sources such as the

111. See Amar, 101 Yale L J at 1193-94 (cited in note 19) (collecting quotes from some of the most influential commentators on constitutional law and theory).

112. Amar, 100 Yale L J at 1136-37 (cited in note 19).

113. US Const Amend XIV § 5 (1868).

114. The Court's understanding of religious liberty is not discussed in detail in this essay, but is the topic of its sequel. The problems which arise from the "selective incorporation" doctrine are discussed in the text at notes 194 to 200.

115. Section One of the Fourteenth Amendment contains four distinct clauses: Citizenship, Privileges and Immunities, Due Process and Equal Protection. The suggestion here is that they should be read together; and to the extent that other relevant constitutional provisions are germane to the inquiry, those should also factor into the analysis. See, for example, US Const Art IV, §§ 1, 4 (Interstate Privileges and Immunities and Guaranty Clauses); Art VI, cl 3 (Test Clause).

Speech and Press Clause and substantive due process; and the limits, if any, imposed on the exercise of federal power (legislative, executive, and judicial) by the structural constraints of separation of powers and federalism.

I shall not, at this point, speculate on the answers to those specific questions, but I do suggest that neither the many legitimate concerns raised by the commentators, nor the distrust of the courts which lies at the root of legislative proposals to "reverse" the Supreme Court's decision in *Employment Division v Smith*, can be addressed systematically without some exploration of the degree to which the Fourteenth Amendment alone, or in conjunction with norms incorporated from the First, empowers either the Congress or the Court to attempt, on a national scale, to "distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other."[116]

To raise, and to consider carefully, just such questions is to get back to basics; to explore not only the nature and function of religious liberty in a continental republic committed to pluralism and equal citizenship, but also what Mary Ann Glendon and Raul Yanes have described as "the purpose of the religious freedom language and its relation to the Fourteenth Amendment within a modern regulatory state."[117] It is a discussion which is long overdue.

The next section illustrates a small, but important, aspect of a "back to basics" approach: a reconsideration of the manner in which history is used to guide the interpretation of the constitutional norms governing religious liberty.

B. The Religion Clause, Incorporation, and the Teachings of History

The political debate over religious freedom has a centuries-old history, and a dynamic all its own. Professor Amar's observation that "[t]wentieth century Americans are still living with the legacy of the Civil War, with modern rhetorical battle lines tracking those laid down a century ago"[118] is even more relevant when the issue is religious liberty. The modern rhetorical battles track ancient reli-

116. John Locke, *A Letter Concerning Toleration* (1686, Popple trans 1689), in John T. Noonan, Jr., *The Believer and the Powers that Are* at 80 (Macmillan, 1987).

117. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 Mich L Rev 477, 482 (1991). This topic is discussed in greater detail in the text accompanying notes 194 to 200.

118. Amar, 100 Yale L J at 1136 (cited in note 19).

gious and philosophical battles with roots in the Inquisition, the establishment of the Church of England, the Reformation, the Enlightenment, and the American Revolution itself.

Judicial supervision of the boundary between law and religion at the federal level is, by contrast, a fairly recent innovation in American constitutional law.[119] Yet it would be naive to suppose that it has been unaffected by the historical and philosophical backdrop against which it has developed. Given this reality, the Court's efforts over the past fifty years raise a number of significant and unresolved questions.

1. "Originalism" and the Religion Clause

One of the more interesting aspects of the religious liberty jurisprudence which has developed since *Cantwell v Connecticut*[120] applied the Religion Clause of the First Amendment to the States is the manner in which historical materials are utilized to determine the content of its prohibitory norms. One need not delve too far into the "originalism vs. contemporary understanding" debate to appreciate that the manner in which that controversy plays out in the interpretation of the Religion Clause is important.[121] The substantive content of the First Amendment's religious liberty guarantee must come from *somewhere*,[122] and the cases have generally assumed that history is a relevant guide to the meaning of the constitutional text.[123] I will not question that assumption here.

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119. *Everson v Board of Education*, 330 US 1 (1947); *Cantwell v Connecticut*, 310 US 296 (1940).

120. *Cantwell v Connecticut*, 310 US 296 (1940).

121. See, for example, L. Benjamin Young, Jr., *Justice Scalia's History and Tradition: The Chief Nightmare in Professor Tribe's Anxiety Closet*, 78 Va L Rev 581 (1992).

122. Compare, for example, *Michael H. v Gerald D.*, 491 US 110 (1989).

123. A notable exception may be Judge Bownes of the United States Court of Appeals for the First Circuit. Concurring in *Weisman v Lee*, 908 F2d 1090 (1st Cir 1990), aff'g, 728 F Supp 68 (DRI 1990), Judge Bownes observed that since "the 'plain meaning' of the text is of little help in determining results in [cases involving school prayer] . . . the interpretation and practice that has evolved throughout the past two hundred years" is determinative. After dismissing both the "intent of the framers" and the teachings of history in both the ratification period and the nineteenth century, he concludes that

> It is useless to rehash this continuing debate. The ground has been trodden so much that it is barren of meaning and persuasive power. The "historical record" is inconclusive on the various cross-currents in the minds of the framers. Because of the tangled and often conflicting historical record, it is unlikely that, as an empirical matter, we can ever know the original intention of the authors of the Constitution. Even if we could reconstruct the framers' intent, that would not necessarily be determinative in this case, given our two hundred years of experience with the Constitution and changing circumstances. Id at 908 F2d at 1093. (footnote omitted)

2. "Original Intent" and the Religion Clause

There is much to be learned about the content of the federal religious liberty guarantee from the laws and the experience, both political and judicial, of each of the Colonies. The Supreme Court, however, has been rather selective in its use of history as a device to give content to the constitutional norms protecting religious liberty. The "Virginia experience" has become the interpretive touchstone.[124]

Whatever the merits of that particular controversy, however, one thing is certain: the "original intent" of the non-establishment guarantee has generally been considered quite relevant to its interpretation.[125] There is, by contrast, little discussion of the "original intent" of either the Free Exercise or Test Clauses.[126] The "original intent" of the Fourteenth Amendment with respect to matters of religious liberty seems to attract virtually no attention at all.[127]

Selective use of history has a profound effect on the Court's understanding of the religious liberty guarantee. The most obvious problem is conceptual. To the extent that an historical perspective is used as the grounding for the Court's interpretation of any constitutional provision, it is necessary to have a complete (or as near to complete as possible) understanding of the evil at which that provision was directed. If the historical understanding is incomplete, so too will be the vision of what that provision of the Consti-

124. The Second Circuit has held, for example, that "The drafting and adoption of the First Amendment, in which Madison and Jefferson played leading roles, can *only* be understood in light of the Virginia experience." *Lamont v Woods*, 948 F2d 825, 837 (2d Cir 1991). It even goes so far as to allege that alternative arguments which challenge the prevailing reliance on the Virginia experience represent "scholarship born of advocacy" which present a "treatment of history [that] is selective and one-sided." Id at 836.

125. See, for example, *Lee v Weisman*, 112 S Ct 2649, 2656-58 (opinion of the Court, per Kennedy) (1992); id at 2667 (Souter, O'Connor and Stevens concurring in the judgment); id 2678 (Scalia and Thomas, and Rehnquist dissenting); *Everson v Board of Education*, 330 US 1 (1947). See also Douglas Laycock, *"Non-preferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm & Mary L Rev 875 (1985-86); Louis A. Fisher, *American Constitutional Law* at 698-783 (McGraw-Hill, 1990).

126. See note 33.

127. A notable exception is Akhil Reed Amar's discussion of the close connection between the abolitionist movement's reliance on the rights of speech, petition, press and the religious exercise of preaching as the means of spreading their message. He notes for example, a speech given in 1866 by John Bingham, the author of Section One of the Fourteenth Amendment, in which "he reminded his audience that men had been imprisoned in Georgia for teaching the Bible," and another by Lyman Trumbull, who introduced the Civil Rights Bill of 1866 "by stressing the need to protect the freedom 'to teach' and 'to preach,' citing a Mississippi Black Code punishing any 'free negroes and mulattoes' who dared to 'exercis[e] the functions of a minister of the gospel." Amar, 101 Yale L J at 1275-77 (cited in note 19).

tution requires or prohibits.[128] Without historical grounding, the language will be infused with whatever meaning seems appropriate to the time and circumstances.[129]

This is particularly true with respect to the Court's paradigm for understanding the non-establishment principle. The views of Madison and Jefferson in Colonial Virginia's struggle to come to

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128. One of the more interesting debates within the Court on this topic occurs in *Michael H. and Victoria D. v Gerald D.*, 491 US 110 (1989).

129. See, for example, Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U Chi L Rev 195, 198-201 (1992). Professor Sullivan suggests that the correct baseline for the Religion Clause "is not unfettered religious liberty, but rather religious liberty insofar as it is consistent with the establishment of the secular public moral order," and appears to suggest that the members of the Supreme Court know enough about both philosophy and theology to "draw a distinction between [them]." The point here is not to debate either the substance of Professor Sullivan's views about the privileges which are to be enjoyed by a "secular moral order", or the validity of her implicit assumption that the legal training of judges and Justices equips them to make fine philosophical and theological distinctions which can (or should) have the force of law. In structural terms, Professor Sullivan's argument has two glaring weaknesses, neither of which is addressed in her article.

First, she does not demonstrate the existence of a grant of authority to the federal government, express or implied, which would empower it to "establish" *any* "moral order," secular or otherwise. That would be impossible. Her argument, instead, is that "[j]ust as the affirmative right to practice a specific religion implies the negative right to practice none, so the negative bar against establishment of religion implies the affirmative 'establishment' of a civil order for the resolution of public moral disputes." 59 U Chi L Rev 197-98. The key word here is "implies"—and her use of it to transform the Establishment Clause into an affirmative grant of federal authority to define and enforce a "secular" moral order illustrates the point made in the text. Reading the First Amendment, both as a whole and in light of its history and that of the Test Clause, illustrates that "establishment" of either an exclusive moral *or* political orthodoxy by the federal government is precisely what the Framers feared—and they explicitly rejected the existence of any such power by adopting the Test Clause and the First, Ninth and Tenth Amendments.

The second structural point is related to the first. Professor Sullivan's position that religious liberty is not "unfettered" rests on the structural argument that the Establishment Clause should have a legal effect which is quite distinct from that of either the Free Exercise or Speech Clause. Yet like most commentators on the Religion Clause, she ignores an important structural and analytical component of her own argument: the Fourteenth Amendment. The *operative* constitutional provision at the heart of most of the cases she cites is not the First Amendment, but the Due Process Clause of the Fourteenth. And since the regime of religious liberty she elaborates is dependent on the meaning of that amendment (at least insofar as it binds the States), an argument which ignores *its* impact is, at the very least, inconsistent with the view that constitutional provisions should be read as having distinct legal effects.

In sum, Professor Sullivan's argument is structurally incomplete to the extent that the analysis rests, ultimately, on a reading of the Establishment and Free Exercise Clauses which holds only them in "tension." See note 32. If she is correct that the correct baseline "is not unfettered religious liberty," but only that which "is consistent with the establishment of the secular public moral order," the same must also be true with respect to all other forms of "liberty" incorporated by or implicit in the Due Process Clause of the Fourteenth Amendment, including speech, association, and the personal interests collectively known as "privacy" rights. Compare Robert Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy and the First Amendment*, 76 Cal L Rev 297 (1988).

grips with the fact of religious diversity and state-sponsored oppression during the period prior to 1785[130] have provided some members of the Court with a starting point for their analysis,[131] while other members of the Court appear to view what is clearly an incomplete historical picture of what might be termed the "Virginia understanding"[132] as synonymous with the non-establishment norm itself.[133]

Discussions of the free exercise norm, by contrast, are generally grounded in a rather truncated justification of the limits a free

130. Noonan, *The Believer and the Powers That Are* at 93-113 (cited in note 116) (recounting the Virginia experience).

131. Even though the struggle for religious liberty in other States contains important insights concerning some of the evils against which the Test Clause and First Amendment were directed, they have never figured, prominently or otherwise, in the Supreme Court's interpretation of the non-establishment norm. See Chester J. Antieau, Arthur T. Downey & Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* at 161-63 (Bruce, 1964) (briefly discussing developments in the States from 1776-1825). Neither, for that matter, has either the text or structure of the Constitution itself. See, for example, *Everson v Board of Education*, 330 US 1 (1947). Members of the Court have, however, utilized the Virginia debate over general assessments for the payment of the salaries of Christian ministers as the jumping off point for an elaboration of their own respective views concerning the "proper" relationship of law to religious activity. See id, 330 US at 11-14, 31-32 (Rutledge, Frankfurter, Burton and Jackson dissenting) ("[T]he object [of the first amendment] 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.")

132. See, for example, Rhys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 Wm & Mary Q 345 (1974). Professor Isaac's article 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." Id at 368. 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 in both structural and substantive terms. Id. At the structural level, the concern for the maintenance of the integrity of individual political and faith communities is an important motivation for the political insistence on the part of the Anti-federalists and the States for 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 are entitled to equal civil and political rights. Notably, each amendment contains an important structural component as well.

133. See, for example, *Lee v Weisman*, 112 S Ct 2649, 2667, 2770 (1992) (Souter, Stevens and O'Connor concurring) (relying on the Virginia experience and Statute for Religious Freedom as indicative of "separationist response" throughout the country). Examination of the ratification debates generally—and those involving the Test Clause in particular—indicate that one criticism of the new Constitution is that it did not invoke the name of the Deity. Another was that the absence of religious tests might make for a regime of religious liberty which was *too* tolerant of religious diversity; for it would permit "a Papist or an infidel" to serve in the federal government. See Antieau, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* at 92-113 (cited in note 9); Bradley, 37 Case W L Rev 674 (cited in note 33).

society may impose upon individual liberty.[134] The Supreme Court's discussions of free exercise generally begin with the decision in *Reynolds v United States*,[135] and its observation that, by their nature, free exercise rights cannot be absolute.[136] *Reynolds* and its modern progeny, however, do not reflect either a reading of the original legislative intent of the Free Exercise Clause (though it may reflect it), or an attempt to ascertain the evils against which it was erected. *Reynolds* clearly reflects the late-Nineteenth Century cultural, racial, and religious perspectives of the Supreme Court itself,[137] and the current case law and commentary is replete with references to a more modern vision of the proper scope of religious liberty in a pluralistic democracy.

The omission of any meaningful discussion of the intent and history of the Test Clause and the Fourteenth Amendment is also significant. Both speak strongly to the need for equal treatment of persons and citizens by their government. More important, close scrutiny of the state-sponsored practices at which they, and the First Amendment itself, were aimed would provide a useful backdrop against which to view contemporary policy.

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134. The most recent—and controversial—example is *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (1990).

135. 98 US 145 (1878).

136. A good example is the opinion of Justice O'Connor concurring in the judgment in *Smith II*. Condemning the majority's approach to Free Exercise Clause cases, Justice O'Connor, joined on this point by Justices Brennan, Marshall, and Blackmun, wrote:

> To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. [citing *Cantwell* and *Reynolds v United States*]. Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the Government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest.

Smith, II, 494 US at 894.

137. The imagery of community, race and culture evoked by Chief Justice Waite's opinion for the Court rejecting the Mormon practice of polygamy could not have been clearer: "Polygamy," he stated, "ha[d] always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people." *Reynolds v United States*, 98 US (8 Otto) 145, 164 (1878). The similarity between Chief Justice Waite's concepts of legitimate culture, which certainly reflected the views of "the thoughtful part of the Nation" at the time *Reynolds* was decided, and those of the Virginia gentry during the Revolutionary period, who also considered themselves to be "the thoughtful part of" their community, are striking. See Robert A. Destro, Review Essay, *The Supreme Court, the "Facts of Life," and the Moral Sensibilities of "the Thoughtful Part of the Nation,"* 20 Human Life Rev 28-48 (Summer, 1994) (reviewing David Garrow's *Liberty & Sexuality: The Rights of Privacy and the Making of Roe v. Wade).*

Scholarly commentary follows much the same pattern: Establishment Clause commentary relies heavily upon the teachings of Virginia history as the ultimate grounding for the Establishment Clause, while Free Exercise discussions are rarely framed in historical terms.[138] Non-discrimination norms get even less attention.[139] Recent scholarship, however, indicates that this pattern may be changing.[140]

Without questioning the relevance of either the Mormon polygamy cases[141] to our understanding of the concept of "free exercise," or of the Virginia experience to our understanding of the concept of non-establishment, it seems fairly clear that to *draw the content* of these religious liberty norms from either set of materials alone is a mistake with immense ramifications for individual rights. The history is far more extensive, and paints a far more complex picture of the problem at which the Test Clause and the First, Ninth, Tenth and Fourteenth Amendments were aimed than that sketched out by the Court to date. We must, as Judge John T. Noonan, Jr. has observed, "immerse ourselves in history":

> "A page of history is worth a volume of logic." "The life of the law has not been logic but experience." These two axioms of Holmes—always given lip service by law schools but rarely taken seriously in academic milieus where the arts of logic flourish—are here, if anywhere, the keys of understanding. It is not only a matter of grasping the intentions of the Founding Fathers (a necessity if our national notion of a written Constitution as

138. Compare, Laycock, *"Non-Preferential" Aid to Religion* (cited in note 125) (extensive analysis of history), with Donald A. Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part I. The Religious Liberty Guarantee*, 80 Harv L Rev 1381 (1968)(no real historical analysis) and McConnell, 103 Harv L Rev 1410 (cited in note 33)(extensive historical analysis).

139. But see Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L Rev 311 (1986).

140. See generally, Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 Ohio St L J 89 (1990)(Due Process analysis of religious liberty generally); Bradley, 20 Hofstra L Rev 245 (cited in note 65) (historical analysis of free exercise norms); Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U Pa L Rev 555 (1991); William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U Chi L Rev 308 (1991); Laurence Tribe, *American Constitutional Law* (Foundation Press 2d ed 1988) 1154-1301 (religious freedom as a right of "personal autonomy"); Ellis West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J of Law, Ethics & Pub Pol'y 591 (1990).

141. *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v United States*, 136 US 1 (1889); *Davis v Beason*, 133 US 333 (1889); *Reynolds v United States*, 98 US 145 (1878).

> bedrock is to have validity.) It is also a matter of empathetically appropriating the experience that undergirds the constitutional principles of free exercise and no establishment. The experience that made the law is capturable only through history. To know the price other systems have exacted, to know the prize we have, we must immerse ourselves in history.[142]

3. Freedom from Federal Establishment as a Component of Religious Liberty

The relevance of Judge Noonan's observation is apparent from the text of the First Amendment: by its terms, it does not apply to the States.[143] The omission is significant for several reasons, not the least of which is that there is no dispute whatever as to its "original intent". The language "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" was designed explicitly to negate any assertion that the federal government had a generalized power to do that which is "necessary and proper" with respect to religion; whether it was to follow Locke and attempt to "distinguish exactly the business of civil government from that of religion,"[144] to establish or disestablish an official church, or to inhibit religious exercise altogether.[145]

Since the framers also believed that a strong central government with unlimited authority (such as the British Crown) was a danger to freedom, they created a federal government of divided and enumerated powers explicitly granted by the Constitution. All other power—including the power to define the substantive content of their own religious liberty norms—was reserved to the people and the States.[146] Federalism and separation of powers—the

142. John T. Noonan, Jr., *The Believer and the Powers That Are* at xiii (Macmillan 1987).

143. *Barron v Mayor and City Council of Baltimore*, 32 US (7 Pet) 243 (1833).

144. Locke, *A Letter Concerning Toleration* (cited in note 116).

145. See generally Robert S. Alley, ed, *James Madison on Religious Liberty* (Prometheus Books, 1985); Antieau, *Freedom From Federal Establishment* (cited in note 9); Robert L. Cord, *Separation of Church and State — Historical Fact and Current Fiction* (Lambeth Press, 1982); Mark DeWolfe Howe, *The Garden and the Wilderness* (U of Chicago Press, 1965); Leonard W. Levy, *The Establishment Clause* (Macmillan, 1986); Noonan, *The Believer and the Powers That Are* (cited in note 116); William G. Torpey, *Judicial Doctrines of Religious Rights in America* (U of North Carolina Press, 1948).

146. US Const Art VI, cl 3 (1787), amends IX, X (1791). See *Permoli v Municipality No. 1 of the City of New Orleans*, 44 US (3 How) 589, 609 (1845) ("the Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States."); *Hale v Everett*, 53 NH 9, 16 Am Rep 82 (NH, 1868) The First, Ninth and Tenth Amendments were adopted at a time of

allocation of *political* competence (or subject matter jurisdiction)[147]—were viewed as, and remain, important mechanisms for the protection of individual liberty and popular sovereignty.[148]

The task of the Supreme Court in the framers' plan was similarly constrained. While the role assigned by Article III necessarily included interpretation of the First Amendment,[149] the limited nature of federal power and jurisdiction confined its rulings to cases arising within the jurisdiction of the federal government.[150]

4. The Impact of the Fourteenth Amendment: Incorporation

The Fourteenth Amendment created immense substantive and jurisdictional changes in the balance of federalism. Congress was given the express power to enforce by law its own substantive vision of the liberty and equality principles embodied in the Amendment's guarantees—and to make that vision of the "Privileges and Immunities of Citizens of the United States"[151] binding on the States.[152] The reach of the Supreme Court's mandate expanded accordingly,[153] though it sometimes declined to exercise it.[154]

The rhetorical problem with incorporation identified earlier[155] now begins to take a more palpable shape. The Fourteenth Amendment is so much a fixture of our present national and con-

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transition in the Nation's understanding of the concept of religious liberty. Though some States, such as New York and Virginia, had abolished their official "establishments," others, such as Connecticut and Massachusetts had not. Religiously based civil and political disabilities were prominent features of most of the States at the time of ratification, and for many years thereafter.

147. See note 20.

148. See *United States v Lopez*, 115 S Ct 1624, 1637-1638 (1995). See generally, Amar, 100 Yale L J 1131 (cited in note 19).

149. *Marbury v Madison*, 5 US (1 Cranch) 137, 177 (1803) (". . . it is emphatically the province and duty of the judicial department to say what the law is.")

150. *Quick Bear v Leupp*, 210 US 50 (1908) (upholding tuition grants for Sioux Indians in Catholic schools); *Bradfield v Roberts*, 175 US 291 (1899)(upholding federal funding of Catholic hospital in the District of Columbia); *The Late Corporation of the Church of Jesus Christ of Latter Day Saints v United States*, 136 US 1 (1890); *Davis v Beason*, 133 US 333 (1890); *Reynolds v United States*, 98 US 145 (1878). See *Permoli v Municipality No. 1 of the City of New Orleans*, 44 US (3 How) 589, 609 (1845).

151. US Const Amend XIV § 1, cl 2 (1868).

152. US Const Amend XIV § 5 (1868). See generally Raoul Berger, *Government By Judiciary* at 31-51 (Harvard U Press, 1977); Akhil Reed Amar, 101 Yale L J at 1193 (cited in note 19). .

153. See, for example, *County of Santa Clara v Southern Pac. R. Co.*, 118 US 394 (1886) (assuming that corporations are "persons" protected by the Fourteenth Amendment); *Ex Parte Young*, 209 US 123 (1908).

154. *Plessy v Ferguson*, 163 US 537 (1896).

155. See text accompanying note 111.

stitutional identity that it has become both politically and academically risky to question a number of critical assumptions in constitutional theory.

That this is so is understandable. But for active federal intervention on behalf of civil rights, our Nation would not have witnessed the gradual, and as yet incomplete, dismantling of our own peculiar variants of racial, ethnic and religious apartheid. That such intervention was (and continues to be) both "necessary and proper" to the integration of all citizens and legal residents into a pluralistic democratic society should not obscure the fact that, if we are to succeed in the task we have set out for ourselves, we must be realistic about the role of the federal government—especially that of the Court.

Notwithstanding the record of their past failings (which are certainly mirrored at the federal level), the people, acting as private attorneys-general, and through their elected representatives in Congress, in the States, and in local governments, can and do play a significant—and often more direct and immediate—role in the protection of individual rights than does the federal government.[156]

This is not to say, of course, that federal intervention on behalf of individual rights is not necessary—it is. Rather, the focus must be on the degree to which the explicit and implicit structural limitations contained in the Constitution both define and limit the federal role.

This is why the federalism and separation of powers components of the religious liberty guarantees are so important. Madison and Jefferson did not trust *any* government authority which claimed the right to set the boundaries of religious liberty. There is no question that both would have considered it absurd for anyone to suggest that, just because the States could not be trusted with the power to define the permissible scope of speech, publication, or religious exercise, a single branch of the federal government could be. On this score, in fact, the available historical material cuts precisely the other way. The debates in the Convention and after make it clear that there was no doubt about *whether* individual rights, including the freedoms of speech, press, religion and trial by

156. See, for example, *Roberts v United States Jaycees*, 468 US 609 (1984) (upholding Minnesota's ban on sex-discrimination as applied to a private association). Another good example is the fact that several State constitutions explicitly protect the rights to informational and other types of privacy, whereas the federal constitution does not. See, for example, Ariz Const art 2, section 8; Fla Const art 1, section 23; Wash Const art 1, section 7.

jury, should be protected. The only question was *who* could be trusted to undertake the job.

a) The Early Debates Over Structural Devices for the Protection of Liberty

Madison, who, as "Publius," wrote eloquently of the merits of both separation of powers and federalism in *The Federalist*[157] did not embrace either concept at the Constitutional Convention. He wrote, and strongly supported, the "Virginia Plan," which called for proportional representation in both houses of Congress, a Congressional negative on state laws (which would have had the impact of reducing the States to the status of counties), and judicial participation with the Executive in a Council of Revision. Even after the Convention he remained a nationalist, who strongly believed that only the Congress of an extended republic would embrace a sufficient multitude of diverse factional interests to assure the formation of "disinterested majorities, strongly disposed to seek the general good of the society."[158] In his view, a wide-open and robust political "marketplace of ideas" and factions was *itself* an essential structural protection for individual liberties.

Yet, like the Constitution he so eloquently defended as "Publius," his "Virginia Plan" also contained structural devices clearly designed to exert a "check" on the power of *all* levels of government, including that of the national government he wanted to see established. The negative on state laws was designed to check the power of the States to vex individual liberties, the Council of Revision the power of Congress,[159] and proportional representation in the Senate was, in his view, both a reflection of Republicanism, and a practical check on the power and jealousy of the States among themselves.[160] But Madison's plan was rejected by the Convention,

157. The most recent author to attribute what are essentially anti-federalist views to Madison is Akhil Reed Amar. Amar, 100 Yale L J at 1134-36 (cited in note 19). See also Price Marshall, *"No Political Truth:" The Federalist And Justice Scalia On The Separation Of Powers*, 12 U Ark Little Rock L J 245 (1989). See generally Stephen B. Presser, *The Original Misunderstanding: The English, the Americans and the Dialectic of Federalist Jurisprudence* (Carolina Academic Press, 1991).

158. Hobson, 36 The Wm & Mary Q at 232-234 (cited in note 102).

159. See *Debate on the Judiciary, the Veto and Separation of Powers, July 21, 1787*, in Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates*, at 120-124 (Mentor, 1986)(cited in note 17) (speeches of Madison and Wilson).

160. See *Debate on State Equality in the Senate, June 28-July 2*, 1787, in Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates* at 93-113 (cited in note 17).

and he left it, confiding to Thomas Jefferson his opinion that the Constitution would "neither effectually *answer* its *national* object nor prevent the local *mischiefs* which every where *excite disgusts* ag[ain]st the *state governments*."[161]

The Anti-Federalists, by contrast, just as emphatically did *not* want a "national" government.[162] Mirroring their distrust of the proposed federal government was their faith in representatives known to and trusted by their local communities.[163] To them, the victory in the American Revolution meant not so much the big chance to become a wealthy world power, but rather the opportunity to achieve a genuinely republican polity, far from the greed, lust for power, and tyranny that had generally characterized human society. It meant "retaining as much as possible the vitality of local government where rulers and ruled could see, know and understand each other."[164] So there was a compromise: "the government contemplated by the Convention was to have a mixed character—*'partly federal and partly national'*."[165]

This did not sit well with Madison. During his tenure in the Virginia House of Delegates he reportedly "became increasingly disillusioned and finally disgusted with the proceedings of that

161. Hobson, 36 The Wm & Mary Q at 230 (cited in note 102) quoting Letter of James Madison to Thomas Jefferson, September 6, 1787, *Papers of Madison*, X, 163-164.

162. This point was raised in the House debate over the First Amendment by Elbridge Gerry, who

> did not like the term national, proposed by the gentleman from Virginia [Madison]. . . . It had been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made. Their names then ought not to have been distinguished by federalists and antifederalists, but rats and antirats. Mr. Madison withdrew his motion, but observed that the words 'no national religion shall be established by law,' did not imply the government was a national one;. . . .

Annals of Congress, I, 757-59.

163. See, for example, "The Address and Reasons of Dissent of the Minority of the convention of Pennsylvania to their Constituents" (December 18, 1787) (attributed to Samuel Bryan, the author of "Centinel"), in Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates* at 237 (cited in note 17).

164. R. Ketcham, *Antifederalist Political Thought*, in id at 17. See *Debate on State Equality in the Senate, June 28-July 2, 1787*, in Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates* at 95 (cited in note 17) (remarks of Dr. Johnson).

165. The phrase is Olliver Ellsworth's, who admitted "that the effect of this motion [for equal suffrage in the Senate] was to make the general government *partly federal and partly national*," a characterization which Madison denied in his speech of July 14, 1787. Hobson, 36 The Wm & Mary Q at 228 n 28 (cited in note 102).

body."[166] To him the problem was that the States—including his native Virginia—were simply too small to insure that factional diversity would exert an effective check on the tendency of legislatures to favoritism and the pursuit of narrow agendas.[167] Though he had recognized in the *Memorial and Remonstrance Against Religious Assessments* "that no other rule exists by which any question which may divide a Society, can be ultimately determined, but the will of the majority," he feared its tyranny as well.

And so, it seems, did the Anti-Federalists. The debates over proportional representation and the Bill of Rights were debates over *power*, as well as liberty.[168] Olliver Ellsworth, denied James Wilson's charge that equal representation in the Senate would lead to minority rule of the majority, and added that "[t]he power is given to the few to save them from being destroyed by the many. . . . Is it a novel thing that the few should have a check on the many?"[169] The antifederalist demands for recognition of the States as distinct political communities were later reflected in the call of the State conventions for a Bill of Rights, and both were political responses to the reasonable fear (shared by Madison himself) that the federal government could come to be dominated by factions inhospitable to the rights of individuals and local communities.

The question, quite simply, was one of *power*, and Madison lost his battles in the Convention and the First Congress because the majority of delegates and representatives did not share his vision for a "national" government. Distrust of the proposed government by the constituents of the convention delegates, and a preference for political decisionmaking at a level of government closer to the people led the Convention to reject a negative on State laws on both political and practical grounds.[170] Madison's proposed amendment to prohibit the States from violating the rights of conscience, freedom of the press, and trial by jury suffered the same fate in the First Congress.

Charles Hobson, editor of the James Madison papers at the University of Virginia, has written that on the very eve of his debut

166. Id at 223.
167. Id at 225.
168. See Brutus, No 2, November 1, 1787 in J. Storing, ed, *The Complete Anti-Federalist* at 372-377 (U of Chicago Press, 1981).
169. *Debate on State Equality in the Senate, June 28-July 2, 1787*, in Ketcham, ed, *The Anti-Federalist Papers and the Constitutional Convention Debates* at 101 (cited in note 17).
170. Hobson, 36 The Wm & Mary Q at 225 (cited in note 102).

in *The Federalist*, Madison was highly dissatisfied with, not to say contemptuous of, the proposed government. [Madison's] October 1787 letter [to Jefferson] was a strong dose of nationalism that contrasted sharply with "Publius' " celebration of the Constitution and indeed with all of Madison's subsequent writings."[171] But after explaining his opposition to Jefferson one last time,[172] Madison shelved most of his objections "and never again spoke ill of the Constitution."[173] In part out of fear that the Anti-Federalists might prevail in their attempts to force another convention,[174] and also because he was convinced that continuing under the Articles of Confederation would result in anarchy, the consummate political genius we now know as the "Father" of federalism and separation of powers became "Publius."

The failure of Madison's proposals, the adoption of a federal form with separated powers, and Madison's subsequent decision to support the work of the Convention underscores a fact not often appreciated fully in today's value-laden and legalistic discourse on constitutional doctrine: The Constitution and the Bill of Rights are an integrated *political* response to a pressing *political* problem: the need to create a Union from a loosely organized Confederation.

As a result, the Constitution and Bill of Rights must be read together. Federalism, separation of powers, the rights enumerated in the original Constitution *and* the Bill of Rights are *integrated* structural and substantive devices which were intended to be, and remain, important sources of protection from an overreaching *federal* government.[175]

Subsequent amendments, including the Fourteenth, must be viewed from the same structural perspective; that is, what do the language, structure and history of each amendment tell us about the evils to which they were addressed? Each is aimed at a specific political or social problem deemed to be inconsistent with the gen-

171. Id at 233.

172. Letter of James Madison to Thomas Jefferson, October 24,1787, *Papers of James Madison*, X, 212-214, id at 230-33.

173. Id at 233.

174. See generally Daniel A. Farber & Suzanna Sherry, *A History of the American Constitution* at 175-245 (West, 1990).

175. See J. Madison, *General Defense of the Constitution* (June 12, 1788) [presented during the Virginia Ratification debate]; Letter to Thomas Jefferson—October 17, 1788; Letter to George Eve—January 2, 1789 in Alley, *James Madison on Religious Liberty* at 70-75 (cited in note 145); Chester J. Antieau, Arthur T. Downey & Edward C. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* at 111-158 (Bruce, 1964).

eral welfare of the people. Each resolves a pressing political, as well as substantive, debate; and does so by utilizing substantive and structural devices appropriate to the political situation at issue. Some, like the Civil War and Nineteenth Amendments, provide protection for individuals, and appear to the contemporary reader as primarily "substantive" in nature. Others are clear allocations of governmental power, and function as "structural" controls on the power of faction.[176] But all have both substantive and structural components, and must be read together as an integrated whole—as a "supreme Law of the Land"[177]—which functions to protect individuals, and their interests in the preservation of participatory democracy, from the overreaching of factions operating on *both* levels of government: state and federal.

The lesson which should be taken from Madison's experience in the Convention, in the debates over the Bill of Rights, and as a leader in the Virginia debates over religious liberty, is that politics plays an essential role in the protection of individual rights. The "Virginia experience," upon which so much of our religious liberty jurisprudence is based, is, at bottom, a *political* history. By reading it as a philosophical and legal triumph for Madisonian and Jeffersonian ideas, rather than the real-life political battle that it was, the Court and many commentators may well be missing the point of the whole story. In fact, Madison's practical experiences as an advocate embroiled in the politics of religious liberty issues may be a more accurate guide for the interpretation of the incorporated First Amendment than are the philosophical positions of Locke, Jefferson, or even those of Madison himself.[178]

The roots of Madison's stunning success are found in his ability to recognize the inherently political nature of the problem facing those who would protect religious liberty.[179] He utilized that

176. See, for example, US Const Amends XI (1795); XII (1804); XVII (1913); XXI 2 (1933); XXII (1951); XXIV (1964); XXVII (1992).

177. US Const Art VI.

178. Except to the extent necessary to illustrate a point in the discussion, I will not make any attempt to discuss the philosophical particulars of Madison's views. That task is best left to historians, and biographers and philosophers.

179. In his letter to Thomas Jefferson dated October 17, 1788, Madison wrote:

> Wherever the real power of Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from actions in which the Government is the mere instrument of the major number of the constituents . . . Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful & interested party than by a powerful

insight to great political advantage, first in Virginia,[180] and later, as "Publius, who wrote that "the great object to which our inquiries are directed" is "[t]o secure the public good and private rights against the danger of . . . faction and at the same time to preserve the spirit and form of popular government."[181]

Had Madison relied solely upon his philosophical convictions concerning either religious liberty or the structure of government, he would have lost not only the battle, but also the wars over religious liberty in Virginia and in Congress. It was his understanding of both the practical *and the sectarian* politics of his day that made him the champion of liberty he is today.[182] The record of his political successes and failures thus contains important lessons, not only for those who would seek political protection for religious liberty,

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> and interested prince. . . . What use then it may be asked can a bill of rights serve in popular Governments? I answer the two following which though less essential than in other Governments, sufficiently recommend the precaution. I. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion. 2. Altho' it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community.

R.S. Alley, *James Madison on Religious Liberty* at 73 (cited in note 145)(emphasis in the original).

180. Marvin K. Singleton has noted that "Madison had a secular alternative to [Jefferson's suggestion of devout] prayer [for the death of Patrick Henry]: get Henry out of the legislature by having him elected governor." See Marvin K. Singleton, *Colonial Virginia as First Amendment Matrix: Henry, Madison and the Assessment Establishment* in Alley, *James Madison on Religious Liberty* at 164 (cited in note 145). Singleton's account of Madison's role in the Virginia assessment controversy notes that

> Madison's role in the assessment fight has been diversely evaluated by posterity. Eckenrode has asserted that Henry's effort to implement assessment was defeated "by the spirit of the age rather than the skill of [its] opponents." This judgment is inaccurate. Madison and his colleagues proved themselves astute in their management of the threatened levy. Without the resources of a party behind him, without the machinery of caucus, and without charisma, Madison handled well both parliamentary matters and crystallization of public opinion.

Id at 169.

181. Federalist 10 (Madison) 82 (cited in note 22). Religion was listed first among the types of faction which needed to be controlled: "The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points . . . ." Id at 79.

182. See generally Robert S. Alley, *The Church of England and Virginia Politics*, and Marvin K. Singleton, *Colonial Virginia as First Amendment Matrix: Henry, Madison and Assessment Establishment* in Alley, *James Madison on Religious Liberty* at 153-172 (cited in note 145).

but also for those who suggest that such questions should be "justiciable only."[183]

This is especially so when the Fourteenth Amendment is factored into the analysis. Section 5 of the Amendment gives Congress—the most political of the branches—explicit power to assure that the privileges and immunities of citizens of the United States are preserved, and that all persons are treated equally and fairly in their dealings with the law. Though such a fundamental structural alteration in the balance of power necessarily affects everything within its arguable scope, comparatively little attention has been given to the impact of the Fourteenth Amendment on the structural questions which lie at the heart of the Court's post-incorporation policy governing religious liberty.

Though the task is a difficult one given the passage of time, developments in the law, and the impact of *stare decisis*, it is by no means untimely. Religion Clause jurisprudence is widely acknowledged to be in an advanced state of disarray, and the intent of this essay is to suggest that structural analysis is the only way to assure a systematic discussion of all the relevant issues.

The primary benefit, in our time, of viewing these issues through the lens of Madison's politics, rather than his political philosophy (to which it is inextricably linked), is that one need not go beyond the analytical and structural framework of the Constitution itself to conduct the initial inquiry. The ultimate task, of course, is to discover which issues are legal (i.e. for judges),[184] and which are political (i.e. for Congress and the State legislatures).[185] And it is to a discussion of the judicial task to which we must now turn.

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183. See Lupu, 140 U Pa L Rev 555 (cited in note 140).

184. Hobson reports that Madison viewed the judicial remedy as inadequate to the task of protecting individual rights. "[U]nlike the legislative veto, it could not operate until after the injury had occurred. The procedure was too cumbersome and costly, and would therefore fail to provide an immediate and full measure of justice." Hobson, 36 The Wm & Mary Q at 229 & n 31 (cited in note 102).

185. What Professor Amar describes as the "Madisonian insight that localism and liberty can sometimes work together, rather than at cross-purposes" is perhaps more accurately described as a reflection of Madison's exquisite political sense concerning the impact that contending, self-interested factions would have on the liberties of individuals in an extended republic. Amar, 100 Yale L J at 1136 (cited in note 19).

Professor Amar is particularly critical of Dean Jesse Choper's position that "[T]he assertion that federalism was meant to protect individual constitutional freedoms . . . has no solid historical or logical basis," describing it as "outlandish" and "odd" from the perspective of the founding generation. See id at 1205-1206. With due respect to my former teacher, I wholeheartedly agree with Professor Amar. The language and logic of the Test Clause and First Amendment point clearly to federalism as a structural mechanism for the protection of religious liberty. There is no question that a federal test oath would inhibit

b) *The Impact of Selective Incorporation on Federalism and Separation of Powers*

A quantum leap in both structural and substantive terms was taken when the Court accepted the incorporation doctrine[186] and began the piecemeal process[187] of applying national standards to the States. Though the full jurisdictional implications of the doctrine remain to be worked out in the context of religious liberty,[188] the *fact* of incorporation is no longer open to serious question.[189] Writing for the Court in *Wallace v Jaffree*,[190] Justice John Paul Stevens rejected United States District Judge Brevard Hand's attempt to reopen the incorporation debate.[191] The incorporation of the

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the religious liberty of any individual forced to swear it. The threat to liberty it addressed arose at the *federal* level. The fact that the very same individual might be forced to swear a similar, but inconsistent, test oath to qualify for State office illustrates clearly that the logic of utilizing structural mechanisms such as federalism to protect individuals from federal overreaching was as apparent to States which had established religions (such as Massachusetts), as it was to the Virginia of Jefferson and Madison, which did not.

186. See *Missouri Pacific Ry. Co. v Nebraska*, 164 US 403 (1896); *Chicago, B. & Q. Ry. Co. v Chicago*, 166 US 226 (1897). The Court had earlier rejected the concept. *Slaughter-House Cases*, 83 US (16 Wall) 36 (1873). See generally Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 Stan L Rev 5 (1949); Berger, *Government By Judiciary* (cited in note 102).

187. Louis Fisher has prepared a very useful table which traces the steps by which incorporation has been accomplished. See Louis Fisher, *American Constitutional Law* at 393-94 (cited in note 125). See generally Louis Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 Yale L J 74 (1963); William B. Lockhart, Yale Kamisar, Jesse H. Choper & Steven H. Shiffrin, *Constitutional Law* (West, 7th Ed 1991).

188. *Witters v State, Com'n for the Blind*, 102 Wash 2d 624, 689 P2d 53 (1984), rev'd, 474 US 481 (1986), reaffirmed on state constitutional grounds, 112 Wash 2d 363, 771 P2d 1119 (1989), cert denied, 475 US 1091 (1989) (denial of educational grant to blind student on the grounds that he would use it to study for the ministry). Four of the nine Justices of the Washington Supreme Court dissented, and three wrote opinions. Justices Utter, Dolliver & Dore dissented on the grounds that the majority's holding was inconsistent with the language of the Washington State Constitution, and that it denied Mr. Witters the right to practice his religion as he chose. Id 771 P2d at 1124. Justices Dolliver and Dore dissented on the grounds that the majority's ruling was a denial of Witters' rights under the Free Exercise Clause. Id, 771 P2d at 1132. And Justice Durham dissented on the grounds that the Washington State Constitution's Establishment Clause should not be construed so broadly in a case such as this one. Id, 771 P2d at 1136.

189. The question of just *how* the Fourteenth Amendment "incorporates" the liberty and equality norms of the Constitution and Bill of Rights is a subject beyond the scope of this paper. Akhil Reed Amar's work on the meaning of the Privileges and Immunities Clause provides much useful background and critical analysis of earlier sources. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L J 1131 (1991).

190. *Wallace v Jaffree*, 472 US 38 (1985).

191. See *Jaffree v James*, 554 F Supp 1130, 1132 (SD Ala 1983), rev'd 705 F2d 1526 (11th Cir 1983) and 713 F2d 614 (11th Cir 1983) aff'd, *Wallace v Jaffree*, 472 US 38 (1985). See also *Jaffree v Board of School Comm'rs of Mobile County*, 459 US 1314, 1315-1316 (1983) (Powell, J. Circuit Justice).

First Amendment, wrote Justice Stevens, is an "elementary proposition of law."[192]

Without questioning that proposition, however, it remains fair to ask two "elementary" questions in response. First, *how* can the prohibitory norms of the Religion Clause be "applied" to the States without doing violence to the language of the amendment itself? Second, and equally important, how does the substantive content of the norms "incorporated" from the First Amendment relate to other relevant norms which can be derived from the text and structure of the amended Constitution?

With respect to the first question: *how* can the prohibitory norms of the First Amendment be "applied" to the States via the Fourteenth Amendment without doing violence to the language of the amendment itself, the answer is relatively straightforward: it cannot be done without some *very* fancy interpretive footwork.[193]

Part I of this essay demonstrates that, while the First Amendment provides that "*Congress* shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ," the Test Clause as well as the structure of separation of powers and federalism impose these norms (as well as the others in the First Amendment) on both the Executive and Judicial branches. Interpreted in context, the First Amendment is a jurisdictional *bar*; that is, Congress has no jurisdiction to prescribe with respect to matters within its prohibitory norms. The powers of the Executive and the Judiciary are thus similarly circumscribed.

Section Five of the Fourteenth Amendment, by contrast, is a grant *to Congress* of the power to prescribe with respect to matters within its scope, and, by definition, to the Executive and Judiciary of the power to enforce. Thus, to the extent that the bar of the First Amendment is "incorporated" into the grant of the Fourteenth, we must consider a rather significant interpretive problem: What powers concerning the subject matter of the First Amendment does the federal government (including Congress and the Court) acquire via the adoption of the Fourteenth Amendment?

Space constraints preclude a full examination of the problem in this essay, but it can be illustrated by asking a simple question:

192. *Wallace v Jaffree*, 472 US at 49.

193. This topic is developed in considerable detail in the part of this essay which could not be included here due to space limitations. That manuscript, entitled "By What Right?" The Sources and Limits of Federal Court and Congressional Jurisdiction Over Matters "Touching Religion," has only recently been submitted for editorial consideration.

Does the Fourteenth Amendment empower Congress *to enact laws which would prohibit a State from doing any or all of the following*:

- setting up or maintaining a church;
- aiding religion in general, or preferring one religion over another;
- penalizing or mandating church attendance or requiring profession of belief or disbelief;
- levying taxes to support religious endeavors of any kind; or
- participating in the affairs of religious organizations or institutions, or permitting them or participate in the affairs of government?

The obvious answer is that it does not do so "directly." As a result, Congress' power would be contingent upon a showing that the evils to which such legislation is addressed must have at least a colorable relationship, or "nexus," to the guarantees embodied in the Fourteeth Amendment. Congressional disdain for specific practices might not be enough. The Court's power would be similarly constrained.

The Court, however, does not view its power under the Fourteenth Amendment in this way. In *Everson v Board of Education*, the Court assumes[194] that *it* has the power to impose such an understaning on both Congress *and* the States.

> The "establishment of religion" clause of the First Amendment means at least this: *Neither a state nor the Federal Government* can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go 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. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Fed-

194. In *Oregon v Mitchell*, 400 US 112 (1970), Justice Brennan wrote that: "[T]he statements of Bingham and Howard in the text indicate, the framers of the [Fourteenth] Amendment were not always clear whether they understood it merely as a grant of power to Congress or whether they thought, in addition, that it would confer power upon the courts, which the courts would use to achieve equality of rights. Since § 5 is clear in its grant of power to Congress and we have consistently held that the Admendment grants power to the courts, this issue is of academic interest only." Id 400 US at 264 & n 37.

> eral Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between the church and State."[195]

The point here is not that the Court is "wrong" in its conclusions about the meaning of either the First or the Fourth Amendment. At this stage of the analysis, the substantive holdings are largely irrelevant because the issue is one of subject-matter jurisdiction, just as it was in *Marbury v Madison*, *Erie v Tompkins*, *New York v United States*, and *United States v Lopez*. Jurisdiction is not assumed, and can be raised at any point in a proceeding.[196]

A discussion of the doctrinal issues is therefore appropriate only after the existence of federal subject-matter jurisdiction has been demonstrated.[197] Once that task is complete, it will then be necessary to address the second question: the relationship between the First Amendment's "incorporated" norms and other relevant norms which can be derived from the text and structure of the amended Constitution?

The most obvious of these issues is the relationship between and among the norms of the First and Fourteenth Amendments. Though this too is a very complex topic, Mary Ann Glendon and Raul Yanes have identified the point at which any thorough analysis of the topic must begin. They point out that a large part of the current confusion about the nature of the religious liberty guarantee is traceable to Justice Benjamin Cardozo's defense of "selective" incorporation in *Palko v Connecticut*.[198] By rejecting wholesale incorporation of the entire Bill of Rights,[199] *Palko* necessarily adopts the view that there is "an implied hierarchy of constitutional values."[200] It also necessarily implies that it is the task of the Supreme Court to discern both the identity and relative position within that hierarchy of the rights identified as "fundamental."

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195. 330 US 1, 15-16 (1947) (citation omitted) (emphasis added).

196. See Restatement (First) Conflict of Laws, § 451(2) (Supp. 1948) (discussing the availability of collateral attack on a judgment for lack of subject matter jurisdiction); Restatement (2d) Judgments § 11 (1982).

197. *Erie v Tompkins*, 304 US 64, 79 (1938). See *Reid v Covert*, 354 US 1, 5-6 (1957) (plurality opinion, per Black) (footnote omitted) ("[T]he United States is entirely a creature of the Constitution. Its power and authority have no other source.").

198. 302 US 319 (1937).

199. Glendon & Yanes, 90 Mich L Rev at 479 (cited in note 117).

200. Id at 479.

The Court's understanding of the religious liberty guarantees reflects both its views concerning the existence of an implicit hierarchy of values, and its assumption that the Court has been entrusted by Article III with the task of anointing that hierarchy. In *Palko*, Justice Cardozo placed religious liberty among the rights "implicit in the concept of ordered liberty" and " 'so rooted in the traditions and conscience of our people as to be ranked as fundamental',"[201] but he did not "suggest any more sophisticated ranking than 'in' and 'out', nor [did he] offer an exhaustive catalog of the rights that ought to be so ranked."[202]

Professor Glendon and Mr. Yanes view Cardozo's approach for the Court as a major shortcoming of the decision to incorporate the religious liberty guarantee. Without giving "some thought about the purpose of the religious freedom language and its relation to the Fourteenth Amendment within a modern regulatory state"[203] the *operative* vision of religious liberty will not be nearly as robust as that which animates the interpretation of other constitutional guarantees. Freedom of speech and press provides useful contrast.

By focusing on the Court's handiwork in *Palko*, Glendon and Yanes correctly identify the nexus between structural questions (*whose* right or power?) and interpretive ones (the *meaning* of the constitutional norm?). They are also correct in their observation that a number of significant questions have been "glossed over" during the Court's incorporation project.[204] Among them are the following:[205]

> 1. Wholly without regard to the Fourteenth Amendment, what is the relationship *among* the First Amendment (and other) norms it incorporates? Should they be construed as components of an organic "concept of ordered liberty", as "privileges and immunities" of national citizenship, or as discrete, and sometimes conflicting, limitations on governmental power?

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201. Id at 479, quoting *Palko v Connecticut*, 302 US 319, 325 (1937) (quoting *Snyder v Massachusetts*, 291 US 97, 105 (1934)).

202. Id at 479.

203. Id at 482.

204. See Akhil Reed Amar, 100 Yale L J 1131 (1991); Glendon & Yanes, 90 Mich L Rev at 482 & n 25 (cited in note 17) (noting Amar's work).

205. Though each of these questions could be the subject of a separate essay, an exhaustive treatment is not possible here. The intention is simply to raise the questions, and to note that the answers may require reconsideration of some of the existing case law. (See note 193).

2. What is the impact of the Fourteenth Amendment's provisions on the norms it "incorporates"? Do the norms it incorporates retain their original character (and limitations), or should they be characterized as "Fourteenth Amendment rights" and be held subject to the same rules which govern cases which "arise under" its various provisions?

As important as these questions may be, however, there is another, more fundamental, problem with the "implied hierarchy of values" model: the Court's implicit claim of power to "rank" via selective application or avoidance. With respect to religious liberty, this tendency is manifest in the Court's assertion of a broadly-based federal power to make and enforce national rules which rest on hazy or unarticulated images of a "proper" or ideal relationship among three cultures: a secular state, a community of institutions and believers which defines itself in religious terms, and a diverse mix of institutions and individuals that define themselves in a variety of non-religious ways.[206]

To the extent that the exercises of the "judicial power of the United States" result in the formulation of *rules* which govern both the relationship of law to religion, and the limits on State or Congressional power to strike balances between the needs of believers and others, at least two additional questions arise:

3. What limits do the religious liberty norms derived from the Test Clause, and the First Amendment, read together with the liberty and equality norms of the Fourteenth Amendment and other relevant constitutional provisions, impose on the exercise of the power of judicial review?; and

4. Does judicial incorporation of the First Amendment via the Due Process Clause of the Fourteenth Amendment implicitly confer legislative powers upon the Congress which the First Amendment appears to deny?

CONCLUSION

This essay began as an attempt to understand how and why the Supreme Court became the branch of the federal government which has undertaken to police the boundary between church and

206. See Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 Ind L Rev 469 (1993) ("Church and state law represents the quintessential opportunity for application of federalist principles. While federalism does not eliminate religious liberty concerns, it provides a solution which mitigates deleterious effects on freedom. It is a solution which represents the wisdom of both the past and the present.")

state. As might be expected in any such inquiry, the research led to the investigation of many more questions than can be discussed in one place. This essay should thus be seen for what it is: the first installment of several articles which explore the manner in which the Supreme Court of the United States has undertaken to make policy on what is, next to race, the most exquisitely sensitive issue of American public policy.[207]

It is, however, possible to draw several conclusions from the research summarized to this point. The first is that not enough attention has been given to the manner in which "structural" devices such as separation of powers and federalism may contribute to the protection of substantive rights. Though these devices were clearly among the most important issues debated at the Constitutional Convention, their import has been obscured by a reading of the First Amendment which focuses almost exclusively on the work of Congress and the states, and a reading of the Fourteenth Amendment which focuses only rarely on the important powers claimed by the Supreme Court.

The second is that the Court's selective use of history obscures the important political dimensions of debates over the adoption and interpretation of the First Amendment. Stated baldly, the First Amendment and Test Clause can be described in present-day terms as an effort by the Framers to keep the federal government from setting national "political correctness" standards in matters concerning religion. The Framers would, I think, be quite surprised to learn that they had atoned for their rejection of Madison's "Virginia Plan" for the federal government by adopting Madison and Jefferson's "Virginia experience" as the single appropriate paradigm for understanding the religious liberty they claimed for "[them]selves and their posterity."

The last conclusion which can be drawn at this stage of my structural analysis is that far too little attention has been given to manner in which the prohibitory norms of the First and Fourteenth Amendments apply to the activities of the Judicial Branch.[208] This too is, in part, a result of both the Court's selective reading of history, and the tendency of incorporation discussions to focus on the development of ever-more precise legal standards to resolve doctrinal controversies. By focusing exclusively on the history of the

207. See note 193.

208. See, for example, *Madsen v Women's Health Center, Inc.*, 114 S Ct 2516 (1994).

First Amendment, while ignoring the history of the Fourteenth altogether, the Court begs the critical *political* question: what powers do the First and Fourteenth Amendments give to *the Court*?

Like the answers to the questions addressed in Parts I and II of this essay, the answer to this last question is "capturable only through history." I am grateful that the occasion of this *festschrift* in honor of John Noonan, jurist, historian, and teacher, has given me the opportunity "[to] know the price other systems have exacted, to know the prize we have, [and to] immerse [myself] in [that] history."[209] A good teacher like John Noonan does that wherever he or she may be; in the classroom, in their writings, and on the bench.[210] And we are grateful for it.

209. J.T. Noonan, Jr., *The Believer and the Powers That Are* (Macmillan, 1987) xiii.

210. John Noonan's newest book, *Free Exercise! The American Experience of Religious Freedom* is due out in 1996.