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ARTICLES

"BY WHAT RIGHT?": THE SOURCES AND LIMITS OF FEDERAL COURT AND CONGRESSIONAL JURISDICTION OVER MATTERS "TOUCHING RELIGION"

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TABLE OF CONTENTS

Table of Contents 1
Introduction 4
I. The Binding Nature of the Federal Vision 8
A. *Introduction* 8
B. *The Nature of the Judicial Interest* 11
II. A "Structural Evaluation of *Texas Monthly, Inc. v. Bullock* and *Employment Division v. Smith* 14
A. *The Nature of the Legislative Interest* 14
B. *Texas Monthly, Inc. v. Bullock: Navigating the Space Between Scylla and Charybdis* 16
1. Construing Constitutional Norms: Should the Analysis of First Amendment Issues be Categorical or Integral? 17
2. Characterization and Categorical Analysis: Which Clause Controls?. 19
a. Establishment or free exercise? 19
b. Religion or speech and press? 22
3. The Structural Implications of Categorical Analysis 22
a. What is the judicial role? 22
b. What is the legislative role? 26
c. *Employment Division v. Smith*: Whither free exercise? ... 27
(i) Characterization and the facts of *Smith* 28
(ii) Characterizing the constitutional issues presented in *Smith* 29
(iii) Relating norm to structure: the limits of legislative power after *Smith* 32
III. Liberty, Democracy and the Mechanics of Incorporation 36
A. *Which Clause?: Due Process or Privileges and Immunities?* 36
1. Due Process or Privileges and Immunities? The Structural Implications 37

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2. Due Process or Privileges and Immunities? The Substantive Implications 42
B. "Structural Incorporation": Weighing the Impact of the Text and Structure of the Fourteenth Amendment on the Religious Liberty Norms Incorporated from the First Amendment 48
1. Relating the Religious Liberty Norms of the First Amendment to the Equal Citizenship and Protection Norms of the Fourteenth 49
2. "Neutrality" or Non-Discrimination: Importing the Debate Over "Intent" vs. "Effects" into the Jurisprudence of the Religion Clause 53
3. Relating Norm to Structure: The Power to Relieve Governmentally-Imposed Burdens on Religious Practice 54
4. Structuralism and the Debate within the Rehnquist Court 57
IV. State and Federal Legislative Efforts to Protect and Define the Scope of Religious Liberty 59
A. Limiting the Role of State Legislatures: The Curious Case of Kiryas Joel 60
1. Accommodating Religious and Cultural Differences via Legislation: Distinguishing Neutrality, Non-Discrimination, and Equal Protection 62
a. "Neutrality toward religion" 62
b. Equal protection: is Kiryas Joel segregated or is it a religious gerrymander? 64
(i) Is Kiryas Joel a religious gerrymander? 64
(ii) Was there a legislative intent to segregate? 65
2. Taking a Structural Approach: Do Courts Have Exclusive Jurisdiction to Accommodate? 66
B. Statutory Protection for Religious Liberty: What is the Role of Congress 68
1. Introduction: The "Religious Freedom Restoration Act" 68
2. The Power of Congress to Define and Enforce the Fourteenth Amendment: The Relationship Between Section Five and Section One 68
a. *Katzenbach v. Morgan*: The Fourteenth Amendment and separation of powers 72
(i) Equal Protection or Privileges and Immunities? 75
(ii) The power to define the equal protection norm 77
b. *Oregon v. Mitchell* 79
(i) Justice Harlan: The Fourteenth Amendment as defined by the intent of its framers 81
(ii) Justice Black: The Fourteenth Amendment and "structural" federalism 82
(iii) Justice Stewart, Chief Justice Burger, and Justice Blackmun: The Fourteenth Amendment and the legislative jurisdiction of Congress 84

(iv) Justices Brennan, White, Marshall, and Douglas: The Fourteenth Amendment as a grant of plenary federal authority 85
C. *Congress and the Power to Make Laws "Respecting an Establishment of Religion or Prohibiting the Free Exercise thereof."* 88
1. Does the Text of the Constitution Expressly Reserve for the States Legislative Jurisdiction over Matters "Respecting" Religion and Religious Establishments? 90
2. Does the Constitution, Read Without Regard to the Fourteenth Amendment, Grant Congress Power to Legislate with Respect to Establishments of Religion and the Permissible Scope of Free Exercise by Individuals and Groups, thus Requiring that the Express Powers of Congress be Read Together with the Reserved Powers of the States in Order to Define the Appropriate Spheres of Federal and State Power? 91
3. Does the Amended Constitution Contain Other, More Generalized, Authorizing or Prohibiting Norms Which Might Fairly be Construed to Limit Either the Power of the States, or that of the Federal Government, with Respect to "Establishments of Religion" and Laws "Prohibiting the Free Exercise Thereof"? 91
4. Given that the Religion Clause has now been "Incorporated" by Judicial Decree, to what Extent Should the Fourteenth Amendment be Interpreted to Authorize Preemptive Federal Policy-Making, Either by Congress or the Court, with Respect to Religious Liberty? 92
D. *What is the Role of the Court in Protecting Religious Liberty?* 93
1. Evaluating Claims of Special Competence and Limited Judicial Supremacy 93
2. Judicial Power: The Relationship of a Structural Inquiry to the Working Definition of Religious Liberty 96
E. *Locating the Power to Preserve Religious Liberty: RFRA in Context* ... 98
Conclusion 99

[T]he fact that the Court rules in a case . . . that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is.[1]

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1. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 193 (1962). Many thanks to Louis Fisher, Ph.D., of the Library of Congress Congressional Research Service, whose helpful comments, and reference to this quotation, were instrumental in bringing this phase of my research into the structure of the religious liberty guarantee to a close. This point is discussed at length in Mr. Fisher's book, AMERICAN CONSTITUTIONAL LAW (2d ed. 1995). I would also like to acknowledge all those others including my research assistants, who will remain nameless for fear of forgetting one or another, whose comments, criticisms and encouragement led me to conclude that the question: "Who left the Court in charge?" was not only a legitimate

INTRODUCTION

For nearly fifty years it has been apparent that, for all practical purposes, federal judges claim a de facto "revisory" power over both federal and state policy on the subject of religious freedom, including the sensitive topic of church-state relations. Until the United States Supreme Court rendered its 1990 decision *Employment Division v. Smith*,[2] it seems largely to have been assumed that this is simply the "way it is" or, perhaps more accurately, "the way it should be."

The Court's decision in *Smith*, however, changed all this—at least insofar as the Free Exercise Clause[3] was involved. Almost immediately, it became an article of faith among most advocates of religious liberty that *Smith* was wrongly decided and that the rule announced in the case should not be followed.[4] State courts were urged to read the religious liberty provisions of their respective state constitutions more broadly than the Court had read the Free Exercise Clause in *Smith*.[5] More importantly, Congress was urged to "restore" the constitutional status quo that prevailed prior to *Smith* by enacting legislation pursuant to its power under Section Five of the Fourteenth Amendment.[6] The Religious Freedom Restoration Act of 1993 (RFRA)[7] was the result of that effort.

RFRA contains explicit congressional "findings" to the effect that the Supreme Court's Free Exercise Clause jurisprudence is no longer adequate to protect religious liberty, and that its prior case law provided "a workable test for striking sensible balances between religious liberty and competing prior governmental interests."[8] The Supreme

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one, but an under-appreciated one as well.

2. 494 U.S. 872 (1990).

3. U.S. CONST. amend. I.

4. *See, e.g.*, Steven D. Smith, *The Rise and Fall of Religious Freedom in Constitutional Discourse*, 140 U. PA. L. REV. 149, 231-33 (1991) (referring to *Smith* as "the virtual abandonment of the Free Exercise Clause," "reach[ing] a low point in modern constitutional protection under the Free Exercise Clause," and "leav[ing] the Free Exercise Clause without independent constitutional content and thus, for practical purposes, largely meaningless"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 140 (1992) ("*Smith* converts a constitutionally explicit liberty into a nondiscrimination requirement, in violation of the most straightforward interpretation of the First Amendment text."); Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 841 (1992) (summarizing a symposium of ten articles and finding that "[n]o one in this symposium takes seriously the possibility that *Employment Division v. Smith* might be defensible.").

5. *See, e.g.*, People v. DeJonge, 501 N.W.2d 127 (Mich. 1993); Porth v. Roman Catholic Diocese, 532 N.W.2d 195, 199 (Mich. Ct. App. 1995) (declining to do so, but stating that the Michigan view was more in accordance with Justice O'Connor's concurring opinion in *Smith*); State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990); First Covenant Church v. City of Seattle, 840 P.2d 174 (Wash. 1992) (Utter, J., concurring). *See generally* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992) (arguing that state courts have not developed an independent jurisprudence of state constitutional law).

6. U.S. CONST. amend. XIV, § 5.

7. 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993).

8. *Id.* § 2000bb(a)(5). The findings state that:

(a) Findings

Court, however, remains unmoved by these findings.[9]

These are important developments, both legally and politically. The Court has long been viewed in some quarters as hostile to religious liberty,[10] but the nature of the issues involved in the cases forming the basis of this view—polygamy, school prayer, tuition assistance for children in religiously-affiliated schools, respect for Native American sacred sites, and the free exercise rights of military personnel—has led both courts and some political commentators to view the claims made in those cases as idiosyncratic. The passage of RFRA, and the rejection of the *Smith* Court's rationale in cases litigated under state constitutions, however, indicates the existence of broadly-based *political* discontent with at least the "free exercise" component of the Court's religious liberty jurisprudence.

Legally, these developments are even more significant. RFRA can be read as an explicit claim that Section Five of the Fourteenth Amendment makes Congress the final arbiter of Free Exercise Clause standards of review. State court decisions rejecting the *Smith* holding indicate that the state courts also view themselves as free to interpret their respective state constitutions more "expansively" in matters affecting religious liberty. Like Congress, these state courts assume that the Supreme Court does not always have the final word on what are commonly called "First Amendment interests."

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

Id. §§ 2000bb(a)-(b).

9. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

10. *See generally* WILLIAM A. DONOHUE, TWILIGHT OF LIBERTY: THE LEGACY OF THE ACLU (1994); JAMES D. HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA (1991); RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984); Frederick M. Gedicks, *Public Life and Hostility to Religion*, 78 VA. L. REV. 671 (1992); Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-modern Age*, 1993 B.Y.U. L. REV. 163.

This Article examines the extent to which the Court's power "to say what the law is"[11] on the sensitive subject of religious liberty has been, and continues to be, constrained by the lawmaking powers of Congress and the states. Though the topic is obviously an important one, it has not been examined systematically. Most of the case law and commentary focuses on the *limits* which the Constitution imposes, or should be held to impose, on the powers of Congress and the states.[12] The Court's power to define those limits appears, by contrast, to be one of those "fundamental assumptions [that] 'appear[s] so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them.'"[13]

In an article published elsewhere,[14] I have argued that the application of the Test Clause of Article VI[15] and the First Amendment[16] to the functions of the "Judicial Department," including the power of judicial review, is accomplished "structurally"; that is, by reference to the Court's position in the plan of government created by the Constitution.[17] The present inquiry builds upon that analysis, and asks the following question:

> If Congress or the legislatures and courts of the several states perceive the Court's vision of religious liberty to be either unconstitutionally narrow, discriminatory, or both, what political and legal options are available at the federal or state levels to modify or lessen the impact of the federal rule(s) announced by the Court?

This question is both "structural" and "jurisdictional." It is "structural" in the sense that it speaks to the relative competence of Congress and the states (legislatures and courts) to assure that religious liberty is accorded a sufficiently high place in the hierarchy of fundamental values. It is "jurisdictional" in the sense that the constitutionality of RFRA—which is intended to supplant the free exercise policy announced by the Supreme

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11. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

12. Much of the recent commentary on RFRA and the powers of Congress under Section Five of the Fourteenth Amendment fits into this category. *See, e.g.*, Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5 (1995); Daniel O. Conkle, *The Religious Freedom Restoration Act: The Constitutional Significance of an Unconstitutional Statute*, 56 MONT. L. REV. 39 (1995); Ira C. Lupu, *Of Time and the RFRA*, 56 MONT. L. REV. 171 (1995).

13. Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-48 (1978). Though Dean Cramton was speaking of the unarticulated value systems that influence American legal education, the criticism is equally applicable to cases involving religious liberty.

14. Robert A. Destro, *The Structure of the Religious Liberty Guarantee*, 11 J.L. & RELIGION 355 (1995).

15. U.S. CONST. art. VI, cl. 3.

16. *Id.* amend. I.

17. "Structural" analysis has been the methodology in an increasing number of articles. *See, e.g.*, Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991); Stephen L. Carter, Comment, *The Independent Counsel Mess*, 102 HARV. L. REV. 105 (1988); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1155 (1992); E. Donald Elliot, *Why Our Separation of Powers Jurisprudence is so Abysmal*, 57 GEO. WASH. L. REV. 506 (1989); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477 (1991).

Court in *Smith* with a legislatively mandated "return"[18] to the policy embodied in *Sherbert v. Verner*[19] and *Wisconsin v. Yoder*[20]—turns on three closely-related, but conceptually distinct, questions:

> 1) Does Congress have the power to legislate on the subject of the free exercise of religion?
>
> 2) Is congressional legislation, adopted pursuant to Section Five of the Fourteenth Amendment and which purports to protect or "restore" protection to the free exercise of religion, consistent with the free exercise norm it seeks to "enforce?"
>
> 3) To what extent does the Court's Article III[21] power "to say what the law [of the First and Fourteenth Amendments] is" limit the powers of Congress under Article I[22] and Section Five of the Fourteenth Amendment to "prescribe[] the rules by which the duties and rights of every citizen are to be regulated"[23] through enacting a prospective change in the law enunciated by the Court?

Part I of this Article will look at the degree to which the federal judiciary's vision of religious liberty has become controlling. Part II will undertake a "structural" evaluation of two cases which speak directly to the power of legislatures to accommodate religious liberty concerns: *Texas Monthly, Inc. v. Bullock*[24] and *Employment Division v. Smith*.[25] Part III will consider the impact of the text and structure of the Fourteenth Amendment on the norms incorporated from the First Amendment by utilizing a model of "structural incorporation" to examine just how much federal power—or jurisdiction—actually exists concerning matters "touching religion."[26] Part IV will discuss the legitimacy of state and federal legislative efforts to protect religious liberty and concludes that such efforts are legitimate to the extent that they are consistent with the norms of equal citizenship and protection which lie at the heart of the Fourteenth Amendment. More specifically, this Part will argue that congressional and state efforts to enact laws which provide "affirmative" protection for religious liberty have a greater claim to structural validity under the First and Fourteenth Amendments than do most of the Supreme Court's

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18. 42 U.S.C. §§ 2000bb(a)(3-4), (b)(1) (Supp. V 1993). This formulation assumes two things: 1) that the statutory language accurately captures the meaning of the prior case law; and 2) that the prior case law is a more accurate rendition of the command of the Free Exercise Clause than the Court's formulation of the rule in *Smith*.

19. 374 U.S. 398 (1963).

20. 406 U.S. 205 (1972).

21. U.S. CONST. art. III.

22. *Id.* art. I.

23. THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

24. 489 U.S. 1 (1989).

25. 494 U.S. 872 (1990).

26. The phrase is derived from the proposed language for a federal religious liberty clause in the Constitution authored by Samuel Livermore of New Hampshire: "Congress shall make no laws touching religion, or infringing the rights of conscience." 1 ANNALS OF CONG. 729 (Joseph Gales ed., 1789).

pronouncements under the Religion Clause to date.

I. THE BINDING NATURE OF THE FEDERAL VISION

A. Introduction

The degree to which the Court claims the power to define the rules which shape our national understanding of religious liberty is not immediately apparent. Only when the Court renders a decision which seems to break with prior precedent, such as Employment *Division v. Smith*,[27] does the "change" in the rules constructed by the judiciary become obvious. As long as the interpretive ratchet appears to freely turn in the direction of "increased" liberty or "separation," it is possible for interested observers to imagine that the Court is only playing the "intermediate" role envisioned by Alexander Hamilton in *The Federalist No. 78*.[28] But when the Court either departs radically from, or raises serious questions about, the nature of its role, as it did in both *Sherbert v. Verner*[29] and *Smith*, its role as the nation's chief policy-maker on religious liberty matters stands clearly revealed.

Smith is a significant case for many reasons. However, in the long-run, its legal significance may be eclipsed by the reaction to the decision, both political and judicial. The post-*Smith* case law and commentary tell us much not only about the manner in which judges, commentators, and religious liberty activists view the substantive liberty protected by the Free Exercise Clause, but it also speaks volumes concerning their perception of the role of the Court in religious liberty cases.[30] In fact, the Court's opinions are now so closely identified with the substantive scope of the Religion Clause(s)[31] that Dr. Dean Kelley, formerly of the National Council of Churches, was moved to assert in testimony before the House Judiciary Committee that the practical impact of *Smith* was a judicial "repeal" of the Free Exercise Clause itself.[32]

Though I believe Dr. Kelley and other outspoken opponents of *Smith* have overstated

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27. 494 U.S. 872 (1990).

28. And this is so even if there is considerable evidence that the protection provided is not nearly so expansive as it appears to be. Judge John Noonan of the United States Court of Appeals for the Ninth Circuit has provided a useful list of free exercise cases and their outcomes in the Supreme Court and the federal courts of appeal which is current to September 1988. EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 622, 625 (9th Cir. 1988) (Noonan, J., dissenting).

29. 374 U.S. 398 (1963).

30. *See generally The James R. Browning Symposium for 1994: The Religious Freedom Restoration Act*, 56 MONT. L. REV. 5 (1995).

31. There is considerable debate over the proper nomenclature to be assigned to the religion-specific provisions of the First Amendment. Some, including perhaps a majority of the Court, view these provisions as analytically distinct clauses, others view them as integral parts of a single clause. The relevance of this controversy is addressed at greater length *infra* in the text accompanying notes 82-122.

32. *Religious Freedom Restoration Act of 1990: Hearings on H.R. 5377 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 27 (1990) (statement of Rev. Dean M. Kelley, Counselor on Religious Liberty, National Council of Churches). In Dr. Kelley's view, the majority's rejection of the compelling state interest standard of review in cases involving religious practice burdened by laws of general applicability repeals the Free Exercise Clause of the First Amendment.

their case somewhat, they do raise several important questions. How, for example, did an "incorrigibly religious"[33] country like the United States become so dependent upon the Court for guidance on religious liberty matters that its backsliding from precedent, established in the nine years between *Sherbert v. Verner*[34] and *Wisconsin v. Yoder*,[35] is perceived to be a "repeal" of the Free Exercise Clause? Is it wise in a liberal democracy to entrust such power to nine Justices appointed for life terms? More to the point: By what right does the federal judiciary exercise authority over matters of religious liberty anyway?[36]

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.[37] Significantly, the power to regulate religion, or its place in society, was not one of them. There is no express power under the original Constitution which authorizes Congress to make laws respecting either a state or a federal establishment of religion, and none of Congress' enumerated powers, save the most general,[38] would seem to authorize the enactment of laws designed to inhibit religious exercise. Legislation requiring a religious test "as a Qualification to any Office or public Trust under the United States" is expressly forbidden.[39]

The text of the amendments also fails to directly answer the question. We learn from the First, Fifth, Ninth and Tenth Amendments that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof,"[40] that "[n]o person shall . . . be deprived of life, liberty or property without due process of law,"[41] 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.[42] Thus, the practical impact of the Bill of Rights is to limit the ability of Congress to conclude that laws respecting religious establishments (i.e., laws creating, prohibiting, or otherwise regulating "an establishment of religion"), or laws which limit free exercise of religion, are in the public

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33. The phrase is borrowed from Rev. Richard John Neuhaus, who describes Americans as "incorrigibly religious," a description that is borne out in all of the survey data on religiousness. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE 113 (1984).

34. 374 U.S. 398 (1963).

35. 406 U.S. 205 (1972).

36. The phrase is borrowed from Louis Lusky. LOUIS LUSKY, BY WHAT RIGHT?: A COMMENTARY ON THE SUPREME COURT'S POWER TO REVISE THE CONSTITUTION (1975).

37. For example, Congress has the power to lay and collect taxes, to provide for the common defense and general welfare of the United States, and to establish uniform rules on matters relating to the growth and development of the United States and its economy. *See* U.S. CONST. art. I, §§ 8, 9, 10; *id.* art. IV.

38. The Necessary and Proper Clause, U.S. CONST. art. I, § 8, cl. 18; The General Welfare Clause, U.S. CONST. art. I, § 8, cl. 1.

39. U.S. CONST. art. VI, cl. 3.

40. *Id.* amend. I.

41. *Id.* amend. V.

42. *Id.* amends. IX, X.

interest, and therefore justifiable under, or in aid of,[43] one of its enumerated powers.

From the text of 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.[44] Second, that the states are prohibited from denying to any person within their jurisdiction due process or equal protection of the laws.[45] Third, that Congress has the power to assure that the states comply with otherwise valid laws adopted to "enforce" the Fourteenth Amendment.[46]

Viewed as a question of power allocation, the amended Constitution seems, at first glance, to deal only with questions of *legislative* overreaching on matters of religious liberty; the First Amendment, by its terms, limits only the acts of Congress, and the Fourteenth, only the acts of the states. But such a reading would be too narrow. John Marshall cautioned early-on that "[i]n considering [such] questions[s] . . . we must never forget that it is a *constitution* we are expounding."[47] Not only does the text clearly delineate what is permitted and prohibited, but it also contains important structural limitations which delineate the authority of the states and federal government, respectively, and which define the powers of the legislative, executive and judicial branches of the federal government.

Why then, has the national policy governing religious liberty been controlled largely, at least until the adoption of RFRA, by federal judge-made rules?[48] If Article III does not even *expressly* grant the federal judiciary the power of judicial review, why should it be assumed that the implied (but necessary) power recognized in *Marbury v. Madison*[49] leaves the federal courts in sole charge of what virtually all observers—especially those who lived during the founding generation—have viewed as one of the most exquisitely sensitive issues in all of public policy?[50] Although this question admits of many answers, it has received comparatively little attention.

The analytical task requires consideration of two basic structural questions:

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43. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

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

45. *Id.*

46. *Id.* amend. XIV, § 5.

47. *McCulloch*, 17 U.S. (4 Wheat.) at 407 (emphasis added).

48. Until the incorporation of the First Amendment, there was not a "national policy" defining the substantive content of religious liberty. Congressional policy dealing with religion or religious liberty applied only in the discrete subject areas over which Congress had legislative jurisdiction. *See, e.g.*, Revenue Act of 1894, ch. 349, § 32, 28 Stat. 509, 556 (exempting religious, charitable and educational organizations from the first income tax); Act of March 3, 1791, ch. XXVIII, § 5, 1 Stat. 222, 222-23 (creating the post of Army chaplain). Pre-incorporation cases such as Pierce v. Society of Sisters, 268 U.S. 510 (1925), and Meyer v. Nebraska, 262 U.S. 390 (1923), though "national" in their scope and beneficial to religious liberty interests, were not decided on religious liberty grounds. The Incorporation Doctrine is discussed at greater length *infra* Part III.

49. 5 U.S. (1 Cranch) 137, 177 (1803).

50. 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 ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 126 (1964) (quoting 1 ANNALS OF CONG. 730 (Joseph Gales ed., 1789)).

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. The Nature of the Judicial Interest

The judicial process is, by definition, a resolution of discrete "cases or controversies." In contrast with norms fixed by legislation, rules developed through a case-by-case analysis tend to remain "in process" over a long period of time. The Court's development of the federal constitutional law of religious liberty has followed this pattern.

From the time of the founding period through most of the Nineteenth Century, the federal courts developed little, if any, case law that contributes significantly to our present-day understanding of the concept of religious liberty.[51] The Court had not yet "applied" the First Amendment to the states, and the general view in cases where the First Amendment *did* apply was that religious belief, while important, could not justify behavior that the community viewed as antisocial. In *The Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, Justice Bradley wrote that "[t]he State has a perfect right to prohibit . . . all . . . open offences against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practised."[52]

Although both *Pierce v. Society of Sisters*[53] and *Meyer v. Nebraska*[54] are often given as examples of "First Amendment" case law because the controversies resolved in those cases were integrally bound up with the issue of religious freedom and education, the process of defining the "incorporated" norms of the First Amendment truly began in earnest with *Cantwell v. Connecticut*.[55] The *federal* constitutional law of religious liberty

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51. *Compare* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) *with* Gerard V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245 (1991) *and* Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992). *See also* David M. Rabban, *The First Amendment in its Forgotten Years*, 90 YALE L.J. 514 (1981).

52. 136 U.S. 1, 50 (1890) (citing Davis v. Beason, 133 U.S. 333, 342-43 (1890)).

53. 268 U.S. 510 (1925).

54. 262 U.S. 390 (1923).

55. 310 U.S. 296, 303 (1940). The process actually began much earlier, and has its roots in the Court's conception of substantive due process. The dissenting opinion of Justice Brandies in Gilbert v. Minnesota, 254 U.S. 325, 337-38 (1920) (quoting United States v. Cruikshank, 92 U.S. 542, 552 (1875)) argues that:

> The right to speak freely concerning functions of the Federal Government is a privilege or immunity of every citizen of the United States which, even before the adoption of the Fourteenth Amendment, a State was powerless to curtail. . . . Were this not so "the right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for any thing else connected with the powers or duties of the national government" would be a right totally without substance.

Building on the logic of substantive due process, he noted that he had:

has thus been "in process" for approximately fifty years, but the Court has yet to articulate clearly the precise nature and content of the religious liberty guarantee "incorporated" via the Fourteenth Amendment. What we have is an amalgam of rules which are, to put it mildly, confusing.[56] By the Court's own admission, its current jurisprudence is a

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> difficulty in believing that the liberty guaranteed by the Constitution, which has been held to protect against state denial the right of an employer to discriminate against a workman because he is a member of a trade union, the right of a business man to conduct a private employment agency, or to contract outside the State for insurance of his property, although the legislature deems it inimical to the public welfare, does not include liberty to teach, either in the privacy of the home or publicly, the doctrine of pacifism; so long, at least, as Congress has not declared that the public safety demands its suppression. I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and to enjoy property.

Id. at 343 (citations omitted).

The next case in which the First and Fourteenth Amendments are mentioned is Gitlow v. New York, 268 U.S. 652 (1925). In *Gitlow*, the Court simply assumed that the liberties of speech and press were "among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666. By the time the Court decided Near v. Minnesota, 283 U.S. 697 (1931), the Court felt:

> It [was] no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.

Id. at 707 (citations omitted).

The incorporation of the Religion Clause follows a similar pattern. The concurring opinion of Justice Cardozo, joined by Justices Brandies and Stone, in Hamilton v. Regents of the Univ. of California, 293 U.S. 245, 265 (1934), "assume[d] for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states," even though Justice Cardozo goes to great lengths to demonstrate why that liberty is not violated by compelling a student having religious objections to enroll in military training as a precondition for enrollment in the University of California. In language reminiscent of the Court's approach in Employment Div. v. Smith, 494 U.S. 872 (1990), Justice Cardozo wrote:

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war, whether for attack or for defense, or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to a principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

Hamilton, 293 U.S. at 268.

The Court had, but avoided, the opportunity to address the Religion Clause question directly in Lovell v. City of Griffin, 303 U.S. 444, 450 (1938), choosing instead to place its reliance on the already firmer foundation of the incorporated Speech and Press Clause.

56. In Murray v. City of Austin, 947 F.2d 147, 163 (5th Cir. 1991), Judge Myron Goldberg noted in dissent that "[a]nyone reading Establishment Clause precedent—the cases on non-purposeful, symbolic government support for religion—cannot help but be struck by the confusion that reigns in this area."

"'blurred, indistinct and variable' [set of rules which are] 'depend[ent] on all the circumstances of a particular relationship.'"[57]

This is not surprising. The Due Process Clause of the Fourteenth Amendment is the conduit through which the First Amendment is "applied" to the states by the United States Supreme Court, and the Court has held, rather consistently, that the process of giving it substantive content is, at bottom, a balancing process. In *Planned Parenthood v. Casey*,[58] the Court adopted the formulation suggested by Justice Harlan in *Poe v. Ullman*:[59]

> The best that can be said is that through the course of this Court's decisions it [the due process definition of "liberty"] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution.

As a result, case law applying the First Amendment to both Congress and the states is best understood as a reflection of the federal judiciary's vision of two related, but distinct, topics: 1) the substantive balance to be struck between religious liberty and the demands of organized society, and 2) the appropriate *political* balance to be struck among and between the federal judiciary, the Congress, and the states.

But where does the Court *find* the authority to strike such "balances" in the first place? This is a "first order," or jurisdictional, question which has simply been glossed over in the Court's incorporation project. It cannot, however, be ignored. Separation of powers and federalism are particularly important issues when the topic is individual rights, especially if a plausible case can be made either that the Court is wrong, or that it has exceeded its jurisdiction. When that happens, there are only two places aggrieved citizens can go for a remedy: to Congress, or to their state of residence.

This is why the text of the Fourteenth Amendment is an important, but generally overlooked, factor in the "incorporation equation." Not only is its language the source of judicial authority to "incorporate" the Bill of Rights and other, extra-constitutional liberties, but its history also speaks volumes concerning the very power allocation question with which this Article is concerned. The Reconstruction Congress was well aware of the Court's Article III powers and took a dim view of the manner in which that power had been exercised with respect to the issue of slavery.

The executive branch also took a dim view of the manner in which the Court exercised its power. President Lincoln's *First Inaugural Address* grappled with the political problems which arise in the aftermath of politically unpopular Supreme Court decisions. He recognized, correctly, that Supreme Court decisions are "final" in two ways: they resolve a given case or controversy, and they become a part of the edifice known as stare decisis.[60] Whether or not the Court's views on the subject are "correct"

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

58. 112 S. Ct. 2791, 2806 (1992) (plurality opinion).

59. 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

60. Abraham Lincoln, First Inaugural Address (March 4, 1861), *in* SPEECHES AND LETTERS 165, 171

as a matter of constitutional or political theory, justice, or morality, the rules adopted by it to govern future cases must be respected as constitutional law unless and until they are modified or changed by the Court, by constitutional amendment, or by Congress acting pursuant to its express authority to enforce certain constitutional guarantees.[61]

The Fourteenth Amendment was expressly designed by the Reconstruction Congress to assure that *political*, as well as judicial, remedies would be available to those aggrieved by the exercise of either state power or "the judicial power of the United States." Not only does the Amendment grant to Congress the power to assure that the rights of citizens and others are protected, but the Citizenship Clause also restores power to the states which had been taken from them by the Supreme Court.[62] Thus, when the assertion is that the federal government's definition of a substantive constitutional guarantee is too narrow, the explicit federalism of the First, Ninth and Tenth Amendments remains, true to its original design, as a "structural" protection designed to limit the impact of the federal vision on the people's understanding of their rights.

Since this is, in fact, the implicit claim made by the many commentators who urged, after *Smith*, that Congress and the states set their own respective paths, we return to the problem at hand: How to determine *whose* vision of religious liberty is controlling. *Texas Monthly, Inc. v. Bullock*[63] and *Employment Division v. Smith*[64] provide some important clues.

II. A "STRUCTURAL" EVALUATION OF *TEXAS MONTHLY, INC. V. BULLOCK* AND *EMPLOYMENT DIVISION V. SMITH*

In general, commentators view *Texas Monthly, Inc. v. Bullock*[65] as an "Establishment Clause" case, and *Employment Division v. Smith*[66] as a "Free Exercise Clause" case. This is a bit surprising, since both cases involve judicial review of legislative decisions which either grant or withhold an exemption from an otherwise neutral law of general applicability. The next section views these cases together, through a "structural" lens, to determine what, if anything, can be learned about the Court's view of the structure and substance of the incorporated First Amendment.

A. The Nature of the Legislative Interest

Before turning to a review of the cases, however, it will be useful to take a brief look at the nature of the interest that legislatures have in the preservation of religious liberty. Congressional enactments form the basis for the litigation of most constitutional claims,[67] including those which allege violations of the religious liberty guarantee. State constitutions and statutory law provide an additional source of protection.

(Merwin Roe ed. 1943).

61. *See, e.g.*, U.S. CONST. amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2.

62. *See infra* text accompanying notes 163-80.

63. 489 U.S. 1 (1989).

64. 494 U.S. 872 (1990).

65. 489 U.S. 1 (1989).

66. 494 U.S. 872 (1990).

67. 28 U.S.C. § 1331 (1988); 42 U.S.C. §§ 1983, 1985 (1988).

Notwithstanding the limits that the First and Fourteenth Amendments and the Test Clause impose on their respective powers, Congress and the states have both the power and the duty to assure that the norms embodied in those provisions and their state law counterparts are respected.

Much of the case law and commentary simply assumes that the states are free to apply more "stringent" standards under their own constitutions and laws, provided that the outcome is otherwise consistent with the Court's interpretation of the First Amendment.[68] To the extent that state laws and judicial interpretations are consistent with the norms of equal citizenship embodied in the Fourteenth Amendment,[69] this is as it should be. But this is not the way it is.

In practice, the Establishment Clause is viewed as setting the upper boundary or "ceiling" on accommodation of religion and cooperation with religious believers and institutions, and the Free Exercise Clause is perceived as the "floor," or the minimum level of protection required.[70] In between (the area of "tension" between the two clauses) lies the realm of religious liberty, permissible accommodation, and mandated equality.[71]

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68. What makes a state standard either "broader" or "stricter" than the applicable standard to be applied at the federal level appears to depend upon the nature of the claim asserted. In the "no-aid" context, the view is that the state rule is "stricter" than the federal non-establishment rule, whenever it denies assistance that the United States Supreme Court would permit. Where the assertion is that free exercise rights are at stake, a state standard is "broader" or "more expansive" than its federal counterpart when a state permits assistance or accommodations which the Unite States Supreme Court does not require. *Compare, e.g.*, Witters v. State, 689 P.2d 53 (Wash. 1984), *rev'd sub. nom.* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986), *reaffirmed on state constitutional grounds*, 771 P.2d 1119 (Wash. 1989), *cert. denied*, 493 U.S. 850 (1989) *and* Wheeler v. Barrera, 417 U.S. 402 (1974) *with* Society of Jesus v. Boston Landmarks Comm'n, 564 N.E.2d 571 (Mass. 1990) *and* State v. Hershberger, 462 N.W.2d 393 (Minn. 1990). Viewed from an individual perspective, however, the distinction between a "no-aid" and "free exercise" case has little practical significance. The issue is whether individual freedom or equality interests are recognized. *Compare* Garnett v. Renton Sch. Dist., 772 F. Supp. 531 (W.D. Wash. 1991) (Equal Access Act does not preempt state constitutional provisions which are said "stricter" than the Establishment Clause), *rev'd*, 987 F.2d 641 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 72 (1993) *with* Hoppock v. Twin Falls Sch. Dist., 772 F. Supp. 1160 (D. Idaho 1991) (Equal Access Act has preemptive effect). *See generally* Robert A. Destro, *Religious Freedom During the 1985-1986 Supreme Court Term: Adrift on Troubled Waters*, 6 RELIGIOUS FREEDOM REP. 481 (1986).

69. *See infra* text accompanying notes 144-251.

70. The image of religion surrounded on all sides by the regulatory power of the secular state is so closely akin to Roger Williams' metaphor of "the garden and the wilderness" that it might be mistaken for it. *See* MARK D. HOWE, THE GARDEN AND THE WILDERNESS (1965). Williams, however, was concerned about setting boundaries on state powers that harm or otherwise taint the religious community. The Supreme Court's concern—primarily "excessive entanglement" and "endorsement"—appear to be drawn straight from John Locke, who would probably be quite surprised at the extent to which such analytical constructs have been useful in the Court's attempts to "distinguish exactly the business of civil government from that of religion and . . . settle the just bounds that lie between the one and the other." John Locke, *A Letter Concerning Toleration*, *in* THE BELIEVER AND THE POWERS THAT ARE 78, 80 (John T. Noonan ed., Macmillan 1987).

71. Though their importance in the overall structure of the religious liberty guarantee cannot be doubted, the explicit non-discrimination norms of the Test and Equal Protection Clauses are rarely discussed—even when they are clearly relevant. *See, e.g.*, Hernandez v. Commissioner, 490 U.S. 680 (1989) (rejecting a claim of alleged

Because *Smith* was viewed as knocking out the "floor" from under this edifice, increasing attention has been given to the question of congressional power to enact comprehensive legislation that would "restore" the "floor," either by defining the scope of religious liberty for federal purposes,[72] or by singling out religious liberty for special protection where that approach may be warranted.[73] This presents a problem: Federal control over the substance of individual rights is precisely the situation the framers of the Bill of Rights sought to avoid with (among others) the First, Ninth and Tenth Amendments. The focus, therefore, must shift to the Fourteenth Amendment. Its language, structure and history leave no doubt that it was designed to "federalize" at least some aspects of individual rights, including religious liberty. So what *is* the locus of federal power to protect and define those rights when the states fail to do so? Is it the Congress, the Court, or both?

B. Texas Monthly, Inc. v. Bullock: Navigating the Space Between Scylla and Charybdis[74]

The Texas Monthly is a general circulation magazine devoted to a wide range of issues of interest to readers in the State of Texas. In 1985, it objected to the Texas sales tax exemption for "[p]eriodicals that are published or distributed by a religious faith and that consist wholly of writings sacred to a religious faith."[75] In arguments before the Supreme Court, *The Texas Monthly* advanced two theories to support its claim that the Texas practice was unconstitutional: First, that an exclusive tax exemption for religious publications serves only to promote religion itself, which is prohibited under the Establishment Clause.[76] Second, that the Free Press Clause of the First Amendment

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religious discrimination by the Internal Revenue Service).

72. The structure of RFRA bears witness to this perception. Though there was a clear consensus that the "floor" of the federal edifice should be rebuilt by "restoring" pre-*Smith* standards of review in free exercise cases, there was no consensus with respect to the "ceiling." The Act contains an "exception" which purports to leave unaffected the Court's current jurisprudence under the Establishment Clause. 42 U.S.C. § 2000bb-4 (Supp. V 1993).

73. The power of Congress and the states to provide special protection for the press and electronic media is generally assumed without much discussion. For example, Congress enacted the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1877 (codified at 42 U.S.C. §§ 2000aa to 2000aa-12 (1988)), in response to Zurcher v. Stanford Daily, 436 U.S. 547 (1978). The effect of the statute is to enact special rules which govern investigators seeking documents from the media. 42 U.S.C. § 2000aa(b)(3). *See generally* Richard Rosen, Comment, *A Call For Legislative Response To New York's Narrow Interpretation of the Newspersons' Privilege:* Knight—Ridder Broadcasting Inc. v. Greenberg, 54 BROOK. L. REV. 285 (1988); Sam Ervin, *In Pursuit of a Press Privilege*, 11 HARV. J. LEGIS. 233, 274 (1974). A similar approach was taken with respect to church documents when Congress enacted the Church Audit Procedures Act of 1984, Pub. L. No. 98-369, 98 Stat. 1034 (codified at 26 U.S.C. § 7611 (1994)). *See also* 26 U.S.C. § 3127 (providing special Social Security tax exemption for employers and their employees where both are members of religious faiths opposed to participation in Social Security Act programs).

74. *See infra* note 253 and accompanying text.

75. *See* TEX. TAX CODE ANN. § 151.312 (West 1982) (amended 1989).

76. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 11 (1989).

prohibits tax exemptions which discriminate on the basis of a publication's content.

The State of Texas defended the tax exemption by arguing that the law was a reasonable accommodation of religious efforts to spread belief and practice which could be justified under the Free Exercise Clause. Though only fifteen states at the time had express sales tax exemptions like that of Texas,[77] the practice of exempting religious institutions from general taxation schemes[78] remains widespread and antedates the Constitution itself.[79] The rule announced in the case would therefore have wide application beyond the immediate parties to this particular controversy.

The case thus presented the Court with an opportunity to begin the task of reconciling what appear to be at least three seemingly divergent lines of constitutional authority: the Speech and Press Clause, the Establishment Clause, and the Free Exercise Clause.[80] But unlike the Texas Court of Appeals, which took up the challenge and rejected *The Texas Monthly's* claims,[81] the United States Supreme Court could not even agree on an approach.

The Justices split into four factions. The plurality was comprised of three groups: Justices Brennan, Marshall, and Stevens; Justices O'Connor and Blackmun; and Justice White. The dissenters were Chief Justice Rehnquist, Justices Scalia, and Kennedy. The fundamental nature of the disagreements within the Court are best illustrated in structural terms; for no matter what the Court decided, it could not avoid taking an explicit position on the relationship among the clauses of the First and Fourteenth Amendments, and the relative competence of Congress, the states and the Court in resolving apparent conflicts.

1. Construing Constitutional Norms: Should the Analysis of First Amendment Issues be Categorical or Integral?—From a structural perspective, the three opinions in the plurality have much in common. The defense of the Texas tax exemption rested on the argument that the First Amendment, *taken as a whole*, permits broadly-based religious

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77. *See id.* at 30 (Scalia, J., dissenting). At least fifteen of the forty-five states that have sales and use taxes have express exemptions for sales of religious literature. In practice, even more states exempt sales of religious goods and goods used by religious organizations from certain taxes of general applicability.

78. This would include income, sales, use, real and personal property, motor vehicle, excise, and certain types of employment taxes. Neither the United States nor any of the states has adopted a value-added tax (VAT).

79. For a summary of the history of religious tax exemptions in the pre- and early constitutional period, see Walz v. Tax Comm'n, 397 U.S. 664 (1970).

80. Depending on the construction given these provisions, there may be Equal Protection Clause issues as well. At this point an extended discussion of the topic would be premature.

81. Utilizing the three-part test for Establishment Clause analysis set out in Lemon v. Kurtzman, 403 U.S. 602 (1971), the Texas Court of Appeals held that the sales tax exemption had the secular purpose of preserving the separation of church and state; that it did not have the primary effect of advancing or inhibiting religion because it permitted them to be independent of government support or sanction; that the exemption was, in fact, a neutral policy with respect to religious publications, notwithstanding the lack of exemptions for non-religious publications, and that the exemption actually minimized state entanglement with religion because it eliminated the necessity for government oversight of the content of religious publications. *Texas Monthly*, 489 U.S. at 6-7 (citing Texas Monthly, Inc. v. Bullock, 731 S.W.2d 160, 169 (Tex. Ct. App. 1987)). It also rejected the free press claim on the ground that a prior decision of the United States Supreme Court, Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221 (1987), should be read as prohibiting only taxes that are imposed solely on the press or targeted at a small group within the press. *Texas Monthly*, 489 U.S. at 7.

exemptions to laws of general applicability.[82] All six Justices in the plurality rejected that approach in favor of the Court's traditional "categorical" approach to First Amendment issues, and it is on this point, more so than any other, that they parted company with the dissenters.

For Justices Scalia, Kennedy, and Chief Justice Rehnquist, the disturbing aspect of the plurality's reasoning lay not in the breadth or narrowness of its approach to any specific factual question (such as the constitutionality of sales tax exemptions limited to religious publications), but in the "irrationality" of a constitutional analysis that makes no attempt to resolve inconsistencies among governing constitutional norms. Justice Scalia summarized the dissenters' position as follows:

> Today's decision introduces a new strain of irrationality in our Religion Clause jurisprudence. I have no idea how to reconcile it with *Zorach [v. Clauson]* (which seems a much harder case of accommodation), with *Walz* [*v. Tax Commission*] (which seems precisely in point), and with *Corporation of Presiding Bishop* [*v. Amos*] (on which the ink is hardly dry). It is not right—it is not constitutionally healthy—that this Court should feel authorized to refashion anew our civil society's relationship with religion, adopting a theory of church and state that is contradicted by current practice, tradition, and even our current case law.[83]

In the dissenters' view, the resolution of the tension among the clauses of the First Amendment is to be accomplished by interpreting the rules organically in light of their intended purposes and prior interpretation.[84] And thus, "[i]f the exemption comes so close

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82. *Texas Monthly*, 489 U.S. at 17. Justice Brennan's opinion summarized Texas' defense as follows:

> In defense of its sales tax exemption for religious publications, Texas claims that it has a compelling interest in avoiding violations of the Free Exercise and Establishment Clauses, and that the exemption serves that end. Without such an exemption, Texas contends, its sales tax might trammel free exercise rights, as did the flat license tax this Court struck down as applied to proselytizing by Jehovah's Witnesses in *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). In addition, Texas argues that an exemption for religious publications neither advances nor inhibits religion, as required by the Establishment Clause, and that its elimination would entangle church and state to a greater degree than the exemption itself.

Texas Monthly, 489 U.S. at 17.

83. *Id.* at 45 (Scalia, J., dissenting).

84. *Id.* at 44-45. Justice Scalia wrote:

> If the purpose of accommodating religion can support action that might otherwise violate the Establishment Clause, I see no reason why it does not also support action that might otherwise violate the Press Clause or the Speech Clause. To hold otherwise would be to narrow the accommodation principle enormously, leaving it applicable to only nonexpressive religious worship. I do not think that is the law. Just as the Constitution sometimes requires accommodation of religious expression despite not only the Establishment Clause but also the Speech and Press Clauses, so also it sometimes permits accommodation despite all those Clauses. Such accommodation is unavoidably content based—because the Freedom of Religion Clause is content based.

Id.

to being a constitutionally required accommodation, there is no doubt that it is at least a permissible one" under *both* the Establishment and the Speech and Press Clauses.[85]

From a "structural" perspective, it is obvious that there is far more going on here than a simple dispute over the constitutionality of a sales tax exemption limited to religious publications. This dispute concerns, among other things:

1) the legitimacy of "categorical" analysis in the First Amendment context;[86]

2) the role played by categorization when the Court utilizes mutually exclusive categories within a specific clause or amendment to describe what can be argued to be variants of the same organic liberty;

3) the right and power of a legislature to relieve the burdens imposed on religious practice by specific, generally-applicable laws (e.g., sales taxes);

4) the right and power of the judiciary to relieve such burdens on a case-by-case basis; and

5) the "fairness" of such exemptions when viewed from the perspective of those ineligible to claim them.

The implications of these questions can be brought into clearer focus by examining the role characterization and categorical analysis played in the plurality's decision to strike the Texas sales tax exemption. All six Justices in the plurality employed categorical analysis, but each characterized the issue to be decided in strikingly different ways.

2. *Characterization and Categorical Analysis: Which Clause Controls?*—There are several ways in which the issues presented in *Texas Monthly* can be characterized. If viewed purely as a "First Amendment case," the available categories for analysis are speech and press, religion (non-establishment and free exercise), assembly (including association), and petition for redress. If, on the other hand, the case were viewed as arising under the Fourteenth Amendment (which "incorporates" the First), the options would also include liberty (including substantive due process and personal autonomy), equal protection, and "hybrid" (i.e., "all of the above"). Interestingly, *none* of the nine Justices discussed the Fourteenth Amendment.

a. Establishment or free exercise?—Five Justices (Brennan, Marshall, Blackmun, O'Connor, and Stevens) chose "religion" as the controlling category, even though the case also contained strong "speech and press" elements. Once categorized as a "religion case," the jurisprudence of the Religion Clause itself required another characterization—choice of the controlling sub-category, and hence, of the controlling norm: non-establishment or

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85. *Id.* at 42. *Accord id.* at 28 (Blackmun, J., concurring) ("Justice Scalia rightly points out . . . that the Free Exercise and Establishment Clauses often appear like Scylla and Charybdis, leaving a State little room to maneuver between them.").

86. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992). There are a number of across-the-board questions which can be raised concerning the legitimacy of "categorical analysis," not the least of which is how to reconcile a more integrated approach with existing case law. Discussion of these topics is largely beyond the scope of this Article.

free exercise.

Texas Monthly was a difficult case because Texas argued that the tax exemption was justified as an accommodation of the religious publishers' rights under the Free Exercise Clause. *The Texas Monthly* argued that, whatever the result under Religion Clause analysis, the exemption was forbidden by the Speech and Press Clause. The Court thus faced what might be called a "true categorical conflict;"[87] one norm or the other would have to yield. It was on the question, "which one?," that the three opinions in the plurality parted company.

Justice Brennan announced the judgment of the Court in an opinion joined by Justices Marshall and Stevens. Its sole focus was the relationship between the Establishment Clause claims made by *The Texas Monthly* and the free exercise interests the State of Texas sought to protect by the sales tax exemption.[88] No attempt was made to discuss the free speech implications of the controversy,[89] to strike a balance between free exercise and the non-establishment concerns, or to reconcile the apparently disparate requirements of the three constitutional norms alleged by the parties to be controlling.

Justice Blackmun, joined by Justice O'Connor, dealt at some length with the relationship among the three lines of authority and the conceptual difficulty of the structural task of reconciling them; yet, he was troubled by the substantive implications of resolving them in the manner suggested by either Justice Brennan (limiting the scope of the free exercise norm) or Justice Scalia (limiting the categorical nature of both non-establishment and speech analysis). Justice Blackmun suggested that it might be wiser for the Court to "avoid most of these difficulties with a narrow resolution of the case."[90]

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87. Apologies to the late Professor Brainerd Currie, who coined the term "true conflict" to describe a choice-of-law problem in which the interests or policies of two jurisdictions are irreconcilable. In such a situation, one will, of necessity, be subordinated to the other. In that situation, it is incumbent on the court which is to make the choice to attempt "a more moderate and restrained interpretation of the policy or interest of one state or the other," in an attempt to avoid the conflict. Brainerd Currie, *Comments on* Babcock v. Jackson, 63 COLUM. L. REV. 1233, 1242-43 (1953), *quoted in* LEAH BRILMAYER & JAMES MARTIN, CONFLICT OF LAWS 222-35 (3d ed., 1990).

88. *Texas Monthly*, 489 U.S. at 15.

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.

Id. (quoting Corporation of Presiding Bishop v. Amos, 483 U.S. 327, 348 (1987)) (citation omitted).

89. *Id.* at 5. "We hold that, when confined exclusively to publications advancing the tenets of a religious faith, the exemption runs afoul of the Establishment Clause; accordingly, we need not reach the question whether it contravenes the Free Press Clause as well." *Id.*

90. *Id.* at 28 (Blackmun, J., concurring).

> I believe we can avoid most of these difficulties with a narrow resolution of the case before us. We need not decide today the extent to which the Free Exercise Clause requires a tax exemption for the sale of religious literature by a religious organization; in other words, defining the ultimate scope of *Follett* and *Murdock* may be left for another day. We need decide here only whether a tax exemption *limited to* the sale of religious literature by religious organizations violates the Establishment Clause.

The disagreement among these five Justices was focused on whether it was possible (or desirable) to avoid a head-on collision between the Establishment and Free Exercise Clauses. Justices Brennan, Stevens, and Marshall saw a categorical conflict and resolved it by holding that the Establishment Clause limits the permissible scope of Free Exercise Clause claims to cases of empirically demonstrable, "concrete," *individual* need.

> "It is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights." In this case, the State has adduced no evidence that the payment of a sales tax by subscribers to religious periodicals or purchasers of religious books would offend their religious beliefs or inhibit religious activity. The State therefore cannot claim persuasively that its tax exemption is compelled by the Free Exercise Clause in even a single instance, let alone in every case. No concrete need to accommodate religious activity has been shown.[91]

This, however, was the precise categorical conflict—and the result—that Justices Blackmun and O'Connor sought to avoid when they suggested that the Court consider a theory permitting a "narrow[er] resolution of the case."[92] Because they agreed with Justice Brennan that the ultimate question to be decided was "whether a tax exemption limited to the sale of religious literature by religious organizations violates the Establishment Clause,"[93] the only way to avoid the conflict was to reserve for decision in a later case "the extent to which the Free Exercise Clause *requires* a tax exemption for the sale of religious literature by a religious organization."[94] This characterization of the issues would have preserved the possibility that the Free Exercise Clause might be construed to require a "religious exemption" in a very limited class of cases. Such a characterization of the "reserved" free exercise issue would also enable the Court to characterize the non-establishment issue before them as one of discretionary financial assistance to religion, unsullied by free exercise concerns.

By focusing on *Follet v. McCormick*[95] and *Murdock v. Pennsylvania*,[96] and deferring decision on "the ultimate scope of [those cases] . . . [to] another day,"[97] Justices Blackmun and O'Connor unwittingly underscored the futility of their attempt to develop "narrowing" characterizations. *Murdock* makes it clear that the activity involved—sale and distribution of religious tracts—is "a combination of both" preaching (which is both "pure" speech and religion) and the distribution of literature (which is both religion and press). As a "hybrid" activity (to borrow a phrase from *Smith*[98]), "[i]t has the same claim to protection

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Id.

91. *Id.* at 18 (citation omitted).

92. *Id.* at 28.

93. *Id.* Justice Brennan's formulation focused on whether sales tax exemptions "confined exclusively to publications advancing the tenets of a religious faith, . . . run[] afoul of the Establishment Clause." *Id.* at 5.

94. *Id.* at 28 (Blackmun, J., concurring) (emphasis added).

95. 321 U.S. 573 (1944).

96. 319 U.S. 105 (1943).

97. *Texas Monthly*, 489 U.S. at 28.

98. Employment Div. v. Smith, 494 U.S. 872, 882 (1990).

as the more orthodox and conventional exercises of religion" as well as "the same claim as the others to the guarantees of freedom of speech and freedom of the press."[99] As a result, the only way to "narrow" *Texas Monthly* in the manner suggested by Justices Blackmun and O'Connor is to isolate its free exercise and speech components from those which sound in non-establishment. This could only have been accomplished by focusing on the action of the state (granting a tax exemption) *without regard to its intended purpose.*[100]

Viewed from an "establishment only" perspective, it is possible to characterize the case as one involving only a tax exemption limited to religious publications. The problem with such a device is its obviousness. Current standards under *both* components of the Religion Clause[101] and the Equal Protection Clause[102] require an examination of the policy's intended purpose. Under the formulation suggested by Justices Blackmun and O'Connor in *Texas Monthly*, however, an inquiry into both the purpose and effect of the tax exemption on the interests of others—most notably the religious groups which will lose their exemption and the press organizations which are ineligible to claim it—does not appear to be necessary.[103] The *individual* liberty interests at stake, including free exercise, free press, and, arguably, equal protection, simply drop out of the picture. Small wonder that none of the other seven Justices viewed the approach as a viable one.

b. Religion or speech and press?—Justice White also employed categorical analysis to strike the Texas tax exemption. Ignoring the Religion Clause altogether, he held that the tax exemption was invalid under the Speech and Press Clause because it was content-based.[104] Though he did not elaborate further, it is clear from his vote to strike the exemption that he rejected Texas' claim that content-based discrimination can be justified on free exercise grounds. For Justice White, the "categorical" conflict was between the norms that guarantee free exercise and those which guarantee free speech and press.[105]

3. The Structural Implications of Categorical Analysis.—

a. What is the judicial role?—Perhaps the most important information contained in the four opinions in *Texas Monthly* is an insight into the Justices' views concerning the Court's role when faced with controversies involving alleged conflict among the clauses of the incorporated First Amendment. The position of Justices Scalia, Kennedy, and Chief Justice Rehnquist is fairly clear on this point: the Court's role is limited to interpretation. It must read the Constitution as an organic whole and avoid the temptation to utilize categorical analysis in a manner that permits it to fine-tune the public policy which governs "our civil society's relationship with religion."[106]

Justice White appears to view the substantive norms contained in the First

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99. *Murdock*, 319 U.S. at 109.

100. For a discussion of the relevance of "intent" or "purpose" to First Amendment litigation, see *infra* notes 241-46 and accompanying text.

101. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993); Lemon v. Kurtzman, 403 U.S. 602 (1971) (prongs 1 and 2 of the "three pronged test").

102. Washington v. Davis, 426 U.S. 229 (1976).

103. This view appears to be at odds with the positions taken by both Justices in *Smith.*

104. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 26 (1989) (White, J., concurring).

105. *Cf.* Widmar v. Vincent, 454 U.S. 263, 283-84 (1981) (White, J., dissenting).

106. *Texas Monthly*, 489 U.S. at 45.

Amendment as discrete, categorical rules that determine the legitimacy or illegitimacy of governmental conduct.[107] His opinion was short because his view of the constitutional norm governing "speech cases" is clear: *laws may not discriminate on the basis of the content of "protected" speech.*[108] Because the category chosen (e.g., "protected," "unprotected," speech, religion) drives the analysis,[109] his vision of the Court's role in First Amendment cases can only be discerned on a category-by-category basis. In Religion Clause cases, he has made it clear that he favors a relatively inactive judicial role.[110] With respect to virtually all cases stating a claim under the Speech and Press Clause (i.e., those involving "protected" speech), the role is an active one.[111]

Justices Brennan, Marshall, Stevens, Blackmun, and O'Connor also take a categorical approach to the First Amendment. After *Texas Monthly*, it appears that their view of the relationship of the Establishment Clause to the Free Exercise Clause is governed by the following norm: *no aid or accommodation for religion is permitted by the Establishment Clause unless it is judicially determined to be required by the Free Exercise Clause.* Because they view the Establishment and Free Exercise Clauses as being in "tension" with one another, it follows that the judicial role is an active one across-the-board. The highly categorical "three-pronged test" enunciated in *Lemon v. Kurtzman*,[112] and modified over the years by Justice O'Connor's "endorsement" analysis,[113] provides clearly articulated rules which set the boundaries for permissible governmental accommodation of religious believers and institutions—and thus, the outer limits of the Free Exercise Clause itself.

Their approach on free exercise questions is only slightly less categorical. Here, however, the focus for Justices Brennan, Marshall, Blackmun, and O'Connor appears to

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107. In R.A.V. v. City of St. Paul, 505 U.S. 377, 400 (1992) (White, J., concurring), Justice White, with whom Justices Blackmun and O'Connor joined, stated that "[t]he categorical approach is a firmly entrenched part of our First Amendment jurisprudence." *See also id.* at 421-23 (Stevens, J., concurring).

108. *Id.* at 399.

109. The "categorical approach" suggested by these Justices is not unlike the practice of characterization in the choice of law process. Because the *Restatement (First) of Conflict of Laws* resolved conflicts by reference to a set of jurisdiction selecting rules, it was necessary to determine the category (torts, contract, etc.) under which the particular choice-of-law problem should be solved. *See generally* DAVID H. VERNON ET AL., CONFLICT OF LAWS: CASES MATERIALS AND PROBLEMS 247-70 (1990). "Modern" choice of law theory, by contrast, rejects a "categorical approach" in favor of what might loosely be termed a "multi-factor interests analysis," which seeks to determine the nature of the sovereign interests involved, and the degree to which they might be affected by the factual and legal setting of a particular case. The Court's approach to deciding First Amendment cases appears to mirror the hybrid approach to modern choice of law theory taken by the *Restatement (Second) of Conflict of Laws* in cases involving the selective incorporation of the Bill of Rights, and a "pure" interests analysis of the sort exemplified by Professor Leflar's "Better Rule" approach when it decides cases under the rubric of substantive due process.

110. Widmar v. Vincent, 454 U.S. 263, 283-84 (1981) (White, J., dissenting) (taking issue with the Court's characterization of prayer as "religious speech" and recounting his problem with the Court's jurisprudence under the Religion Clause).

111. *R.A.V.*, 505 U.S. at 399 (White, J., concurring) (applying a similar "categorical" approach to "hate speech").

112. 403 U.S. 602, 614 (1971).

113. *See* County of Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnelly, 465 U.S. 668 (1984).

be the "fundamental" nature of the right and the "minority" status of the individual raising the religious liberty claim in the political community that made the decision at issue.[114] These questions are, by their very nature, fact-sensitive, and presuppose a searching judicial inquiry.

The difficulty of the structural problems inherent in categorical analysis troubled Justices Blackmun and O'Connor in *Texas Monthly*.[115] Though they rejected Justice Brennan's overt subordination of the Free Exercise Clause to non-establishment concerns, they were also concerned that Justice Scalia's approach tipped the balance too far in the other direction:

> The Texas statute at issue touches upon values that underlie three different clauses of the First Amendment: the Free Exercise Clause, the Establishment Clause, and the Press Clause. As indicated by the number of opinions issued in this case today, harmonizing these several values is not an easy task.

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114. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 909-19 (1990) (Blackmun, J., dissenting); *id.* at 902-03 (O'Connor, J., concurring); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (Marshall, J., concurring); Goldman v. Weinberger, 475 U.S. 503, 513 (1986) (Brennan, J., dissenting).

Justice O'Connor's "endorsement" analysis focuses almost exclusively on the impact of perceived endorsement of religion on the most discrete and insular members of the political community, but stops short of creating what might be termed a "dissenter's veto" by imposing an "objective observer" standard. It remains unclear, however, just what specific criteria the "objective observer" is permitted to take into account. Justice Kennedy, for example, has noted that "[a]lthough Justice O'Connor disavows Justice Blackmun's suggestion that the minority or majority status of a religion is relevant to the question whether government recognition constitutes a forbidden endorsement, . . . the very nature of the endorsement test, with its emphasis on the feelings of the objective observer, easily lends itself to this type of inquiry." *ACLU*, 492 U.S. at 677 (Kennedy, J., concurring in part and dissenting in part). Justice O'Connor herself has indicated that questions of this sort require sensitive judicial inquiries into social fact. *See* Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 345, 348 (1987) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring). The minority or majority status of the religion would certainly be relevant to such an inquiry, even if, in the end, it was not determinative.

Alone among the Justices, Justice Stevens does not appear to be particularly sympathetic to the claims of religious minorities. Not only has he consistently questioned both the under-inclusiveness and over-inclusiveness of the Court's definition of the term "minority" (*see* Fullilove v. Klutznick, 448 U.S. 448, 552-53 & n.30 (1980)), he has made it clear that government endorsement of religion, or lack of neutrality when faced with "partisan ideology" (which, for him, includes religion), should be the Court's primary concern. *See Mergens*, 496 U.S. at 280-81 & 282 n.16 (Stevens, J., dissenting); *ACLU*, 492 U.S. at 649 (Stevens, J., concurring). On occasion this may mean no accommodation for religion at all. *See Goldman*, 475 U.S. at 513 & n.6 (1986) (Stevens, J., concurring).

115. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 28 (1989) (Blackmun, J., concurring) "Accordingly, *whether or not Follett and Murdock prohibit taxing the sale of religious literature*, the Establishment Clause prohibits a tax exemption limited to the sale of religious literature." *Id.* (emphasis added).

To acknowledge that a potential conflict between and among several constitutional provisions might exist, and yet hold that one of these provisions is controlling, without explaining why, is not "analysis." More importantly, it is not organic judicial review of the sort contemplated in either Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), or McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

> . . . .
>
> It perhaps is fairly easy to reconcile the Free Exercise and Press Clause values. . . .
>
> I find it more difficult to reconcile the Free Exercise and Establishment Clause values. . . .
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> Justice Brennan's opinion . . . would resolve the tension simply by subordinating the Free Exercise value, even, it seems to me, at the expense of longstanding precedents. . . . Justice Scalia's opinion, conversely, would subordinate the Establishment Clause value.[116]

The relationship of "structure" to interpretive substance could not be more clearly expressed, but the tendency to focus on the interpretive questions obscures consideration of those which relate to the power of the Court. The interpretive problem presented in *Texas Monthly* is indeed a difficult one, but it is a difficulty largely of the Court's own making. The Court's adoption of a categorical approach is a logical outcome of its decision to incorporate the Bill of Rights "selectively,"[117] but it would be a stretch to assert that such an approach is compelled by a reading of the constitutional text. The Court simply made a series of policy choices, and glossed over many of the structural and interpretive difficulties inherent in these clauses.

The Religion Clause is perhaps the clearest case in point. There was no tension between the Free Exercise and Establishment Clauses before *Cantwell v. Connecticut*[118] because there were few, if any, occasions to "balance" them against one another. The Court's categorical approach of applying two express limits on congressional authority to the states via the Due Process Clause of the Fourteenth Amendment lies at the root of the interpretive difficulty. Had Justices Blackmun and O'Connor pursued their line of reasoning any further, they might have turned to a discussion of what the "values" which animate each of the incorporated provisions *are*. Only then would it be truly possible for the public to determine why "it is fairly easy to reconcile the Free Exercise and Press Clause values," but it is much more difficult for a judge to reconcile the values of the Establishment and Press Clauses.

Texas Monthly is the logical outcome of an approach to religious liberty issues that views the Court as the one branch of government which possesses the constitutional authority 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."[119] There is an inherent tension between the political resolutions reached in disputes between the state and

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116. *Texas Monthly*, 489 U.S. at 26-27 (Blackmun, J., concurring).

117. Mary Glendon and Raul Yanes have pointed 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, 302 U.S. 319 (1937). Glendon & Yanes, *supra* note 17, at 479. By rejecting wholesale incorporation of the entire Bill of Rights, *Palko* necessarily adopts the view that there is "an implied hierarchy of constitutional values." *Id.* 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." *Id.*

118. 310 U.S. 296 (1940).

119. Locke, *supra* note 70, at 80.

believers over the two centuries of this nation's existence and the content of the norms the Court has developed. Justice Blackmun, with whom Justice O'Connor joined, clearly recognized that fact in his opinion; and it unquestionably affected his conclusion concerning the rule to be applied in the case. Yet he sought to avoid resolving it because long-standing precedent (and, hence, the Court's credibility) might be called into question as a result. Therefore, even though he agreed with Chief Justice Rehnquist, and Justices Scalia, and Kennedy that a more organic approach to constitutional interpretation is necessary, he refused to embark on the process of applying it.[120]

By contrast, neither Justice White nor Justice Brennan appeared to be concerned about the tension between structure and content. Though his opinion is silent on the topic, Justice White's vote to strike the tax exemption leaves little doubt that he did not view the Free Exercise Clause as a justification for content-based discrimination.[121] The same is true with respect to the opinion of Justice Brennan, which simply assumes that the Establishment Clause is a structural limit on the reach of the Free Exercise Clause.[122] Their "categorical" logic is both clear and inexorable.

b. What is the legislative role?—The significant point for this writer is that all of the opinions (including that of Justice Scalia) ignore the impact of the Fourteenth Amendment. Not only is the Fourteenth Amendment the source of the Court's power to incorporate the Bill of Rights and apply it to the states, but it is also an important source of *legislative* authority to protect the rights of citizens and others within the jurisdiction of the United States.[123]

None of the six Justices accepting the categorical approach in *Texas Monthly* make any attempt to explain why a categorical analysis is either a necessary or proper approach to defining the "liberty" protected by the Due Process Clause of the Fourteenth Amendment if the result will be a "true conflict" among the clauses of the incorporated First Amendment. A "more moderate and restrained approach"[124] to constitutional interpretation is required if Congress and the state legislatures are to have any meaningful authority of their own. For this reason, it is the obligation of the Court to make sense of these overlapping protections of individual liberty.

If, as the Court holds in *Texas Monthly*, the Establishment Clause limits permissible

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120. For an illuminating discussion of the role of stare decisis in such circumstances, see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247-50 (1993) (Souter, J., concurring in part and concurring in the judgment); Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

121. Justice White does, however, appear to view the Establishment Clause as a justification for content-based discrimination against speech which can also be characterized as "prayer." *See* Widmar v. Vincent, 454 U.S. 263, 283-84 (1981) (White, J., dissenting).

122. Justices Brennan and Marshall also appear to view the Establishment Clause as a structural limit on freedom of speech. Board of Educ. v. Mergens, 496 U.S. 226, 264 (1990) (Marshall, J., concurring) (noting that the Court had "addressed at length the potential conflict between toleration and endorsement of religious speech in *Widmar*"). This position has been echoed in the recent opinions of Justices Souter, Breyer, Stevens, and Ginsburg. *See* Rosenberger v. Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510, 2535 (1995) (Souter, J., dissenting, joined by Breyer, Stevens, JJ.); Capitol Square Review and Advisory Bd. v. Pinette, 115 S. Ct. 2440, 2475 (1995) (Ginsburg, J., dissenting); *id.* at 2469 (Stevens, J., dissenting).

123. See *infra* notes 164-70 and accompanying text.

124. *See supra* note 86.

free exercise claims to those in which a claimant can prove to the satisfaction of a judge a "concrete need to accommodate religious activity," the Court has struck an important interpretive and structural balance which tips the power to control the content of religious liberty policy to the judicial department. After *Texas Monthly*, judges, rather than legislatures, decide how the substantive balance should be struck between and among interests which might loosely be described as those "concerned about religion" and those which are "concerned about speech and press."[125] Why this balance is struck with respect to religion and not, for example, with respect to speech or race is neither explained nor defended.[126] Nor is any attention given to the important (and practical) vagueness problems inherent in its own formulations. Just what kinds of needs the Court might consider to be "concrete" (enough to pass constitutional muster) is anyone's guess.

The Court's categorical approach to the incorporation and interpretation of the religious liberty norms of the First Amendment gives little, if any, guidance whatsoever to lower court judges or administrators on how particular balances should be struck. Terms such as "concrete need" and "sensible balance" confer immense discretion on Article III judges—a discretion which would not be tolerated in the First Amendment context for anyone else were the issue one of freedom of speech or the press. The language and history of the First and Fourteenth Amendments make it doubtful that this was the power allocation Congress and the state legislatures intended when these Amendments were ratified.

If the Court has identified both freedom of the press and freedom of religion as rights "implicit in the concept of ordered liberty," and if the Court alone is empowered by the Due Process Clause of the Fourteenth Amendment to strike unreviewable balances between these rights (which is certainly debatable),[127] the "province and duty of the judicial department to say what the law is"[128] necessarily includes the responsibility to minimize interpretative inconsistency by construing the Constitution as an organic whole. Just as Article VI requires the states, Congress, and the executive branch to acknowledge (and respect) relevant text and precedent as they formulate policy (or plead their respective cases), so too must the Court.[129] When there appears to be an irreconcilable conflict, it is the duty of the Court to resolve it in a manner consistent with the view that it is a constitution and not a code that the Court is expounding.

c. Employment Division v. Smith: Whither free exercise?—If viewed from a structural perspective, *Employment Division v. Smith* is, in many respects, the mirror image of *Texas Monthly, Inc. v. Bullock*. The Free Exercise Clause figures prominently in both cases and the assertion is that the values it protects should be taken into account in the administration of laws of general applicability. Yet, only *Smith* is formally

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125. These interests overlap in significant ways, and I do not mean by the characterization chosen in the text to suggest that they are necessarily at odds.

126. *Cf.* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

127. *See infra* text accompanying notes 144-59.

128. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

129. Alexander Hamilton supplied the most compelling reason for the rule: "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them . . . ." THE FEDERALIST No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

characterized as a "free exercise" case, even though the structural and interpretive questions which lie at the heart of both cases are closely related.

The commentary critical of *Smith* has primarily focused on the interpretive question of whether the command of the Free Exercise Clause was correctly construed.[130] However, the structural question: "On whom does the Constitution confer the power to create, and enforce, 'religious exemptions?'" is either not discussed, or it is glossed over in a rather cursory fashion. For present purposes, this is the structural question that is important. On what division of government *does* the Constitution confer the power to grant, and enforce, "religious exemptions" from laws of general applicability? In *Texas Monthly*, a majority of the United States Supreme Court wrote that the answer is generally, "the Court." In *Smith*, the majority indicates that the answer is, at least in certain cases, "the legislature."

(i) Characterization and the facts of Smith.—Because there are several ways in which to characterize the legal issue before the Court in *Employment Division v. Smith*, it is useful to recount the relevant facts before exploring the manner in which the case should be characterized.

Alfred Smith and Galen Black were drug and alcohol counselors employed by a private, nonprofit substance abuse treatment organization called "ADAPT." Both had former drug and alcohol dependencies, and in accordance with its treatment philosophy, ADAPT required its recovering counselors to agree to abstain from alcohol and non-prescription drugs as a condition of employment. Smith and Black did so, notwithstanding their membership in the Native American Church.

When ADAPT learned that Smith and Black had, on one occasion, used a small amount of peyote for sacramental purposes during a Native American religious ceremony, it fired them. In response, Smith and Black filed claims for unemployment benefits and a charge of religious discrimination under Title VII of the Civil Rights Act of 1964.[131] Notwithstanding the religious nature of the peyote use, the unemployment claims were rejected by the Oregon Employment Division on the grounds that the use of peyote was work-related misconduct. This decision was affirmed by the United States Supreme Court. The Title VII claims, on the other hand, were successfully pursued by the United States Equal Employment Opportunity Commission, and resulted in the entry of a federal consent decree, the terms of which provided that Smith and Black were to be rehired and that ADAPT would no longer consider the religious use of peyote by Native American Church members to be work-related misconduct.[132]

Given these facts, the case may be characterized in several plausible ways under federal statutory and constitutional law:

1) An individual rights case, insofar as the employer and the State of Oregon interfered with the privacy and liberty of Messrs. Smith and Black.

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130. *See, e.g.*, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247-50 (1993).

131. 42 U.S.C. § 2000e-2 (1988).

132. The federal consent decree is reprinted in Appendix A to Respondents' Brief in Opposition to Petition for Writ of Certiorari, Employment Div. v. Smith, 489 U.S. 1077 (1989) (No. 88-1213).

2) A religious liberty case, to the extent that the policies of the employer and the State of Oregon intentionally interfered with, or inadvertently placed burdens upon, the religious beliefs or practices of Messrs. Smith and Black.

3) A Free Exercise Clause case, insofar as the application of the unemployment compensation policies of the State of Oregon would inhibit sacramental use of peyote by members of the Native American Church.

4) An Equal Protection Clause case, to the extent that it could be proven that the State of Oregon's refusal to accommodate the use of peyote in Native American religious church services was a manifestation of an invidiously discriminatory intent to deprive Native Americans of equal treatment under the law.

5) An Establishment Clause or religious discrimination case, to the extent that the State of Oregon was not even-handed in either the letter or the application of its civil and criminal laws to various classes of religious believers; specifically between those eligible to receive special exemptions because their conduct was religious in character or motivation, and those whose conduct was not. This was the situation in *Texas Monthly*, and it was raised, albeit late in the proceedings, by Messrs. Smith and Black.

6) A religious discrimination in employment case, insofar as ADAPT failed to comply with Title VII's requirement that employers "reasonably accommodate" the religious needs of their employees, or singled out adherents of the Native American Church for differential treatment.

7) An American Indian religious liberty case, to the extent that federal law governing American Indians is either relevant or controlling.

8) A criminal law matter, to the extent that the behavior at issue (use of peyote, regardless of the circumstances) is a criminal offense under Oregon law.

9) A separation of powers and federalism case, to the extent that the issue to be decided is one of deciding *which* division of government shall strike the balance between individual religious liberty interests and the community's interest in the uniform enforcement and application of laws of general applicability.

Based on the issues presented, the factual setting in *Smith* presented far more than a Free Exercise Clause question. It could just as easily (and plausibly) have been characterized in any of the terms described above. The present question is how the appropriate characterization should be chosen.

(ii) Characterizing the constitutional issues presented in Smith.—Assuming, for present purposes, that it is preferable to avoid constitutional issues when possible, the analysis should begin with any relevant statutory provisions which would govern its outcome. To the extent that the underlying statute is valid, such an approach would

transform a case like *Smith* from a "First Amendment" case into a statutory one. Two statutes were available which would have served this purpose: Title VII of the Civil Rights Act of 1964, which governs the question of termination and backpay, and the American Indian Religious Freedom Act (AIRFA).[133]

Because Messrs. Smith and Black were reinstated and awarded backpay under Title VII, those aspects of their religious liberty interests were fully vindicated by a statutory remedy. The only remaining religious liberty issue left for the Court to decide in *Smith* was the power of the State of Oregon to deny unemployment compensation for the time they were without jobs. Thus, for present purposes, the issue is whether the constitutional issue could be characterized as a statutory one.

AIRFA does not speak directly to the issue. It provides that:

> [I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. [134]

Given what appears to be a series of unequivocal congressional statements that native people shall be permitted, among other things, "access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites," it could be argued that preemption analysis would have been appropriate. Congress had enacted a series of laws that, when read together, enunciated a policy which addressed the issue of peyote in "ceremonials and traditional rites."[135] The Supreme Court, however,

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133. 42 U.S.C. § 1996 (1988).

134. *Id.* The Act further provided that:

> The President [shall] direct the various Federal departments, agencies, and other instrumentalities responsible for administering relevant laws to evaluate their policies and procedures in consultation with native traditional religious leaders to determine changes necessary to preserve Native American religious cultural rights and practices and report back to Congress 12 months after Aug. 11, 1978.

Id. note (Federal Implementation of Protective and Preservation Functions Relating to Native American Religious Cultural Rights and Practices; Presidential Report to Congress). This report was released in August 1979. *See* FEDERAL AGENCIES TASK FORCE, U.S. DEP'T OF INTERIOR, PUB. NO. 95-341, AMERICAN INDIAN RELIGIOUS FREEDOM ACT REPORT (1979).

135. *See* Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, 25 U.S.C. §§ 2401-55 (1994); American Indian Religious Freedom Act of 1978, 42 U.S.C. § 1996 (1988); Native American Church v. United States, 468 F. Supp. 1247 (S.D.N.Y. 1979). Schedule I of the Controlled Substance Act, 21 U.S.C. § 812(c) (1994) contains an exemption for the sacramental use of peyote. 21 C.F.R. § 1307.31 (1995). In fact, the Oregon Supreme Court had rested its holding in support of Smith and Black's federal free exercise claim on its view that *Congress* had determined that peyote use by the Native American Church is constitutionally protected. *See* Smith v. Employment Div., 763 P.2d 146, 149 (1988). The State of Oregon, however, was not sure what weight it should be given.

A discussion of the Indian law aspects of this policy are beyond the scope of this Article, but it is painfully obvious that neither the states nor the federal government take their respective obligations under this provision very seriously. Given the federal government's virtual abdication of oversight authority respecting tribal

disagreed.

In *Lyng v. Northwest Indian Cemetery Protective Ass'n,*[136] the Supreme Court held that AIRFA's policy statement was "without teeth," and it made no mention of the possibility that a preemption analysis might be as appropriate in the Indian law context as it is in the Commerce Clause setting. In the Court's view, AIRFA was simply a statement of congressional resolve which assured that "the basic right of the Indian people to exercise their traditional religious practices [would not be] infringed *without a clear decision on the part of the Congress or the administrators that such religious practices must yield to some higher consideration.*"[137]

This is an interesting formulation indeed. The statute, as construed, does *nothing* of substance to foster religious liberty. It reserves Congress' non-delegable power to make decisions concerning the balance to be struck between federal programs and Native American religious needs—a task for which no statute was needed, and it creates no judicially enforceable rights.[138]

What the Court's construction *does* do, however, is quite interesting. It holds that Congress has delegated *to the executive branch agency charged with the administration of the relevant statute* the same power the Court claims for itself: the power to strike "sensible" balances between religious freedom interests and laws which do not contain explicit religious exemptions.

The Court in *Lyng* correctly perceived the generalized free exercise claim made by the Cemetery Protective Association as an attempt to constrain the apparently unfettered discretion of Congress and the executive branch to determine when Native American religious practices "must yield to some higher consideration."[139] It rejected the suggestion

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compliance with the Indian Civil Rights Act of 1978 (ICRA), 25 U.S.C. §§ 1301-02 (1994), it is not surprising that the federal government would argue that it was under no real obligation to apply AIRFA in a manner which would advance the protection of the religious liberty of individual adherents to Native American religions, especially if such an obligation would interfere with agency discretion.

136. 485 U.S. 439 (1988).

137. *Id.* at 455 (quoting 124 CONG. REC. 21444 (1978)) (emphasis added).

138. *Id.* at 455-57. *See also id.* at 471 (Brennan, J., dissenting) (agreeing that AIRFA creates no federal cause of action or judicially enforceable rights).

139. The Solicitor General's Brief in *Lyng* argued:

> The bill originally "requir[ed] Government agencies to implement changes in the law to accommodate religious practices of Indians where infringements have been identified." 124 Cong. Rec. 21444 (1978) (remarks of Rep. Udall); see also id. at 21451 (similar language in Senate bill). Representative Udall amended the bill to delete that language on the ground that the implementation of changes in the law "is the responsibility of Congress" (id. at 21444). Representative Udall explained that "[w]here administrative changes [to agency policies and procedures] can be made, consistent with the enabling legislation, to eliminate unwarranted restrictions on Indian religion, the bill intends that appropriate changes be made. Where the underlying law is determined to be the reason for such restrictions and where these restrictions are determined to be unwarranted and unnecessary, the bill contemplates that the President, in his report to the Congress, would request appropriate legislative changes." (ibid.).

Reply Brief for the Petitioners, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013).

that it should supply guidelines for the exercise of administrative discretion as "incompatible with the text of the Constitution, with the precedents of this Court, and with a responsible sense of our own institutional role."[140] In the Court's view, religious freedom is nothing more than a "sensible balance." Insofar as Native American religious interests are involved, *Lyng* raised more important separation of powers questions than it did free exercise issues.

Why this is so is not immediately apparent. The text and structure of the Constitution certainly limit both congressional and executive branch discretion in matters relating to first amendment rights, and it is the very essence of the Court's "institutional role" to enforce those limits. The problem, to the extent that one exists, must lie in the Court's precedents concerning the nature and scope of religious liberty itself. With this background we turn to the question on which the Supreme Court granted certiorari in *Smith*: Does the Free Exercise Clause of the First Amendment to the United States Constitution protect a person's religiously motivated use of peyote from the reach of a state's general criminal law prohibition?

This question has two discrete components, one largely interpretive and the other largely structural:

> 1) Is the religious motivation (or objection) of an adherent whose belief or practice is burdened by otherwise constitutional, generally applicable law sufficient, standing alone, to invoke the protection of the Free Exercise Clause?
>
> 2) If so, how is that protection manifest?
>
> (a) Via judicial review of the facts of the particular case; or
>
> (b) Via the political process?

In *Lyng*, the Supreme Court held that a formulation of the free exercise norm which holds that the Free Exercise Clause "'is directed against *any* form of government action that frustrates or inhibits religious practice'"[141] was not acceptable because "[t]he Constitution . . . says no such thing. Rather, it states: 'Congress shall make no law . . . *prohibiting* the free exercise [of religion].'"[142] Thus, when the Court granted certiorari in *Smith*, the fault line within the Court on both the structural and interpretive issues had already been clearly sketched out in both *Lyng* and *Texas Monthly*. All that remained to be seen in *Smith* was whether the Court would adhere to the reasoning (and result) of *Reynolds v. United States*[143] or opt for the more expansive view of the free exercise norm urged by the dissenters in *Lyng*. Not surprisingly, the Court reaffirmed *Reynolds*.

(iii) Relating norm to structure: the limits of legislative power after Smith.—Because the majority opinion in *Smith* addresses both the content of the constitutional norm which has been incorporated by the Fourteenth Amendment and the role of the legislature in enforcing it, the Court's approach represents a significant departure from that taken in *Texas Monthly*. Given the uncertainty bred by such divisions within the Court, *Smith*

This was a point expressly argued by the United States, and rejected by the Native American Respondents.

140. *Lyng*, 485 U.S. at 456.

141. *Id.* (quoting the dissenting opinion of Brennan, J.).

142. *Id.* (quoting U.S. CONST. amend. I) (alteration in original).

143. 98 U.S. 145 (1878).

arguably makes the channel between the constitutional *Scylla* and *Charybdis* of religious liberty even smaller.

The majority opinion by Justice Scalia has a twofold focus. The first is the practical and theoretical problems which arise when judges attempt to craft exemptions to generally applicable laws. The second is the institutional competence and responsibility of the legislature to protect the rights of those who adhere to minority religious views. (The very point which appears to have influenced the Court in *Lyng*.)

Expressing confidence that "a society [which] believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well,"[144] the majority explicitly recognized that this may not always be the case.[145] In so doing, the majority implicitly rejected categorical analysis in free exercise cases. After *Smith*, "the *First Amendment* has not been offended" if generally applicable and otherwise valid legislation has the incidental (unintended) effect of "prohibiting the exercise of religion."[146]

The structural and substantive issues involved in *Smith* are thus virtually identical to those involved in *Texas Monthly*. The Court remained deeply divided over: 1) the balance of power to be struck between the judicial and legislative branches when there is a claim that a burden on religious liberty should be lifted; 2) the legitimacy of categorical analysis in First Amendment cases; and 3) the substantive meaning of the constitutional norms of the First and Fourteenth Amendments. In *Smith*, just as in *Texas Monthly*, the structural question is the important question because it will tell us *whose* vision of religious liberty is controlling. Once this question is answered, the substantive scope of religious liberty is more easily discerned.

We are now in the position to ask a question which mixes both structure and substance: After *Texas Monthly* and *Smith*, just how "solicitous of" religious liberty can legislators (or state judges) be? The answer is apparently—not very. *Texas Monthly* holds that the First Amendment *is* offended by exemptions which "benefit religion alone."[147] For at least five members of the Court prior to the appointments of Justices Souter, Thomas, Ginsburg, and Breyer, the only religiously-based exemptions from generally applicable laws which can survive review under the Establishment Clause are those where the state can prove that the proposed exemption both "remove[s] a demonstrated and possibly grave imposition on religious activity sheltered by the Free

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144. Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

145. In an extraordinarily candid statement which brings together both the structural and normative aspects of these questions, Justice Scalia wrote:

> It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

Id. Justice Scalia's words take on added meaning when considered in light of James Madison's preference for a broadly-based, and highly factional, legislative arena as the place in which it is most likely that individual rights would be protected. For a discussion of this topic, see Destro, *supra* note 14.

146. *Smith*, 494 U.S. at 878 (emphasis added).

147. Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 n.4 (1989).

Exercise Clause" *and* the exemption cannot "impose substantial burdens on nonbeneficiaries."[148]

For the majority in *Texas Monthly*, the *only* permissible religious exemptions from generally applicable laws are those carefully crafted to eliminate both "demonstrated and possibly grave impositions" on free exercise rights[149] and any "appreciable privation" that the exemption might have upon persons who cannot (or do not) claim them.[150] If the exemption in question might have a monetary impact on others, including taxpayers, or if it has some other characteristic which might result in its being perceived as an "endorsement" of religion, the exemption will be invalid.[151] After both *Lyng* and *Smith*, however, it appears that the opposite is true. Legislatures may single out religion for special exemptions to the extent they feel it is appropriate to do so.

Which rule applies? The answer is by no means clear as these words are written. If the overarching concern is to minimize social and legislative conflict over issues of religious tolerance, the "balancing" formulations favored by Justices O'Connor, Blackmun, Marshall, Brennan and, most recently, Justices Souter and Ginsburg, make eminent sense. They eliminate legislative conflict over the scope of religious liberty by holding that the operational effect of the incorporated First Amendment is judicial preemption of state and federal legislative authority to strike balances beyond those designed to address "concrete" individual needs.

If virtually all religious liberty claims are to be decided judicially on a case-by-case basis, the transfer of power over the question of religious liberty from the legislative departments of the states to the judicial branch of the federal government is virtually complete,[152] notwithstanding the Religious Freedom Restoration Act. At least insofar as the issue is religious liberty, the Ninth Amendment and Citizenship Clauses are rendered

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148. *Id.* at 18-19 n.8. *Accord id.* at 26 (Blackmun, J., concurring). Justice Souter appears to have cast his lot with the majority in *Texas Monthly*. *See* Lee v. Weisman, 505 U.S. 577, 609 (1992) (Souter, J., concurring). Justice Ginsburg also appears to side with the majority. *See* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2487 (1994). Justice Thomas appears to have sided with the dissenters in *Texas Monthly*. *See Lee*, 505 U.S. at 631 (Scalia, J., dissenting, joined by Thomas, J.). Justice Souter also apparently believes the Court to have been wrong in *Smith*. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2247-50 (1993) (Souter, J., concurring in part and concurring in the judgment). Justice Thomas apparently agrees with *Smith*, at least insofar as it was applied by Justice Kennedy in the majority opinion in *Church of the Lukumi Babalu Aye, Inc.*

149. *Cf., e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (Brennan, J., concurring); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (Marshall and Brennan, JJ., concurring in the judgment); *id.* at 270 (Stevens, J., dissenting).

150. *Texas Monthly*, 489 U.S. at 18-19 n.8 (opinion of Brennan, Marshall & Stevens, JJ.); *id.* at 26 (O'Connor & Blackmun, JJ., concurring in the judgment).

151. *Id.* Examples given were representative of a class of "legislative exemptions that did not, or would not, impose substantial burdens on nonbeneficiaries while allowing others to act according to their religious beliefs, or that were designed to alleviate government intrusions that might significantly deter adherents of a particular faith from conduct protected by the Free Exercise Clause." *Id.*

152. This, I suspect, is what Professor Lupu had in mind when he wrote that religious liberty claims should be justiciable only. *See generally* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

null.

This is a significant shift of power, but its true magnitude can only be seen by noting its impact on the power of Congress. To the extent that the Fourteenth Amendment worked a shift of power away from the states and the Court and into Congress, application of the *Texas Monthly* approach to federal legislation designed to protect religious liberty casts serious doubt on the continued vitality of the congressional "check" on judicial power built into the Amendment by its framers.[153] In this view of the free exercise norm, the role of the judiciary is to strike individualized balances between and among those whose religious freedom rights will be accommodated and those who are burdened or offended by the accommodation.

If, however, the interpretive task of the judiciary is to assure that religious liberty, like speech and press, is given the widest possible berth by both legislatures and administrators, these rules are senseless. After *Texas Monthly*, accommodation of free exercise rights via legislation is to be the exception rather than the rule, and even then the accommodation must be defended on the basis of "concrete need."[154] This is because the *Texas Monthly* construct has three main facets: a narrow definition of the free exercise norm, a broad definition of the non-establishment norm, and an active judicial role in assuring that the burdens lifted are "demonstrated," "grave," and "central" to religious belief or practice. Needless to say, the rules governing speech and press are considerably more expansive.

What of the first amendment right "to petition the government for a redress of grievances?"[155] After *Texas Monthly*, it means only one thing: if the grievance relates to religious liberty and the grievants can afford a lawyer, then they will be heard by an Article III judge. The irony of utilizing the First and Fourteenth Amendments to empower the judiciary in this fashion is exquisite.[156]

The majority in *Smith*, by contrast, expressly casts its lot with the "legislative department" and refuses to engage in the kind of case-by-case balancing analysis said to be required by *Sherbert v. Verner*,[157] *Wisconsin* v. *Yoder*,[158] and *Texas Monthly*. Justice Scalia actually goes out of his way to demonstrate why the analytical centerpiece of the plurality decision in *Texas Monthly* is wrong. It is significant that he does so in structural, rather than normative, terms:

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153. *See infra* notes 172-90 and accompanying text.

154. *Texas Monthly*, 489 U.S. at 18 & n.8. "No concrete need to accommodate religious activity has been shown." *Id.*

155. U.S. CONST. amend. I.

156. *Cf.* Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199-201 (1992). On this point the Court appears to have drawn precisely the wrong conclusion from the career and vision of James Madison. Assuring constant and intense competition between and among factions, including those organized around religious matters, was the essence of Madison's structural proposals to assure that religious liberty was given wide berth at both the federal and state levels. *See* Destro, *supra* note 14, at 393-402 (arguing that the First Amendment is best viewed through the prism of Madison's political vision concerning the power of the state in matters of religion and conscience, rather than his philosophical views of the optimal relationship between church and state).

157. 374 U.S. 398 (1963).

158. 406 U.S. 205 (1972).

> Justice O'Connor contends that the "parade of horribles" in the text only "demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests.". . . In any event, Justice O'Connor mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use Justice Blackmun's terminology) or the "constitutiona[l] significan[ce]" of the "burden on the particular plaintiffs" (to use Justice O'Connor's terminology) suffices to permit us to confer an exemption. *It is a parade of horribles because it is horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.*[159]

Under *Texas Monthly*, the Establishment Clause leaves little room for legislatively mandated accommodation of free exercise rights. After *Smith*, there is no judge to whom one can complain of a Free Exercise Clause violation. Aside from a structural and doctrinal mess, what is left of free exercise?

I submit that both the supporters and the critics of the Court's decision in *Smith* are basically correct: The Supreme Court does not take religious liberty very seriously. Like Professor Bradley, I would argue that they have never done so, notwithstanding the *Sherbert-Yoder* line of cases.[160] Unlike Professor William Marshall, however, I do not view *Smith* as a welcome development.[161] It was, if anything, the logical result of the Court's unwillingness to continue to make case-by-case exceptions to its holding in *Reynolds*, but nothing more.

Read together, the decisions in *Texas Monthly* and *Smith* invite all who are concerned with the protection of religious liberty to think about the *kind* of religious liberty the incorporation doctrine actually incorporates. Is it limited to providing a judicial forum for citizens aggrieved by society's unwillingness to tolerate or accommodate the concerns of religious minorities, or is it a freedom which is every bit as essential to the maintenance of a pluralistic democracy as freedom of speech and press?

The question posed at the outset of this section—*To whom does the Constitution entrust the protection of religious liberty?*—cannot be answered in the abstract, for it has both structural and substantive components. If it is to be addressed at all—and the adoption of RFRA assures that it will be—the place to begin the inquiry is with the Court's interpretation of the Fourteenth Amendment.

III. LIBERTY, DEMOCRACY AND THE MECHANICS OF INCORPORATION

A. Which Clause?: Due Process or Privileges and Immunities?

We begin the first stage of this inquiry into the meaning of the Fourteenth

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159. Employment Div. v. Smith, 494 U.S. 872, 889 n.5 (1990) (citations omitted) (alteration in original).

160. *See generally* Bradley, *supra* note 51.

161. *See generally* Marshall, *infra* note 342.

Amendment with Justice John Paul Stevens' observation that the incorporation of the First Amendment by the Fourteenth is an "elementary proposition of law."[162] Given that starting point, the first question is not *whether* the First Amendment is incorporated, but *how*. The usual assumption is that the Due Process Clause of the Fourteenth Amendment provides the constitutional basis for applying the First Amendment to the states.[163] The alternative is to view all of the substantive federal guarantees that are not applicable to the states by force of the Constitution itself[164] as part and parcel of the "privileges or immunities of citizens of the United States."[165]

1. Due Process or Privileges and Immunities? The Structural Implications.—The structural implications of choosing a "due process" over a "privileges and immunities" mechanism for incorporating the Bill of Rights (selectively or *en masse*) are as significant as they are subtle. The rights protected by the Fourteenth Amendment "'go[] to the very nature of our Constitution'" and have "'profound effects for all of us'" as individuals.[166] This is so not only because of their substantive content, but also because the very existence of those rights presupposes a set of political relationships with equally "profound effects for all of us."

Although "'it is difficult to imagine a more consequential subject'" than the relationship of the Fourteenth Amendment to the Bill of Rights,[167] the structural questions which lie at the heart of the incorporation doctrine are often eclipsed by debates over the normative content of the rights incorporated. This is so, in part, because post-incorporation literature generally assigns the task of protecting individuals to the judiciary, the branch considered by many to be the "least dangerous" and most sympathetic to individual interests.[168]

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162. Wallace v. Jaffree, 472 U.S. 38, 49 (1985).

163. *See, e.g.*, LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1154 (2d ed. 1988).

164. *See, e.g.*, U.S. CONST. art. I, § 10, which includes, among other things, guarantees against bills of attainder and ex post facto laws, and which protects the creditors and parties to contracts from manipulation of tender and contract rights. *See also id.* art. III, § 2 (diversity jurisdiction as a means of preventing discrimination on the basis of citizenship); *id.* art. IV, §§ 2, 4 (Interstate Privileges and Immunities and republican form of government).

165. These would, of course, include the rights expressly guaranteed against the federal government as well. *See* Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1198-1203 (1992) (discussing the relationship between the general prohibitions of Article I, Section Nine, and the specific prohibitions of Article I, Section Ten (binding the states), and the First Amendment (binding Congress alone)).

166. *Id.* at 1194 (quoting Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929, 934 (1965)).

167. *Id.* (quoting William W. Van Alstyne, *Foreword* to MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS at ix (1986)).

168. It is notable, however, that the appellation "least dangerous" branch depends upon strict observation of the strictures of separation of powers. Alexander Hamilton, who coined the description, made it clear that "in a government in which [the different departments of power] are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961); *see also id.* No. 71, at 433 (noting the "tendency of the legislative authority to absorb every other").

From a structural perspective, this is as it should be. The power to decide individual "cases or controversies" is the heart of Article III. More importantly, the majoritarian bias of the legislative branch makes it particularly unsuited to the task of protecting the interests of specific individuals and factions who are unable, for whatever reason, to gain protection in the normal course of the legislative process.[169] The "comparative competence and 'expertise'" of the judiciary in cases involving individual rights[170] is thus a structural attribute of Article III.

Congress, by contrast, is the body charged with the task of making laws conducive to the general welfare. Congress may adopt general legislation mandating the protection of individual rights to the extent that it is a necessary or proper means to attaining an otherwise legitimate goal. The power to make civil rights policy in fields subject to its jurisdiction is a "necessary and proper" attribute of the powers Congress was granted.[171]

When the issue is due process incorporation, however, the issue is no longer one of comparative competence and expertise; it is power. The foundation of due process incorporation is a claim that the Due Process Clause of the Fourteenth Amendment empowers the federal government to determine which liberties (including those contained in the Bill of Rights) are fundamental, and therefore bind the states, and which liberties are not.[172] If that claim of federal power is valid (the Court has held that it is), the *structural* question is whether the power to decide that a right is (or is not) fundamental

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Though Madison viewed the operation of factionalism within the legislative branch as one of the primary protections of the rights of individuals, he did not trust the legislature either. He warned:

> [I]n a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

Id. No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). Hamilton agreed. *See id.* No. 71, at 431-35 (Alexander Hamilton), No. 78, at 464-72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

169. *Cf.* U.S. CONST. art. I, § 9, cl. 2 (Writ of Habeas Corpus), cl. 3 (prohibiting Bills of Attainder and ex post facto laws).

170. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW 15 (5th ed. 1980) (citing HENRY M. HART, JR. & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 82 (2d ed. 1973)); Clifton McCleskey, *Judicial Review in a Democracy: A Dissenting Opinion*, 3 HOUS. L. REV. 354, 360-61 (1966); MARTIN SHAPIRO, FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW 29-30 (1966).

171. *See, e.g.*, Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (religious discrimination under Title VII of the Civil Rights Act of 1964); Katzenbach v. McClung, 379 U.S. 294 (1964) (race discrimination); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (public accommodations).

172. A structural analysis makes it clear that both Congress and the states are free to protect rights which the Court does not deem to be fundamental—as long as they respect the boundaries set by separation of powers and federalism. Though these structural concerns are not generally viewed as devices for the protection of individual rights, both function as important "checks" on the exercise of political power.

belongs to Congress, to the Court, or to both.[173]

The fundamental nature of an interest or right is less significant in a privileges and immunities analysis. Although the phrase "privileges or immunities of citizens of the United States"[174] is not defined in the Constitution,[175] it is clear from both the usage of the phase in the 1860s and the text and structure of the Constitution itself that such interests need not be characterized as either "personal" or "fundamental" in order to merit protection.[176] Because some interests, such as those which flow from citizenship status or private contract, arise from and are legally defined by reference to an individual's relationship to a particular public or private community, the important question under the Privileges and Immunities Clause is whether the law defines a right as one attaching to a person's status as a citizen of the United States.[177]

The purpose of the Privileges and Immunities Clause of the Fourteenth Amendment is a straightforward one. Based on Article IV, Section Two of the United States Constitution,[178] the clause protects "citizens of the United States" in the same manner that the Interstate Privileges and Immunities Clause protects the "Citizens in the Several States:" it limits a state's ability to exclude from the protection of its internal law those it considers to be non-members of its body politic. Both provisions draw their content by reference to a larger body of positive law, and both recognize that certain rights and obligations flow from one's political status in a community. Both clauses are, in short, restraints that assume not only the existence of state power to protect and preserve the rights of citizens and strangers in the community, but also that lapses in the political will to use that power for its intended purpose are inconsistent with the general welfare of the United States.

This interpretation is confirmed by reading Article IV, Section Two, the Ninth and

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173. I use the term "federal government" here deliberately; for if the Due Process Clause is the source of federal authority to incorporate the Bill of Rights, the argument that the Constitution allocates the "incorporation" power to the judiciary alone must rest, if anywhere, in the doctrine of separation of powers.

174. U.S. CONST. amend. XIV, § 1.

175. Having held in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 78 (1873), that "the privileges and immunities relied on in the argument are those which belong to citizens of the States as such," Justice Miller concluded that the Court "[might] hold [itself] excused from defining the privileges and immunities of citizens of the United States which no State can abridge, until some case involving those privileges may make it necessary to do so."

176. *See* Amar, *supra* note 165, at 1227-33, 1258-60. *Accord* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842, 1874 (1995) (Kennedy, J., concurring).

177. The Interstate Privileges and Immunities Clause, the Privileges and Immunities Clause of the Fourteenth Amendment, and the Contracts Clause, U.S. CONST. art. I, § 10, are examples of provisions designed to protect interests which are not accurately characterized as either "personal" in nature, or so "fundamental" as to be "implicit in the concept of ordered liberty." Rights and obligations of this type are best described as "community status rights." *See, e.g.*, Baldwin v. Montana Fish & Game Comm'n, 436 U.S. 371 (1978); Allied Structural Steel v. Spannaus, 438 U.S. 234 (1978). Such interests are clearly distinguishable from "group rights." *See* LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 1050-1140 (1990). They are also distinguishable from what Professor Tribe describes as rights of "citizen autonomy." *See* TRIBE, *supra* note 163, at 546-59.

178. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) (comments of Jonathan Bingham, draftsman of Section One).

Tenth Amendments, and the Privileges and Immunities Clause of the Fourteenth Amendment together with Article VI. These provisions explicitly recognize that the legislatures "in the several States" retain the power (if not the duty) to preserve, protect, and defend the rights of all within their respective jurisdictions. The power of Congress to protect and preserve the privileges and immunities of citizens of the United States, including their "fundamental rights," stands on the same footing. Congress clearly has the power under Articles I, III, IV, V and VI[179] to define the rights and obligations of American citizens, both at home and abroad.[180] The Court, however, has not always agreed.

In *Dred Scott v. Sandford*,[181] the Court interpreted Article IV[182] in a manner that negated the federalism it embodies. By reading the scope of congressional power over the territories narrowly, the Court gutted both the Missouri Compromise[183] and the power of Congress under Article IV, Section Three to adopt "all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." By permitting the Missouri Supreme Court to refuse to give effect to the law of Illinois governing the personal status and contractual capacity of those who resided in Illinois or entered into contractual relationships to be performed there,[184] the Court negated the cooperative federalism implicit in the Full Faith and Credit Clause.[185] The gutting of Article IV made it impossible for either Congress or the free states to protect the privileges and immunities of individuals living within their respective jurisdictions.[186]

The Citizenship, Privileges and Immunities, and Enforcement Clauses of the Fourteenth Amendment thus fill three gaps created by the Court's ruling in *Dred Scott*: they set a single standard for citizenship in the United States and in the several states; they confer unquestioned power upon the Congress to enact legislation designed to protect citizens of the United States; and, by conferring state citizenship as an incident of residency, they restore the power of the states to protect the civil and human rights of all

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179. *See, e.g.*, U.S. CONST. art. I, §§ 8, 10; *id.* art. III, § 2; *id.* arts. IV, V, VI.

180. *See* U.S. CONST. art. I, § 8, cls. 1, 3, 4, 5, 10, 17, 18; *id.* art. IV, § 3, cl. 2. A recent example of congressional action in the field is section 109 of the Civil Rights Act of 1991, PUB. L. NO. 102-166, 105 Stat. 1071. It was passed in response to the Supreme Court's opinion in EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991). The Act amends section 701(f) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(f) (1988), and section 101(4) of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12111(4) (1988). It extends statutory protection to American citizens employed in foreign countries where the extraterritorial application of the law would not violate the sovereignty of the host nation. *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-03 (1986).

181. 60 U.S. (19 How.) 393 (1856).

182. U.S. CONST. art. IV, §§ 1, 3.

183. Act of Mar. 6, 1820, ch. 22, 3 Stat. 545; Act of Mar. 2, 1821, ch. 1, 3 Stat. 645.

184. Under controlling Illinois precedent, Dred Scott's employment by his master while both were living within the State of Illinois was an act which declared Dred Scott a free person and citizen of Illinois. Jarrot v. Jarrot, 7 Ill. (2 Gilm.) 1 (1845).

185. U.S. CONST. art. IV, § 1; *Dred Scott*, 60 U.S. (19 How.) at 555-58 (McLean, J., dissenting).

186. The dissenting opinion of Justice McLean contains a thorough discussion of the choice of law, comity, and sovereignty aspects of the decision. *Dred Scott*, 60 U.S. (19 How.) at 350-64.

persons who reside within their jurisdiction.[187]

Though there is no longer any doubt about persons who are entitled to the status of "citizen" in our national and state communities, there remains considerable doubt about which branch has the final word in defining the scope of the substantive rights enjoyed by citizens and others living within our national, state, and local communities.[188] Because the choice of an incorporation mechanism has significant separation of powers and federalism implications, there is no easy answer to this question.

The adoption of the Fourteenth Amendment left no doubt as to the power of Congress to protect the rights of citizens and others subject to the jurisdiction of the United States. Congress also has the additional power to enforce the Fourteenth Amendment against recalcitrant states and their officials. Because the Court has the power to interpret both the Amendment and laws enforcing it,[189] the contours of the separation of powers boundary between the Congress and the Court (including the existence of a "zone of twilight," if any) are important not only for structural reasons but also for historical reasons as well. The Reconstruction Congress, it should be remembered, neither trusted the Court nor viewed it as an ally in the struggle for equal rights. One of the primary goals of Sections One and Five of the Fourteenth Amendment was to undo the structural damage done by the Taney Court in *Dred Scott*.[190]

The same analysis holds true for the states. Not only do they have the power to protect the rights of citizens of the United States, the Ninth and Tenth Amendments reserve for them the power to protect and define rights beyond those enumerated in the Bill of Rights, whether the federal judiciary considers them to be fundamental or not. In a milieu where the Court is perceived to be either antagonistic or stingy in its interpretation of the law of individual rights, these are significant powers. Largely because federalism is not perceived to be a source of protection for individual rights,[191]

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187. The Missouri courts recognized this rule up to and including the *Dred Scott* case. In fact, a Missouri trial court ruled in Scott's favor. That decision, however, was overturned on appeal by the Missouri Supreme Court, which refused to concede the applicability of either federal law (the Missouri Compromise or the Northwest Ordinance) to the period when Scott lived in the Wisconsin and Minnesota territories, or of Illinois law to the period when Scott was employed by his former owner in that State. Under either law, employment in the jurisdiction operated as a manumission, and Scott would have become a citizen entitled to sue in a federal court.

188. Cases such as Plyler v. Doe, 457 U.S. 202 (1982) indicate that this issue arises in non-incorporation contexts as well.

189. In *Oregon v. Mitchell*, Justice Brennan dismissed inquiries into the source of the Supreme Court's power to enforce the Fourteenth Amendment as being "of academic interest only." 400 U.S. 112, 264 n.37 (1971). While this is not the precise question raised here, the Court's decision in *Katzenbach v. Morgan*, poses the separation of powers and federalism questions starkly. 384 U.S. 641 (1966). Both cases are discussed *infra* Part IV.

190. Raoul Berger notes, for example, that Senator Charles Sumner of Massachusetts was so incensed by Taney's decision in *Dred Scott* that he "sought to bar the customary memorial, placement of Chief Justice Taney's bust in the Supreme Court chamber, and insisted that his name should be 'hooted down in the pages of history.'" RAOUL BERGER, GOVERNMENT BY JUDICIARY 222 (1977) (quoting DAVID DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 193 (1970)).

191. In *United States v. Lopez*, Justice Kennedy noted that this is an "ironic" perception. "Because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers

neither the Court nor the commentators have explored the possibility that the explicit reservation of the power to expand upon the federal conception of rights contained in the Ninth Amendment is a potential limit on the preemptive power of Congress or the Court under the Fourteenth Amendment.[192]

At bottom, the answers to the federalism and separation of powers questions raised above determine whether the judicial process, by which fundamental rights are defined, limited, or balanced against other important social interests, is subject to any meaningful restraint via the democratic process aside from impeachment. More specifically, the structural implications of the First Amendment are "First Amendment questions" in their own right. The Amendment guarantees to each of us, individually and collectively, the right to "petition the [federal] Government for a redress of grievances."[193] To whom shall petitions concerning the Court's handiwork respecting religious liberty (or other "fundamental rights") be addressed?—To Congress or the courts themselves?

On this point, at least, the structure of the Constitution seems clear. Articles I, III, IV, VI, and the Seventeenth, Nineteenth, Twenty-third, Twenty-fourth, Twenty-sixth, and Twenty-seventh Amendments presuppose a *political* response. To the extent that the First Amendment recognizes a limited power in Congress and the states to legislate in furtherance of religious liberty as well as the right of the people to petition the government for redress of grievances, the political right of citizens of voting age to oust Senators and Representatives who either ignore their petitions or propose inadequate remedies is a necessary component of the liberty protected by the First Amendment. Henry J. Friendly was correct: the answers to questions such as these do have "profound effects for all of us."[194]

2. Due Process or Privileges and Immunities? The Substantive Implications.—"By strangling the privileges or immunities clause in its crib,"[195] *The Slaughter-House Cases*[196] made it all-but-certain that the Privileges and Immunities Clause route to incorporation of the Constitution's religious liberty guarantees would remain the path not chosen. The

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to political science and political theory." 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring) (citing Henry J. Friendly, *Federalism: A Foreword*, 86 YALE L.J. 1019 (1977); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 524-32, 564 (1969)). "Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one." *Id.*

192. In fact, precisely the opposite is true. The more common tendency is to view the Ninth Amendment as a basis for federal court invalidation of state laws. *See, e.g., Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L. REV. 37-168 (1988); Lawrence G. 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?*, 64 CHI.-KENT L. REV. 239 (1988); THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989); CHARLES L. BLACK, DECISION ACCORDING TO LAW (1981). A notable exception is Calvin R. Massey, *The Anti-Federalist Ninth Amendment and Its Implications For State Constitutional Law*, 1990 WIS. L. REV. 1229 (1990). Not only is Professor Massey's thesis an interesting one, it contains an extremely useful collection of the literature. *See id.* 1229-39 & n.2 (discussing the academic literature).

193. U.S. CONST. amend. I.

194. Amar, *supra* note 165 and accompanying text.

195. Amar, *supra* note 165, at 1259.

196. 83 U.S. (16 Wall.) 36 (1873).

structural fallout from that decision has significant substantive ramifications.[197]

"Due Process incorporation" of the religious liberty guarantees is, in both theory and practice, heavily dependent on a judicial reading of the nation's values respecting the relationship of religion and religious liberty to liberty in general.[198] Because that reading is not bound by an initial reference to an existing body of positive law other than the text of the First Amendment itself, the structural relationship of legislative to judicial power is quite complex.[199] In practice, the normative content of the Religion Clause has become "in large part a legal question to be answered on the basis of judicial interpretation of social facts."[200]

The cases demonstrate rather clearly that the religious liberty norms actually applied in a given case are less a function of judicial interpretation of "the Constitution and laws of the United States" than the result of an analysis which turns on both the level of generality chosen to describe the individual and state interests involved and the ensuing balance struck between them. Justice O'Connor, whose influence on the recent jurisprudence of the Religion Clause has been significant, is quite explicit about the process. In her view, the Court's function in religious liberty cases is to strike "sensible balances"[201] between the religious liberty of some individuals and the competing interests of others, including the state.

This reasoning has significant substantive consequences. The application of the First Amendment to the states has been a case-by-case process characterized by the application of ever more detailed and nuanced glosses on discrete rules or methodologies ("tests"). Over time, the rules applicable to Religion Clause cases have received so much judicial "gloss" that, to the extent they are recognizable as rules at all, they have become "blurred, indistinct and variable" and "depend[] on all the circumstances of a particular relationship,"[202] sometimes comically so.[203]

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197. *Id.* Professor Amar's articles on the Bill of Rights and the Fourteenth Amendment contain an illuminating—and exhaustive—discussion of the topic. *See* Amar, *supra* note 165; Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1138-41, 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).

198. *See supra* notes 56-60 and accompanying text.

199. *See infra* Part IV.

200. Lynch v. Donnelly, 465 U.S. 668, 694 (1983) (O'Connor, J., concurring).

201. Employment Div. v. Smith, 494 U.S. 872, 902 (1990) (O'Connor, J., concurring).

202. *Lynch* , 465 U.S. at 679 (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

203. A classic example is what has become known to those involved in the litigation of Religion Clause controversies as the "three plastic reindeers" rule. *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992) (describing the concept as a "three plastic animals" rule). Dissenting in ACLU v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986), United States Circuit Judge David A. Nelson noted that the lesson which can be drawn from the cases involving the constitutionality of Christmas displays:

> comes down to this: A city is free to display such a scene at Christmas if it is balanced by symbols which, although they may also be associated with Christmas, are considered secular in origin. If enough such symbols are displayed, the manger scene will pass constitutional muster. It may be convenient to think of this as a "St. Nicholas too" test—a city can get by with displaying a crèche

Given this state of affairs, it is arguable that the Court has stepped outside the normal framework of judicial review of non-establishment and free exercise issues and into a more active, common-law style, policy-making role that defines the proper relationship between religion and the state. Yet, as interesting as a full discussion of that question might be, this Article is not the appropriate place to pursue it. For present purposes, it is enough to note that the legitimacy of what appears to be discretionary policy-making under the substantive due process and selective incorporation doctrines[204] turns on the answer to one question: Does the Fourteenth Amendment authorize *any* branch of the federal government to strike "balances"—sensible or otherwise—when the topic is "an establishment of religion" or a "law prohibiting the free exercise thereof?"

The Court plainly assumes that it does, but it has not given much attention to the separation of powers and federalism aspects of that assumption.[205] Under a privileges and immunities incorporation mechanism, positive law, including the Bill of Rights and federal legislation, plays an important and affirmative role in the protection of individual interests, including religious liberty. This has at least two important consequences.

The first is an obvious one. Because the Clause does not define the "privileges and immunities of citizens of the United States," the Court's initial task is to identify the reference point in positive law from which they can be incorporated. Because Congress is the branch charged by Article I with non-delegable tasks of weighing social facts and striking sensible balances among public and private interests, privileges and immunities incorporation puts much more weight on the existing balance between individual and community interests struck by "the Constitution and laws of the United States."[206] Thus, Congress would have a much more significant role with respect to religious liberty in an

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if it throws in a sleigh full of toys and a Santa Claus, too.

> The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?

Such "lessons" could easily be dismissed as comical were the issues not so serious. Judge Nelson captures the point well:

> The point I am trying to make is a serious one, of course. The holiday we celebrate as Christmas began as a pagan festival millennia before the birth of Christ, and "some people have thought that the Christians invented Christmas to compete against the pagan celebrations of December twenty-fifth." Earl W. Count, *4000 Years of Christmas* (1948), pp. 18 & 27. The symbolism of Christmas in the 20th Century A.D. continues to incorporate many pagan elements, and Christmas would hardly be Christmas, for most Americans, without them. But I question whether it is appropriate for the federal courts to tell the towns and villages of America how much paganism they need to put in their Christmas decorations, and I am reluctant to attribute to the Supreme Court an intent to point us in that direction by implication.

Id. at 1569.

204. *See* Glendon & Yanes, *supra* note 17, at 546.

205. *See, e.g.*, Flast v. Cohen, 392 U.S. 83 (1968); Aguilar v. Felton, 473 U.S. 402 (1985). *See generally* Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

206. U.S. CONST. art. III, § 2, cl. 1.

incorporation analysis based on the Privileges and Immunities Clause than it does under the current regime of Due Process Clause incorporation. *Texas Monthly* and the Religious Freedom Restoration Act demonstrate that this issue is of more than academic importance.

The second consequence flows directly from the first. The Court has yet to deal with the explicit federalism of the text of the First Amendment itself. The words "*Congress* shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"[207] sound in both federalism and freedom. To pose the question: "Given the text of the First Amendment, what role may Congress and the states play in the *protection* of religious liberty?" is to raise the federalism and freedom questions in a manner which is both clear and historically comprehensible. Under the "pre-incorporation" First Amendment, Congress and the Court had *some* role, but it was limited substantively by the text and structurally by the limited legislative jurisdiction of the federal government. The lawmaking powers of the states (both legislative and judicial) were explicitly reserved.

Does the Fourteenth Amendment repeal the federalism and separation of powers components of the pre-incorporation equation? Once again, the Court plainly assumes that it does—but only with respect to the Court itself. From whence, if not from the Fourteenth Amendment, does the Court derive the power to issue orders respecting any "establishment of religion," or limiting a state's ability to foster "the free exercise thereof" in a manner otherwise consistent with the rights of equal citizenship? The Court has never answered this question. *Everson* simply states a rule to be applied in future cases without ever considering whether Congress and the President could have deemed a statute with provisions identical to the list provided by the Court to be a "necessary and proper" means of enforcing the Fourteenth Amendment.[208]

When the Court announces rules ("tests") that are to be applied in future constitutional cases, such pronouncements, like legislation, have "the purpose and effect of altering the legal rights, duties and relations of persons" and institutions (including Congress, the executive and the states) outside the case or controversy in which they are announced.[209] The Court confirmed this view of its power in *Cooper v. Aaron*[210] when it

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207. U.S. CONST. amend. I (emphasis added).

208. The Court held in *Everson*:

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

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947) (citation omitted).

209. *Cf.* INS v. Chadha, 462 U.S. 919, 951-52 (1983). The dissenting opinion of Justices Brennan and Marshall in *Marsh v. Chambers* is as clear an example as can be found in the case law. 463 U.S. 783, 796 (1983).

held that "[i]t follows [from *Marbury v. Madison* and the Supremacy Clause] that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.'"[211]

There are, of course, two ways to interpret what appears on its face to be a rather sweeping claim of judicial power.[212] The first, and most consistent with *Marbury* and the Supremacy Clause, is that the Court is indeed the final arbiter of any "case or controversy" which comes before it, but the binding nature of its rulings is limited by the scope of its jurisdiction.[213] Other branches are free to interpret the Constitution in the manner they deem appropriate when the issue falls within the scope of their permissible discretion. What this means in practice is that the only meaningful constraint on judicial attempts to narrow the permissible scope of religious freedom short of a constitutional amendment is a congressional declaration that a more robust version of that liberty is either a "privilege or immunity of citizens of the United States," or an aspect of "liberty" under the Due Process Clause of the Fourteenth Amendment.

Would such a response be a legitimate one for Congress? I submit that it would be and discuss the details of the argument in Part IV. For present purposes, however, it is sufficient to note that unless the Court's rulings are exempt from otherwise applicable constraints on state and federal policy-making discretion, including the First Amendment and the Test Clause (a proposition which seems wrong on its face), Article VI and *Marbury* require that the substantive rules developed by the Court to resolve future cases or controversies should be justified (tested) under the same criteria and at the same level of scrutiny as the Constitution requires for acts of Congress or a state legislature. But, as the keeper of the due process flame, the Court's pronouncements and sensible balances are, for all practical purposes, exempt from review under the standards applicable to congressional, executive and state action—or are they?

The answer to this question depends upon whether or not the Constitution assigns a "checking" function with respect to the Court to a coordinate branch of the federal government. Does the Constitution assign this task to Congress? I believe that it does. Congress already bears the structural obligation of "reviewing" both the face and the application of the rules developed by the Court. It is the branch which controls the Court's budget, its appellate jurisdiction, its size, and the tenure of individual Justices under the "good behavior" standard of Article III.[214] It also regularly makes "adjustments" to the substantive rules announced when the Court decides cases under the Dormant Commerce Clause and the Fourteenth Amendment. The analytical problem is how to

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In their view "settled doctrine"—the standard of review—is to be applied with an "unsentimental eye" in much the same manner that a first-year law student would apply a statute. *Id.*

210. 358 U.S. 1 (1958).

211. *Id.* at 18 (quoting U.S. CONST. art. VI).

212. *See* Daniel A. Farber, *The Supreme Court and the Rule of Law:* Cooper v. Aaron *Revisited*, 1982 U. ILL. L. REV. 387 (noted in LOCKHART ET AL., CONSTITUTIONAL LAW: CASES, COMMENTS, QUESTIONS 15 & note m. (7th ed. 1991)).

213. *See* LOCKHART ET AL., *supra* note 170, at 13-16 (collecting sources).

214. U.S. CONST. art. III, § 1.

conduct such a systematic review in the First Amendment area without crossing the separation of powers boundary and intruding on the power of judicial review itself (which, in the end, will be impossible without a clear definition of the constitutional norms in question), or upsetting the Court's institutional sensibilities (which may be impossible).[215]

Given the nature of the substantive and structural issues at stake, the first part of a systematic inquiry into these issues is an examination into the relationship of the norms contained in the Fourteenth Amendment to those incorporated from the First.

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215. They are significant indeed. In *Planned Parenthood v. Casey*, a majority of the Court (Justices O'Connor, Kennedy, Blackmun, Stevens, and Souter) agreed with the following proposition:

> The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon this Court. . . . The Court's power lies in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.
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> . . . There is a limit to the amount of error that can plausibly be imputed to prior courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

112 S. Ct. 2791, 2814-15 (1992).

It is difficult to discern precisely why "[t]he root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States and specifically upon th[e] Court." *Id.* at 2814. The "root of American governmental power" is not revealed in either the Court's or "[s]ociety's understanding of the [social] facts [of life] upon which a constitutional ruling [is] sought" at a given place or time. *Id.* at 2813. Rather, it lies in the consent of the governed as manifest in their reluctance to utilize the powers reserved to them under Article V.

From a structural perspective, Plessy v. Ferguson, 163 U.S. 537 (1896), was wrongly decided "the day it was decided," not because the social "facts of life" had changed (they certainly had not changed for Louise Brown), or because "changed circumstances may impose new obligations," or because "the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty." *Planned Parenthood*, 112 S. Ct. at 2813. In point of fact, *nothing relevant to the Court's obligation* had changed. That duty clearly existed from the ratification of the Civil War Amendments, which were plainly intended—by their plain language and structure (not to mention their legislative history)—to lift African-Americans from the bonds of slavery and make them citizens equal before the law. The only thing that changed over time—and it is significant that the Court was honest enough to admit it—was that the Court was able to find, as a social fact, that "the thoughtful part of the Nation" (including the majority of the Court) "could accept" the social and legal consequences of "the Court's [performing its] constitutional duty." *Id.* It has not gone unnoticed, however, that it took nearly twenty years before the Court realized that the "all deliberate speed" timetable proposed in Brown v. Board of Education, 347 U.S. 483 (1954), was a mixed message coming from an institution which had tolerated Jim Crow for nearly a century.

B. "Structural Incorporation": Weighing the Impact of the Text and Structure of the Fourteenth Amendment on the Religious Liberty Norms Incorporated from the First Amendment

One of the most important questions left open by *Cantwell* and *Everson* is the effect of the text and structure of the Fourteenth Amendment on the constitutional norms (rights) it incorporates. Like the First Amendment itself, Section One of the Fourteenth Amendment contains a number of substantive rules designed to effectuate a common purpose: Legal protection for individuals from specific kinds of harm. In the case of the First Amendment, the harms are interference with the rights of citizens and others to speak, publish, practice their religion, and assemble peaceably for any purpose, including the right to petition for redress of grievances. In the case of the Fourteenth Amendment, the overarching concern was to eliminate state-sponsored racial discrimination—an insidious practice that touched virtually every facet of daily life. For millions of Americans, the vestiges of officially sanctioned discrimination remain to this day.

At a more structural level, the Citizenship, Privileges and Immunities, Due Process, and Equal Protection Clauses were designed by the Reconstruction Congress to perform three basic tasks: 1) overrule the Supreme Court's assertion in *Dred Scott v. Sandford*[216] that persons of African descent had no rights that a white person or state was bound to respect;[217] 2) negate state claims that federal efforts to enforce standards of equal citizenship might be a violation of their retained sovereignty; and 3) empower Congress to make such rules as might be necessary to make the promise of equal citizenship a reality.

The Supreme Court's record with respect to enforcing the principles enshrined in the Fourteenth Amendment may charitably be described as mixed, but what has emerged from the Court's fits and starts is a body of doctrine that provides us with at least three clearly articulated themes: First, that citizens and other persons within the jurisdiction of the

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216. 60 U.S. (19 How.) 393 (1857).

217. *Id.* at 407, 410, 416. Justice Roger Taney wrote:

> They [persons of African descent] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it.
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> . . . [They] were never thought of or spoken of except as property, and when the claims of the owner or the profit of the trader were supposed to need protection.
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> . . . [A]nd it is hardly consistent . . . to suppose that they [the people of the states] regarded at that time, as fellow-citizens and members of the sovereignty, a class of beings whom they had thus stigmatized; . . . upon whom they had impressed such deep and enduring marks of inferiority and degradation; . . . to include them in the provisions . . . for the security and protection of the liberties and rights of their citizens.

Id. This holding was overturned by the Citizenship Clause. U.S. CONST. amend. XIV, § 1.

states are entitled to both equal protection and due process of law.[218] Second, that the Court is determined to play a major role in both defining and enforcing these norms.[219] And third, that the policies enacted by Congress will be given great deference in most circumstances.[220]

Professor Amar's observation concerning "the peculiar logistics of incorporation"[221] is particularly relevant here. When speaking of the incorporated First Amendment, "the Civil War Amendment is mentioned only in passing or not at all," and the result is that "we *appear* to be applying the First Amendment directly" when, actually, we are not.[222] Viewing the First Amendment through the lens of the Fourteenth thus presents some interesting, albeit unresolved, questions.

1. Relating the Religious Liberty Norms of the First Amendment to the Equal Citizenship and Protection Norms of the Fourteenth.—The most important of these unresolved questions, for present purposes, is the relationship between the religious liberty norms of the First Amendment and the equal citizenship and protection norms of the Fourteenth Amendment. The Court has consistently failed to explore the link between the Equal Protection, Citizenship and Privileges and Immunities Clauses and the "incorporated" First Amendment as a whole.[223] The Court's opinions occasionally disclose that de jure religious discrimination may be a factor in the case before them,[224] but neither the categorical reasoning employed to decide Establishment Clause cases, nor the multifactor balancing utilized in free exercise litigation appear to allow much room for analysis of this problem.[225] Though the same can be said for much of the Court's jurisprudence under the Speech and Press Clause, there are indications that the Court is beginning to recognize problems in cases arising under the Religion Clause as well.[226]

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218. *See, e.g.*, Plyler v. Doe, 457 U.S. 202 (1982); Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954).

219. *See, e.g.*, Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Flast v. Cohen, 392 U.S. 83 (1968).

220. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Fullilove v. Klutznick, 448 U.S. 448 (1980); Katzenbach v. Morgan, 384 U.S. 641 (1966). *But see* Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097 (1995); Miller v. Johnson, 115 S. Ct. 2475 (1995); Oregon v. Mitchell, 400 U.S. 112 (1970).

221. Amar, *supra* note 17, at 1136.

222. *Id.*

223. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990); Casarez v. State, No. 1114-93, 1994 WL 695868 (Tex. Crim. App. Dec 14, 1994) (religious discrimination in *voir dire*); State v. Davis, 504 N.W.2d 767 (Minn. 1993) (religious discrimination in *voir dire*), *cert. denied*, 114 S. Ct. 2120 (1994).

224. *See, e.g.*, Board of Educ. v. Grumet, 114 S. Ct. 2481 (1994); Hernandez v. Commissioner, 490 U.S. 680 (1989) (O'Connor, J., dissenting); Larsen v. Valente, 456 U.S. 228 (1982); Sherbert v. Verner, 374 U.S. 398 (1963).

225. It could be argued that the neutrality requirement imposed by the Establishment Clause captures the equality components of both the Speech and Equal Protection Clauses. *See* Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311 (1986). I do not believe that, as applied in many cases litigated under both components of the Religion Clause, the Court's own reasoning could survive "strict" Equal Protection or Speech Clause scrutiny.

226. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992); Lee v. International Soc'y for Krishna

What has largely been ignored in the Court's selective use of history as a guide to the interpretation of the incorporated First Amendment is the "social fact"[227] that religious discrimination and prejudice, like their counterparts in the field of race and gender relations, have a long and sordid pedigree in this country. De jure religious discrimination led to Roger Williams' exile from Massachusetts and the founding of Rhode Island. It was the hallmark of the British and Colonial establishments,[228] for social control and unequal citizenship went hand in hand. Deeply ingrained in the fabric of community life, it continued to exist in the states even after the adoption of laws to guarantee religious liberty in the post-colonial period, and it has played a major role in national and local political struggles ever since.

The influx of immigrants during the great immigration waves from Europe during the century between 1820 and 1920 added cultural and religious xenophobia to the mix. In 1790, Catholics numbered only about 35,000 out of a total population of over four million, and together, Catholics and Jews amounted to only about 0.1 percent of the population.[229] "The great Atlantic migration," first of the Irish, later of Germans and Scandinavians, and finally of Eastern and Southern Europeans, brought in over forty million immigrants with "foreign" ways, languages, and loyalties. For many, this was an unwelcome development, and it is mirrored today in the prejudice and intolerance of the religious traditions of our newest immigrants from Africa, the Caribbean Basin,[230] Central and South America, the Pacific Rim, and the Indian Subcontinent.

Consciousness, Inc., 112 S. Ct. 2709 (1992). *Cf.* Lee v. Weisman, 505 U.S. 577 (1992).

227. *See* Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988); Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477 (1986). Although it is not clear if judicial reliance on findings of "social fact" is legitimate in constitutional decision-making, it is quite clear, as Professors Walker and Monahan put it, that there is a "more generic movement on the part of American courts to use general research findings to create a context or background within which facts specific to a case can be determined." Walker & Monahan, *supra*, 73 VA. L. REV. at 571 n.32. The use of "social fact" as background played an important role in shaping the Supreme Court's approach, if not the outcome of the case itself. It is in the "social framework" sense that the term "social fact" is used here.

228. Commenting on the debates over the Test Clause of Article VI during and after the Constitutional Convention, Professor Bradley underscores the Machiavellian spin that the Clause places on the Golden Rule by reminding us just how prejudiced many of the Framers were:

> In all, it is just not morally inspiring to be told that the foundation of constitutional liberty was a system of ambition, jealousy, and parochialism of our hallowed founding generation. For instance, one of the government-funded, Bicentennial, celebratory projects is "baseball cards" of the fifty-five framers. I doubt that the vital statistics on the back of Roger Sherman's card will include his hatred for Catholics.

Gerard V. 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, 743 (1987) (citation omitted).

229. REV. H.A. BUETOW, NATIONAL CATHOLIC EDUC. ASSN., KEYNOTE SERIES NO. 2, A HISTORY OF UNITED STATES CATHOLIC SCHOOLING 13 (1985).

230. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 936 F.2d 586 (11th Cir. 1991), *rev'd*, 113 S. Ct. 2217 (1993).

The Nineteenth Century immigration period was characterized by a politics tainted with overt religious, ethnic, and racial animus. Discrimination on the basis of race, national origin (which was often equated with race) and religion (which is often associated with nationality)[231] was practiced openly, and a wide range of discriminatory legal policies neutral on their face, but discriminatory in both purpose and effect were adopted.[232] There was violence as well.[233] It was not until the early 1920s that the Supreme Court intervened.[234] And when it did intervene, it did so on the basis of a substantive due process: freedom of contract or religious liberty, but not equal protection.

Application of rules developed for equal protection cases involving de jure discrimination would yield results in a number of religious liberty cases that would be quite interesting. Religious liberty cases often contain hints—if not explicit evidence—that de jure discrimination on the basis of religion is at least one source of the complaint at issue. This was certainly the case in both *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[235] where the law was aimed at a specific religious sect and its practices, and in *Sherbert v. Verner*,[236] where the law contained an explicit exemption for Sunday observers forced to work on their Sabbath.[237] Further, history leaves little doubt that

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231. St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987) (definition of "race discrimination" under 42 U.S.C. § 1981 (1988), as applied to persons of Arab descent); Shaare Tefila Congregation v. Cobb, 481 U.S. 615, 617-18 (1987) (definition of "race discrimination" under 42 U.S.C. §§ 1981 & 1982 as applied to persons of Jewish descent).

232. There is an extensive discussion of this problem in Washington State contained in the dissenting opinion of Justice Utter of the Washington Supreme Court in Witters v. State Comm'n for the Blind, 771 P.2d 1119 (Wash. 1989), *reaffirming on state constitutional grounds* 689 P.2d 53 (1984), *rev'd sub nom.* Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986). In New York, for example, a law passed in 1813 provided that the Free School Society (later the Public School Society) should allocate the educational funds at its disposal to, among others, "such incorporated religious societies in said city, as now support or hereafter shall establish charity schools within the said city, who may apply for the same." PAUL A. FISHER, BEHIND THE LODGE DOOR: CHURCH, STATE AND FREEMASONRY IN AMERICA (1988) (quoting CHARELTON BEALS, BRASS KNUCKLE CRUSADE 45-77 (1960)). Immigration changed all that.

From the perspective of the non-Protestant immigrants whose choice in education was limited to the newly-established public schools, the vestiges of the de jure religious establishment were alive and well. These schools "tended to be close copies of the Protestant schools they replaced," and when Catholic and Jewish immigrant groups were unsuccessful in their attempts "to remove Protestant sectarianism from the public schools," they began to request their fair share of the tax monies allocated to the schools of other religious organizations under the 1813 statute. The result was a change in the law of New York which denied funds to any school which taught "sectarian doctrine." *Id.* (quoting WM. OLAND BOURNE, HISTORY OF THE PUBLIC SCHOOL SOCIETY OF THE CITY OF NEW YORK 7, 31, 45 (1870)); W.G. KATZ, RELIGION AND THE AMERICAN CONSTITUTIONS 63 (1964).

233. Mormons and Catholics were subjected to some of the most brutal attacks, including murder and arson.

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

235. 113 S. Ct. 2217 (1993).

236. 374 U.S. 398 (1963).

237. *Id.* at 406. The Court stated:

> Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of

discrimination has played a significant role in the treatment of Mormons and their beliefs.[238]

Because religious discrimination is essential to the maintenance of what the First Amendment refers to as "an establishment of religion," preferential treatment, test oaths to demonstrate one's loyalty to king and country, and attempts to rid the community of dissenters from the reigning orthodoxy by suppression of free exercise and contrary world-views should be seen as devices designed to maintain a de jure orthodoxy respecting religion. Viewed through the lens of the Fourteenth Amendment, each device which can be utilized to support an establishment of religion would (or should) also present a prima facie case under either the Privileges and Immunities or the Equal Protection Clause. Intent to discriminate (classify) on the basis of a characteristic which is, or has been held to be, *legally* irrelevant to government decision-making as a matter of constitutional law (inherently suspect) is the essence of an equal protection claim. It also happens to be the essence of a claim under the Test Clause of Article VI.

The Court's selective use of history in its interpretation of the Religion Clause thus has another insidious effect: it misses the forest for the trees. The views of the champions of religious freedom during the Colonial period are significant indeed, but they were not mere philosophical reflections on the human condition. Madison, Jefferson, Roger Williams and other champions of religious liberty during the formative period are remembered because their commitment was directed toward the alleviation of human suffering at the hands of governments *antagonistic* to religious beliefs other than those established by law, and to religious practices that were deemed to be inconsistent with the religio-cultural cohesiveness of the community.[239]

Madison, Jefferson and Williams are heroes, not because they were able to translate their views into statutory or constitutional law, but because their commitment to human rights and non-discrimination for those who did not partake in the political orthodoxy concerning religion was the *exception* in their respective states, not the rule. It was their commitment to religious liberty and non-discrimination, as well as their savvy at power politics, that gave Madison and Jefferson the credibility to motivate those Virginians who lived under the heel of the Anglican boot to challenge what might be described today as

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> "national emergency" the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." S.C. Code, § 64-4. No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

Id.

238. Judge John T. Noonan, Jr. has noted, however, that the laws against polygamy were actually the result of a sustained effort on the part of a number of religious groups to ban the practice. *See* John T. Noonan, Jr., *The End of Free Exercise?*, 42 DEPAUL L. REV. 567 (1992).

239. *See* Rys Isaac, *Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775*, 31 WM. & MARY QUARTERLY 345 (1974).

political correctness in the field of religion.[240]

2. "Neutrality" or Non-Discrimination: Importing the Debate Over "Intent" vs. "Effects" into the Jurisprudence of the Religion Clause.—The Court's equal protection jurisprudence reflects an important ongoing debate over the nature of the judicial role. *Employment Division v. Smith, Texas Monthly v. Bullock*, and *Board of Education v. Grumet* illustrate that this debate has now spilled over into cases arising under the Religion Clause as well.

In sum, the issue is whether the Court's role is limited to cases in which there is discriminatory intent, or whether it should intervene in cases where there is a discriminatory effect on a protected class as well. The Court's opinion in *Smith* signaled its decision to take a Fourteenth Amendment approach to at least *some* First Amendment cases. Justice Scalia, writing for the majority in *Smith*, explained that "the *First Amendment* has not been offended" if generally applicable and otherwise valid legislation has the incidental effect of "prohibiting the exercise of religion."[241] The Court has taken a major step toward integrating its interpretation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It did so by extending the rule of *Washington v. Davis*[242] to cases arising under the Free Exercise Clause.

After *Smith*, proof of intent to discriminate or otherwise burden religion is required to trigger plenary review under the Free Exercise Clause.[243] At its most basic level, such an approach will subject laws or practices which smack of religious discrimination to the same strict scrutiny applied to other forms of intentional discrimination. The debate within the Court over this point was developed in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[244] Justice Kennedy's opinion for the majority indicates that "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt."[245]

But just as in equal protection cases, there is a dispute within the Court over what kinds of conduct are prohibited. All of the Justices in *Lukumi* were of the view that the laws which target religious practice, either overtly or covertly, are unconstitutional. Justice Souter's concurring opinion, for example, agrees that the Hialeah law is unconstitutional "[b]ecause prohibiting religious exercise is the object of the laws at hand," but he hastens to point out that "[*Lukumi*] does not present the more difficult issue addressed in . . . [*Smith*], which announced the rule that a 'neutral, generally applicable'

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240. *See generally* Daniel L. Driesbach, *A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Context*, 35 AM. J. OF LEGAL HIST. 172 (1991); Daniel L. Driesbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159 (1990).

241. Employment Div. v. Smith, 494 U.S. 872, 878 (1990) (emphasis added).

242. 426 U.S. 229 (1976). *See Smith*, 494 U.S. at 886.

243. *See* Citizen Publishing Co. v. United States, 394 U.S. 131, 139 (1969) (antitrust law impact on press liberty); Washington v. Davis, 426 U.S. 229 (1976) (racial discrimination). In one respect, it only stands to reason that if the Fourteenth Amendment itself requires intentional action, then so too should judicial review which relies upon its Due Process Clause as the source of judicial authority.

244. 113 S. Ct. 2217 (1993).

245. *Id.* at 2221.

law does not run afoul of the Free Exercise Clause even when it prohibits religious exercise in effect."[246]

As understood in the Free Exercise Clause context, the "effects" test looks to what Professor Douglas Laycock describes as "substantive neutrality";[247] a proposition described by Justice Souter as one "which, in addition to demanding a secular object, would generally require government to accommodate religious differences by exempting religious practices from formally neutral laws"[248] whenever the law "unduly burdens the free exercise of religion." [249] Justices O'Connor and Blackmun agreed: "When the State enacts legislation that *intentionally or unintentionally* places a burden upon religiously motivated practice, it must justify that burden by 'showing that it is the least restrictive means of achieving some compelling state interest.'"[250]

The problem, of course, is how to determine just what a "substantial" or "undue burden" on the free exercise of religion *is*, and, more importantly, *who* is empowered to make a determination that a burden exists, and that a special exemption is either necessary or appropriate? By forcing consideration of free exercise cases into the existing framework of Fourteenth Amendment jurisprudence, the Court in *Smith* has raised a number of extremely significant questions. These questions go to the heart of the Court's incorporation of the First Amendment,[251] and to the thorny issues of separation of powers and federalism which have been long ignored.

3. Relating Norm to Structure: The Power to Relieve Governmentally-Imposed Burdens on Religious Practice.—Taken at face value, Justice Scalia's comments in *Smith* regarding the role of the legislature in protecting First Amendment rights hold out the possibility that legislatures, including Congress, might be able to enact laws specifically designed to protect religious liberty alone.[252] The *Texas Monthly* case reaches precisely the opposite conclusion. The result is that the structural and normative questions which emerge from *Smith* and *Texas Monthly* are virtually identical to those which divide the Court on questions of affirmative action:[253] the content of the relevant constitutional norms (Equal Protection and Free Exercise), the role of the Court as an advocate for minorities, and the right of Congress to intervene should the Court reach a policy conclusion it considers to be an inappropriate response to a pressing social problem.

Two further points are worth noting. First, the Court in *Smith* appears to have limited the reach of its holding to cases arising under the Free Exercise Clause.[254] This aspect of

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246. *Id.* at 2242 (Souter, J., concurring).

247. Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993 (1990).

248. *Church of the Lukumi Babalu Aye, Inc.*, 113 S. Ct. at 2241.

249. *Id.* at 2242 (quoting Employment Div. v. Smith, 490 U.S. 872, 896 (1990)).

250. *Id.* at 2250 (citing Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 718 (1981)) (emphasis added); Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

251. The original drafts of this Article included a comparative discussion of the substantive, rather than the structural, protections afforded freedom of speech and religion. Due to space limitations, however, it was necessary to delete them. Along with additional material, they will be published as a separate Article.

252. *See supra* notes 156-58 and accompanying text.

253. *See, e.g.*, Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990).

254. "Hybrid" cases—those involving the Free Exercise Clause "in conjunction with other constitutional

Smith has been particularly nettlesome to Justice Scalia's critics, who have accused him of being openly hostile to free exercise rights. However, precisely the opposite is true and his critics have failed to consider the significance of Justice Scalia's dissent in *Texas Monthly*.

Neither the case law nor the literature supports the proposition that accommodation of any individual right—especially those protected by the First Amendment—must proceed on a case-by-case basis; yet this is precisely what *Texas Monthly* holds with respect to the Free Exercise Clause.[255] *Smith* presents the converse scenario. In *Smith*, the issue was whether the Free Exercise Clause *required* an exemption—the very issue Justice O'Connor would have reserved in *Texas Monthly*.[256] Just as in *Texas Monthly*, Justice O'Connor concluded in *Smith*[257] that there was no showing of concrete need to accommodate under the circumstances.

The interesting thing about this particular controversy is how little it has to do with religious liberty. The real issue is judicial power. Justice Scalia opposes courts striking what Justice O'Connor calls "sensible balances." In operation, these sensible balances inevitably limit the ability (and power) of legislatures, including Congress, to accommodate the sincerely-held religious beliefs and practices of all of those who feel threatened by what Justice Kennedy and others have called the "modern administrative state."[258]

For the Justices who joined the majority opinion in *Smith* (Scalia, Kennedy, Stevens, White, and Chief Justice Rehnquist), most of the criteria relevant to striking such a balance are simply irrelevant: the degree of burden, the centrality of the belief, the importance of the state's interest, and one's status in the community (i.e., as a "minority," however defined).[259] When the task is striking balances of this sort, their preference (at

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protections, such as freedom of speech and of the press"—may indeed qualify for analysis under an "effects" test in the future. Employment Div. v. Smith, 494 U.S. 872, 880, 887 & n.4. (1990).

255. *But see* Louis Fisher, *The Curious Belief in Judicial Supremacy*, 25 SUFFOLK U. L. REV. 85 (1991).

256. *See supra* notes 74-81 and accompanying text.

257. *Smith*, 494 U.S. at 906-07.

258. County of Allegheny v. ACLU, 492 U.S. 573, 655, 657 (1989) (Kennedy, White & Scalia, JJ., concurring and dissenting).

259. See *Fullilove v. Klutznick*, in which Justice Stevens' dissent raised the definitional question in the context of minority set-asides:

> [W]hy were these six racial classifications, and no others, included in the preferred class? Why are aliens excluded from the preference although they are not otherwise ineligible for public contracts? What percentage of Oriental blood or what degree of Spanish-speaking skill is required for membership in the preferred class? How does the legacy of slavery and the history of discrimination against the descendants of its victims support a preference for Spanish-speaking citizens who may be directly competing with black citizens in some overpopulated communities? Why is a preference given only to owners of business enterprises and why is that preference unaccompanied by any requirement concerning the employment of disadvantaged persons? Is the preference limited to a subclass of persons who can prove that they are subject to a special disability caused by past discrimination, as the Court's opinion indicates? Or is every member of the racial class entitled to a preference as the statutory language seems plainly to indicate?

448 U.S. 448, 552-53, 552 n.30 (1980).

least in some of these cases) appears to be for the legislature. The dissenters, including Justices O'Connor and Souter vehemently disagree on this point.[260]

The second point is also noteworthy. The most significant impact of the extension of Fourteenth Amendment reasoning to all religious liberty cases would be on the Court's interpretation of the Establishment Clause. This is so for two reasons: one substantive and one structural.

The substantive reason is briefly summarized. To the extent that the effect of an otherwise valid and facially neutral statute does not violate the First Amendment, both the second prong of the analysis set out in *Lemon v. Kurtzman*[261] for Establishment Clause cases, and Justice O'Connor's endorsement analysis are at risk. *Lemon*'s second prong asks whether the "principal or primary *effect* [of the governmental practice at issue] either advances [or] inhibits religion . . . ."[262] If it does, the law is unconstitutional. Endorsement analysis also rests squarely upon the *effect* that endorsements have on a hypothetical objective observer.[263]

An approach to Establishment Clause cases which proceeds structurally from the individual orientation of the Fourteenth Amendment would eliminate one of the more troublesome substantive aspects of the Court's jurisprudence: its propensity to strike what shifting majorities consider to be "sensible balances" on the basis of judicial interpretation of social, rather than adjudicative facts.[264] This has the operational effect of reading the welfare of the individual citizens involved in the case out of the analytical equation.

Since *Everson*, the Court's concern in Establishment Clause cases has focused almost entirely on the effect that government action has on religion,[265] rather than individuals.[266]

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260. Part II of Justice O'Connor's opinion in *Smith*, joined by Justices Blackmun, Brennan, and Stevens, contains an extensive discussion of the values underlying the respective clauses, and the role of both categorical reasoning and balancing in the Court's analysis. *See* Employment Div. v. Smith, 494 U.S. 872, 901-02 (1990).

261. 403 U.S. 602 (1971).

262. *Id.* at 612.

263. The concept of the "objective observer" is derived from the opinions of Justice O'Connor in Wallace v. Jaffree, 472 U.S. 38, 69 (1985), and Corporation of Presiding Bishop v. Amos, 483 U.S. 327 (1987). In her view, apparently now adopted by the Court, the inquiry under the Establishment Clause should be how government action "would be perceived by an objective observer, acquainted with the text, legislative history, and implementation of the statute" or policy at issue. *Amos*, 483 U.S. at 348 (O'Connor, J., concurring in the result).

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

265. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985).

266. At least insofar as the expenditure of funds derived from taxes is concerned, an individual who alleges that government action "advances" religion need not demonstrate a personal injury; vindication of the "public" interest in the maintenance of an appropriate distance between church and state is enough. *See* Valley Forge Christian Academy v. Americans United for Separation of Church and State, 454 U.S. 464 (1982) (no standing for taxpayers when government disposes of excess property); Flast v. Cohen, 392 U.S. 83 (1968) (taxpayer standing where funds are expended). *But see* Allen v. Wright, 468 U.S. 737 (1984) (no taxpayer standing to challenge tax exemptions of schools alleged to be racially discriminatory). Justice Powell's concurring opinion in *Aguilar v. Felton* is a good example of an instance where a member of the Court makes explicit the trade-off between individual and societal concerns that is implicit in the Court's Establishment Clause jurisprudence. Justice Powell noted that the Title I programs for disadvantaged children, which were held unconstitutional in the case, "concededly have 'done so much good and little, if any, detectable harm.'" However,

As a result, the effect of the government's actions on the people involved in non-establishment cases appears to be less important than the substantive balance to be struck by the Court among public and private interests.[267]

When government action is alleged to burden a specific individual's religious liberty interests, however, the case must be litigated under the Free Exercise Clause or another provision, such as the Speech and Press Clause,[268] that is appropriate under the circumstances. *Texas Monthly*, however, makes it clear that a claim of entitlement arising under either of these Clauses will not constitute a defense to a charge that an Establishment Clause violation has occurred. The Court will simply ignore the characterization and resolve the tension among the clauses at issue by striking a substantive balance between the individual liberty at issue and the non-establishment value.

The equal citizenship orientation of the Fourteenth Amendment would seem to require a slightly different approach. The Court's present approach is to read the Due Process Clause, the conduit through which the Court applies the First Amendment to the states, in isolation. It is not an isolated provision, however, but an integral part of a structural response to the problem of officially sanctioned discrimination by both the states and the Court. Taken as a whole, i.e., read structurally, the Fourteenth Amendment requires that lawmaking by either Congress or the states, the administration of the laws by either the executive branch or state authorities, and the judicial decision-making by either the state or federal courts be consistent with the equal citizenship and non-discrimination norms of Section One, the Test Clause, and the First Amendment.

Viewed structurally, the significance of the most recent series of Religion Clause cases, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[269] *Lamb's Chapel v. Center Moriches Union Free School District*,[270] *Zobrest v. Catalina Foothills School District*,[271] and *Board of Education v. Grumet*,[272] lies not so much in their specific outcomes, but in the way in which the Court grapples with the role that de jure religious discrimination plays in the formulation of public policy, including its own holdings under the Religion Clause.[273]

4. Structuralism and the Debate within the Rehnquist Court.—We are now in a

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he concurred on the ground that "[o]ur cases have noted that '[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion.'" *Aguilar*, 473 U.S. at 402 (Powell, J., concurring).

267. This is the import of the Court's view that neither coercion nor discrimination is necessary to make a prima facie case under the Establishment Clause.

268. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981).

269. 113 S. Ct. 2217 (1993).

270. 113 S. Ct. 2141 (1993).

271. 113 S. Ct. 2462 (1993).

272. 114 S. Ct. 2481 (1994).

273. In both Rosenberger v. The Rector & Visitors of the Univ. of Virginia, 115 S. Ct. 2510 (1995), and Capitol Square Review & Advisory Bd. v. Pinette, 115 S. Ct. 2440 (1995), the Court divided over precisely this issue. In both cases, the majority strikes down state policies which discriminate on the basis of religion, and require the states to utilize formally neutral criteria in the administration of the public programs and fora at issue. The dissenters, by contrast, would hold not only that discrimination on the basis of religion is not only constitutionally permissable, it may sometimes be required.

position to review the structural posture of each of the factions within the Rehnquist Court on the constitutionality of laws that aid religion by creating religious exemptions from laws of general applicability. Viewed structurally, the *Texas Monthly* decision is more than just a conclusion that broadly-based religious exemptions violate the Establishment Clause. From a structural perspective, it is also an assertion of judicial supremacy in the field of policy "touching religion" made by at least two present and two former members of the Court.[274] The specter of legislatures writing religion-specific accommodations into general laws has long troubled a number of the Justices and commentators. Many of these individuals view affirmative accommodation as an official endorsement or advancement of religion at the expense of non-adherents or dissenters.[275] *Texas Monthly* adopts that perspective as the constitutional norm. After *Texas Monthly*, the judiciary must be convinced that a religion-specific exemption written by a legislature is required by the Free Exercise Clause. If the factions supporting it cannot demonstrate to the satisfaction of a court that a concrete need was the basis for the legislative accommodation, the legislative accommodation will violate the Establishment Clause.

Smith represents a radically different view of both judicial power and constitutional norm. The opinion in *Smith* explicitly rejects both the structural and the substantive balance of interests struck by the plurality in *Texas Monthly*. To the extent that the Constitution confers considerable discretion to federal and state legislators who write otherwise non-discriminatory laws of general applicability, the permissible scope of judicial authority is a narrow one indeed.

It is a small wonder that many advocates for religious liberty are upset with the current state of affairs. In its attempt to work around what Justice Brennan has called the "paradox" of the Religion Clause, the Court has finally accomplished what was predictable to objective observers all along: "in attempting to steer a course between the Scylla and Charybdis of the Establishment and Free Exercise Clauses," the Court has finally "collided with one and fallen into the other."[276]

This is why Justice Scalia's comments in *Smith* regarding the limits of judicial deference in free exercise cases are significant. Now that Congress has taken his suggestion to heart and attempted to reverse *Smith* by legislation, courts considering the issue find themselves unable to avoid either the structural questions raised in *Texas Monthly* or the normative ones left undecided in *Smith*.[277] Such an outcome would have

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274. The Justices include Brennan, Marshall, Stevens, Souter, O'Connor, and Blackmun. I have counted Justice Souter among the supporters of the analysis in *Texas Monthly* because his opinion in *Lee v. Weisman*, which was joined by Justices O'Connor and Stevens, explicitly endorses both its "strict separationist" holding and its rationale. 505 U.S. 577 (Souter, O'Connor, & Stevens, JJ., concurring).

275. *See, e.g.*, Board of Educ. v. Mergens, 496 U.S. 226, 284 (1990) (Stevens, J., dissenting); Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985). *See generally* Lawrence G. Sager & Christopher L. Eisgruber, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994). *See also* sources cites *supra* note 12, and *infra* notes 284, 342.

276. Catholic Bishop of Chicago v. NLRB, 559 F.2d 1112, 1131 (7th Cir. 1977) (Sprecher, J., concurring).

277. RFRA was held unconstitutional on separation of powers grounds in Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995). The United States District Court for the District of Hawaii reached precisely the opposite conclusion. *See* Belgard v. Hawaii, No. 93-00961, 1995 WL 170221, at *7 (D. Haw. Feb. 3, 1995)

the salutary effect of forcing the Court to test the limits of its own logic, not only with respect to the substance of religious liberty, but also with respect to "affirmative action" (i.e., accommodation) in the field of religious liberty as well. This will not be an easy task. Analysis at this point, however, is premature. A more fundamental structural problem stands in the way and it is to that question I now turn.

IV. STATE AND FEDERAL LEGISLATIVE EFFORTS TO PROTECT AND DEFINE THE SCOPE OF RELIGIOUS LIBERTY

One of the most remarkable aspects of the Court's opinion in *Smith* is its virtual invitation to legislatures to write legislation designed to remedy the disproportionate impact that facially neutral laws can have on members of minority religions.[278] Such a development leaves advocates for religious liberty and the Court in a tight bind. The Court's jurisprudence of the Religion Clause has long been what Justice O'Connor aptly described (albeit in another context) as "[on] a collision course with itself"[279] and with other constitutional and statutory guarantees.[280] The affirmative action implications of the decision in *Smith* place it on a collision course with equal protection theory as well. If affirmative action in the context of race discrimination presents the ultimate "hard question" under the Equal Protection Clause of the Fourteenth Amendment,[281] affirmative action designed to accommodate religious belief or practice ("affirmative accommodation") will be even more difficult.[282]

(holding RFRA constitutional pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment).

278. Employment Div. v. Smith, 494 U.S. 872, 888-89 (1990).

279. *See* City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416, 455 (1983).

280. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (freedom of speech; content-based regulations); Zobrest v. Catalina Foothills Sch. Dist., 114 S. Ct. 2481 (1994) (equal protection; Education of Handicapped Act); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (freedom of speech; Equal Access Act); Bender v. Williamsport Area Sch. Dist., 475 U.S. 534 (1986), *vacating and remanding* 741 F.2d 538 (3d Cir. 1984) (student-initiated prayer in public schools); Widmar v. Vincent, 454 U.S. 263 (1981) (freedom of speech).

281. *See, e.g.*, Metro Broadcasting v. F.C.C., 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Fullilove v. Klutznick, 448 U.S. 448 (1980).

282. That it should be so difficult for the Court to accept is somewhat surprising. In the now famous "Carolene Products footnote," the Court ushered in the era of "affirmative action" with respect to "particular religions or national or racial minorities." United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[N]or need we enquire whether similar considerations enter into the review of statutes directed at particular religions or racial minorities . . . ."). Dean Guido Calabresi has referred to the Court's Establishment Clause holdings as "a form of affirmative action," since most of the cases involve "the validity of rules designed to protect the non-religious, even when such rules, in practice, burdened religión and the religious." Guido Calabresi, *The Supreme Court: 1990 Term Foreword: Antidiscrimination And Constitutional Accountability (What The Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 101 n.63 (1991) (citing Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971); Edwards v. Aguillard, 482 U.S. 578, 593-94 (1987); School Dist. v. Ball, 473 U.S. 373, 397-98 (1985)). He noted that "[s]uch rules could be viewed as examples of the dominant majority accepting burdens on itself for the benefit of outcasts." *Id.*

A primary reason for the difficulty is the Court's perception of the nature of the religious liberty guarantees it is obliged to enforce. 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."[283] Why that relationship is a paradox, or why the Court should consider it a paradox, has never been explained. However, one thing is clear: *Smith* and *Texas Monthly* are the logical outcome of a jurisprudence built around a "paradox."

The immediate question is what can be done about it. Like so much else in the law, the answer to that question is: It depends on who is empowered to be the agent of change—the Court, the Congress, or the states.

A. Limiting the Role of State Legislatures: The Curious Case of Kiryas Joel

Read together, *Texas Monthly* and *Grumet* leave no doubt that state legislatures have little, if any, authority to grant relief from the burdens public policy may impose on specific religious groups. Both cases require legislation to be both generally applicable and neutral with respect to religion in order to pass muster under the Establishment Clause. To the extent that religious accommodation may be accomplished legislatively, it must be general in form and content and religiously neutral.

This has two intended effects. First, it forces all claims for relief from laws of general applicability (such as the claim involved in *Smith*) into court, thereby making accommodation claims "justiciable only."[284] Second, it narrows the circumstances in which accommodation will be permitted to those in which the judiciary will find a concrete need. The factual setting in which *Grumet* arose illustrates the nature of the problem.

Dean Calabresi's comments are quite interesting. Though his conclusion appears to be correct—that the Court's Establishment Clause case law is a form of "affirmative action"—his rationale for so concluding is inaccurate. It is simply wrong to characterize the beneficiaries of the Court's holdings as "non-religious." The only characteristic which is common to plaintiffs in Establishment Clause cases is their status as *dissenters* from government policy. Flast v. Cohen, 392 U.S. 83 (1968). Their religious beliefs run the gamut from nonbelief to religiously-based views of the proper relationship of church to state. As a result, it is doubtful that the mere fact that one dissents from a government policy concerning religious accommodation is enough to qualify the individual as a member of a "discrete and insular minority." Moreover, there is no doubt whatever that, with only a few notable exceptions, laws successfully challenged on Establishment Clause grounds are not "statutes directed at" the dissenting plaintiff. As a result, Dean Calabresi's speculation that the rules could be justified as "examples of the dominant majority accepting burdens on itself for the benefit of outcasts" is simply wrong. Calabresi, *supra*, 101 n.63. The burden was not borne by the "dominant majority," but by those minorities accommodated by the challenged statute. In fact, it could be argued that it was the "dominant majority" which reaped all the benefits. *See, e.g.*, Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Aguilar v. Felton, 473 U.S. 402 (1985).

283. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 230, 231, 247 (1963) (Brennan, J., concurring).

284. *See* Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

The *Grumet* case involved the Satmar Hassidim, a "discrete and insular minority."[285] Like the Christian Amish involved in *Wisconsin v. Yoder*,[286] the Satmars' distinctive dress and cultural traditions, tightly-knit communities, and orthodox religious beliefs set them apart from their neighbors in both Brooklyn and rural Orange County, New York. Unlike the Amish, the Satmars did not isolate themselves in rural communities; they clustered in urban neighborhoods and did not hesitate to call upon the local community for the goods and services they needed, including special educational services provided by the local public school system.

When friction grew between the Satmars and their neighbors due to incompatible views concerning land use in the area of Orange County, New York, the Village of Kiryas Joel was incorporated. The incorporation subsequently reduced friction and gave the Satmars control over the character of their own neighborhoods. At that point, the schools were not a problem. Following Orthodox Jewish traditions, the Satmar children were educated in religious schools. Prior to 1985, Satmar children needing special education were provided with the services in their schools. After the Supreme Court's decision in *Aguilar v. Felton*,[287] however, things began to change.

In *Aguilar*, the Court held that public school teachers could not provide special education services on the premises of a religious school because Establishment Clause cases hold that "[t]he State must be *certain*, given the Religion Clauses, that subsidized teachers do not inculcate religion."[288] Henceforth, if the Satmar children were to receive the services to which they were entitled under state and federal law, they would have to attend the public schools operated by the Monroe-Woodbury School District.

It was not a happy relationship. The Satmar parents felt the environment of the local public schools was hostile to their children and beliefs. They also felt the local school board was making no attempt to provide an environment in which the children could feel comfortable. The school board, however, felt constrained by both state and federal law. It did not believe that it had the authority to accommodate the religious and cultural needs of the Satmar children to the degree requested, and when the New York courts ruled that it did, it declined to do so.

After much litigation, the Satmar parents took their case to the New York Legislature. They petitioned for and received a "redress of grievances" in the form of a public school district with boundaries contiguous to the borders of their village. It was this accommodation which remains the subject of the continuing litigation over who shall control the educational environment for the special education children who live in the Village of Kiryas Joel.[289]

As in *Texas Monthly* and *Smith*, there are a number of ways in which the case could be characterized for analytical purposes. Among these are:

1) a "special education" case in which the focus is on the appropriateness of the

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285. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2485-87 (1994).

286. 406 U.S. 205 (1972).

287. 473 U.S. 402 (1985).

288. *Id.* at 415 (Powell, J., concurring).

289. *See* Grumet v. Cuomo, 625 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1995) (challenging constitutionality of new school district created in aftermath of Supreme Court decision).

educational environment for the individual children involved;

2) a "civil rights" case in which the question is how local school boards and state legislatures should deal with the issue of "cultural diversity" and "hostile environments";

3) a "religious test for public office" case in which the dispute centers on the ability or willingness of the Satmar majority in the town to adhere to their public trust, and administer a "secular" public school system;

4) a "merger of civic and religious authority" case in which the creation of the school district is viewed as the cession by the state of civil authority over a public institution to a religious organization or group;

5) a "religious accommodation" case in which the Satmar are viewed as a group whose religious liberty interests were adversely affected by a rule of general applicability (i.e., school attendance laws which resulted in the children's exposure to a hostile environment);

6) a "religious gerrymandering" case which raises directly the issue of whether the New York Legislature, knowing the religious demographics of the town, should have permitted the Village of Kiryas Joel to incorporate in the first place;

7) a "state sponsored segregation" case in which the dispute centers on the legitimacy of the state making it easier, or less expensive, for children to attend schools which are demographically identifiable (i.e., by race, religion, or other "suspect" characteristic);

8) a "petition for redress of grievances" case in which the dispute focuses on the common purpose of the faction seeking redress in order to determine the legitimacy of the legislative response; or

9) a "tangible support for religion" case in which the government is viewed as providing illicit support to the religious activities of the Satmar.

Because the Court was split over the appropriate characterization of the case, it was also split on what principles should be applied to resolve it.

1. Accommodating Religious and Cultural Differences via Legislation: Distinguishing Neutrality, Non-Discrimination, and Equal Protection.—

a. "Neutrality toward religion."—For the majority (Justices Souter, Blackmun, Stevens, O'Connor, and Ginsburg), the issue in *Grumet* was "neutrality toward religion."[290] That principle, according to the majority, was violated when the State of New York "delegat[ed its] discretionary authority over public schools to a group defined by its

290. Board of Educ. v. Grumet, 114 S. Ct. 2481, 2487 (1993).

character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally." [291]

Because the Court framed the issue as one of "delegation" of a public trust (i.e., of the discretionary administration of a public school system) "to a group defined by its character as a religious community,"[292] the case can be characterized in either of two ways. The first and most obvious choice is to view the delegation as creating Establishment Clause and equal protection problems because it unites "civic and religious authority"[293] through the creation of a religious gerrymander. It can also be viewed as a "religious test for public office" which challenges the right of a community identified by its common religion to exercise a public trust.[294]

In order to characterize the case as one involving the merger of religious and civic authority, the majority had to consider and decide a preliminary factual question: *Is the Village of Kiryas Joel a "religious group," or a legitimate organ of local self-government?* None of the justices in the majority address this question directly, but the impact of the observation that the Village is "a group defined by its character as a religious community" is clear. In the view of the majority, the Village of Kiryas Joel is a "religious group."[295] It gave the following reasons:

> 1) "those who negotiated the village boundaries when applying the general village incorporation statute drew them so as to exclude all but Satmars, and that the New York Legislature was well aware that the village remained exclusively Satmar in 1989 when it [created the school district]";[296]
>
> 2) "carving out the village school district ran counter to customary districting practices in the State,"[297] which had gradually eliminated local control by merging and centralizing school districts;
>
> 3) the Village district has very few students, "and in offering only special education and remedial programs it makes no pretense to be a full-service district";[298]
>
> 4) the district "origin[ated] in a special act of the legislature, rather than the State's general laws governing school district reorganization";[299] and

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291. *Id.*

292. *Id.*

293. *Id.* at 2488.

294. *See* McDaniel v. Paty, 435 U.S. 618 (1978); Torcaso v. Watkins, 367 U.S. 488 (1961).

295. Though the majority did not say so directly, Justice Souter's discussion of Larkin v. Grendel's Den, 459 U.S. 116 (1982), and the problems which arise when government grants a "special franchise" to a religion, indicates that the Court clearly had serious reservations concerning the legitimacy of the school district and the incorporation of the Village itself. *Grumet*, 114 S. Ct. at 2492, 2488-89.

296. *Grumet*, 114 S. Ct. at 2489.

297. *Id.*

298. *Id.* at 2490.

299. *Id.*

> 5) "the pattern of interdistrict transfers, proposed and presently occurring, tends to confirm that religion rather than geography is the organizing principle for this district."[300]

Read together, these anomalies point to what was obvious from the very beginning: a specific legislative intent to accommodate the needs of a specific discrete and insular religious group.[301]

In the majority's estimation, this is precisely what made the law unconstitutional. At least with respect to *religious* minorities, state legislatures can take steps to remedy civil rights violations only through neutral laws of general applicability.[302] If their needs are "targeted" for accommodation, the Court will want to know up front "whether the benefit received by the [religious group] is one that the legislature will provide equally to other religious (and nonreligious) groups."[303] This is so because the Judiciary has "no assurance that the next similarly situated group seeking a school district of its own will receive one," and the matter would be effectively insulated from judicial review to determine whether "the legislature may [have] fail[ed] to exercise governmental authority in a religiously neutral way."[304]

"Neutrality" and "equal protection," however, do not describe the same concept.[305] More important, it is the Fourteenth Amendment, not the First Amendment, which actually governs New York's conduct with respect to religious liberty. The *Grumet* case provides a textbook example of the difference between the equality principle(s) involved in religion cases and those applied in a standard equal protection case.

b. Equal protection: is Kiryas Joel segregated or is it a religious gerrymander?—

(i) Is Kiryas Joel a religious gerrymander?—Like Justices O'Connor and Blackmun in *Texas Monthly* and Justice O'Connor in *Smith*, Justice Kennedy attempts to "decide the issue [presented] upon [a] narrow[] theory." Although Justice Kennedy agreed that "a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment," he disagreed with the suggestion of Justices Souter, Blackmun, Stevens, and Ginsburg that the creation of the Kiryas Joel Village School District contravenes these basic constitutional commands.[306]

Justice Kennedy felt "[t]he real vice of the school district is . . . that New York created it by drawing political boundaries on the basis of religion."[307] This made *Grumet*

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300. *Id.* at 2490 n.5.

301. *Id.* at 2490.

302. *Cf.* Shaw v. Reno, 113 S. Ct. 2816 (1993); *id.* at 2834 (White, Blackmun, & Stevens, JJ., dissenting); *id.* at 2843 (Blackmun, J., dissenting); *id.* at 2845 (Souter, J., dissenting).

303. *Grumet*, 114 S. Ct. at 2491, 2494.

304. *Id.* at 2491. The New York Legislature has responded to the challenge by passing a facially neutral statute which is clearly designed to accommodate Kiryas Joel. *See also* Grumet v. Cuomo, 625 N.Y.S.2d 1000 (N.Y. Sup. Ct. 1995).

305. *See* Robert A. Destro, *Equality, Social Welfare and Equal Protection*, 9 HARV. J. L. & PUB. POL'Y. 51 (1986).

306. *Grumet*, 114 S. Ct. at 2501 (opinion of Kennedy, J.).

307. *Id.*

an equal protection case, and made the intent of the New York Legislature's line drawing exercise critical to the outcome of the case. Echoing the theme he articulated in *Lukumi*, Justice Kennedy asserted that the New York Legislature's decision to give the Village of Kiryas Joel control over the special education programs of its children should be viewed as a religious gerrymander rather than a legitimate legislative response to a community's petition for a redress of grievances arising from a religious and cultural conflict.[308]

This is an important distinction, but in light of his view that "[t]he danger of stigma and stirred animosities is no less acute for religious line-drawing than for racial,"[309] it misses an important point. Given that the New York Judiciary had been unwilling or unable to resolve the controversy, the only remedy available *to the Legislature* was to redraw the school district lines. A finding with respect to their intent was critical. A finding that their otherwise-legitimate actions *resulted* in a demographically homogeneous district would not be enough to find a violation of the Equal Protection Clause.

(ii) Was there a legislative intent to segregate?—The key to an equal protection analysis is a finding of intent to classify on the basis of a characteristic that is impermissible as a matter of constitutional law. A standard equal protection analysis of the facts in *Grumet* should therefore have examined a number of factors to determine whether the New York Legislature intended to accomplish an impermissible purpose. The treatment of the Satmars in and by the public school system would be relevant because it could give rise to a need to remedy past discrimination; so too would be the Legislature's record with respect to the creation of special school districts.

Since it was clear that the New York Legislature had created public school districts designed to meet the unique needs of children in other settings,[310] the only *equal protection* question should have been the "fit" between the remedy and the problem to be solved. In the absence of a finding of a close relationship between the remedy and the problem, there would have been strong grounds for assuming that illegal discrimination (preference) was the motivating factor for the legislative act.

In *Grumet*, however, this was not the case. There was little dispute over the difficulties which were faced by the Satmar children in the public school. The legislative response, though targeted on the Satmar, was rationally related to an important state and private interest: meeting the special education needs of children in a distinctive cultural and religious community.

Whereas Justice Kennedy's concern was the *manner* in which the accommodation was carried out, Justices Stevens, Blackmun, and Ginsburg viewed the accommodation *itself* as raising an Establishment Clause problem.[311] Because the need arose in the context of public education, and involved the accommodation of both cultural and *religious* needs, they viewed *Grumet* as a religious education case.[312] Accordingly, their focus shifted from the interests of the Satmar children who had been placed in what their parents considered a hostile environment, to the "strong public interest in promoting diversity and

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308. *Id.* at 2504.

309. *Id.*

310. *See, e.g.*, 1970 N.Y. Laws 843 (authorizing a union free school district for the area owned by Blythedale Children's Hospital).

311. *Grumet*, 114 S. Ct. at 2506.

312. *Id.* at 2492.

understanding in the public schools."[313]

The children's interests, wrote Justice Stevens, would have been accommodated if "the State [had] taken steps to alleviate the children's fear by teaching their schoolmates to be tolerant and respectful of Satmar customs."[314] Such an approach would certainly have been the minimum in a setting where a hostile environment is found to have existed, and Justice Stevens was quite correct in noting that an "[a]ction of that kind would raise no constitutional concerns."[315] But the legislation at issue in *Grumet* went much further:

> Instead, the State responded with a solution that affirmatively supports a religious sect's interest in segregating itself and preventing its children from associating with their neighbors. The isolation of these children, while it may protect them from "panic, fear and trauma," also unquestionably increased the likelihood that they would remain within the fold, faithful adherents of their parents' religious faith. By creating a school district that is specifically intended to shield children from contact with others who have "different ways," the State provided official support to cement the attachment of young adherents to a particular faith.[316]

For Justices Stevens, Blackmun, and Ginsburg, the issue was not "targeted accommodation" as such, or even the way the circumstances make it "look" (*viz.*, as a merger of civic and religious authority (Justice Souter),[317] nor was the issue a religious gerrymander (Justice Kennedy)).[318] Instead, the issue was the *effect* the accommodation had on the religious beliefs of those accommodated.[319] The accommodation in *Grumet* was unconstitutional, not only because it *looked* bad, but also because it actually *advanced* the religious agenda of the families involved.

Why this is a problem, however, is not explained. Just as "burdens" have the *effect* of "inhibiting" religious exercise, most religious accommodations have the *effect* of "advancing" the religious endeavors of those accommodated. The key, at least in most equal protection cases, is whether the intent is to discriminate on the basis of a suspect classification or to remedy some damage done by the government's action. In *Grumet*, it was conceded by all parties that there was a problem the New York courts had been unable to remedy and the Legislature intented to "fix."

2. Taking A Structural Approach: Do Courts Have Exclusive Jurisdiction to Accommodate?—Viewed structurally, the connection between the outcome in *Grumet* and the debates among the Justices in *Texas Monthly* and *Smith* is striking. The majority in both *Texas Monthly* and *Grumet*, viewed legislatures as having no business writing laws that accommodate the needs of specific, religiously-identifiable groups. If they do, the

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313. *Id.* at 2495 (Stevens, J., concurring, with whom Blackmun & Ginsburg, JJ., joined).

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 2488.

318. *Id.* at 2501 (Kennedy, J., concurring).

319. This was precisely the problem which caused Justice Douglas to dissent in Wisconsin v. Yoder, 406 U.S. 205 (1972). He viewed the *judicial* accommodation as one which provided official support for parents who raise their children in the Amish religious tradition. *Id.* at 240, 245-47.

intent of the statute is indistinguishable from its effect, and the law "advances" the religion accommodated. Justice O'Connor's concurring opinion makes this clear:

> There is nothing improper about a legislative intention to accommodate a religious group, *so long as it is implemented through generally applicable legislation.* New York may, for instance, allow all villages to operate their own school districts. *If it does not want to act so broadly, it may set forth neutral criteria that a village must meet to have a school district of its own; these criteria can then be applied by a state agency, and the decision would then be reviewable by the judiciary.*[320]

This is an interesting approach, but it completely avoids the question which so troubled Justices Stevens, Ginsburg, Breyer, and Souter. Their concerns centered on the fact that this legislative accommodation targeted the special needs of a religious group. Justice O'Connor, however, apparently believes that "[a] district created under a generally applicable scheme would be acceptable even though it coincides with a village which was consciously created by its voters as an enclave for their religious group." [321] By contrast, Justice Souter rejects this proposition outright, and Justices Stevens, Blackmun, and Ginsburg view legislative accommodations of *religiously*-based educational interests as "state action in aid of segregation."[322]

The *Grumet* case tells us that a majority of the Court would permit *some* legislative accommodation of specific burdens on religious belief or practice, but that all would scrutinize them "strictly" for evidence of discrimination or preference (Justices Rehnquist, Scalia, Thomas, Kennedy, and O'Connor), while three more Justices (Justices Blackmun, Stevens, and Ginsburg) would scrutinize the nature of the benefit received as well. Justices Souter and O'Connor clearly prefer that the case for accommodation be made by a judge who is presumably capable of tailoring the relief to a "concrete need" which appears in the record. This was what bothered the dissenters in *Grumet*.

The contrast between the majority and the dissenters in *Grumet* was as stark as that which appears in both *Texas Monthly* and *Smith*. Justices Scalia, Thomas, and Chief Justice Rehnquist, viewed the *majority's* approach as one which is discriminatory and "hostile" to religion.[323] They explained that *Grumet* was not a case involving the government subsidy of private schools or of religion, but one which questions the creation and legitimacy of a *public* school where the "only thing distinctive about the school is that all the students share the same religion."[324] In their view, the formation of the Village of Kiryas Joel simply continued a practice prevalent throughout the history of the United States—people of the same religious persuasion forming communities and establishing schools to serve them.[325]

These are strong words that pose the direct question: Can *any* legislature be clear about its intent to accommodate religion? *Grumet*, *Texas Monthly*, and other cases

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320. *Grumet*, 114 S. Ct. at 2498 (O'Connor, J., concurring) (emphasis added).

321. *Id.*

322. *Id.* at 2495 (opinion of Stevens, Blackmun, & Ginsburg, JJ.).

323. *Id.* at 2508 (Scalia, J., dissenting, with whom Rehnquist, C.J., and Thomas, J., joined).

324. *Id.* at 2506.

325. *Id.* at 2507-08.

involving legislative accommodation make it clear that, while a majority of the Court may be amenable in theory to legislative accommodations, it is not receptive in practice to legislative efforts to strike sensible balances between religious and non-religious interests. But there is one legislature left to whom the First Amendment itself guarantees access and petition for redress of grievances. Can Congress be the agent of change?

B. Statutory Protection for Religious Liberty: What is the Role of Congress?

1. Introduction: The "Religious Freedom Restoration Act."—The Religious Freedom Restoration Act (RFRA) contains an explicit congressional finding that the policy position enunciated by the Court in *Employment Division v. Smith* is not good public policy. But statutes like the proposed RFRA do more than indicate the sense of the Congress respecting disputed points of law; they stake an explicit claim to the power to resolve them.

Since all such power claims must rest on a fair reading of the text of the amended Constitution, Congress' power to enact a statute like RFRA must rest upon the powers enumerated in the Constitution itself or those conferred by later amendments.[326] Given the fact of incorporation, the assertion is that Section Five of the Fourteenth Amendment provides the jurisdictional basis for RFRA.

2. The Power of Congress to Define and Enforce the Fourteenth Amendment: The Relationship Between Section Five and Section One.—To assert that Section Five is the source of congressional authority to legislate with respect to the rights incorporated is to raise a number of significant questions, both structural and substantive. At the highest level of generality, the question may be phrased as follows: Does Section Five authorize Congress to legislate with respect to *all* constitutional norms arguably within the scope of the Citizenship, Due Process, Privileges and Immunities, and Equal Protection Clauses, or is congressional power limited to enforcing norms which are recognized as fundamental by judicial interpretation of Section One?

As applied to the specific issue of *religious* liberty, the question is: May Congress pass laws with the specific intent of protecting religious liberty from burdens caused by laws of general applicability, or is congressional authority under Section Five limited to empowering the judiciary to strike its own sensible balances between religious liberty and other important state and individual interests?

The Court's opinions in *Katzenbach v. Morgan*[327] and *Oregon v. Mitchell*[328] provide a useful backdrop against which to consider the structural difficulties inherent in developing a standard for reviewing the scope of congressional power to adopt laws protecting religious liberty. *Morgan* provides insights regarding the relationship of the normative content of the specific guarantees (non-establishment and no limits on free exercise) to the structural mechanisms the framers put in place to help insure that they would be respected (separation of powers and federalism).

The First Amendment's introductory phrase, "Congress shall make no law,"[329] has

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326. *See* United States v. Lopez, 115 S. Ct. 1624 (1995).

327. 384 U.S. 641 (1966).

328. 400 U.S. 112 (1970).

329. There is no logical way to confine this question to the First Amendment alone. All other rights

been interpreted by the Court to mean that "Congress[,] [the Executive, and the States] shall make no law [or enforce any policy]."[330] *Morgan* thus provides the backdrop for considering the separation of powers boundary between Congress and the Court when a dispute arises between them concerning the contours of the incorporated religious liberty guarantees. Put in structural terms, the question is whether the incorporated First Amendment should be interpreted to mean that neither "Congress[,] [the Executive, the Judicial Branch, nor the States] shall make [any] law [or enforce any policy]" which has as either its purpose or its effect the creation, maintenance, enforcement or application of a law or policy *respecting* an establishment of religion; or *prohibiting* the free exercise of religion; or *abridging* the freedoms of speech, press, peaceable assembly or petition for a redress of grievances.

Following the lead of most of the post-*Smith* legal scholarship which addresses the general contours of these questions, the two federal courts which have considered the constitutionality of RFRA, and reached opposite results, have concluded their respective analyses at this point.[331] They do so because they assume, as does the Supreme Court, that the structural locus of power to protect religious liberty has been vested in the federal government generally, and in the Court in particular. In *Flores v. City of Boerne*, the United States District Court for the Western District of Texas held that RFRA is unconstitutional because:

> According to the holding of *Marbury v. Madison*, "[i]t is emphatically the province and duty of the judicial department to say what the law is. . . ." "Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."
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> . . . .
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> In this instance, Congress specifically sought to overturn Supreme Court precedent as found in *Employment Division v. Smith* through the passage of RFRA. . . . The Court is cognizant of Congress' Authority under Section 5 of the Fourteenth Amendment, yet is convinced of Congress' violation of the doctrine of Separation of Powers by intruding on the power and duty of the judiciary.[332]

In the District Court's view, this was because "RFRA only mentions the First Amendment as the empowering provision to change the burden of proof standard to compelling interest. . . . [And] the First Amendment is not an enumerated power of

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incorporated via the Due Process Clause are subject to the same structural evaluation.

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

331. *See* Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding RFRA unconstitutional as a violation of separation of powers and beyond the powers of Congress to enact); Belgard v. Hawaii, No. 93-00961, 1995 WL 170221, at *7 (D. Haw. Feb. 3, 1995) (holding RFRA constitutional pursuant to Congress' enforcement power under Section Five of the Fourteenth Amendment).

332. 877 F. Supp. 355, 356-57 (W.D. Tex. 1995) (citations omitted).

Congress, but merely a limitation . . . ."[333] As a result, the Court stated, "*Katzenbach v. Morgan* and its progeny are inapplicable."[334] Separation of powers controls the analysis because the First Amendment simply "does not empower Congress to regulate all federal law in order to achieve religious liberty, unless it is done pursuant to an enumerated power."[335]

The *Boerne* court thus accurately identifies the first of the structural questions: What are the source(s) of congressional power to protect religious liberty? But by viewing the First Amendment as a blanket limitation on the power of Congress to make laws concerning religious liberty the *Boerne* court ignores the second question: Whether the laws adopted by Congress under its plenary powers to regulate virtually every aspect of the federal government's operations are *consistent* with the powers granted and the limits imposed?

This is a critical omission. In order for any court to hold a statute unconstitutional there must first be a finding that Congress or a state has either exceeded the powers granted or transgressed a limit on powers it does have.[336] Since Congress clearly has the power to legislate civil rights protections in all fields otherwise subject to its lawmaking power,[337] the district court's view that the First Amendment is, or should be considered, the locus of congressional power to legislate on the topic of religious liberty is clearly wrong.[338] The First Amendment, if anything, is a structural limitation of the subject-matter of federal authority with respect to establishments of religion and laws prohibiting the free exercise thereof.

Also incorrect is the *Boerne* court's apparent view, which is shared by some commentators, that Section Five of the Fourteenth Amendment is not relevant in the absence of *another* specific source of congressional authority to legislate. Part III of this Article points out that the power granted by Section Five of the Fourteenth Amendment, "like all others vested in Congress, is complete in itself, [and] may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."[339] Therefore, just as the Commerce power enunciated in *Gibbons v. Ogden* is plenary as to every matter within its scope, *United States v. Lopez* stands as a stark reminder that the limitations on Congress' Section Five power (and of the Court's power under the First and Fourteenth Amendments) are also "inherent in [its] very language."[340]

The language and history of the Fourteenth Amendment leave no doubt that Congress has the power to pass laws which will enforce the norms embodied in the Citizenship, Due Process and Equal Protection Clauses. It also has power both to define and enforce "privileges and immunities of citizens of the United States" which are otherwise consistent

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333. *Id.* at 357 n.1.

334. *Id.*

335. *Id.* (citing Marci A. Hamilton, *The Religious Freedom Restoration Act: Letting the Fox into the Henhouse Under Cover of Section 5 of the Fourteenth Amendment*, 16 CARDOZO L. REV. 357, 363 (1994)).

336. *See* U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

337. *See* United States v. Lopez, 115 S. Ct. 1624 (1995).

338. *See, e.g.*, Michael A. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249 (1995).

339. *Lopez*, 115 S. Ct. at 1627 (*quoting* Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 196 (1824)).

340. *Id.*

with the Constitution.[341]

What then is left of the district court's rationale in *Boerne*? The answer is simple: consideration of the important structural questions of federalism and separation of powers. RFRA, it should be remembered, is an assertion of congressional authority to preempt contrary law at both the federal and the state levels. Since the analysis in *Katzenbach v. Morgan* is addressed primarily to the issue of separation of powers under the Fourteenth Amendment, the question for the Court is whether RFRA is consistent with both the First Amendment itself, *and* with the equality and equal citizenship norms of the Fourteenth Amendment.

I have yet to see an argument that RFRA violates the Establishment Clause which does not beg the very question to be decided: What is the relationship between the non-establishment and free exercise guarantees in light of the Fourteenth Amendment norms which give both clauses force over the states?[342] Most of the anti-RFRA arguments turn on the perceived effrontery of a Congress bent on restoring the pre-*Smith* balancing test embodied in the *Sherbert-Yoder* line of cases and giving it some teeth by placing the burden of proof on the government.[343] But this is precisely the wrong focus: "the Court cannot refuse to enforce a statutory right that Congress creates pursuant to one of its constitutional powers"[344] unless it violates either the Establishment or Free Exercise Clauses or the equal citizenship and protection norms embodied in the Fourteenth Amendment.

Because it would be impossible to argue that RFRA prohibits the free exercise of religion, and it certainly is not (at least in its present form) a law respecting an establishment of religion, the only legitimate arguments against the RFRA would be: 1) that it violates the equal protection norms contained in the Fourteenth Amendment itself;[345] 2) that it violates the Free Speech Clause;[346] or 3) that Congress has no power

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341. The requirement that the substantive understanding or interpretation of concepts such as "privileges and immunities" or "substantive due process" (including "incorporation" questions) should be consistent with the Constitution, taken as a whole, seems unexceptionable on its face. It does, however, present a number of interesting questions which, while relevant to the topics raised in this Article, must be reserved for discussion at another place and time. Among these are the questions of whether federalism, the "reverse incorporation" of the Fourteenth Amendment's Equal Protection Clause through the Due Process Clause of the Fifth Amendment (Bolling v. Sharpe, 347 U.S. 497 (1954)), and the Ninth Amendment should be viewed as structural limitations on the exercise of federal power under the Fourteenth Amendment.

As the discussion at notes 277 to 311 points out, reasonable minds can differ concerning the extent to which a community can or should accommodate the religious liberty interests of individuals (whether or not they are citizens). Utilizing the incorporated Establishment Clause or other fundamental rights to limit the power of local communities to strike balances between and among interests protected by the First Amendment, which are otherwise consistent with the demands of "equal citizenship," raises substantial federalism questions under the Ninth and Fourteenth Amendments.

342. *See, e.g.*, William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 237-42 (1995).

343. *See, e.g.*, Brant, *supra* note 12; *see also* Conkle, *supra* note 12 *and* Sager & Eisgruber, *supra* note 275.

344. Douglas Laycock, *RFRA, Congress & the Ratchet*, 56 MONT. L. REV. 145, 169 (1995).

345. *See* Marshall, *supra* note 342, at 242-43. I have serious problems with Marshall's analysis under the

under the Fourteenth Amendment to bind the states.

The following sections focus on the structural significance of the Fourteenth Amendment. Though its impact on the federal-state power equation with respect to race relations and other aspects of equal protection appears to be well-settled, a number of important substantive and structural issues which go to the heart of the Court's incorporation project, including preemption and separation of powers, remain open.

a. Katzenbach v. Morgan:[347] *The Fourteenth Amendment and separation of powers.*—The debate between the majority and the dissents in *Katzenbach v. Morgan* bears witness to the structural difficulties which lurk at the heart of the Fourteenth Amendment. Viewed structurally, the Amendment has four basic components: first, a series of norms which guarantee the rights and obligations of citizens and others lawfully within the jurisdiction of the United States or of any state;[348] second, an implicit recognition that the states are both empowered and obligated to protect the rights of citizens and others lawfully within their respective jurisdictions; third, an express grant of legislative power to Congress to enforce the norms enacted; and fourth, a set of specific disabilities to be imposed on those who violate their oaths of office or aid the rebellion.

Morgan illustrates the structural tension which exists between the legislative power of Congress and the judicial power of the Court discussed in Parts I, II and III of this Article.[349] At issue in *Morgan* was Congress' decision to prohibit English literacy tests as a voter qualification. In the view of Congress, all citizens who meet the literacy requirements "in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English,"[350] should be entitled to vote in both state and federal elections. The structural problem was twofold.

The first was an explicit example of text-based federalism: Article I, Section 2 and

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Equal Protection Clause, in part because it combines Establishment Clause arguments with those arising under the Equal Protection Clause. A full Equal Protection Clause analysis regarding the scope of congressional power to enforce the Fourteenth Amendment would require analysis of the norms enunciated by the Court itself. There is no question that some of the Court's decisions prefer, or can be viewed as endorsing, non-religion over religion, and they sometimes sacrifice the equal citizenship rights of individuals as a part of what appears to be a Solomonic attempt to strike sensible balances between the interests of believers to equal treatment, and the interests of dissenters to non-association. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985); Flast v. Cohen, 392 U.S. 83 (1968).

346. *See* Marshall, *supra* note 342, at 245-47. I have the same problem with Professor Marshall's free speech analysis. The Court's treatment of speech is content-based, and, on occasion, its rulings mandate viewpoint-based discrimination as well.

347. 384 U.S. 641 (1966).

348. *Cf.* Plyler v. Doe, 457 U.S. 202 (1982). Because it deals with persons who are illegally within the state, California's Proposition 187 will test the limits on federal preemption authority, as well as the privileges and immunities of *state* citizenship. *See, e.g.*, Wilson v. City of San Jose, No. C-95-0633 DLJ., 1995 WL 241452 (N.D. Cal. Apr. 14, 1995) (application of Proposition 187 to state welfare programs). *See also* Paul Feldman, *Judge Asked to Declare Prop. 187 Unconstitutional*, LOS ANGELES TIMES, May 2, 1995, at A3 (recounting developments in pending federal litigation).

349. *See supra* Part I.A.

350. 42 U.S.C. § 1973b(e)(2) (1988).

the Seventeenth Amendment reserve for the states the power to set voter qualifications "for the most numerous branch of the state legislature" and adopt those qualifications by reference as the qualifications for federal electors. In order to prevail against such a text-based claim, the express authority to enforce the non-discrimination norms of the Fourteenth and Fifteenth Amendments contained in their enforcement clauses[351] must empower Congress to preempt state regulations governing voter qualifications "for the most numerous branch of the state legislature."

The second problem was separation of powers. In *Lassiter v. Northhampton County Board of Elections*,[352] the Court held that North Carolina's English literacy requirement did not violate the Fourteenth and Fifteenth Amendments if applied uniformly and fairly to all citizens. It did recognize, however, that such tests could be, and had been, applied by the states in a manner which violated the Equal Protection Clause.[353] Congress disagreed with the Court's holding in *Lassiter*. The disagreement was not over the content of the equal protection norm of the Fourteenth Amendment, but was focused on the danger posed to certain classes of citizens by the English literacy tests used by a number of states as a prerequisite for becoming eligible to vote.[354]

The issue, properly framed in *Morgan*, was whether state power to define voter qualifications, expressly reserved in Article I, Section Two and the Seventeenth Amendment, should prevail against preemptive congressional legislation which was based on express powers to enforce the Fourteenth and Fifteenth Amendments, notwithstanding the Court's finding that the "literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage."[355]

Significantly, the State of New York did not argue in *Morgan* that Congress lacked the power to preempt all discriminatory voter qualifications. Given the Fifteenth Amendment, that argument would have been absurd on its face. New York's argument was instead more limited and rested on the Court's finding in *Lassiter* that literacy tests were not *per se* unconstitutional. In New York's view, the power of Congress concerning discriminatory state voter qualifications was not plenary; it was remedial. As such, congressional power was contingent on a prior *judicial* finding that there had been illegal conduct. In other words, New York would prevail unless and until someone could prove *to a judge* that its literacy test was discriminatory.

The federalism component of the argument rests on the premise that once the Court has spoken with respect to the legitimacy of a voter qualification, the states are free under Article I, Section Two and the Seventeenth Amendment to utilize it in an otherwise nondiscriminatory manner without fear that Congress might intervene. The implicit assumption appears to be that the congressional power embodied in the enforcement provisions of the Thirteenth, Fourteenth and Fifteenth Amendments is qualitatively different with respect to matters within their scope than the powers enumerated in Articles I through VI, such as the Commerce, Necessary and Proper, or Full Faith and Credit

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351. U.S. CONST. amend. XIV, § 5; *id.* amend. XV, § 2.

352. 360 U.S. 45 (1959).

353. The validity of North Carolina's literacy test "as applied" was not presented. *Id.* at 50.

354. At the time *Lassiter* was decided, nineteen states, including North Carolina, utilized literacy tests in this manner. The citations are collected in the Court's opinion. *See id.* at 52-53 n.7.

355. *Id.*

Clauses. The important question remains: How is it different?

The answer to this question depends upon the balance of power struck by the Fourteenth Amendment between the states and the Congress, on the one hand, and Congress and the Court on the other. Congress' power under the Fourteenth Amendment is clearly remedial.[356] The language of the Amendment itself is, for the most part, phrased in the negative. It therefore presupposes, quite logically, that an exercise of federal *lawmaking* authority will occasionally be necessary to control state officers and agencies.[357]

The Court's powers under the Fourteenth Amendment, however, are a bit more difficult to describe. As Justice Brennan explained in *Oregon v. Mitchell*:

> [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 Amendment grants power to the courts, this issue is of academic interest only.[358]

The argument in *Morgan*, however, was far from academic. It was quite sophisticated and of immense practical and political significance. Since we know that the Civil War Amendments federalized the subjects of equal citizenship and equal protection of the law by enacting a series of non-discrimination norms that are enforceable against the states by their own terms, federalism alone cannot be a plausible defense by a state to preemptive congressional legislation designed to eliminate state-sponsored discrimination on the basis of race, national origin or citizenship status. More is needed, but it cannot be found in the reserved powers of the states.

The only plausible argument which would exert a "check" on congressional authority beyond the powers explicitly reserved by the states is one that rests on separation of powers. Rather than assert that Congress does not have the power to ban devices which, in its view, have the potential to discriminate on the basis of race or national origin, New York's argument in *Morgan* was that the powers of Congress under the Thirteenth, Fourteenth, and Fifteenth Amendments are more limited in scope than those enumerated in Articles I through VI, and that the Court need not defer to Congress in the same manner as it does on the subjects within the scope of the Necessary and Proper Clause.[359] Viewed

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356. This is in accord with *The Civil Rights Cases* in which the Court concluded that congressional power under Section Five was, in fact, "remedial" in character. 109 U.S. 3 (1883). The Court held that Section Five does not "authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers when these are subversive of the fundamental rights specified in the amendment." *Id.* at 11.

357. *See* BERGER, *supra* note 190, at 226 (discussing Kentucky v. Dennison, 65 U.S. (24 How.) 66, 107 (1858), which held that the federal government had no "implied power to exercise any control over a state's officers and agencies").

358. Oregon v. Mitchell, 400 U.S. 112, 264 n.37 (1970).

359. Katzenbach v. Morgan, 384 U.S. 641, 647-49 (1966). There is, needless to say, a problem with such an argument: the text of the Necessary and Proper Clause itself. It provides that "The Congress shall have Power

in this fashion, the federalism argument made by New York has substance: Congress was overreaching its authority because the Court had already spoken on the matter.

(i) Equal Protection or Privileges and Immunities?—The argument that Congress was acting outside the scope of its authority to enforce the Equal Protection Clause is an interesting one for several reasons. First, Section Five is read without regard to the provision of the Fourteenth Amendment most directly relevant to the voting rights involved in the case: the Privileges and Immunities Clause. Puerto Ricans are citizens of the United States by birth and native born citizens need not demonstrate proficiency in either written or spoken English to maintain that status. New York State, however, considered language proficiency relevant to citizenship status. It claimed the right to deny the franchise, the most basic political right of the citizen, to adult citizens who were illiterate in English.[360]

What is remarkable about New York's constitutional provision conditioning the franchise on English literacy is that it was so clearly aimed at the immigrants who were flooding into New York and the rest of the country in the early 1920s. To the New York establishment, both native-born and naturalized non-English speakers residing in New York who had attained the age of majority were "foreigners" notwithstanding their status as "citizens of the United States and of the State wherein they reside."[361] In New York's view, "Citizens of New York" were American citizens who could read and write English.[362]

Such a reading obviously flies in the face of the Citizenship Clause of Section One. By operation of the Fourteenth Amendment, citizens of the United States are also citizens "of the State wherein they reside." Unlike the situation in *Oregon v. Mitchell*, where the voter qualification at issue (the necessity of attaining twenty-one years of age) was one mentioned by the Fourteenth Amendment,[363] the New York election laws (as well as the North Carolina laws upheld in *Lassiter*) were aimed squarely at those who sought to claim their rights as state citizens on the basis of their status as citizens of the United States. Thus, both *Lassiter* and *Morgan* are cases arising under the Citizenship and Privileges and Immunities Clauses.[364]

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18 (emphasis added). The powers vested by Article IV may be characterized as "Powers vested by this Constitution in the Government of the United States", so too are the powers vested in Congress by the enforcement clauses of the Amendments adopted pursuant to Article V.

360. *Morgan*, 384 U.S. at 644 n.2. The *Morgan* Court was faced with the problem of construing the New York Constitution which provided in relevant part:

> Notwithstanding the foregoing provisions, after January first, one thousand nine hundred twenty-two, no person shall become entitled to vote by attaining majority, by naturalization or otherwise, unless such person is also able, except for physical disability, to read and write English.

N.Y. CONST. art. II, § 1.

361. U.S. CONST. amend. XIV, § 1.

362. *Cf.* Meyer v. Nebraska, 262 U.S. 390 (1923) (prohibiting instruction in languages other than English).

363. U.S. CONST. amend. XIV, § 2.

364. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873), are not to the contrary. In *Slaughter-House*, the Court held that it would be "a little remarkable, if this clause was intended as a protection to the citizen

Though it clearly applied, the Privileges and Immunities Clause was not even mentioned in either *Morgan* or *Lassiter*. These cases serve as a stark reminder of the force ascribed to the Court's reading of the Clause in *The Slaughterhouse Cases*. The Solicitor General's fallback argument in *Morgan* was that denial of the franchise to those already citizens was tantamount to State denial of a republican form of government under Article IV, Section Four.[365] The Court characterized the case as one sounding in equal protection.

The practical impact of such a characterization was minuscule; the enforcement power of Congress is the same under both clauses. The theoretical impact of that characterization, however, is quite significant. Not only is it far easier as a practical and theoretical matter for a legislature to define the privileges and immunities of United States citizenship than it is to legislate or adjudicate the meaning of the phrase "equal protection of the laws," the former is a power committed by the text of the Constitution to Congress.[366]

When the issue is equal protection, however, the allocation of power made by the text is considerably less straightforward. Congress certainly has the power under both Article I and Section Five to provide whatever prospective guidelines might be necessary and proper to effectuate the guarantee. Under Article III and *Marbury*,[367] it is the Court's role to determine whether or not a given action by a state or the federal government is consistent with the equal protection norm or the legislation adopted to enforce it. Thus, what is commonly understood to be the meaning of the norm is derived at any given point in time from the manner in which the law is understood by Congress, enforced by the executive, and applied by the judiciary. Yet once a specific controversy is resolved in a manner which is arguably within the scope of the discretion granted to the branch resolving it (i.e., by legislation or judgment), that resolution will inevitably have an impact on the manner in which the right is understood by the other branches and by the states.[368]

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of a State against the legislative power of his own State, [and] that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it." *Id.* at 74. In *Lassiter* and *Morgan*, the legislative power of the state had singled out a class of United States citizens who had been naturalized by operation of constitutional and statutory law, and attempted to deny them the rights of state citizenship. In effect, the message was that these non-English literate "newcomers" were not (and could not become) members of the class known collectively as "the people" (i.e., the electorate) until they became literate in English. *See* THE FEDERALIST NOS. 39, 57 (James Madison) (commenting on the nature of republicanism).

As a result, I believe the Court's decision in *Lassiter* is wrong. In *Lassiter*, the Court relied on a Massachusetts case, *Stone v. Smith*, for the proposition "that a literacy test was designed to insure an 'independent and intelligent' exercise of the right of suffrage." 34 N.E. 521, 521 (Mass. 1893). Although such laws might be justified by reference to non-discriminatory reasons, the fact remains that they do trench upon important federal interests in "a uniform Rule of naturalization." U.S. CONST. art. I, § 8, cl. 4.

365. Katzenbach v. Morgan, 384 U.S. 641, 647 n.5 (1966).

366. U.S. CONST. art. I, § 8, cls. 4, 18; *id.* art. IV, § 4; *id.* amend. XIV, §§ 1, 5. A recent discussion of this very point occurs in Justice Kennedy's concurring opinion in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

367. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 144 (1803).

368. Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995).

Thus, when the Court determines, as it did in *Lassiter*, that literacy tests do not by their nature violate the equal protection guarantee, the ruling imparts to the Equal Protection Clause a definitional "gloss" that inevitably limits the discretion of Congress to actions inconsistent with the Article III power of the Court to resolve such controversies.[369]

The same analysis holds true when Congress has made a determination which is within the scope of its authority. Notwithstanding that, at least for the present, the Clause remains (in the words of Professor Amar) an infant "strangled in its crib,"[370] cases arising under the Privileges and Immunities Clause provide a useful comparison. Since Congress controls the scope of the privileges and immunities which inhere in United States citizenship but are not specified in the Constitution itself, the role of the Court in privileges and immunities cases would be limited in most cases to exploring the nexus of the asserted privilege or immunity to the status of "citizen of the United States." In fact, this is precisely what the Court did in *The Slaughterhouse Cases*.[371]

From this it is possible to derive a subtle but obvious point: Constitutional "rights," including equal protection, cannot be understood without reference to the separation of powers and federalism issues which lie at heart of the amended Constitution. Thus, it is with this structural insight in mind that we must now turn to the equal protection analysis utilized by the Court in *Katzenbach v. Morgan*.

(ii) The power to define the equal protection norm.—At least to the extent that congressional action deals with the evils at which the Civil War Amendments were directed, the majority opinion in *Katzenbach v. Morgan* can be read as an affirmation that Section Five "grant[s] to Congress [the] same broad powers expressed in the Necessary and Proper Clause."[372] For the majority, the ultimate question was whether Congress could validly be enforcing the constitutional norm.[373]

In contrast, the dissenting opinion of Justice Harlan in *Morgan* collapses the structural question (whose power?) into the normative one (what limit?). Believing that "the Court has confused the issue of how much enforcement power Congress possesses under [Section] 5 with the distinct issue of what questions are appropriate for congressional determination and what questions are essentially judicial in nature,"[374] Justice Harlan's opinion proceeds from the premise that once the Court has ruled with respect to the application of the non-discrimination norm to a specific set of facts, the normative and structural aspects of equal protection cannot be distinguished. Both aspects are viewed as a single question concerning the separation of powers:

> The question here is not whether the statute is appropriate remedial legislation to cure an established violation of a constitutional command, but whether there has in fact been an infringement of that constitutional command . . . . That question is one for the judicial branch ultimately to determine. . . . In effect the

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369. *Id.*

370. Amar, *supra* note 165, at 1259.

371. The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872).

372. Katzenbach v. Morgan, 384 U.S. 641, 650 n.9 (1966).

373. *Id.* at 651 n.10.

374. *Id.* at 666 (Harlan, J., with whom Stewart, J., joins, dissenting).

> Court reads § 5 of the Fourteenth Amendment as giving Congress the power to define the substantive scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court. In all such cases there is room for reasonable men to differ as to whether or not a denial of equal protection or due process has occurred, and the final decision is one of judgment. Until today this judgment has always been one for the judiciary to resolve.[375]

But the majority in *Morgan* did not agree that the need for the legislation must first be established to the satisfaction of the judicial branch. Congress' power to enforce the norm is not contingent, but rather plenary with respect to issues falling within its scope.[376] The key finding, wrote Justice Brennan, is whether the substance of the legislation is consistent with the constitutional norm as understood by the Court:

> [Section] 5 does not grant Congress power to exercise discretion in the other direction and to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." We emphasize that Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees.[377]

Justice Brennan had the better part of the argument insofar as it turns on the specific facts of *Morgan*. The Fourteenth and Fifteenth Amendments gave Congress legislative jurisdiction over both the subject matter (the rights of citizens of the United States and non-discrimination on the basis of race with respect to voting rights) and the offending party (the State of New York). Since there was no disagreement over the content of the applicable non-discrimination norm itself, the question in *Morgan* was whether Congress could utilize its fact-finding ability and enforcement authority to reach a conclusion arguably at odds with a decision of the Court respecting the proper application of that norm.

Though the majority was correct in its finding that Congress could validly preempt the field if it could rationally conclude that such tests were rooted in a discriminatory conception of what it means to be a citizen, it is the dissenting opinion in *Morgan* which most clearly articulates the relationship between norm and structure. It should be remembered that the Fourteenth Amendment was created for several purposes. The most important was to grant to both Congress and the states the explicit power to protect human and civil rights of all citizens and legal residents. The existence of such a power has been questioned not only by some of the states but also by the Supreme Court in *Dred Scott*.[378] It is against this historical background that Justice Harlan's position with respect to the power of the states and the Court should be read.

The issue in *Morgan* was not discrimination on the basis of race or national origin. Instead, it was a dispute over a congressional judgment that a general rule protecting

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375. *Id.* at 667-68.

376. United States v. Lopez, 115 S. Ct. 1624 (1995).

377. *Morgan*, 384 U.S. at 651 n.10.

378. Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1856).

individuals from the possibility of race or national origin discrimination is more appropriate (i.e., "necessary and proper") as a resolution of an admitted social problem (the discriminatory use of literacy tests by some jurisdictions) than the case-by-case adjudication generally preferred by states and some members of the Court.[379] RFRA raises precisely these same issues.

The question before the Court in *Morgan*, and the question decided by the United States District Court in *Flores v. City of Boerne*,[380] was whether the structural concepts of federalism or separation of powers authorize either the states or the Court to second-guess the necessity or propriety of an otherwise rational, non-discriminatory congressional choice of means to effectuate the Fourteenth Amendment's normative commands. The majority in *Morgan* seemed instinctively to grasp (for it is not developed by them to any greater degree) that there are important structural protections which lie at the heart of the Civil War Amendments. Though "the People" themselves selected the ends by adopting the Fourteenth Amendment, they empowered Congress to select the means by which they were to be implemented. The "ratchet theory" in footnote ten is a relatively simple, if inartistic, way to express the substantive concern that the power to choose the means to an otherwise legitimate end does not include the power to pursue an end which is inconsistent with the norm to be enforced.[381] What remains to be determined is what happens when the Court and Congress disagree concerning the meaning of the relevant constitutional norms.

b. Oregon v. Mitchell:[382] *The Fourteenth Amendment and federalism.*—When Congress attempts to reject or modify a constitutional holding of the Court, the problem is far more difficult than that which was presented in *Morgan*. Structural analysis is the only possible method of resolving such a controversy. When the norms Congress seeks to reject or modify are those embodied in the concepts of federalism and separation of powers, the structural problem is apparent from the face of the Constitution itself.

Mitchell contains the most clearly articulated discussion by the Court of the relationship between the structure of federalism, separation of powers, and the normative content of the Fourteenth Amendment when there is a disagreement concerning the content of the norm to be enforced, and Congress is claiming the power to resolve the dispute under an express grant such as that provided in Section Five of the Fourteenth Amendment. Like *Katzenbach v. Morgan*, *Mitchell* involved legislation that preempted state laws governing voter qualifications. In *Mitchell*, however, Congress did not act

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379. This is why affirmative action cases provide such an interesting contrast. Justice Brennan's last opinion as a member of the Court, Metro Broadcasting v. FCC, 497 U.S. 547 (1990), divided the Court on virtually the same lines as those articulated by Justice Harlan in *Morgan*, but there is one critical difference: the allegation in *Metro Broadcasting* was that the congressional action was *not* consistent with *any* of the constitutional norms that the challenged policy—a minority set-aside in broadcast licensing—was attempting to protect. Unlike the situation in *Morgan* where there was a fair amount of agreement on the content of the applicable constitutional norms, *Metro Broadcasting* indicates that there is substantial disagreement over both the content of the norms themselves and the roles of both the Court and the Congress in enforcing and defining them.

380. 877 F. Supp. 355 (W.D. Tex. 1995).

381. *Morgan*, 384 U.S. at 651 n.10.

382. 400 U.S. 112 (1970).

either to prevent or to remedy discrimination on the basis of race or ethnic ancestry. Instead, it extended the right to vote in all elections (state and federal) to citizens between the ages of eighteen and twenty-one, and it abolished state durational residency requirements as applied to voting in presidential elections.[383]

In *Mitchell*, the relevant norms are those which reserved state power over the qualifications of electors in congressional elections.[384] They are: the Regulations Clause of Article I, Section Four;[385] the Necessary and Proper Clause;[386] the provisions of Article II, Section One that govern the qualifications of presidential electors;[387] Sections One, Two and Five of the Fourteenth Amendment;[388] and Amendments Fifteen, Seventeen and Twenty-four.

The Court was badly divided as to both reasoning and result, but the issue was clearly framed: Do any of the express powers of Congress, including Section Five of the Fourteenth Amendment, grant it the power to define the qualifications for voters in state and federal elections notwithstanding the express language of Article I, Section Two and the Seventeenth Amendment stating that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature?"

Because this is inherently a structural question and is similar to the structural questions "glossed over" in the incorporation of the Religion Clause, the discussion which follows emphasizes the "structural" logic of each of the contending viewpoints within the Court. It is organized around the following questions:[389]

> 1) Does the amended Constitution expressly reserve for the states legislative jurisdiction with respect to the specific subject matter at issue (i.e., voter qualifications)?
>
> 2) Does the amended Constitution expressly grant Congress legislative jurisdiction over the same subject matter and thus require that the provisions be read together in order to define both the reservation of state power and the grant of federal legislative jurisdiction?
>
> 3) Does the amended Constitution contain other, more generalized, authorizing or prohibiting norms which might fairly be construed by the Court to limit either the power of the states or that of Congress with respect to the subject matter at issue?

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383. Voting Rights Amendments of 1970, Pub. L. No. 92-285, 84 Stat. 314.

384. U.S. CONST. art. I, § 2; *id.* amend. XVII.

385. "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; *but Congress may at any time by Law make or alter such Regulations*, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. (emphasis added).

386. *Id.* art. I, § 8, cl. 18.

387. *Id.* art. II, § 1; *id.* amend. XII.

388. *Id.* amend. XIV.

389. The application of these questions to a structural analysis of the first amendment is contained in the text *infra* Part IV.C.1-4.

4) If such norms exist, to what extent should they be interpreted to authorize preemptive federal policy-making, either by Congress or the Court?

These same questions are relevant when Congress attempts to legislate with respect to religious freedom and will be addressed immediately following the discussion of *Oregon v. Mitchell.*

(i) Justice Harlan: The Fourteenth Amendment as defined by the intent of its framers.—Justice Harlan's opinion in *Oregon v. Mitchell* readily lends itself to an analysis framed in structural terms. The power to set voter qualifications is expressly reserved to the states by Article I, Section Two, as well as the Tenth and Seventeenth Amendments, and it is expressly qualified by the powers conferred on Congress by Section Four of Article I, Section Two of the Fourteenth Amendment, and the Fifteenth, Nineteenth and Twenty-Fourth Amendments.[390] Reading these provisions together in light of the history of the Fourteenth Amendment itself, Justice Harlan concluded that, except to the extent that state voter qualifications conflict with the clearly articulated prohibitions against race, sex, and poll tax qualifications set forth in the Constitution itself,[391] the states retained the power to set them:

> No one asserts that the power to set voting qualifications was taken from the States or subjected to federal control by any Amendment before the Fourteenth. The historical evidence makes it plain that the Congress and the States proposing and ratifying that Amendment affirmatively understood that they were not limiting state power over voting qualifications. The existence of the power therefore survived the amending process, and, except as it has been limited by the Fifteenth, Nineteenth, and Twenty-fourth Amendments, it still exists today.[392]

Justice Harlan conceded that such a structural interpretation "may well foreclose the possibility that Section Five empowers Congress to enfranchise a class of citizens so that they may protect themselves against discrimination forbidden by the first section."

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390. Oregon v. Mitchell, 400 U.S. 112, 154, 202 (1970) (opinion of Harlan, J.).

391. *Id.* at 154.

392. *Id.* at 201-02 (opinion of Harlan, J.). Justices Brennan, White, Marshall, and Douglas took precisely the opposite view, reading the history as follows:

> [T]he evidence suggests an alternative hypothesis: that the Amendment was framed by men who possessed differing views on the great question of the suffrage and who, partly in order to formulate some program of government and partly out of political expediency, papered over their differences with the broad, elastic language of § 1 and left to future interpreters of their Amendment the task of resolving in accordance with future vision and future needs the issues that they left unresolved. Such a hypothesis strikes us as far more consistent with the turbulent character of the times than one resting upon a belief that the broad language of the Equal Protection Clause contained a hidden limitation upon its operation that would prevent it from applying to state action regulating rights that could be characterized as "political."

Id. at 274-75 (opinion of Brennan, White, & Marshall, JJ.) (footnote omitted). *See also infra* note 410 and accompanying text.

However, he felt that it was "unnecessary for [him] to explore that question"[393] in *Mitchell* because, in the final analysis, he did not believe that discrimination against individuals who had not reached the age of twenty-one was prohibited by the Fourteenth Amendment.

From that point on, the rest was easy. To the extent that the equal protection norm was not violated, there was no congressional warrant to invade the retained powers of the states, even if the Congress found as a fact that there was unequal treatment on the basis of age. Like the factually unassailable findings of a court which lacks subject-matter jurisdiction, congressional findings on a topic beyond its competence are entitled to no deference at all.[394] "Judicial deference is based, not on relative fact-finding competence, but on due regard for the decision of the body constitutionally appointed to decide."[395] Thus, as applied to the First Amendment, Justice Harlan's approach raises the question as to which branch of government has the power to make preemptive rules respecting an establishment of religion or guaranteeing the free exercise thereof; Congress, the Court, or the states?

(ii) Justice Black: The Fourteenth Amendment and "structural" federalism.—Justice Black's approach might be called "functional federalism."[396] He found the requisite grant of authority to sustain Congress' extension of the franchise to eighteen to twenty year-olds in the Regulations Clause of Article I, Section Four.[397] By reading this language as a grant "to make or alter regulations in national elections, including the qualifications of voters,"[398] Justice Black construed the express reservation of state power contained in Article I, Section Two and the Seventeenth Amendment as one defined and limited by overarching federal concerns—including equality.[399] Therefore, Congress has "ultimate supervisory power" over federal elections.[400]

State elections, however, were another matter for Justice Black. Because "[n]o function is more essential to the separate and independent existence of the states and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices,"[401] Justice Black believed that the Tenth Amendment reserved at least that power to the states.[402] That reservation, in conjunction with what he viewed as the clear textual implication from Article I, Sections Two and Four, that Congress had regulatory power only over the conduct of federal elections, led him to conclude that Congress was never granted the authority to make

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393. *Mitchell*, 400 U.S. at 212 (opinion of Harlan, J.).

394. *Accord* United States v. Lopez, 115 S. Ct. 1624 (1995).

395. *Mitchell*, 400 U.S. at 207.

396. This was also the approach taken by the Court in U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).

397. With one qualification (later made irrelevant by the Seventeenth Amendment), Section Four grants Congress the power to alter the "Times, Places, and Manner of holding Elections for Senators and Representatives" which have been set by the state legislatures. U.S. CONST. art. I, § 4, cl. 1.

398. *Mitchell*, 400 U.S. at 121.

399. *Id.* at 122-24 & n.5.

400. *Id.* at 124.

401. *Id.* at 125.

402. *Accord* New York v. United States, 505 U.S. 144, 155-83 (1992).

general regulations for the conduct of state elections. Its authority was more limited and was defined by the Fourteenth, Fifteenth, Nineteenth and Twenty-Fourth Amendments.[403]

For Justice Black, the determinative question was the relationship of structural federalism to the normative content of the Equal Protection Clause:

> [T]ypical equal protection cases . . . are not relevant or material to our decision in [the] cases before us. The establishment of voter age qualifications is a matter of legislative judgment which cannot be properly decided under the Equal Protection Clause. The crucial question here is not who is denied equal protection, but, rather, which political body, state or federal, is empowered to fix the minimum age of voters.[404]

For present purposes, the important lesson to draw from Justice Black's opinion is how he views the nature of the rights protected by the Fourteenth Amendment. For Justice Black, the content of the equal protection norm of the Fourteenth Amendment is to be defined by reference to three criteria:

> 1) the nature of the evil that it was intended to eliminate (racial or other forms of discrimination which have no rational connection to legitimate governmental purposes);
>
> 2) its impact on the structure of federalism; and
>
> 3) its relationship to other constitutional norms.

This is why, according to Justice Black, "typical Equal Protection cases" are neither relevant nor material when Congress attempts to legislate in an area exclusively reserved for the states.[405]

When a power is explicitly reserved for the states, the legitimacy of congressional action is contingent on legislative findings that the challenged policy is discriminatory on the basis of a characteristic which is repugnant to the Fourteenth or Fifteenth Amendments. If, "[o]n the other hand, Congress legislates in a domain not exclusively reserved by the Constitution to the States, its enforcement power need not be tied so closely to the goal of eliminating discrimination on account of race."[406] In the end, the limitation is federalism itself. As Justice Black explained:

> Amendments Fourteen, Fifteen, Nineteen, and Twenty-four, are examples of express limitations on the power of the States to govern themselves. And the Equal Protection Clause of the Fourteenth Amendment was never intended to destroy the States' power to govern themselves, making the Nineteenth and Twenty-fourth Amendments superfluous. My brother Brennan's opinion, if carried to its logical conclusion, would, under the guise of insuring equal

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403. This view of congressional authority is generally in accord with the Court's position on this topic in The Civil Rights Cases, 109 U.S. 3 (1883). *See supra* text accompanying note 356.

404. *Mitchell*, 400 U.S. at 127 n.10.

405. *Id.*

406. *Id.* at 130.

> protection, blot out all state power, leaving the 50 States as little more than impotent figureheads. In interpreting what the Fourteenth Amendment means, the Equal Protection Clause should not be stretched to nullify the States' powers over elections which they had before the Constitution was adopted and which they have retained throughout our history.[407]

Since the supervision of federal elections and the elimination of certain forms of discrimination with respect to voting are federal functions, the power to preempt state electoral qualifications inconsistent with federal policy must, in Justice Black's view, rest with Congress.[408] Just as with Justice Harlan, the question was one of subject matter jurisdiction, not one of individual rights. This is why the term "functional federalism" is a good description of Justice Black's position.

As applied to the incorporated First Amendment, Justice Black's position most clearly articulates the relationship of the jurisdictional norms of the First Amendment and the prohibitory norms of the Fourteenth. With respect to matters involving religious liberty, his opinion in *Mitchell* can be read as an assertion that the Fourteenth Amendment provides for a limited judicial role and a more active role on the part of the states and Congress.

(iii) Justice Stewart, Chief Justice Burger, and Justice Blackmun: The Fourteenth Amendment and the legislative jurisdiction of Congress.—In *Mitchell*, Justice Stewart wrote an opinion concurring in part and dissenting in part in which Chief Justice Burger and Justice Blackmun joined. The opinion attempted to strike a middle ground between the structuralism of Justices Black and Harlan, and the normative focus of Justice Brennan. The result was an opinion which had a number of divergent threads.

Perhaps the best way to begin is by noting that, like Justices Harlan and Black, Justice Stewart viewed the express reservation of state authority over voter qualifications to be a significant structural impediment to a broad assertion of federal power to alter them. Although the legislative (subject matter) jurisdiction was granted to Congress under the Equal Protection and Enforcement Clauses of the Fourteenth Amendment, both the Equal Protection and Enforcement Clauses are stated in general terms and do not expressly negate the reserved state powers at issue.[409] Though such jurisdiction might exist in a proper case, Justice Stewart viewed the judicial task as one of identifying the factors that create federal subject-matter jurisdiction.

His disagreement with Justice Brennan appears to rest upon two observations. The first is the scope of the Equal Protection Clause, which he viewed as designed only to protect discrete and insular minorities.[410] The second and more important criterion is what

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407. *Id.* at 125-26.

408. Justice Black does not deal with the power of the states to set the qualifications for presidential electors under Article II, Section One. Though they perform a federal function, their qualification and appointment is reserved for the states.

409. *Mitchell*, 400 U.S. at 287-92.

410. *Id.* at 296. Justices Brennan, White, and Marshall, by contrast, make it clear that they "believe there is serious question whether a statute granting the franchise to citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause." *Id.* at 240.

he viewed as the contingent nature of congressional authority under Section Five of the Fourteen Amendment. For Justice Stewart, that power was limited to eradicating situations which, in the judgment of the Court, amounted to a violation of the Equal Protection Clause.[411]

Although Justice Stewart agreed with Justice Brennan that Congress has broad authority over matters falling within the scope of the Fourteenth Amendment *as construed by the Court*,[412] he did not believe that Congress had the authority to adjust the normative content of the Amendment, either to "ratchet up," as footnote ten of Justice Brennan's opinion in *Morgan* seems to suggest is permissible, or "down," a point on which all members of the Court agree. For Justice Stewart the key inquiry is the content of the constitutional norm itself; the Equal Protection Clause simply did not govern the case. Age is a voter qualification contained in the Fourteenth Amendment.[413] For that reason, it cannot be viewed as either an invidious or irrational voter qualification. Given this conclusion, the reserved power of the states was controlling.[414]

As applied to the incorporated First Amendment, Justice Stewart's position illustrates the potential for conflict between the Court's interpretation of the Due Process Clause, which is the conduit for the First Amendment, and Congress' views concerning the proper application of the equal protection and citizenship norms of the Citizenship, Privileges and Immunities, and Equal Protection Clauses.

(iv) Justices Brennan, White, Marshall, and Douglas: The Fourteenth Amendment as a grant of plenary federal authority.—The opinions of Justices Brennan (who wrote for himself, Justice White, and Justice Marshall) and Justice Douglas were focused on "the scope of congressional power under § 5 of the Fourteenth Amendment," as interpreted by the Court.[415] The remainder of the analysis proceeds from that perspective.

Since Congress' power under Section Five is express, Justice Brennan opined that "it is no answer to say that [the challenged act of Congress] intrudes upon a domain reserved to the States"; the federal power is plenary with respect to all cases falling within its

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411. *Id.* In this respect, his views in *Mitchell* mirror those he advanced in *Morgan*.

412. *Id.* at 293-96 (Stewart, J., concurring and dissenting, with whom Burger, C.J., and Blackmun, J., joined).

413. *Id.* at 249 n.14 (citing U.S. CONST. amend. XIV, § 2). He might also have noted, in response to Justice Brennan's assertions concerning the qualifications of office-holders, *see infra* text accompanying note 419, that the Constitution itself discriminates on the basis of age with respect to qualification for federal office-holders as well. U.S. CONST. art. I, § 2, cl. 2 (Representatives must be at least 25 years of age); *id.* art. I, § 3, cl. 3 (Senators must be at least 30 years of age); *id.* art. II, § 1, cl. 5 (President must be at least 35 years of age).

414. Justice Stewart's conclusions concerning durational residency requirements follow the same pattern. Since the Court had held the right of interstate travel to be one of the "Privileges and Immunities of citizens of the United States," Congress was empowered to legislate on the topic by the Necessary and Proper Clause "without reference to § 5." *Mitchell*, 400 U.S. at 286. The result and rationale would arguably be the same were Congress to eliminate other durational residency requirements, including those limiting access to the state ballot. A more interesting question would be presented were Congress to justify abolition of durational residency requirements on the basis that it was enforcing the *State* Citizenship Clause of the Fourteenth Amendment. *Cf.* Sosna v. Iowa, 419 U.S. 393 (1975).

415. *Mitchell*, 400 U.S. at 241, 246 (Brennan, White, and Marshall, JJ., concurring in part and dissenting in part).

ambit.[416] Read together, the separate opinions of Justices Brennan and Douglas agree that where either Congress or the Court could rationally conclude on the basis of the evidence before them that state action violates the Fourteenth Amendment, the states have no reserved power.[417]

An appropriate analogy is the Commerce Clause as it was understood by many courts and commentators prior to the Supreme Court's recent holding in *United States v. Lopez*.[418] Just as Congress was free under that interpretation of the Commerce Clause to substitute its judgment for otherwise rational and non-discriminatory state legislation (or the judgment of the Court with respect to the nature or existence of a "burden" on interstate commerce), it was also free, in the view of these Justices, to utilize its best judgment concerning the shape and scope of federal policy governing both equal protection and the privileges and immunities of national citizenship.

From a structural standpoint, the most interesting aspect of these opinions is that neither Justice Brennan nor Justice Douglas dealt with the express language of the Seventeenth Amendment which explicitly reaffirms, after the adoption of the Fourteenth Amendment, the power of the states reserved in Article I, Section Two. Though there is no question that the general language of the Equal Protection Clause can be read to cover voter qualifications, Justice Brennan's discussion regarding the need of the Fourteenth Amendment's drafters to be vague with respect to its impact on that subject illustrates only that the language is general. It does not illustrate how it meshes with other relevant provisions.

By contrast, Article I, Section Two, and the Fifteenth, Seventeenth, Nineteenth, and Twenty-Fourth Amendments are specific and deal with the same subject as Section Two of the Fourteenth Amendment: "the Qualifications for Electors of the most numerous Branch of the State Legislature." Whatever the reason for, and impact of, the vagueness which might lurk within the language of Section One of the Fourteenth Amendment, Section Two and later enactments are specific and address both the remedies for, and the permissible limits of, state power to define the qualifications of "electors of the most numerous Branch of the State Legislature."[419]

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416. *Id.* at 250 (citing *Ex parte* Virginia, 100 U.S. 339, 347-48 (1880) (Brennan, White, and Marshall, JJ., concurring and dissenting)); *id.* at 142-43 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (Douglas, J., concurring and dissenting)).

417. *See id.* at 236-39, 242-46 (Brennan, White, and Marshall, JJ., concurring and dissenting) (voting to uphold Congress' decision to eliminate the durational residency requirement as a legitimate exercise of its authority to make policy which enforces the Court's Fourteenth Amendment jurisprudence); *id.* at 144 (Douglas, J., concurring and dissenting).

418. United States v. Lopez, 115 S. Ct. 1624 (1995).

419. Justice Brennan defends his substantive conclusions by focusing on state power to set the qualifications of state office-holders, and notes the obvious: that the Equal Protection Clause "applies on its face to all assertions of state power, however made." *Mitchell*, 400 U.S. at 251. Though arguably critical to the preservation of state powers of self-governance, the power to set such qualifications was *not* expressly referenced in the Constitution; rather, it falls within the general reservation of state power in the Tenth Amendment. Justice Brennan's argument to the effect that, if Justice Harlan's interpretation of the Fourteenth Amendment were to be accepted, states could encourage racially motivated voting patterns for state office-holders, is actually directed more to the Tenth Amendment argument of Justice Black than it is to the Fourteenth Amendment argument of

Because there is no question that the evolutionary development of the language of the Constitution itself is a significant indicator of its meaning, especially where amendments are expressly designed to overturn the constitutional rulings of the Court,[420] the opinions of Justices Brennan and Douglas raise at least two significant structural questions. The first is a subtle one and relates to the Court's selective use of history. Even if, as Justices Douglas and Brennan seem to suggest, "the history of the Fourteenth Amendment tendered by [Justice] Harlan is irrelevant to the present problem,"[421] these Justices do seem to agree that the "original intent" is relevant when the issue is one of power rather than specific interpretation. Otherwise, they could not "conclude that its framers understood their Amendment to be a broadly worded injunction capable of being interpreted by future generations in accordance with the vision and needs of those generations."[422]

Because there is no question concerning the doubts of the framers of the Fourteenth Amendment about the wisdom of trusting the Court to be the ultimate interpreter of the application of that Amendment's equality principles, it is important to recognize that precisely the same distrust of preemptive federal power animated the jurisdictional prohibitions of the First Amendment. The Court's selective use of history in cases arising under the Religion Clauses, which I have criticized elsewhere,[423] tends to support its assumption of the power to make preemptive rules which attempt to balance the relationship between law and religion, religion and non-religion, and believers and dissenters. Rarely, does the Court focus on the intended effect its theories have on relationships between government and individual citizens.

The second structural point is more straightforward and builds on the first. Even if one assumes that the framers of the Fourteenth Amendment intended to grant Congress and the Court the power to interpret its language "in accordance with the vision and needs of [future] generations,"[424] there remains the question which lies at the heart of this Article: To what extent do Articles V and VI permit either the Court or Congress to construe constitutional norms in a manner which appears to be at odds with the express language or settled interpretations of other provisions of the Constitution itself?[425]

This observation is particularly relevant with respect to the Court. While the

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Justice Harlan. *Id.* at 250-52. The arguments of Justices Black, Harlan, and Stewart with respect to the states' reserved power to set the qualifications of "electors of the most numerous Branch of the State Legislature" simply do not speak to other ways in which a state might inject racial and other forms of discrimination into the political process. Rather, they utilize the text, structure, and history of the Constitution to determine the *contextual* meaning of the general prohibitory norm at issue.

420. *But see id.* at 136 (opinion of Douglas, J.); *id.* at 241-47, 275-76 (opinion of Brennan, White, and Marshall, JJ.).

421. *Id.* at 140 (opinion of Douglas, J.).

422. *Id.* at 278 (opinion of Brennan, White, and Marshall, JJ.).

423. *See generally* Destro, *supra* note 14.

424. *Mitchell*, 400 U.S. at 139-40 (opinion of Brennan, J.).

425. *Cf.* Irving A. Gordon, *The Nature and Uses of Congressional Power under Section Five of the Fourteenth Amendment to Overcome Decisions of the Supreme Court*, 72 Nw. U. L. Rev. 656 (1977) (arguing that Congress may not alter the "normative content" of a judicial decision, but that it may find facts ("the empirical content") which cast doubt on its continuing validity).

judiciary is certainly the branch most likely to aggrandize its own power by encroachment upon the prerogatives of the Congress, executive branch, and the states, both Congress and the executive branch have acted boldly in the field of individual rights when these branches had sufficient political power. Their inaction on such matters can largely be traced to the political dynamics which are the heart of Articles I and II. The same cannot be said of the Court, whose members, once confirmed, are insulated by their life tenure from the vagaries of the political process.

This point was not lost on the Reconstruction Congress. The framers of the Fourteenth Amendment, Bingham, Howard, and Sumner in particular, would have blanched at the thought that, by adopting an amendment to give Congress and the states the power to set a federal "floor" on the protection of civil rights, they might be empowering the Court (especially one led by Roger Taney) to claim either an exclusive power to define those rights using language that would be "in accordance [with the] vision and needs of [future] generations,"[426] or a more limited (though equally significant) power to set arbitrary "ceilings" on the rights.[427] This is why the power of the Court under the Fourteenth Amendment is not, as Justice Brennan held, an "issue of academic interest only";[428] it is one of immense political and constitutional significance.

C. Congress and the Power to Make Laws "Respecting an Establishment of Religion or Prohibiting the Free Exercise thereof."

We are now ready to look at the structural issues presented when Congress, the states, and the Court disagree concerning the "just bounds" between law and religion. Because such disagreements sound in both separation of powers and federalism, the same questions which arose in the analysis of *Morgan* and *Mitchell* are relevant here.

The First Amendment, it should be remembered, embodies both substantive and structural (federalism) norms. It is Congress which shall make "no law respecting an establishment of religion, or prohibiting the free exercise thereof." It is Congress which is forbidden to "abridg[e] the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." And it is the job of Article III courts to respect and enforce those rules against Congress.

But the first step is to determine what those rules mean by attempting to elicit their plain meaning. It is clear from the language alone what Congress cannot do. Neither Congress, the President, nor the Supreme Court may make or enforce policy having the force of law:

1) *respecting* an establishment of religion; or

2) *prohibiting* the free exercise of religion; or

3) *abridging* the freedoms of speech, press, peaceable assembly or petition for

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426. *See supra* text accompanying note 425.

427. *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 HUM. LIFE REV. 28, 28-48 (1994) (reviewing DAVID GARROW, LIBERTY & SEXUALITY: THE RIGHTS OF PRIVACY AND THE MAKING OF *ROE V. WADE* (1994)).

428. *Mitchell*, 400 U.S. at 264 n.37.

a redress of grievances.

Given the substantive terms of RFRA, the important question for present purposes is what Congress *can* do under the language of the First Amendment. Given the express protection afforded by the negative on federal power, one could certainly conclude that laws which protect and encourage free exercise, speech, press, peaceable assembly and petition for redress of grievances would be permitted.[429] Laws or policies "respecting an establishment of religion," by contrast, are forbidden.[430]

Setting aside, for present purposes, the intriguing question of whether Congress could have written the *Lemon*[431] test (which would certainly be a law "respecting" what the courts view as "establishments of religion"), we are faced with the primary problem glossed over in the Court's incorporation project: the relationship of the Court's First Amendment jurisprudence to the language of the First Amendment itself.

The case law does not begin its analysis from the text of the First Amendment, rather it begins with the Court's decisions incorporating the Amendment. Because the First Amendment does not literally apply to the states, the task the Court has undertaken for itself has been to interpret the language of the Fourteenth Amendment in a manner that captures the essence of the First. The result has been confusion.[432] The content of the incorporated norms is not clearly understood, their relationships to each other and with those of the Fourteenth Amendment have not been explored to any great degree.[433] Also, the structural or power relationships among Congress, the states and the Court have, until *Smith,* largely been ignored.[434]

As applied to religious liberty, the structural issue is *whose* vision of religious liberty and equality of citizens and persons controls: that of the states, the Congress, or the

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429. *See, e.g.*, Paulsen, *supra* note 338.

430. An extended discussion of the meaning of the key phrase "an establishment of religion" is beyond the scope of this Article. It should be noted, however, that the Court has never defined the term "an establishment of religion," but rather appears to equate the term "religion" with the more limited phrase "an establishment of religion." That this causes a number of conceptual difficulties, including the development of a de facto "two-tiered" definition of religion, is directly relevant to the definition of the non-establishment norm.

431. Lemon v. Kurtzman, 403 U.S. 602 (1971).

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

433. My prior Article on the structural aspects of religious liberty argues that the confusion and disarray is a logical outgrowth of not only the "peculiar logistics" of the selective incorporation doctrine itself, but also the unthinking manner in which the religious liberty norms have been incorporated. *See* Destro, *supra* note 14.

434. Occasionally, however, a case does arise where these issues are clearly involved. Yet, they are rarely analyzed fully. *Compare* Garnett v. Renton School Dist., 772 F. Supp. 531 (W.D. Wash. 1991) (Equal Access Act does not preempt state constitutional provisions which are said "stricter" than the Establishment Clause) *with* Hoppock v. Twin Falls School Dist., 772 F. Supp. 1160 (D. Idaho 1991) (Equal Access Act has preemptive effect).

Court? A structural analysis of this issue would proceed as follows.[435]

1. Does the Text of the Constitution Expressly Reserve for the States Legislative Jurisdiction over Matters "Respecting" Religion and Religious Establishments?—Yes. Under the terms of the Constitution and Bill of Rights, all power to legislate with respect to religious liberty (save that limited by the Test Clause[436]) is reserved to the states or to the people by the First, Ninth, and Tenth Amendments.[437] Congress arguably has only the power to legislate in a manner consistent with the First Amendment in areas that are otherwise subject to its legislative jurisdiction.[438] Thus, under the First, Ninth and Tenth Amendments standing alone, i.e., without regard to the Fourteenth Amendment, the general presumption of constitutionality rests with the states unless the Constitution grants Congress some other power which must be considered before drawing a conclusion.[439]

As applied to RFRA, the question at this point is twofold:

> 1) Does Congress have the power to impose the substantive requirements of RFRA on the operations of federal government, the District of Columbia or territories whose governments are otherwise subject to federal jurisdiction?[440]
>
> 2) Does Congress have the power to impose the substantive requirements of RFRA on the states?

Unless the Court is prepared to hold that the substantive provisions of RFRA, those

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435. *See supra* notes 396-408 and accompanying text for a general discussion of the sort of structural analysis applicable to cases involving the Bill of Rights and the Fourteenth Amendment.

436. *See* Destro, *supra* note 14, at 366-70.

437. Professor Amar's discussion of the federalism components of the First Amendment is very useful here. *See* Amar, *supra* note 165, at 1275-84.

438. The First Amendment forbids laws which *prohibit* the free exercise of religion. To the extent that Congress deems it necessary, proper, and conducive to the general welfare, it may legislate to *protect* religious liberty. *Accord* Amar, *supra* note 165, at 1273-75. *But cf.* William Cohen, *Congressional Power to Interpret Due Process and Equal Protection,* 27 STAN. L. REV. 603, 614 (1975) (arguing that the appropriate distinction is one "that distinguishes between congressional competence to make 'liberty' and 'federalism' judgments . . . ."). Under this theory the focus is on the individual right involved, and if congressional action would limit that right, the congressional judgment "is entitled to no more [judicial] deference than the identical decision of a state legislature." Judgments which could be made at either the state or the federal level would, in Professor Cohen's view, present no problem. How Professor Cohen's suggestion differs from Justice Brennan's "ratchet theory" is not clear.

439. The Court's recent decision in U. S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995), supports this proposition. The federal government *never* had authority over religious establishments, nor did the framers ever claim that it could use any of its powers to create or administer one. The latter is a point recognized by Alexander Hamilton's argument in *The Federalist Papers No.* 69 which stated that the President "has no particle of spiritual jurisdiction." THE FEDERALIST No. 69, at 422 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

440. There is little question that it does. *See generally* Goldman v. Weinberger, 475 U.S. 503 (1986); 10 U.S.C. § 774 (1994) (restricting the scope of command discretion to forbid the wearing of religious symbols by military personnel); UNITED STATES DEP'T 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 F.2d 223 (2d Cir. 1985) (rejecting a challenge to the congressional practice of authorizing military chaplains).

which define the concept of "burden" and reallocate the burden of proof, violate the Establishment Clause because they represent legislative accommodations that impermissibly advance or endorse religion,[441] the first of these questions can be answered in the affirmative. As long as congressional action does not amount to a law "respecting an establishment of religion," it is for Congress to define how solicitous of religious freedom the executive branch shall be as it goes about the task of seeing that the laws "be faithfully executed."

The answer to the second question, the one actually at issue in both *Flores v. City of Boerne*[442] and *Belgard v. Hawaii*, [443] cannot be answered without reference to considerations of federalism. We must therefore ask the following question.

2. Does the Constitution, Read Without Regard to the Fourteenth Amendment, Grant Congress Power to Legislate with Respect to Establishments of Religion and the Permissible Scope of Free Exercise by Individuals and Groups, thus Requiring that the Express Powers of Congress be Read Together with the Reserved Powers of the States in Order to Define the Appropriate Spheres of Federal and State Power?—The answer to this question is "no." The First Amendment was deemed necessary to assure the states that the enumerated powers of the federal government would not be construed to interfere with either state religious establishments or the freedom (or lack thereof) of individuals to exercise their respective faiths in the states in which they resided. The Test Clause of Article VI underscores the point: religious discrimination with respect to offices or public trusts "under the United States" was forbidden, even if the appointing authority was a state.[444]

At this point in the jurisdictional analysis, allocation of power between the federal and state governments with respect to religious liberty is the same as that described by Justice Harlan in *Oregon v. Mitchell*: "No one asserts that the power [at issue] was taken from the States or subjected to federal control by any Amendment before the Fourteenth."[445] Thus, if either Congress or the Court is to have any power at all with respect to non-establishment and free exercise issues in the states, we must also ask:

3. Does the Amended Constitution Contain Other, More Generalized, Authorizing or Prohibiting Norms Which Might Fairly be Construed to Limit Either the Power of the States, or that of the Federal Government, with Respect to "Establishments of Religion" and Laws "Prohibiting the Free Exercise Thereof"?—Section One of the Fourteenth Amendment contains the key prohibiting norms governing the federal rights of individuals as against their respective states. The Citizenship, Privileges and Immunities, Due Process

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441. One author has wrongly argued this writer believes that RFRA may violate the Establishment Clause. Matt Pawa, Comment, *When the Supreme Court Restricts Constitutional Rights, Can Congress Save Us? An Examination of Section 5 of the Fourteenth Amendment*, 141 U. PA. L. REV. 1029, 1098 n.415 (1993). On the contrary, I argued that should Congress be viewed as going too far to accommodate religion, RFRA would be attacked on Establishment Clause grounds. *See Religious Freedom Restoration Act of 1991: Hearings on H.R. 2797 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 102d Cong., 2d Sess. 65, 308-09 (1992) (statement of Professor Robert A. Destro).

442. 877 F. Supp. 355 (W.D. Tex. 1995).

443. 883 F. Supp. 510 (D. Haw. 1995).

444. *See* Destro, *supra* note 14, at 366-370.

445. 400 U.S. 112, 201 (1970).

and Equal Protection Clauses bind the states to certain minimum behavioral standards, and Section Five empowers Congress to enforce them by legislation. Incorporation of the Religion Clause via the Fourteenth Amendment thus answers this question in the affirmative and changes the balance of power between the states and the federal government with respect to religious liberty issues. It does *not,* however, remove the jurisdictional bar of the First Amendment in its entirety. The powers of the federal government remain limited.

At the very least, the express language of Section One presumes the existence of federal power to preempt state laws or policies that have the purpose or effect of denying equal protection to any person on religious grounds[446] or limiting the privileges and immunities of citizens of the United States on the basis of religion or religious exercise.[447] As interpreted by the Court, Section One also authorizes federal intervention to assure that the states do not inhibit personal religious liberty under the substantive components of the Due Process Clause.

To make these points, however, is merely to restate the key provisions of Section One of the Fourteenth Amendment. Unless we are to ignore the impact of those provisions on the rights incorporated (or, in Professor Amar's words, to continue to "read the Bill of Rights through the lens of the Fourteenth Amendment without realizing how powerfully that lens has refracted what [we] see"[448]), we must begin with the Fourteenth Amendment, not the First Amendment, if we are to make structural sense of the religious liberty guarantee.

4. Given that the Religion Clause has now been "Incorporated" by Judicial Decree, to what Extent Should the Fourteenth Amendment be Interpreted to Authorize Preemptive Federal Policy-Making, Either by Congress or the Court, with Respect to Religious Liberty?—A structural approach to the Court's assertion of federal jurisdiction over the balance to be struck among religiously based interests and the balance between religiously based and secular interests clearly leaves a number of very important questions unanswered. Among these are:

> 1) Is it possible to define, with any degree of clarity, both the mechanism for incorporation by the Fourteenth Amendment and its impact on the religious liberty rights incorporated?
>
> 2) Is Congress or the Court empowered by the Fourteenth Amendment to preempt or revise state laws "respecting an establishment of religion or

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446. The Court has never treated religion as either a "suspect" or quasi-suspect classification.

447. Though a full development of the point is beyond the scope of this Article, it is arguable that, with respect to religion-based criteria for participation in federally-funded but State-administered programs, the Privileges and Immunities Clause of the Fourteenth Amendment operates in much the same manner as the Test Clause of Article VI: an individual's religion or religious practice may not be an eligibility factor. *But cf.* Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 113 S. Ct. 2141 (1993) (freedom of speech; content-based regulations); Zobrest v. Catalina Foothills Sch. Dist., 113 S. Ct. 2462 (1993) (equal protection; Education of Handicapped Act); Board of Educ. v. Mergens, 496 U.S. 226 (1990) (freedom of speech; Equal Access Act).

448. *See* Amar, *supra* note 165, at 1136-37.

> prohibiting the free exercise thereof,"[449] notwithstanding the unequivocal language of the First Amendment denying any federal jurisdiction over the subject matter?
>
> 3) Do the substantive limitations imposed on Congress by the Test Clause, the First and Fourteenth Amendments, and the equal protection component of the Due Process Clause of the Fifth Amendment apply with equal vigor to exercises of the "judicial power of the United States?"[450]

These are the questions glossed over in the Court's First Amendment jurisprudence, and since the Court shows little inclination to deal with them, we must ask the question directly.

D. What is the Role of the Court in Protecting Religious Liberty?

1. Evaluating Claims of Special Competence and Limited Judicial Supremacy.—The questions raised above are inextricably bound up with the more fundamental one: the legitimacy of the Court's claim to be the ultimate arbiter of the Constitution's meaning. The purpose of this section is to examine briefly the proposition that the Supreme Court is uniquely suited to and charged with the important task of defining and protecting individual liberties.

This is one of those fundamental assumptions learned in law school that "appear[s] so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them."[451] Nevertheless, it bears careful examination here. Whether it is viewed as a matter of political theory or constitutional doctrine,[452] the proposition is an interesting one. At bottom, it is a theory concerning the distribution of political power (jurisdiction) over an immense range of individual, associational and societal interests.[453]

The Court's assumption of political jurisdiction over matters of religion and religious liberty[454] raises significant questions because the language, history and structure of the Constitution reflect the historic distrust of the framers for national decision-making concerning religion. This is not to say that the Court has no role. In fact, precisely the

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449. U.S. CONST. amend. I.

450. *Id.* art. III.

451. Roger C. Crampton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-48 (1978) (internal quotation marks omitted). Though Dean Crampton was speaking of the unarticulated value systems which influence American legal education, the criticism is equally applicable to cases involving religious liberty as well as to the coverage and content of chapters (or parts thereof) covering religious liberty in recent law school textbooks.

452. *See, e.g.*, Bradley, *supra* note 51.

453. The breadth of this assertion of power can be illustrated by reference to Justice Harlan's dissent in Poe v. Ullman, 367 U.S. 497 (1961). *See infra* notes 463-67and accompanying text for a discussion of this assertion.

454. Professor Ira Lupu has been explicit on this point. He has argued that *only* the judiciary should have jurisdiction over such claims. *See generally* Lupu, *supra* note 12.

opposite is true. The Court's role is ordained by the Constitution itself.[455]

The challenge here is to answer a more limited question: How does the power of judicial review relate to what Locke described as the task of "distinguish[ing] exactly the business of civil government from that of religion and settl[ing] the just bounds that lie between the one and the other"?[456] Developing an answer requires consideration of an even more basic question: whether or not the Constitution can fairly be read as directly attempting to settle that dispute? I submit it does not, despite recent assertions of some commentators to the contrary.[457]

The Court has no greater competence and, in fact, less legitimacy than Congress does to embark upon such a project. Moreover, it is doubtful that the framers of either the First or the Fourteenth Amendments would have entrusted the Court with such a power, even if the Court had demonstrated a unique competence when deciding other questions which go to the heart of the concept of citizenship.[458] (A task at which it has failed miserably.)

The text and structure of our constitutional system, as well as its history, suggest that the goal of the Constitution was more modest: it was to assure that federal policy respecting both religion and state policy on the subject would be characterized by nondiscrimination and accommodation.[459] Because judicial review is but one means selected by the framers to assure the respect and vitality of the Constitution, the Court's

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455. U.S. CONST. art. III; Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("[I]t is emphatically the province and duty of the judicial department to say what the law is.").

456. *See* Locke, *supra* note 70.

457. *See, e.g.*, Sullivan, *supra* note 156. Professor Sullivan argues that "the affirmative implications of the Establishment Clause . . . entail the establishment of a civil order—the culture of liberal democracy." This, in her view, is the "religious truce" which inheres in the Establishment Clause. That such a truce "may well function as a belief system with a substantive content, rather than a neutral and transcendent arbiter among other belief systems" is freely admitted. What is surprising (and refreshing) about the argument is both its candor and its apparent determination to ignore the history, language, and structure of the Constitution in an attempt to demonstrate that "the culture of liberal democracy" is ordained, albeit "implicitly," *by the First Amendment itself as* "the overarching belief system for politics, if not for knowledge." *Id.* at 198-201.

458. *See* THE FEDERALIST Nos. 78-81 (Alexander Hamilton, James Madison, & John Jay) (Clinton Rossiter ed., 1961) (as to the limits on the judicial power of the United States). Some of the Anti-Federalists were even more specific: they wanted specific guarantees directed at the Congress, the executive branch and the federal judiciary. *See* Amar, *supra* note 197. It should also be remembered that "*Dred Scott* [*v. Sandford*, 60 U.S. (19 How.) 393 (1856)] had been so bitterly etched into abolitionist memory that Senator Sumner even sought to bar the customary memorial, placement of Chief Justice Taney's bust in the Supreme Court Chamber, and insisted that his name should be 'hooted down in the pages of history.'" BERGER, *supra* note 190, at 222 n.5. Berger also notes that, "[n]ot long after congressional approval of the [Fourteenth] Amendment, Samuel L. Warner, a Connecticut Republican, said he had 'learned to place but little reliance upon the dogmas of [the] Court upon any question touching the rights of humanity.'" *Id.* at 223 n.9 (quoting VI CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES, RECONSTRUCTION AND REUNION 1864-1878 (1971)). It was that holding which was resoundingly rejected by both the Reconstruction Congress, and the Citizenship Clause of Section One.

459. It should be noted at this point that I do not by this comment intend to become entangled in the debate between Professors Michael McConnell and Gerard Bradley concerning the historical basis for the accommodation claim. *Compare* McConnell, *supra* note 51 *with* Bradley, *supra* note 51. *See also* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 39 (1992).

role must be equally modest. Properly understood, it is.

History suggests that when the Court is true to its role—when it faithfully and actively[460] mandates respect for the jurisdictional and prohibiting norms derived from the text and structure of the Constitution and its amendments—there is strong protection for individual rights, including those of a statutory character, such as the rights of workers and the statutory right to sue for violation of constitutional rights.[461] This is true because the American people *themselves* have viewed the protection of such interests as necessary, but not sufficient, conditions for the attainment of justice and the common good.[462]

It is only when the Court does not maintain the boundaries between the power of government, the rights of the individual set forth by the Constitution, and laws of the United States, that civil liberties will suffer. They will suffer most when the Court does not respect the limits on its own power.[463] Jurisdiction, the structural limit on the power of the judicial department is, technically, what *Marbury v. Madison* was all about.

The Court's role is an indirect one: it protects civil liberties, including First Amendment rights by even-handed enforcement of the Constitution and laws of the United States.[464] The larger task of protecting civil liberties and defining their substantive content is thus, under any fair reading of the Constitution, a *shared* responsibility.[465] Given the

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460. *Compare, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (enforcing equal protection guarantee); Brown v. Board of Educ., 347 U.S. 483 (1954); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) *with* Buck v. Bell, 274 U.S. 200 (1927); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873); Plessy v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

461. 42 U.S.C. § 1983 (1988 & Supp. V 1993). *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (racial discrimination).

462. To the extent that certain liberties are enshrined in federal or state constitutions, they are, by definition, essential to the attainment of the relevant political community's vision of both justice and the common good.

463. In cases such as Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment), Lochner v. New York, 198 U.S. 45 (1905) (invalidation of state labor standards), and Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857) (slavery), careful attention to the limits of the Court's own authority would have been useful. The dissenting opinions of Justices Jackson in *Korematsu*, Holmes in *Lochner*, and Harlan in Plessy v. Ferguson, 163 U.S. 537 (1896), are notable not only because they are correct as a matter of constitutional theory, but because they viewed the Constitution as a constraint on the power of the Court itself. *Compare* Morrison v. Olson, 484 U.S. 1058 (1988) (Scalia, J., dissenting) (Court's assumption of the power to justify a Congressional attempt to transfer a portion of the President's power to control prosecutors by application of a "balancing" rationale exposes targets of "special prosecutors" to risks not shared by other individuals suspected of crime) *with* United States v. North, 859 F.2d 216 (D.C. Cir. 1988) (target of special prosecutor's efforts denied a fair trial because special prosecutor may have used immunized testimony); *compare also* Brown v. Board of Educ., 347 U.S. 483 (1954) ("separate is inherently unequal") *with* Brown v. Board of Educ., 349 U.S. 294 (1955) (Court's reliance on the "all deliberate speed" standard for the pace of desegregation under the mandate of *Brown*).

464. *See* 42 U.S.C. § 1983 (1988 & Supp. V 1993). Hamilton's statement in *The Federalist No. 78*, that the Court has "neither force nor will, but only judgment" is singularly applicable here; for there are only a limited class of cases which rest on the Constitution itself. THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

465. U.S. CONST. art. IV, §§ 2, 4; *id.* arts. V, VI; *id.* amends. IX, X, XIII-XV, XIX, XXIII, XXIV, XXVI. *See also* Oregon v. Mitchell, 400 U.S. 112 (1970); Katzenbach v. Morgan, 384 U.S. 641 (1966). *See generally*

language and structure of the Constitution, assertion of federal judicial supremacy over such matters[466] merits close scrutiny.[467]

2. *Judicial Power: The Relationship of a Structural Inquiry to the Working Definition of Religious Liberty.*—The final step in elaborating a structural framework in which to analyze the substantive rules which can be derived from the Court's incorporation project is to explore not only the basis for the Court's assertion of an unreviewable power to make national policy concerning religion, but also the relationship of that power claim to the definition of religious liberty which has developed since *Cantwell v. Connecticut*[468] and *Everson v. Board of Education.*[469]

This Article, however, is not the forum in which to conduct that examination. For present purposes, it is sufficient to note that, from a structural perspective, both "selective incorporation" and the sort of "pure" substantive due process analysis heralded in the dissent of Justice Harlan in *Poe v. Ullman*[470] and recently affirmed by a majority of the Court in *Planned Parenthood v. Casey*,[471] are sweeping assertions of discretionary policy-making authority grounded in the Due Process Clause of the Fourteenth Amendment. The asserted power is accurately described as sweeping because the full scope of the liberty guaranteed by the Due Process Clause cannot be found in, or limited by, the precise terms of the specific guarantees provided elsewhere in the Constitution.

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to the Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard for what history teaches are the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No

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Archibald Cox, *The Role of Congress in Constitutional Determination*, 40 U. CIN. L. REV. 199, 253 (1971).

466. *Cf.* Lupu, *supra* note 12.

467. *See* Fisher, *supra* note 255. Such scrutiny does not deny or question either the finality and binding nature of the Court's judgments in any given case, or the legitimacy of its role in general. As applied to the subject matter at issue here—the religious liberty guarantee, and the myriad relationships affected by it—the task is to determine whether the Court's actions are consistent with its limited, albeit critical, role in our system of government. *Cf.* LOUIS FISHER, AMERICAN CONSTITUTIONAL LAW 1392-98 (2d ed. 1995) (raising the question, "Is the Supreme Court the Constitution?," and recounting a colloquy during the confirmation hearings of Judge Kennedy (now Supreme Court Justice) on the finality of the Court's holdings).

468. 310 U.S. 296 (1940).

469. 330 U.S. 1 (1947).

470. 367 U.S. 497 (1961). *See supra* note 453 and accompanying text.

471. 112 S. Ct. 2791, 2806 (1992).

formula could serve as a substitute, in this area, for judgment and restraint.[472]

If Justice Harlan and the majority of the current Court are correct concerning the meaning of the concept of "Due Process," their implicit assertion is that the Due Process Clause of the Fourteenth Amendment empowers some branch of the federal government to strike the balance between "respect for the liberty of the individual and the demands of organized society"[473] in virtually every facet of public and private life, including religious liberty. And because an elusive, living concept of liberty presupposes that some institution or person is empowered to ascertain "the balance struck by this country, having regard for what history teaches are the traditions from which it broke,"[474] this is a plausible, but fatally flawed, assertion.

What the Court's analysis ignores, however, is the structural question which Justice Brennan described in *Katzenbach v. Morgan* as "of academic interest only":[475] Why is the Court the only branch empowered to strike such balances?

The text, structure, and history of the Fourteenth Amendment prove that in the course of striking the substantive balances which are reflected in Sections One through Five, this country also struck a structural balance aimed not only at abuses of state authority, but also at abuses of judicial authority; and "the People" did so with a clear understanding of "what history teaches are the traditions from which [the Reconstruction Congress] broke."[476]

To the extent that the liberty protected by the Due Process Clause, as defined by Justice Harlan in *Poe v. Ullman* and reaffirmed in *Casey*, authorizes judicial action in defense of liberty and equality, it also empowers Congress, acting pursuant to Section Five of the Fourteenth Amendment, to enact reasonable legislation designed to assure the same end. There is nothing in the text or structure of the Constitution which requires either Congress or a state legislature to wait for authorization from the Court.

It also seems clear that in cases where Congress or a state legislature believes that the Court has balanced the interests in a manner inconsistent with the constitutional norm, there is nothing in either the text or structure of the Constitution, or in the history of the Fourteenth Amendment, which forbids it to enact prospective remedial legislation reasonably designed to enhance either the liberty or the equal protection of the citizenry. That the Fourteenth Amendment was designed to restore rights taken away by the judiciary simply underscores the point.

To state the separation of powers proposition so baldly exposes the breadth of the Court's assertion in *Casey*. If there is no textual limit to the rights protected by the Due Process Clause, and if Justice Brennan's reading of Section Five in both *Morgan* and *Mitchell* are correct, then there is also no effective limit on Congress' authority to strike whatever balances it deems necessary and proper "between [religious] liberty and the demands of organized society."[477]

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472. *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

473. *Id.*

474. *Id.*

475. *See supra* note 327-30 and accompanying text.

476. *Poe*, 367 U.S. at 542.

477. *Id.*

But this is plainly wrong. Congress' powers are limited by the terms of the express and implied grants which define the limits of its legislative power.[478] Not only are they subject to the power of judicial review,[479] they are also subject to the limitations of structural federalism.

E. Locating the Power to Preserve Religious Liberty: RFRA in Context

The inquiry into the structural foundations of religious liberty reveals, in part, that Congress and the states are free to protect religious liberty by legislation. Only the extent of this power is in question.

Going back to the structural basics is useful because it serves as a reminder that the First, Ninth and Tenth Amendments, as well as the Test Clause of Article VI and the Fourteenth Amendment,[480] are express limits on the power of the federal government, including the Court's power, to impose a harsh view of religious liberty on the nation. When the Court is perceived to be in error, a thorough analysis of congressional and state power to provide a meaningful remedy requires a thorough understanding of the separation of powers and the federalism implications of permitting "vital questions affecting the whole people, is to be irrevocably fixed by [its] decisions . . . the instant they are made, in ordinary litigation between parties in personal actions . . . ."[481]

That such a result may yield an even murkier "zone of twilight" between the Court and the Congress than that which exists between the Congress and the President is unsurprising, but the ultimate result should be the same. When the Court takes action in the field of individual rights, including religious liberty, which are deemed to be incompatible with the express or implied limits imposed by the Constitution or the legislative will of Congress, it must "rely upon [its] own constitutional powers minus any constitutional [and state] powers over the matter."[482]

The powers of both Congress and the states in this regard are formidable. Congress and the states share the right and the duty to protect the privileges and immunities of all citizens of the United States, and the liberties of all persons lawfully residing within their respective jurisdictions. If Congress does not act, or acts in a manner which the states deem inconsistent with their internal welfare, the Ninth Amendment assures the states that they can, consistent with the demands of the amended Constitution, provide additional protection. Both have done so when the Court has adopted a restrictive view of religious

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478. United States v. Lopez, 115 S. Ct. 1624 (1995).

479. The appointment of Justices who are described as "conservative" by Presidents Reagan and Bush may have temporarily weakened both the allure and the promise of civil libertarian reliance on the judiciary, but one still risks a charge of political heresy (and I use the term deliberately) by questioning the ultimate wisdom of placing so much reliance on the constitutional vision of Justices. Just as the Court reads history selectively, so too do the advocates of judicial supremacy in the field of individual rights. While times, and the political sensitivity of Justices to issues of individual liberty, may change, the human tendency toward prejudice, abuse of power, and self-deception does not.

480. U.S. CONST. amend. XIV, § 5.

481. Abraham Lincoln, First Inaugural Address, (March 11, 1861), *in* SPEECHES AND LETTERS 165, 171 (Merwin Roe ed. 1943).

482. Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579, 637-638 (1952) (Jackson, J., concurring).

liberty.

To hold, as the district court does in *Flores v. City of Boerne,* that RFRA is unconstitutional because it is inconsistent with *Smith,* both begs the question and misses the point. *Smith* is the Court's most recent teaching on its substantive due process views concerning the meaning of the Free Exercise Clause. That holding is entitled to deference not only because it resolved the controversy between Smith and Black and the Oregon Employment Division, but also because the Court is empowered to construe the Fourteenth Amendment's meaning in the process of deciding such a case.[483]

Smith, however, does not control the constitutionality of RFRA. If RFRA is unconstitutional, it is because Congress either does not have the authority to require a high standard of care from employees of the federal government (which is clearly wrong), or because it does not have the power to impose its will concerning the accommodation of religious liberty upon a recalcitrant state or local government (e.g., the City of Boerne, Texas or the State of Hawaii). Whether RFRA has any independent substantive content is another question.

The appellate courts considering *Flores v. City of Boerne*[484] and *Belgard v. Hawaii*[485] must decide whether the accommodation of religious practice by federal, state and local governments can be viewed as one of the "privileges and immunities of citizens of the United States," or as one of the rights "incorporated" via the Due Process Clause of the Fourteenth Amendment. Because *Cantwell v. Connecticut* is clear on the second point, the *only* question is whether RFRA is a rational means for attaining that end. It is.

The *Sherbert-Yoder* balancing test, which is the heart of RFRA, was not particularly effective in practice, but it is both a "neutral rule of general applicability," and a familiar place to start. More important, however, is RFRA's design to impose the burden of proving the existence of a "compelling state interest" on the government. To the extent that litigants (and judges) take it seriously and actually litigate the "compelling" nature of the interest, RFRA may actually have the same kind of "teeth" that strict scrutiny does in the Equal Protection context.[486] Given the record of the courts in free exercise cases,[487] however, I remain skeptical.[488] More, not less, legislation is needed.

CONCLUSION

When the United States Supreme Court decided to view religious liberty as a fundamental right[489] it took only the first step on the journey across what the late Professor Robert Cover has described as a "bridge linking a concept of a reality to an imagined alternative."[490] There is now over fifty years of case law which captures on paper the

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483. Plaut v. Spendthrift Farm, 115 S. Ct. 1447 (1995).

484. 877 F. Supp. 355 (W.D. Tex. 1995).

485. 883 F. Supp. 510 (D. Haw. 1995).

486. *See* Paulsen, *supra* note 225.

487. *See supra* notes 18-23 and accompanying text.

488. *See generally* Paulsen, *supra* note 225 (discussing how much of the judicial "gloss" on the Free Exercise Clause RFRA adopts by reference).

489. *See supra* notes 54-65 and accompanying text.

490. Robert M. Cover, *The Supreme Court 1982 Term, Foreword: Nomos and Narrative,* 97 HARV. L.

Court's vision of religious liberty. It should not be surprising that the design work on the concept-bridge linking the constitutional concepts of non-establishment, free exercise and no religious testing to the Court's case law *looks* like it was done by a committee. The Court *is* a committee.

The question discussed in this Article is "by what right" the judiciary claims the unreviewable power to regulate religious establishments (of whatever stripe) and the authority to treat the clauses of the First Amendment as mutually exclusive norms having little or no relationship to the citizenship status of the actual people they are designed to protect. Justice Jackson's words to the President in *Youngstown Sheet & Tube v. Sawyer* are equally applicable to the judiciary. I quote them here with editorial additions to make the point:

> Courts can sustain exclusive . . . control in such case[s] only by disabling the Congress [and the states] from acting upon the subject. Presidential [and judicial] claim[s] 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.[491]

Structural analysis of such questions is a useful tool indeed, not because it enables us to resolve thorny doctrinal issues concerning the proper scope of liberty and personal autonomy in a pluralistic democracy, but because it highlights the very question which plagued both the Constitutional Convention of 1787 and the Reconstruction Congress which sent the Fourteenth Amendment to the states for ratification. To whom does the Constitution entrust the power to preserve and defend the liberties enshrined in the First and Fourteenth Amendments?

We know for certain that, much to Madison's dismay, the Convention rejected both the congressional negative on state laws and judicial participation in a Council of Revision. We also know for certain that neither Madison,[492] nor the Reconstruction Congress, placed any great trust in the ability of the judiciary to control its own powers. Not surprisingly, their distrust has been richly borne out in practice. Judges who strike "sensible balances" on the merits when the underlying issues are jurisdictional are generally wrong on the merits too.[493]

Because it has never been asserted (nor can it be) that the Court's judgments are exempt from the same limits (and prejudices) as apply to other policymakers exercising authority granted or restrained by the Constitution,[494] it is not only possible, but likely, that the Court will, on occasion, misconstrue the very Constitution it is sworn to uphold.[495] As

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REV. 4 (1983).

491. 343 U.S. 579, 637 (1952).

492. Hobson notes that Madison eventually accepted judicial review of state legislation "as a substitute for the congressional negative," but that "his proposal at the Convention to give the executive and judiciary a joint 'revisionary' power over legislative bills was designed to preclude 'the question of a Judiciary annulment of Legislative *Acts*.'" Charles A. Hobson, *James Madison, The Bill of Rights, and the Problem of the States*, 31 WM. & MARY L. REV. 267, 272 (1990).

493. *See* Destro, Review Essay, *supra* note 427.

494. U.S. CONST. art. VI, cl. 2 (Supremacy Clause).

495. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (Japanese internment); Plessy v.

a repository of an immense and unique public trust, it must be viewed in much the same manner as the framers viewed the Congress: as an instrumentality of the federal government with the power (but not the authority)[496] to usurp the limits of its power vis à vis the states and the political branches, and to utilize that power, on occasion, to inhibit individual rights, including religious liberty.[497]

Ferguson, 163 U.S. 537 (1896); Swift v. Tyson, 41 U.S. (1 Pet.) 1 (1842) (described by Justice Holmes in Black and White Taxicab & Transfer Co. v. Brown & Yellow Taxicab Transfer Co., 276 U.S. 518, 533 (1928), as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct"). *See also* Warren, *supra* note 1.

496. It is not necessary to conclude that the Court's function in this limited class of cases is "lawmaking" to be able to make this point, but that term does provide a useful analogy. To the extent that the Court's interpretations of the Constitution have the force of law and alter the rights and obligations of parties beyond the immediate case or controversy, judicial decisions are, from a structural perspective, identical in their impact to laws adopted by Congress and regulations promulgated under statutory authority by the legislative branch. *See* INS v. Chadha, 462 U.S. 919 (1983) ("action that had the purpose and effect of altering the legal rights, duties and relations of persons . . . all outside the Legislative Branch" defined as an exercise of legislative power). Nowhere is this problem more clearly articulated than in the context of "retroactivity."

The retroactive application of newly announced judicial rules, or congressional attempts to "restore" former ones, present equally difficult structural questions. A recent example of the manner in which these issues are related structurally in the context of statutory interpretation is Ribando v. United Airlines, Inc., 787 F. Supp. 827 (N.D. Ill. 1992). In *Ribando*, the United States District Court for the Northern District of Illinois discussed retroactive application of the Civil Rights Act of 1991 to claims occurring before its effective date and held that "prospective application of the Act best preserves the separation of powers." In response to the assertion that Congress had "overruled" the Supreme Court's holdings in a series of highly controversial cases, the District Court stated:

> To say that Congress has the power to overrule decisions of the Supreme Court is simply inaccurate. *See* Marbury v. Madison, 5 U.S. 137, 178 (1803) (Congress cannot add to nor detract from the powers of the courts granted in the Constitution). Equally inaccurate is to say that the Supreme Court promulgates law. Rather, the Supreme Court interprets enactments of Congress. *Id.* at 176. To the extent that Congress disagrees with the Court's interpretation, Congress may promulgate new law for interpretation by the Court, but may not "overrule" those decisions. *Id.* at 178-80. Prospective application of the Act best preserves the separation of powers of which Justice Marshall spoke. Alpo Petfoods, Inc. v. Ralston Purina Co., 913 F.2d 958, 963 n.6 (D.C. Cir. 1990) (Thomas, J.)

Id. at 833 n.8 (citations altered).

A discussion of the separation of powers questions which arise when Congress attempts to promulgate new law designed to strike a constitutional balance other than the one struck by the Supreme Court in the most recent controlling case is largely beyond the scope of this Article.

497. Hamilton addressed this question in *The Federalist No. 81*:

> The arguments or rather suggestions, upon which this charge is founded are to this effect: "The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body . . . ." This, upon examination, will be found to be made up

This is, of course, the basis for Dr. Dean Kelly's claim on behalf of the National Council of Churches that *Smith* worked "a repeal of the Free Exercise Clause." Though I respectfully disagree on that particular point because I believe *Smith* correctly answers the question presented given the state of the case law at the time it was decided, the essential point is well taken. Article VI makes limits on the exercise of the judicial power of the United States every bit as real for the Court as they are for every other official entrusted with governmental authority in our federal system. As a result, the critical questions are what these limitations mean, and how they should apply in and to a Court which is largely free of majoritarian political controls.

To undertake an analysis of the meaning of these limitations remains a daunting task. Ever since the Court began the piecemeal incorporation of the First Amendment in *Cantwell v. Connecticut*, outcomes have been driven by the Court's assumption that individual liberties, including those relating to religious liberty, are distinct and sometimes contradictory, categorical imperatives that must be balanced against the interests (compelling or otherwise) of a faceless state, which is either openly hostile or insensitive, to the rights of the people. Justice William Brennan's statement that the "logical interrelationship between the Establishment and Free Exercise Clauses"[498] is a "paradox central to our scheme of liberty,"[499] reflects that assumption without ever asking why that relationship should be interpreted and characterized as a "paradox" at all.

That is why it is far easier to discuss the structural questions of how these liberties should apply to the judiciary department, and what powers, if any, the states and Congress have to make certain these rights are protected should the federal judiciary be inhospitable to them.

This is why history is so important to the judicial task. If history is to inform the discussion of religious liberty at all (and I think it should), it is the entire historical record including that of the period prior to and after the adoption of the Fourteenth Amendment, which should inform our current understanding of the nature of the federal religious liberty guarantee. Though rarely determinative of any specific question, such inquiries do cast light on the substantive evils against which the Test Clause and the First and Fourteenth Amendments were designed to operate.

This was Judge Noonan's point when he wrote that "[t]he experience that made the law is capturable only through history."[500] Opinion concerning religious liberty in the United States has historically been inextricably bound up with political, cultural, philosophical, and religious assumptions concerning both the proper distribution of power in the federal system, and the important and proper role religion and religious believers

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altogether of false reasoning upon misconceived fact.

> In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws
> . . . .

THE FEDERALIST NO. 81, at 482 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

498. School Dist. of Abington Township v. Schempp, 374 U.S. 203, 247 (1963) (Brennan, J., concurring).

499. *Id.* at 230, 231.

500. Noonan, *supra* note 238.

play in society. The jurisprudence of the incorporated First Amendment is no place to make an exception.

If religious liberty is a fundamental right, then fundamental questions about the nature of the process by which that liberty is understood by the Court and transmitted to the people cannot simply be assumed or treated as matters of "academic" interest only.[501] They are political questions of the highest order.

Because the structural assumptions which undergird the post-*Cantwell* history of the First Amendment are not usually examined, most of the questions, criticism, or approbation of the Court's handiwork focuses on policy and history, not jurisdiction. The inevitable effect is to make it impossible to focus clearly upon the role the judiciary department has played (or failed to play) in the struggle to eliminate the evils which prompted the adoption of these guarantees in the first place.

The twin propositions that subject matter jurisdiction is always an open question, and that judicial power should be "checked" by the political process are by no means radical. Such is the nature of judicial review and of representative democracy. If there is a silver lining in the cloud which darkens the understanding of many advocates of religious liberty after *Smith*, it is that the case has served as a catalyst which will, in time, precipitate a systematic reconsideration of the entire *corpus juris* of religious liberty. Careful consideration of the separation of powers and federalism aspects of RFRA is the first step in that process.[502]

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501. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) *aff'g* 705 F.2d. 1526 (11th Cir. 1983) (affirming reversal of Jafree v. Board of School Comm'rs, 554 F. Supp. 1104 (S.D. Ala. 1982)). *See generally* Michael W. McConnell, *Neutrality Under the Religion Clauses*, 81 Nw. U. L. Rev. 146 (1986); Ruti Teitel, *When Separate is Equal: Why Organized Religious Exercises, Unlike Chess, Do Not Belong in the Public Schools*, 81 Nw. U. L. Rev. 174 (1986); Symposium, *Religion and the State*, 27 WM. & MARY L. REV. 833 (1986); William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983); Nancy H. Fink, *The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values*, 27 CATH. U. L. REV. 207 (1978).

502. On January 26, 1996, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision in Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996), *rev'g* 877 F. Supp. 355 (W.D. Tex. 1995). *Flores* is discussed at length in the text accompanying notes 331 to 335, and is significant because it so clearly rejects the arguments made by a number of writers that RFRA is unconstitutional under the Establishment Clause and the principle of separation of powers. It adopts as its separation of powers holding what is, in essence, the central premise of this Article: "In short, the judiciary's duty is to say what the law is, but that duty is not exclusive." It is shared with Congress and the states to the extent that each sovereign is acting within the scope of its constitutional authority.