DOES THE DECLARATION OF INDEPENDENCE PASS THE *LEMON* TEST?

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I
INTRODUCTION

In 2004, Walt Disney Pictures released the motion picture, "National Treasure."[1] The main character, Benjamin Gates, discovers that the United States Declaration of Independence contains a treasure map on the backside of its old parchment, leading to unfathomable wealth of unprecedented historic significance. Gates *discovers* the symbols of the map because they are not apparent to the natural eye. One must look through a special lens to find the treasure.

So it is with the real Declaration. We need not look to fantasy to discover unfathomable wealth of unprecedented historic significance. Hidden from the dualistic, secular eye, we find in the document the secret of our country's greatness.

America's national treasure has always been her faith in God. Not a ceremonial faith, but a real, substantive faith—a faith so strong that it is *self-evident* that our rights are from God. It is a faith that believes the Creator of mankind is actually there and even national

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1. NATIONAL TREASURE (Walt Disney Pictures 2004).

governments are wise in acknowledging and imploring His kind assistance and protection.

The Declaration is not a petition of redress; it is a document of interposition, where government representatives assert the rights of the populace against the wishes of the presently controlling, albeit oppressive, government.[2] The Declaration declares a complete dissolving of allegiance, and thus, it provides the rudiments of true freedom, starting from a blank sheet, so to speak. "Our Revolution," reflects Thomas Jefferson in 1824, "presented us with an album on which we were free to write what we pleased. We had no occasion to search into musty records, to hunt up royal parchments, or to investigate the laws and institutions of a semi-barbarous ancestry. We appealed to those of nature, and found them engraved on our hearts."[3]

The foundational thesis of the Declaration is uncomplicated, yet overwhelming: fundamental laws and rights are from God and no king is above the law.

As you read on, bear in mind the significance of the preeminent document that will be scrutinized in this Article. The Declaration's quill pen symbols of meaning provided the very foundation for the United States Constitution. Indeed, the Declaration is the constitution of the Constitution. The Declaration cannot be severed from the Constitution without draining the lifeblood from the latter. Without the former, the latter does not become a living Constitution, but a dead one.

2. The adverse response to the petitions of redress of the first Continental Congress led to the measures of the second Continental Congress.

3. Letter from Thomas Jefferson to John Cartwright (June 5, 1824), *in* 16 THE WRITINGS OF THOMAS JEFFERSON 45–46 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905).

Without the Declaration, the Constitution has no transcendent point of reference for meaning and purpose. And without application of the principles and convictions contained in the Declaration during judicial constitutional analysis, court rulings on matters of religion are often at odds with, and unable to support, the values of the individual communities across the country. Hence, contemporary jurisprudence has not produced a living diversity, but a dying conformity to centralized decrees.

It is important to remember that for approximately the first 150 years of the country's short history, establishment claims were sparse and related only to congressional spending and religion.[4] A majority of the states had not attempted to nationally establish the majority religion in the constitutionally forbidden manner—through an act of Congress.

Nevertheless, with the advent of *Everson v. Board of Education*[5] in 1947—where the U.S. Supreme Court casually reached back seventy-nine years to the Fourteenth Amendment[6] to apply the 156 year-old federalism Establishment Clause against the states[7]—earth-shaking change was forthcoming.

4. The only two direct Establishment Clause cases prior to *Everson v. Board of Education*, 330 U.S. 1 (1947), were *Bradfield v. Roberts*, 175 U.S. 291 (1899), and *Quick Bear v. Leupp*, 210 U.S. 50 (1908). Both cases involved federal aid and religion, and neither ruling found that the federal government had established religion.

5. 330 U.S. 1, 8 (1947).

6. U.S. CONST. amend. XIV, *ratified* July 9, 1868.

7. For a comparison, see *Gitlow v. New York*, 268 U.S. 652, 666 (1925), where, although the Court did not *incorporate* the First Amendment, it stated: "[W]e do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." The religion clause was unaffected until 1940, and its Establishment Clause was *incorporated* in 1947. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (stating in a free exercise matter, the Fourteenth Amendment "embraces the [religious] liberties" of the First Amendment); *see also* Murdock v. Pennsylvania, 319 U.S. 105 (1943) (ruling that, on the authority of the Free Exercise Clause, the City of Jeannette could not require a religious group to purchase a business license for books and

At first, on the Court's brave new course of meddling in state matters of religion, the pre-quake tremors were barely noticeable. But in the early 1960s, the time-honored religious traditions of the states, municipalities, and even school districts would be met with federal disapproval. Application of the doctrine of incorporation meant that any practice the Supreme Court deemed impermissible, in any local school district, for example, became unlawful for every school district across the country. The localities became nationalized. The country was (and continues to be) forced to become homogeneous. Ironically, the religious homogeneity of the country was the very *problem* the Court was trying to fix (herein one will find the catalyst for the new rules of Establishment Clause interpretation). After decades of declaring public religious expression unconstitutional at the state and local level (most notably in the educational institutions that transmit values), new, postmodern, post-Christian generations have emerged. Approximately sixty years later, we find a new, homogeneous America; only now it is, or is at least becoming, a secular nation, having no real connection to its own past.

Once public perception on church and state (really, God and state) had changed, as well as religious thinking in general, first in the Supreme Court (and with the intelligentsia) and then throughout every locality in the country, it became a matter of time before the citizenry would turn to challenge the religious tradition at the federal level. Presently, nothing is *self-evident*, including the conviction that our rights are from God—or that the hand of Divine blessing and protection of our country is necessary for our happiness and posterity. There no longer exists much of a connection between the

pamphlets sold in the course of door-to-door proselytizing). For discussion of the doctrine of incorporation, see *infra* section V.

religious relics and language of our past and their once-exalted status. Thus, we have seen and will continue to see challenges to government chaplaincy, proclamations, congressional prayer, the flag pledge, the national motto, monuments, oaths of office, and so on.

We are now beginning to see the Supreme Court in a position where it must attempt to prevent the absurd (arguably, further absurdities) from occurring. The problem the Court faces is that it cannot stop the logical conclusions of its own rulings. To be consistent, even the Court's own religious inscriptions (the Ten Commandments, et al) must come down from its courthouse, and its opening prayers must cease. The Court has opened the floodgates through its rulings and now finds itself vainly bailing water with its own problematic precedent. Activists armed with legal precedent have every reason to believe they can erase every remaining vestige of our religious heritage from memory. Current legal doctrine, as we will see, is on their side.

The title of this piece, hopefully, contains some shock value. Subjecting the Declaration to constitutional analysis ought to draw attention to the state of the contemporary establishment doctrine. Perhaps, the natural conclusion of contemporary analysis will invoke cause for serious reflection and reevaluation. In the 2004 flag pledge case, *Elk Grove Unified School District v. Newdow*,[8] Justice Thomas explained why the Court accepted the case:

> We granted certiorari in this case to decide whether the Elk Grove Unified School District's Pledge policy violates the Constitution. The answer to that question is: 'no.' But in a testament to the condition of our Establishment Clause

8. 542 U.S. 1, 45 (2004) (Thomas, J., concurring). *Newdow* was reversed on a standing technicality, but three Justices (including Justice Thomas) reviewed the substantive issues, concluding that the matter was properly before the Court.

> jurisprudence, the Court of Appeals reached the opposite conclusion based on a persuasive reading of our precedent . . . .[9]

The Justice also observed that we have reached the point where we now have "opportunity to begin the process of rethinking the Establishment Clause."[10]

After reviewing contemporary establishment doctrine, this Article will apply its *neutrality principle* to the government's religious expression found in the Declaration. Following a final appraisal of the doctrine of incorporation—noting that the Establishment Clause became *blurred* only after incorporation—I conclude that the most sensible recourse calls for the relinquishing of *Everson* usurpation and the ousting of its doctrines.[11]

II

THE QUESTION OF THE RELIGIOUS LANGUAGE IN THE DECLARATION

Before cutting into the coppice of this Article, let us refresh our minds with the potentially offensive and prohibited language of the Declaration. The relevant provisions for juridical review are contained throughout the document adopted by the Continental Congress on July 4, 1776 to legally justify the break from the British Crown. The question is whether the national declaration can survive constitutional scrutiny when it is laced with and supported by religious dogma and belief.

The following excerpts from the Declaration contain the relevant language for analysis:

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9. *Id.*

10. *Id.*

11. *See* Everson v. Bd. of Ed., 330 U.S. 1 (1947) (holding that the Establishment Clause applies to the states, as well as to the federal government); *see also* discussion *infra* Parts V, VI. The statement above will be developed in this Article. By "doctrines," the author refers to incorporation of the Establishment Clause and to government neutrality with religion.

> [T]he Laws of Nature and of Nature's God entitle them [one people], a decent Respect to the Opinions of Mankind requires that they should declare the causes which impel them to the Separation.
>
> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness . . . .
>
> WE, therefore, the Representatives of the UNITED STATES of AMERICA, in General Congress, Assembled, appealing to the Supreme Judge of the World for the Rectitude of our Intentions, do . . . solemnly Publish and Declare, that these United Colonies are, and of Right ought to be, FREE AND INDEPENDENT STATES . . . .
>
> And for the support of this Declaration, with a firm Reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.[12]

III

THE CONTROLLING PRINCIPLE OF CONTEMPORARY ESTABLISHMENT CLAUSE INTERPRETATION

At the outset, observe how the Establishment Clause is written: "*Congress shall make no law respecting an establishment of religion*, or prohibiting the free exercise thereof."[13] The second clause of free exercise is included in the quotation because the clauses are interdependently related and together compose one sentence of

12. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

13. U.S. CONST. amend. I (emphasis added). The original religion clause for the Bill of Rights, as proposed by James Madison, sheds some light on the earliest intentions and scope of the clause: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretence, infringed." 1 ANNALS OF CONGRESS 434 (June 8, 1789). "The real object of the [Establishment Clause] was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 § 1871 (1833).

thought. The Free Exercise Clause cannot have real meaning without the proper operation of the preceding clause. That is, manipulation of the words *Congress*, *law* and *establishment* will necessarily impact the free exercise of religion and, for our purposes, may even prohibit the free exercise of religion in the drafting of a government declaration.

The road that leads from the plain language of the Establishment Clause to the added language of the Supreme Court (in interpreting the plain language) is bumpy and winding, indeed, and Establishment Clause meaning and methodology continues to be under construction. Concurring in *Abington School District v. Schempp*, Justice Brennan professes the elusive goal of deciding religion cases: "[T]he line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."[14] Nevertheless, First Amendment establishment doctrine has become what it is. Now that Congress no longer means Congress and law no longer means law, several provisional tests[15] for defining establishment are set on the judicial table for individual consideration. If the relevant religious expression fails just one test, it is ruled unconstitutional.

The initial notion that the Fourteenth Amendment embraces the First Amendment religion provisions began with *Cantwell v. Connecticut*,[16] and the Establishment Clause was turned on its head

14. 374 U.S. 203, 294 (1963).

15. See *infra* part III subsection B for a synopsis of the five tests currently used by the Court to determine whether government has established religion. Of course, the inquiry involves any level of federal and state government, including local townships and school districts. And the government religious expression under review need not correlate to a duly enacted law, but merely a non-written practice, policy or tradition.

16. 310 U.S. 296, 303 (1940). Embracing the Establishment Clause with the long arm of the 14th Amendment implies that state religious expression may be regulated by the federal courts. When the Court says the 14th Amendment embraces, absorbs or incorporates a clause from the

just seven years later in *Everson v. Board of Education*,[17] when Justice Black announced his six commandments that Congress *and* the states and their municipalities shall not do.[18] The second commandment, seemingly pulled out of the midair clouds of Mount Sinai, without supporting precedent, would lay the groundwork for future Establishment Clause tests under the new concept of government neutrality with religion. The neutrality rule, which states that neither the federal nor state governments "can pass laws which aid one religion, aid all religions, or prefer one religion over another,"[19] would become the Achilles' Heel of all future attempts for the Court to produce a systematic establishment doctrine with any semblance of consistency and predictability. Indeed, the common

Bill of Rights, it categorically grants itself jurisdiction over the states. See *infra* section V for an overview of the doctrine of incorporation.

17. 330 U.S. 1 (1947). *Everson*, 374 U.S. 203 (1963), was a dollars and cents establishment case where the question was whether parents of parochial students could be reimbursed by the state for bus fees in like manner as parents of public school students. The Court ruled that the reimbursement law was constitutional and, therefore, reminiscent of its rulings in *Cantwell*, 310 U.S. 296 (1940), and *Murdock*, 319 U.S. 105 (1943), the Court came riding in to the local town to protect free religious expression—armed with the First Amendment.

18. Justice Black's commandments are as follows:

> [1] Neither a state nor the Federal Government can set up a church. [2] Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. [3] 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. [4] No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. [5] 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 from they may adopt to teach or practice religion. [6] Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Cantwell, 310 U.S. at 15–16. Some of the six rules make good historic sense in terms of limiting the federal government *via* the Bill of Rights (the states have their own religious clauses and have a constitutional right to self-government in the non-delegated area of religion). Respecting the national Congress, rule one encapsulates the primary purpose of the Establishment Clause. Rule two is patently false even applied solely to the federal government (as this Article will show, the Declaration could not have been adopted under this test). Rules three and four are unquestionably true. Rule five is true if it is referring to a positive tax and not tax exemption. And who can say what rule six means?

19. *Id*. at 15.

threads binding together the mass of confusion known as establishment doctrine are the valiant efforts of the individual Justices to uphold the concept of neutrality while simultaneously making legal and historic sense.[20] "The most lasting legacy of *Everson*," notes Donald Beschle, "would be the confident assertion that government must maintain a strict neutrality, not merely among religions, but between religion in general and irreligion."[21] We must therefore remember that all subsequent tests invented and used by the Court (to define establishment) are merely subsets and expressions of the neutrality principle.

A. A Closer Look at *Everson*

In review of the landmark case of *Everson v. Board of Education*,[22] let us examine the reasoning of Justice Black relating to federal jurisdiction and the concept of government neutrality.

Initially, we will notice Justice Black's cavalier rephrasing of the religion clause in the Bill of Rights: "The First Amendment, as made applicable to the states by the Fourteenth . . . *commands that a state* 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.'"[23] With a few strokes of the pen, the Justice amended "Congress shall make no law" with an

20. The Court in *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)), noted that "[t]he [Establishment] Clause erects a 'blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.'" *Everson* usurpation (incorporation) and neutrality necessarily produce judicial subjectivity and blurred vision. Establishment jurisprudence is thus consistently inconsistent and predictably unpredictable.

21. Donald L. Beschle, *Does the Establishment Clause Matter? Non-Establishment Principles in the United States and Canada*, 4 U. PA. J. CONST. L. 451, 456 (2002).

22. 330 U.S. 1 (1947).

23. *Id.* at 8 (citation omitted) (emphasis added). One can only imagine the level of anguish Jefferson or Madison would suffer at the sight of those words after laboring to add language to protect the states from the federal government.

editorial note in the margin of the Constitution: "Add local school district here." It was one small step for the Court, but one giant leap for the nation. Next, the Justice is so bold as to pretend that his inverted statement above contains the words of the actual clause: "These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out . . . ."[24] He continues, by stating that, "[d]oubtless their goal has not been entirely reached . . . ."[25] Therefore, the Supreme Court in 1947 is prepared to establish precedent in a brash effort to help those early Americans reach the Court's ill-advised perception of their goal.

Notwithstanding Justice Black's dramatic historical narrative and grandiose goal, one of the major problems for the Court regarding the "evils, fears, and political problems that caused that expression to be written into our Bill of Rights,"[26] is that no historic scholarship maintains that the Bill of Rights was written for any reason other than to control the power of the federal government. No one can argue that the Court's rewriting of the Establishment Clause presently "commands that a state"[27] does or refrains from doing what the Court says. But, the preeminent question asks whether the Court had the authority to rewrite the Bill of Rights in the first place. Indeed, as stated by Justice Marshall in 1833, contrary to what Justice Black asserts, the "serious fears" the early Americans entertained were that federal power might be "exercised in a manner dangerous

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*

to liberty."[28] Moreover, "[the Bill of Rights] demanded security against the apprehended encroachments of the general [federal] government—not against those of the local governments."[29] Closing the door on ambiguity, Justice Marshall concludes that, "[t]hese amendments contain no expression indicating an intention to apply them to the state governments."[30]

In the later *Everson* opinion, approximately eight paragraphs and 1,799 words separate Justice Black's above rephrasing of the religion clause from his infamous use of Thomas Jefferson's *wall of separation* statement. A casual reader cannot help but notice that, setting personal opinion and drama aside, the Court relies upon no direct precedent to support its very specific statements of newly-formulated establishment doctrine.

What the Court does cite neither supports its alleged right to unilaterally amend the Constitution nor its new doctrine of state (and federal) neutrality with religion. Instead, the Court cites an act of the Virginia Assembly known as the *Virginia Bill for Religious Liberty*, which was, like the Declaration, written in large part by

28. Barron v. City of Baltimore, 32 U.S. 243, 250 (1833). The Court also states: "In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in congress, and adopted by the states." *Id.*

29. *Id.*

30. *Id.* Additionally,

> [i]f the original constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government, and on those of the states; if, in every inhibition intended to act on state power, words are employed which directly express that intent; some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed. We search in vain for that reason. Had the people of the several states, or any of them, required changes in their constitutions; had they required additional safe-guards to liberty from the apprehended encroachments of their particular governments: the remedy was in their own hands, and would have been applied by themselves.

Id. at 249.

Thomas Jefferson. The Court quotes part of the preamble of that bill as follows:

> Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either . . . ; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern . . . .[31]

The fact that the states are quite capable of enacting their own bills of religious rights lends little to support the Court's conclusion that the Establishment Clause in the Bill of Rights of the United States Constitution was meant to be anything other than a safeguard from federal power in matters of the states' free exercise of religion.

In the quote above, take note of the phrase, "The Holy author of our religion who being Lord both of body and mind, yet chose not to propagate it by coercions." That is quite a statement. To whom might Virginia be referring to as "Lord?" Those words do not exactly support the contemporary concept of state neutrality with religion. Also, I invite the reader to reexamine the mini-phrase within the phrase: "Our religion." The fact that we find reference to Virginia's general, non-mandated religion in the bosom of the foremost document guaranteeing religious freedom and forbidding coercive action of the state ought to say something about the state's right of preferring its founding religion over others.[32]

31. Everson v. Bd. of Ed., 330 U.S. 1, 12–13 (1947)

32. In 1833, Joseph Story stated the following:

After quoting the Virginia law, the Court in *Everson* then, in either ignorance or arrogance, says, "[t]his Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[33] Of course, one of the minor details Justice Black omits is that the objective of the First Amendment was to safeguard the states *from* the federal government.[34] If Justice Black's reasoning is correct then Virginia must surrender the very religious rights and expression overtly contained in its own bill—which the Court amazingly cites to justify its usurpation.

Finally, we get to Justice Black's misplaced use of Jefferson's wall of separation statement, with supporting citation to *Reynolds v. United States* (1878).[35] Another glittering problem for the *Everson* Court is that *Reynolds* uses Jefferson's phrase in sound historic and legal context (and, of course, *Everson*, does not). In *Reynolds*, the Court acknowledges the wall keeping the federal government out of state religion, but holds that no wall exists with respect to the federal

> Probably at the time of the adoption of the constitution, and of the [First Amendment], now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

3 STORY, *supra* note 13, at § 1868.

33. *Everson,* 330 U.S. at 13 (citing Reynolds v. United States, 98 U.S. 145, 164 (1878)); Watson v. Jones, 80 U.S. (13 Wall.) 679 (1872); Davis v. Beason, 133 U.S. 333, 342 (1890)). None of the cases cited even remotely support the Court's position in *Everson.*

34. *See supra* notes 13, 28–30.

35. *Everson,* 330 U.S. at 16 (citing *Reynolds,* 98 U.S. at 164).

Congress enacting criminal laws for the pre-state territories, even if such laws conflict with practice motivated by religious belief.

The following is from *Reynolds*, where the Court quotes Jefferson and applies the Jeffersonian remark to its ruling:

> Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.[36]

Jefferson wrote to the Baptist Association on January 1, 1802, during his presidency, in response to the Association's inquiry regarding federal power and the church.[37] In his reply, he addressed the short reach of the federal government's power with respect to the church by quoting the religion clause of the First Amendment—followed with the infamous words, "thus building a wall of separation

36. *Reynolds*, 98 U.S. at 164 (internal citations omitted).

37. Letter from Thomas Jefferson to the Danbury Baptist Ass'n (Jan. 1, 1802) *in* 16 WRITINGS OF THOMAS JEFFERSON, *supra* note 3, at 281–82.

between church and state."[38] In context of Jefferson's letter, the legislature of the whole American people (Congress) runs directly into a brick wall in any attempt to dictate the church's opinions and beliefs.

The use of Jefferson's phrase was in perfect context for the issue before the Court in *Reynolds*. For in *Reynolds*, the Court ruled that Congressional power does in fact reach actions regardless of religious belief—if the actions are criminal. So, while a high wall keeps Congress out of state religious matters, there is not so much as a picket fence when it comes to criminal behavior. "Congress was deprived of all legislative power over mere opinion," writes Justice Waite, "but was left free to reach actions which were in violation of social duties or subversive of good order."[39]

Justice Waite, in *Reynolds*, viewed the wall keeping the federal government out of local religious affairs with high esteem, using Jefferson's letter to support a commonsense exception. Justice Black, in *Everson*, on the contrary, tore down the wall raised by the Bill of Rights, allowing the federal courts to ransack the sacred cities. And using Jefferson's words out of context, he erected his own artificial wall, which has been used ever since to command government neutrality and separation of public religious expression from the states and their localities.

Thereafter, by following the precedent handed down in *Everson*, the Supreme Court would go on to build an entire body of establishment doctrine upon a foundation of sinking sand.

38. *Id.*

39. *Reynolds,* 98 U.S. at 164.

B. *Lemon* and Beyond

The overarching principle of neutrality was eventually formulated into a three-prong analysis in the case of *Lemon v. Kurtzman*.[40] Drawing, inter alia, from *Board of Education v. Allen*,[41] and *Walz v. Tax Commission*,[42] the Court spelled out the structure of its scrutiny. "*First*, the statute must have a secular legislative purpose; *second*, its principal or primary effect must be one that neither advances nor inhibits religion; *finally*, the statute must not foster 'an excessive government entanglement with religion.'"[43] If the relevant statute (and presently, language, symbol or practice) fails any of the three tests, it is deemed to be unconstitutional and hence, illegal.[44]

When Justice O'Connor advanced the *endorsement test* in the case of *Lynch v. Donnelly*[45] in 1984, we must not forget that she also was under the influence of the alluring drink of neutrality. In the words of the Justice, "[t]he Establishment Clause prohibits government from making adherence to a religion *relevant* in any way to a person's standing in the political community."[46] Under the test, the state violates the proscription of making religious adherence relevant by either excessive entanglement or "government endorsement or disapproval of religion."[47] The endorsement test as proposed is really a two-prong entanglement/endorsement test, but in keeping with custom, this Article will employ a separate

40. 403 U.S. 602, 612–13 (1971).
41. 392 U.S. 236, 243 (1968).
42. 397 U.S. 664, 674 (1970).
43. *Lemon*, 403 U.S. at 612–13 (emphasis added) (quoting *Walz*, 397 U.S. at 674).
44. *Id.*
45. 465 U.S. 668, 687–95 (1984) (O'Connor, J., concurring).
46. *Id*. at 687 (emphasis added).
47. *Id*. at 687–88.

endorsement subheading. The prohibitive message that government endorsement purportedly sends to "nonadherents [is] that they are outsiders, not full members of the political community, and [endorsement sends] an accompanying message to adherents that they are insiders, favored members of the political community."[48]

The *coercion test* finds its modern antecedents in *McCollum v. Board of Education*,[49] where we find reference to indirect or subtle coercion "through use of the State's compulsory public school machinery."[50] By the time the coercion test was articulated in *Lee v. Weisman*,[51] the indirect-coercion-by-coercive-atmosphere doctrine had been fairly developed in pre-*Lemon* school district cases involving prayer and Bible reading in the early 1960s.[52]

The five tests above are not all applied by every Supreme Court Justice in every establishment question case.[53] The Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area."[54] Inasmuch as they are

48. *Id*. at 688 (citing Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963)).

49. 333 U.S. 203, 217 (1948).

50. *Id*. at 212, 217.

51. 505 U.S. 577 592–99 (1992). *See* Newdow v. U.S. Cong., 292 F.3d 597, 605 (9th Cir. 2002) (insisting that the coercion test is said to have been "first used by the Court in *Lee*").

52. Engel v. Vitale, 370 U.S. 421 (1962) (school prayer); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading).

53. Often, when the Court wants to uphold a government religious expression, neutrality principles are simply set aside. *See, e.g.*, Van Orden v. Perry, 125 S. Ct. 2854, 2861 (2005) (referring to a granite monument standing six-feet tall by three-feet wide and bearing the Ten Commandments, the Court noted, "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation's history"). For another example see *Marsh v. Chambers*, 463 U.S. 783 (1983), where, interestingly, Chief Justice Burger, who had gleaned and articulated the three neutrality elements in *Lemon*, refused to apply any of them in his *Marsh* opinion. Incidentally, *Marsh* involved a Presbyterian minister paid with state funds to serve as a legislative chaplain.

54. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

ladled out of the same pot of neutrality, the tests are often mixed and matched and are used differently by different Justices. For example, as was noted above, Justice O'Connor relied upon only the entanglement and endorsement tests to fashion her concurring opinion in *Lynch*.[55] Nevertheless, in an attempt to leave no touchstone unturned, this Article will consider each of the five tests.

IV
THE DECLARATION AND CONTEMPORARY ANALYSIS

A. Secular Legislative Purpose

We must note first that the *legislative* part of *purpose* is presently a misnomer. The entire concept and requirement of Congress passing a law has been eliminated as an unnecessary inquiry in contemporary establishment jurisprudence. We are only concerned with whether the Declaration has an actual secular purpose.[56]

We will examine the religious nature of the Declaration under subsequent subheadings, but for now we are in search of a genuine secular motivation. With that being the case, we may pass through this subsection rather quickly concluding that the Declaration, of course, has a secular purpose. Though we may easily discern men acknowledging, appealing to, relying upon and exalting the Supreme Judge of the world in the document, no tenable argument can be made that the Declaration was written for ecclesiastical or religious purposes—devoid of secular purpose. The Declaration is an instrument of legal interposition, and its primary purpose was to formally lay out the reasons and justifications for declaring

55. *Id.* at 687–94.

56. Of course, with the present inquiry, the Declaration is the act of a federal legislative body and carries the full force of law.

independence from Great Britain.[57] As such, the Declaration clearly passes the secular purpose part of the *Lemon* test.

B. Primary Effect of Advancing or Prohibiting Religion

Prior to considering the hallmarks of the *effect test*, let us consider the context of the public's contact with the text of the Declaration. Most often people are introduced to the phraseology as students either in public or private school settings. The teaching of certain academic disciplines requires examination, if only at some bare level, of the text of one of our most momentous founding documents. Even at minimum exposure, the reader will encounter religious words capable of offending sensibilities—words the reader might find offensive, repulsive and in direct opposition to one's faith or belief.

Indeed, in the very first sentence of the Declaration we encounter the word "God."[58]

In the subsequent sentence we find codified religious doctrines of presupposition and belief. The religious doctrine of the Declaration's second sentence may be construed as nothing less than six articles of religious faith: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights . . . ."[59] First, we find an absolutist view of truth. Second, we see a proposition of religious epistemology. Third, we cannot escape the religious doctrine of creation. Fourth, a moral pronouncement of equality is based solely upon religion. Fifth, we encounter the bold religious tenet that the Creator has gifted the reader with unalienable Rights. And, sixth, we see the religious

57. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

58. *Id.* para 1.

59. *Id.* para 2.

position that, if the rights are unalienable, the Creator has a higher authority than the state.

"The purpose prong of the Lemon test asks whether government's actual purpose is to endorse or disapprove of religion."[60] We have noted that the Declaration easily passes that test. However, "[t]he effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid."[61]

The effect prong relating to the advancement of religion has been defined and characterized by the idea of government endorsement of religion, which means the two tests overlap, with the former perhaps being integrated into the latter.

The Court in *Allegheny* noted that,

> [o]ur subsequent decisions further have refined the definition of governmental action that unconstitutionally advances religion. In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion, a concern that has long had a place in our Establishment Clause jurisprudence.[62]

We should not be surprised that "the word 'endorsement' is not self-defining. Rather, it derives its meaning from other words that this Court has found useful over the years in interpreting the Establishment Clause."[63] To help us understand, Justice Blackmun explains that government may not "'convey a message that religion

60. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

61. *Id*.

62. County of Allegheny v. ACLU, 492 U.S. 573, 592 (1989) (citing Engel v. Vitale, 370 U.S. 421, 436 (1962)).

63. *Id*. at 593.

or a particular religious belief is favored or preferred.'"[64] Additionally, neither the Congress nor the township may "'favor religious belief over disbelief.'"[65] Neither may the government adopt a "'preference for the dissemination of religious ideas.'"[66] The Justice also mentions *Lynch* to remind us that the word "endorsement is closely linked to the term promotion."[67] *Epperson v. Arkansas* is quoted for the long standing rule that "government 'may not . . . promote one religion or religious theory against another . . . .'"[68] Finally, the Justice concludes by noting that the Court in *Wallace*, uses the "concepts of endorsement, promotion, and favoritism interchangeably."[69]

So how does Justice Blackmun tie it all together with respect to the question of whether the government's actions have the primary effect of advancing religion? "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . ."[70]

One may abandon all hope of making sense of the Court's reasoning and nevertheless conclude that the Declaration is in serious constitutional trouble under part two of the *Lemon* analysis. The problem any government religious expression encounters is that

64. *Id.* (O'Connor, J., concurring) (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985)).

65. *Id.* (Blackmun, J., concurring) (quoting Tex. Monthly v. Bullock, 489 U.S. 1, 27–28 (1989)).

66. *Id*.

67. *Allegheny*, 492 U.S. at 593 (O'Connor, J., concurring) (quoting Lynch v. Donnelly, 465 U.S. 668, 691 (1984)).

68. *Id*. (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).

69. *Id*. (citing *Wallace*, 472 U.S. at 59–60).

70. *Id.* at 593–94.

the more terms (which are not self-defining) the Court adds to its lexicon of Establishment Clause interpretive theory, the greater the odds of the relevant expression failing constitutional muster. After all, the relevant government religious practice or expression will fall if it does not measure up to just one Court-defined term. Just from the brief recital of Justice Blackmun, above, the Declaration encounters a fleet of contact mines that it must successfully navigate to earn the neutrality stamp of the Supreme Court.

It is sensible to start with what the Establishment Clause prohibits at the very least: if *appearing to take a position* on questions of religious belief is a violation, then the government via the Declaration collides head-on with the effect test. In the Declaration, the government does far more than *appearing to take a position*. The government articulates its own religious beliefs, leaving no question as to its position.

One of the many subtests of the test as articulated by the Court in *Wallace v. Jaffree* is that the government is precluded "from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."[71] In *Wallace*, the state legislature attempted to convey a message that prayer was favored over non-prayer meditation. The issue before the Court was the constitutionality of three state statutes which authorized a daily, one-minute period of silence in the public schools for meditation; meditation or voluntary prayer; and for willing students, a prescribed prayer to Almighty God, the Creator and Supreme Judge of the world.[72]

71. 472 U.S. at 70 (O'Connor, J., concurring).

72. *Id.* at 40. The statutes were enacted in 1978, 1981, and 1982, respectively. *Id.*

In consideration of the legislative history and the plain progression of the statutes toward favoring prayer, Justice Stevens, writing for the Court, concluded that "the Alabama Legislature intended to change existing law and that it was motivated . . . [by the] sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each schoolday [sic]."[73] Moreover, the Court noted that the "addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with *the established principle that the government must pursue a course of complete neutrality toward religion*."[74] The *established principle* as succinctly articulated by Justice Stevens encapsulates the Court's contemporary neutrality doctrine in one sentence.

The state legislators, above, may have intended to favor and endorse prayer and, thus, depart from the Court's mandate of *complete neutrality*, but, in doing so they were following suit of certain federal legislators before them. The government, speaking for all the people (in the Declaration), is found appealing to the Supreme Judge of the world with a specific petition for approval of their intentions and protection of their very lives. The voluntary prayer authorized by the state of Alabama was to the same "Supreme Judge of the world,"[75] yet, interestingly, there is neither citation nor reference to the Declaration in the *Wallace* opinion.

Concurring in *Abington School District v. Schempp*, Justice Goldberg boldly states that, "[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects

73. *Id.* at 60.

74. *Id.* (emphasis added).

75. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

or between religion and nonreligion, and that it work deterrence of no religious belief."[76] Certainly, an atheist is likely to view the relevant religious language in the Declaration as a disapproval of his religious choice, while a monotheist is likely to exclaim, "Amen." In shocking contrast to neutrality precedent, the government made no provision to accommodate those who reject the religious doctrine of the Declaration. We do not find one clause that says, "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights," countered by another which says, "Of course, some of us do not hold those propositions as *truths* and, therefore, base the right for freedom not upon god-given rights, but upon wide-ranging conceptions of mankind's inherent right of self realization, autonomous from the restraints of conventional belief in a creator or a god."

The Court in *Texas Monthly v. Bullock*, admonishes the Lone Star State, as follows: "[B]y confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages."[77] Moreover, Justice Blackmun insists that, "[a] statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable."[78]

The Declaration's message, of course, was meant to be disseminated—along with its well-articulated religious ideas and theories, which are endorsed, favored and promoted by the government in its dissemination.

76. 374 U.S. 203, 305 (1963) (Goldberg, J., concurring).

77. 489 U.S. 1, 28 (1989) (Blackmun, J., concurring).

78. *Id.*

In wrapping this inquiry up, we must ask the following rhetorical question: Though the Declaration was written to achieve a secular purpose, does it nevertheless have the primary effect of either advancing or prohibiting religion?[79] Arguably, the original, primary effect of the Declaration was to instill nationalism and patriotism; but even then, the government used religion to do so. The government conveyed a message of endorsing one particular religious belief while remaining conspicuously silent regarding other beliefs and non-religious beliefs.

Of course, the Revolutionary War has long been over. When contemporary non-adherents are made to encounter religious language they find utterly offensive, it becomes difficult to imagine the document having any effect other than advancing a repugnant religion upon the conscience of the objecting reader.

If the Declaration fails one test, it falls short of the Court's standard; but to perceive just how far it falls, let us go on to consider how the document is and is not written in light of the contemporary doctrine of *entanglement*.

C. Excessive Government Entanglement with Religion

Instrumental in positing a declaration of independence against a kingdom whose king is defined in the document as a "tyrant," is stating the sure basis for doing so. The excitement of fight or flight was in the revolutionary air in 1776, and the unified sentiment was fight until freedom was secured. As soon as the ink of ratification had dried, flight was not an option.[80] Prepared for full-scale war, and

79. *See* Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (articulating and applying this three-pronged test).

80. Although historians credit the start of the Revolutionary War with the battles of Lexington and Concord on April 19, 1775, the Lee Resolution of July 2, 1776 and the Declaration solidified the inescapable course of either full national victory or defeat.

great risk of loss of life, the men of the Continental Congress looked to the surest possible foundation to support their intentions. Never was there witnessed a more solemn time of deliberation over the future of a nation than when those men, sensible of danger and incalculable loss, looked to their Creator for the Rights they were claiming. They believed the cause was just, noble and right because the cause found sanction from a Lawgiver higher than the state. Indeed, the adopters of the Declaration appealed to the Supreme Judge of the World for the "rectitude," that is, the *righteousness*, of their intentions. And, mindful of their frailty, they relied upon the protection of Divine Providence.

The American founders believed that certain higher laws entitle nations to govern themselves independently from rule that is contrary to this authority. That idea is so fundamental that it is a matter of natural law.[81] Of course, the laws of nature are subject to their Creator; and it is to the Supreme Deity that people must also subject themselves in order to avail themselves of the rights, blessings and responsibilities associated with the operation of higher law.

Observe that the Declaration is not content to stop with finite nature. To stop there is to have no authority higher than the state. To stop there is to have nothing beyond the mind of man. The

81. William Blackstone said that the "will of [the] maker is called the law of nature." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND § 2 (1765). Another influence was John Locke:

> "The state of nature has a law of nature to govern it, which obliges every one: and reason, which is that law, teaches all mankind . . . that being all *equal and independent*, no one ought to harm another in his life, health, liberty or possessions: for men being all the workmanship of one omnipotent and infinitely wise maker; all the servants of one sovereign master, sent into the world by his order . . . "

2 JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 6 (1772); Charles Montesquieu added that, "The law which, impressing on our minds the idea of a Creator, inclines us towards Him, is the first in importance, though not in order, of natural laws." 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS § 2 (Thomas Nugent trans.) (1873).

American founders did not say that Nature and their brilliant reasoning entitled them to self-government, but rather the Laws of Nature and of Nature's God entitled them. The founders did not grant themselves their rights; they received them from God. They did not create our fundamental rights; they applied them. They did not look to the state. Rather, they looked to God.

A naturalistic, secular world-view has no place in the Declaration. Within the four corners of the great document, man does not exist as the result of impersonal, cold, dead matter mysteriously coming alive, self-creating, breathing and thinking. Man is not part of the machine living in a closed system.[82] On the contrary, the finite has an infinite reference point found only in his Creator. *All men were created equal* says the Declaration, which is another way of saying all men were created in the image of God. Not only did the Creator endow men with breath, but also with *unalienable rights*—rights that cannot lawfully be taken away by the state. So far, we see that the Declaration is anything but a secular or religiously neutral document.

When the Founding Fathers, via the Declaration, appealed to the Supreme Judge of the World for the rectitude to support the grand plan of independence, they were not appealing to one of many sources. They cited no international court rulings. Instead, they took their petition directly to the High Court of heaven and earth. No king had the authority to sanction what they were after; only the King of kings could bless and approve their endeavor. The Declaration does not look to man for validation, but to God alone. The document does not rely upon *human rights*, but upon the God who endows men with unalienable rights. The Declaration does not

82. The concept of the naturalistic man's view of himself as being part of the machine in a closed system is borrowed from FRANCIS A. SCHAEFFER, HE IS THERE AND HE IS NOT SILENT 42–48 (1972).

say that some of the founders appealed to their own reason, others to the secular state, others to the Tao, others to political theory, and still others to the general good of mankind.

The document is profoundly interwoven with one monotheistic religion, and in the postlude of the Declaration, we find a statement of entanglement with this particular religion that equates to nothing less than dependence upon the God of the Declaration. The future of North America as united and free states depends entirely upon this clause: "And for the support of this Declaration, with a firm Reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor."[83] Notice that the patriots pledged to each other their very lives; but also notice that there was a condition antecedent. They did not pledge their lives until they had pledged themselves to the God who was actually able to protect and keep them. That was not ceremonial religious language; that was religious language in the context of life and death. Here, we do not see a faint, superfluous acknowledgment of religion. On the contrary, we see a firm reliance on the protection of Divine Providence. Indeed, 230 years later, we can still feel the intensity of the religious conviction captured on the aging tablet.

We thus find within the Declaration nothing less than a solemn prayer to the Creator and Supreme Judge of the world—a Judge who sees, hears and intervenes for those who trust in Him. Every religious prayer is an appeal to some conceptual deity; in this important document of interposition, we find the government appealing to a very specific Deity, indeed.

The God of the Declaration is notably large, powerful and authoritative. As the Creator of man, He is the very source of life and

83. THE DECLARATION OF INDEPENDENCE para. 32 (U.S. 1776).

liberty. And this God is the substantive source of right and wrong (hence, the supplication to the Supreme Judge for the rectitude of their intentions). The document's language casts aside the contemporary definition of deism. The God of the Declaration is personal, able, and apparently willing to watch over and protect individuals and the nation at large. Having one eye on the parchment and the other looking ahead to the contest with Great Britain, we must conclude that the men of the Continental Congress in fact believed that this God could, and would, protect the nation as they placed themselves under His mighty hand of providence. When considering the specific titles used for the God of the Declaration, together with His attributes, we must conclude that the American forefathers placed their trust firmly in none other than God Almighty.

There scarcely could have been a greater instance of *excessive entanglement* between the state and religion as we find bound together by the *iron pen* of the Declaration.[84]

The problem for the Declaration, of course, is that the Supreme Court's doctrine of excessive entanglement renders our preeminent document illegal as written. In the political context of the Declaration, Chief Justice Burger explains that "a broader base of entanglement" inquiry involves the question of whether the relevant government expression carries the "potential" for political divisiveness based upon religion.[85] Citing a law journal Comment to support its proposition, the Court continues: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government,

84. NATIONAL TREASURE (Walt Disney Pictures 2004) (using the "iron pen" to refer to the strength and resolve with which the Declaration was written).

85. Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[86] That statement should be axiomatic because the "history of many countries attests to the hazards of religion's intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief."[87]

The act of government officials wrapping themselves in religious doctrine in support of the Declaration necessarily places its readers in the tenuous position of accepting or rejecting their country's religious dogma. The Declaration carries the potential for political divisiveness inasmuch as non-adherents might be made to feel less patriotic than adherents.

D. Government Endorsement of Religion

The last thought of the previous subsection creates a natural transition into our next test of endorsement. In fact, Justice O'Conner likely developed her political outsider conceptualization from, inter alia, the *Lemon* principle. We have already seen that the effect test has been somewhat subsumed by the endorsement test. We may also follow the ruminations over "political divisiveness" from the entanglement test to their current form as expressed in the endorsement test.

With that being the case, this subsection will focus on how the Declaration might make "adherence to a religion relevant . . . to a person's standing in the political community."[88] That is, whether the

86. *Id*. Not so ironically, the Court's misconception of the "evils" the First Amendment was intended to protect against are strikingly similar to those arguments first advanced by Justice Black in *Everson v. Board of Education*. 330 U.S. 1 (1947) (holding that the Establishment Clause applies to the states, as well as to the federal government).

87. *Lemon*, 403 U.S. at 623.

88. Lynch v. Donnelly, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring).

government's endorsement of religion via the Declaration sends a "prohibitive message" to non-adherents that "they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[89]

Well, it is difficult to imagine how government could make adherence to religion *more* relevant than by basing the future of the entire nation upon the power of its God to endorse and watch over the cause of freedom. We may mark the operation of reciprocal endorsement: God is endorsing the government, and the government is endorsing the religion of the wise Creator.

When the government speaks for everyone, applying the plural pronoun, "we," (as in "We hold these truths to be self-evident")[90] relevance certainly attaches. Everyone is dragged in and is presumed to hold the religious propositions that follow. That kind of homogeneous religious thinking, of course, runs amuck of what the Supreme Court says the Constitution says.

In *County of Allegheny v. ACLU*,[91] the Court considered the constitutionality of a Christmastime nativity scene (crèche) displayed on city property that included an angel bearing a banner proclaiming, "Gloria in Excelsis Deo!"[92] Writing for the majority, Justice Blackmun concludes: "The government may acknowledge Christmas as a cultural phenomenon, but under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."[93]

89. *Id*. at 688.

90. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

91. 492 U.S. 573 (1989).

92. *Id.* at 580.

93. *Id*. at 601.

That is an interesting and far-reaching conclusion, but it must be followed if contemporary doctrine is to be applied to the Declaration. Justice Blackmun suggests that by displaying the crèche, the City of Pittsburgh was "suggesting that people praise God for the birth of Jesus."[94] The angel's statement, which is part of the history of the birth of Christ, was displayed in Latin. The Declaration, on the contrary, is written in English. If we must conclude that Pittsburgh was suggesting that people praise God for the birth of Jesus from the angel's Latin banner which is translated, "Glory to God in the Highest," then we have yet another neutrality problem for the Declaration. How do we not conclude that the government was suggesting that people should believe they were created by God and endowed with certain unalienable rights? If you read Latin and understand that because the angel was giving glory to God, it is imputed that you also understand that the City of Pittsburgh is suggesting that you, like the angel, give glory to God. Applying that reasoning to the Declaration, when you read of the founders appealing to the Supreme Judge of the world, it is imputed that you understand that the government is suggesting that you, like they, also appeal to the Supreme Judge of the world.

The Court uses the nebulous "reasonable observer" to determine government endorsement and outsider status. In the nativity context above, the Court observed that a reasonable observer would conclude that government was endorsing religion.[95] The "reasonable observer" is presumed to be "aware of the history and context of the community and forum in which the religious display appears."[96] By imputing to our reasonable observer the history and context of the

94. *Id.* at 620.

95. *Id.*

96. Capitol Square Review v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

Declaration, one must ask whether such an observer would view the religious language as merely *ceremonial* or as a substantive expression of faith. Does the religious language contain enough substance that our non-adhering observer would view the religious language as a disapproval of her particular religious choices?

Would a non-adherent be made to feel that she is not part of the "We," in "We hold these truths . . . ?"[97] Is the atheist less worthy of the enumerated rights? Is the non-believer a lesser member of the political community? Certainly, the political force of the Declaration surpasses that of a nativity scene. If a community's seasonal placement of a nativity scene causes individuals to feel as though they are political outsiders, how much more will non-adherents feel like outsiders who reject the enduring religious principles on which the Declaration rests?

E. Government Coercion

"It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[98] The dual clinchers of that sentence from *Lee v. Weisman* are "or otherwise act" and "or tends to do so."[99] So how might the government coerce or otherwise act or otherwise tend to do so?

The contemporary Court, of course, is not looking for actual coercion or even actual establishment, for that matter, but for any

97. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

98. Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)); *see also* County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989) (quoting Everson v. Bd. of Ed., 330 U.S. 1, 15–16 (1947)).

99. *Lee*, 505 U.S. at 587.

violation of the *complete neutrality* principle. In the *Lee* case, which has become known for its coercion test articulation, the question was whether the First Amendment prohibits local public school officials from inviting clergy members to offer invocations and benedictions at graduation ceremonies.[100] The nonsectarian prayers at issue were offered by a local Jewish rabbi and contained the word "God" twice—once in the invocation and once in the benediction.[101] The word "Lord" was also used once in the benediction. God was thanked for the "legacy of America," for endowing the students with the "capacity for learning," and for "keeping us alive, sustaining us, and allowing us to reach this special, happy occasion."[102] Rabbi Gutterman also asked for the blessings of God upon the teachers and administrators and for "strength and guidance" for the graduates.[103]

Subtle and indirect pressure to participate in religious expression "can be as real as any overt compulsion," says Justice Kennedy, armed with the latest "research in psychology."[104] The question of whether the Court should be determining and quantifying student psychological peer pressure is beyond the reach of this Article, but within its reach are the implications of the following statement of the Court: "But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real [than overt compulsion]."[105]

100. *Id.* at 581.
101. *Id.* at 581–83.
102. *Id.*
103. *Id.* at 581–82.
104. *Id.* at 593–94.
105. *Id.* at 593.

That, unfortunately for the Declaration, is the precedent we must apply to our analysis. The Court establishes precedent allowing a student's perception that she is being forced to pray at a graduation ceremony to be classified as a "reasonable perception."[106] As we review the Court-defined coercive atmosphere of the graduation ceremony, we find only that the audience was asked to stand for the "two minutes or so" of invocation and benediction.[107] The dissenting student was not forced to stand, nor make any gesture nor pray nor utter any word.[108]

Similar to the reasoning in *Allegheny*, where a reasonable observer would interpret the city as suggesting that she praise God because of the crèche,[109] here, the reasonable dissenter interprets the school district as forcing her to pray because of the rabbi's invocation.[110] Even though she is not actually praying (and may even be loathing the rabbi's prayer in the silent dissent of her mind), the Court holds that she has the reasonable perception that she is in fact being forced by the state to pray.[111]

Inasmuch as the dissenter perceives she is being forced to pray, the Court also perceives that she sustains injury by virtually praying; and her injuries are no less real than if she had been forced by the state to actually deliver Rabbi Gutterman's nonsectarian prayer. "The injury caused by the government's action . . . is that the State, in a school setting, in effect required participation in a religious

106. *Id.*
107. *Id.*
108. *Id.* at 594.
109. County of Allegheny v. ACLU, 492 U.S. 573, 620 (1989).
110. *Lee*, 505 U.S. at 593.
111. *Id.*

exercise."[112] The Court uses the terms "offense, embarrassment and intrusion" to define the dissenter's injuries.[113]

The coercion test becomes applicable when the federal government's (or the local community's) free exercise of religion creates an indirect, subtle, yet psychologically coercive atmosphere for objectors. In the Declaration, we observe the free exercise and expression of religion by the government itself, not a clergy member. The mere fact that students have little choice but to encounter the religious language of the Declaration is enough to create an atmosphere of psychological coercion wherein dissenters may reasonably feel that the government is forcing them to believe the religious doctrine contained therein.

Contemporary coercion doctrine is violated when an individual is psychologically injured by offensive, embarrassing and intrusive religious expression that is diverse from her particular religious beliefs and choices. Unfortunately, for the rest of the community—because of psychological peer pressure—she is unable to endure the free exercise of religion without colorable offense.

F. The Naivety of Neutrality

The Declaration finds no support from four of the above tests of the Court because the entire paradigm of government neutrality with religion is wrought with frailty. Neutrality is an impossible task, especially at the place the Court has labored most fervently—the public schoolhouse. In the land of secular neutrality, religion comes strolling into the schoolroom unnoticed. When the individual

112. *Id*.

113. *Id*. Of course, the school district and the rest of the students who are forced to abandon their long-standing religious tradition at the command of the Court face actual coercion and substantive injury.

community's version of God (which is much like the Declaration's) is taken out, the religions of neutrality are inadvertently brought in. A total, integrated system of education can never be devoid of moral values—and values must be integrated from somewhere. If not theistic values, then humanistic; if not supernatural, then natural—etcetera. The religions of secular humanism, naturalism and religious plurality presently provide the framework for the moral values transmitted in the federally-controlled public schools of today.[114]

Indeed, the concept of neutrality is an idealistic cloud that never can be caught. It is one of the most simplistic and naive schools of thought ever entertained by the Court. It is a place where all religions are equal, which means none transcend man—man must become and remain the measure of all things. The transcendent God of the Declaration, whom our founders appealed to and trusted in, is now equal to any god of anyone's imagination or to the belief in no god at all. Unfortunately, that system of belief cannot long support the freedom America has known and enjoyed. Without a firm reliance upon the God of our unalienable rights, we are left with no rights at all—merely the fancy of the federal government. Without the conviction of individual responsibility and duty to the God of the Declaration, we are left with subjective license, not objective liberty.

114. An anonymous proverb says that, "the philosophy of the schoolroom in one generation will be the philosophy of the government in the next." That proverb which is often erroneously credited to Abraham Lincoln might also be expressed this way: The philosophy in the schoolroom in one generation will be the philosophy of the culture in the next. Depending on whether you believe our culture has progressed or digressed in the area of morality, you have the Supreme Court to either thank or curse. But before you make assessment, consider the question of whether your present thinking could be a product of the coercive "machinery" of the Court. *See* McCollum v. Bd. of Educ., 333 U.S. 203, 212, 217 (1948) (establishing "coercion" as a possible impermissible violation of the Establishment Clause); *see also supra* text accompanying notes 49–50.

Application of currently controlling neutrality precedent leads us to the inescapable conclusion that the United States Declaration of Independence is unconstitutional and hence, illegal as written.[115] (Another possible, and more likely conclusion, however, is that Supreme Court rulings on establishment cases have been unconstitutional and hence illegal since 1947.) We, therefore, should not be surprised at the state of Establishment Clause doctrine and jurisprudence. Beginning with the spurious command of state neutrality and prohibition of aiding or preferring religion, to secular purpose, to non-advancement of religion, to excessive entanglement with religion, to non-preference of religion over non-religion, to subjective emotional tests to determine government coercion and endorsement of religion, we arrive sixty years later at the current state of establishment doctrine and culture. If the proper gravamen for establishment constitutionality is neutrality, there could hardly be a greater violator of the law than the Declaration itself with its appeal to and firm reliance upon the Creator and "Supreme Judge of the world."[116]

V

THE SENSIBLE ALTERNATIVE: OVERRULE *EVERSON* AND LET FREEDOM RING

The observation of Justice Thomas that the time has come to begin the process of rethinking Establishment Clause jurisprudence was made in the context of realizing that contemporary doctrine

115. Recognizing the absurd truth of that sentence should goad us on to understand the absurdities of contemporary establishment doctrine. A revelatory test for the tests is to square them with the Declaration, observing where and how they conflict.

116. THE DECLARATION OF INDEPENDENCE para. 2, para. 32 (U.S. 1776).

views the U.S. flag pledge as favoring religion over non-religion; and thus it renders the pledge illegal.[117]

In his concurring opinion in *Elk Grove*, Justice Thomas makes the argument that the First Amendment's religion clauses divide between the states' rights of non-interference regarding establishment and individual liberty rights regarding free exercise.[118] Therefore, the learned Justice accepts the following:

> [T]he Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. But the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause. In any case, I do not believe that the Pledge policy infringes any religious liberty right that would arise from incorporation of the Clause. Because the Pledge policy also does not infringe any free-exercise rights, I conclude that it is constitutional.[119]

In the above quote, the Justice accepts the longstanding doctrine of selective incorporation but concludes that the Establishment Clause "resists incorporation," which is another way of saying that the clause should never have been absorbed and applied against the states. Since only fundamental rights of individual liberty are incorporated into the Fourteenth Amendment from the Bill of Rights, and considering that the Establishment Clause "does not

117. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring) ("I conclude that, as a matter of our precedent, the Pledge policy is unconstitutional."). The flag pledge also prefers monotheistic religion over non-monotheistic religion inasmuch as it refers to God and not gods.

118. *Id.*

119. *Id.* (internal citations omitted).

protect an individual right," incorporating the clause is "difficult to understand."[120]

Justice Thomas believes the best argument for finding an individual, fundamental right within the Establishment Clause springs from the position that one has a right "to be free from coercive federal establishments [of religion]."[121] Certainly that right protects the states and, like all federalism provisions, individual rights are realized. There is no need to incorporate the clause, however, when it is already fully functional and capable of guarding against federal encroachment and protecting individual rights.

Under the Thomas view, the Supreme Court would reverse *Everson* and thus duly limit itself under the authority of the federal Establishment Clause and the Tenth and Fourteenth Amendments. The Court, therefore, would not address the Elk Grove School District's pledge policy;[122] the federal tribunal would only address the question of whether Congress had established religion with its relevant pledge legislation.[123]

A. Overview of the Doctrine of Incorporation

At this point some background might be in order to extrapolate the reasoning of Justice Thomas. It is important to remember that the establishment barrier did not become blurred until the

120. *Id*. at 50. I would argue that incorporating the Establishment Clause is more than difficult to understand; it is beyond reason.

121. *Id*. at 50–51.

122. The California courts would decide the constitutionality of the policy based upon the California Constitution. That state's Declaration of Rights employs language strikingly similar to the First Amendment federalism clause: "The Legislature shall make no law respecting an establishment of religion." CAL. CONST. art. 1 § 4. Precisely what that means would rest with the ruling of the California Supreme Court, not the federal courts.

123. *See* H.R. REP. NO. 77-2047, at 1 (1942) ("The purpose of this joint resolution is to provide an authoritative guide to those civilians who desire to use the flag correctly."); S. REP. NO. 77-1477, at 2 (1942) (same).

Establishment Clause was applied against the states.[124] Though Justice Thomas draws attention to the problems of incorporating one particular clause, the broader question is aptly phrased as follows: "Did the 14th Amendment's due process clause make the Bill of Rights—originally adopted as limits addressed solely to the federal government—applicable to the states as well?"[125]

When the Supreme Court began hearing challenges involving the novel proposition that the Fourteenth Amendment[126] might incorporate certain rights from the Bill of Rights, the overwhelming consensus maintained that the purposes of and historic distinctions between the first ten Amendments and the Fourteenth Amendment must remain alive. We have already reviewed some of Justice Marshall's language, prior to the post-Civil War Amendments, rejecting the claim that the just compensation provision of the Fifth Amendment should be applicable to the states—in the 1833 case of *Barron v. City Council of Baltimore*.[127]

The Court's first assessment of the Fourteenth Amendment appears in the *Slaughter-House Cases*, wherein Justice Miller rejected the claim that the privileges and immunities, due process and equal

124. *See* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("The [Establishment] Clause erects a 'blurred, indistinct, and variable barrier . . . .'" (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971))).

125. GERALD GUNTHER, CONSTITUTIONAL LAW 394 (12th ed., Foundation Press, Inc. 1991).

126. The Fourteenth Amendment was ratified on July 9, 1868, to fix a *specific* problem at the national level. *See* Slaughter-House Cases, 83 U.S. 36, 71–72 (1873) (emphasizing that the purposes of the 13th, 14th, and 15th were "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him."). A national war had been fought to preserve the union of the states—with the major contention being the existence of slavery. The 14th Amendment states in its first section: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. Here we find specific, enumerated powers delegated to Congress to bring all states into compliance with the requirements of the post-Civil War Amendment.

127. 32 U.S. 243, 247 (1833); s*ee supra* notes 28–30 and accompanying text.

protection clauses of the Fourteenth Amendment are capable of expanding beyond their original purpose of eliminating the legal disparities between former slaves and the rest of the population.[128]

Interestingly, in *Slaughter-House*, no claims of incorporating any provisions from the Bill of Rights were advanced. The Fourteenth Amendment was properly viewed as a quid pro quo provision which addressed a specific problem and stood independent of the first ten federalism Amendments.[129] Justice Field, in dissent, argued not only that the state-authorized business monopoly at issue should have been broken, but deemed the independent power of the Fourteenth Amendment capable of doing so.[130] Indeed, borrowing Connecticut precedent, Justice Field cites a state Supreme Court opinion striking down an impartial state grant which restricted the livelihood of others. His dissent quotes the Connecticut Court holding that, "although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grants, and it does not require even the aid which may be derived from the [Connecticut] Bill of Rights, the first section of which declares 'that no man or set of men are entitled to exclusive public emoluments or privileges from the community,' to render them void."[131] It appears Connecticut did have a direct constitutional provision in the first section of its own Bill of Rights; nevertheless, the point is that Justice Field did not view the Fourteenth

128. Slaughter-House Cases, 83 U.S. 36, 71–72 (1873).

129. Thus, the Court refused to provide relief, believing that (a) it lacked authority, and (b) the states were capable of governing themselves through the democratic process. *Id.* at 82.

130. By independent, the author means an enforcement power autonomous from the Bill of Rights.

131. *Id.* at 108–09 (Field, J., dissenting) (quoting Norwich Gaslight Co. v. Norwich City Gas Co., 25 Conn. 19 (1856)).

Amendment as requiring the aid of the federalism Bill of Rights to enforce its purposes.

Justice Field was somewhat on track—the Fourteenth Amendment does not require the assistance of the Bill of Rights, but only the aid of Congress to accomplish its purposes.[132] In fact, an often overlooked limitation is that the federal courts have no authority to enforce the provisions of the Amendment. Indeed, section five of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[133] That important clause should limit the power of the Supreme Court to merely resolving actual cases and controversies involving the duly enacted legislation of the Congress in relation to enforcement of the Amendment,[134] if and when necessary. The specific authority delegated to Congress is quite unique and specific. (Similarly, the specific authority withheld from Congress in the Establishment Clause is quite unique and specific.) That specific authority, if followed, ensures that the Fourteenth Amendment will not produce additional, non-ratified constitutional amendments in the form of judicial rulings.[135] If the word *Congress* had retained its meaning in the Fourteenth, it would still mean *Congress* in the context of the First Amendment. Enforcing the

132. Unfortunately, the Court was the obstacle to the Fourteenth Amendment's function in that after Congress enacted the Civil Rights Act of 1875, the Supreme Court ruled a great deal of the act unconstitutional. *See generally* The Civil Rights Cases, 109 U.S. 3, 25 (1883).

133. U.S. CONST. amend. XIV, § 5.

134. That implies that Congress must give definition to the imprecise requirements of the Amendment.

135. As Justice Brandeis aptly stated in his dissent in *Myers v. United States*, 272 U.S. 52, 293 (1926): "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was . . . to save the people from autocracy."

Fourteenth Amendment via its legislation, Congress could not have incorporated the religion clause.

When the incorporation debate began and developed, two significant mistakes were made. The first was bypassing the exclusive authority delegated to Congress, and the second was looking to the federalism provisions of the Bill of Rights to define the Fourteenth Amendment.[136]

The core issue in *Barron* was whether a clause from the first ten amendments could be used against the states.[137] That notion was soundly rejected. When the Court considered the question of incorporation later in *Palko v. Connecticut*,[138] the slope of descent the Court headed down appeared neither to be very steep nor slippery because the context provided a natural setting for the Fourteenth Amendment to find expression. Within an arena relating to what the Fourteenth Amendment logically requires—protection within the context of criminal proceedings—the Court considered which rights were essential to fundamental principles of liberty. There was, of course, no need to *absorb* any clause from the Bill of Rights to give substance to the Fourteenth; but the contrary reasoning seemed harmless enough at the time.[139]

136. If the Court had not overruled significant protections of the original Civil Rights Act of 1875, the Fourteenth Amendment would have found immediate legislative definition and contextual expression. In our context, the federal court looked to the Fourteenth Amendment to justify its interference in state religion.

137. Barron v. City of Baltimore, 32 U.S. 243, 247 (1833).

138. 302 U.S. 319 (1937). In *Palko*, the issue was whether the double jeopardy protection of the Fifth Amendment gives definition and force to the Fourteenth, thus requiring the states to comply with the federal mandate by federal mandate.

139. In addition to deferring to Congress, the preferred reasoning would have involved viewing the two independent Amendments as mirroring some of the same protections—with discrepancies being allowed or resolved by the Democratic process of the states.

During the early-mid period of the 20th century, Justice Cardozo and his faction articulated the doctrine of selective incorporation convincingly enough that it continues to occupy the majority view.[140] Justice Black, et al., advocated the doctrine of full-scale incorporation of the first eight Amendments of the Bill of Rights, believing this would lend itself to a more objective jurisprudence:

> Wholesale incorporation of Bill of Rights guarantees into the 14th Amendment continues to be rejected by the Court; but the modern Court's technique of selective incorporation has achieved virtually the same result—nearly all of the procedural [and substantive] protections in the first eight amendments now apply to the states . . . .[141]

The irony that Justice Black lived to see is that, by using the Bill of Rights as inverted precedent, the violence inflicted upon its language rendered many of its provisions (including the Establishment Clause) entirely subjective, and thus capable of interpretation by the Supreme Court alone.

Incorporation began with process and criminal procedure and incrementally extended into substantive due process, arriving at the current place whereby individual rights are created from shadows and penumbras hidden within secret chambers of the Constitution (and only the priests of the high Court may traverse the sacred passageways).[142]

When Justice Thomas says that he accepts the incorporation of the Free Exercise Clause, but not the Establishment Clause,[143] he is

140. *See* GUNTHER, *supra* note 125, at 409–11.

141. *Id.*

142. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that although the Constitution does not explicitly protect a right to privacy, the specific guarantees within the Bill of Rights have penumbras that create a zone of privacy free from governmental interference).

143. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

saying that even accepting the current doctrine of incorporating clauses relating to individual rights, establishment is a federal prohibition that protects states' rights. Therefore, the Court may not legitimately incorporate a state protection that does not primarily confer individual rights.

Though the reasoning of Justice Thomas is sound, a more historically satisfying view is that the first ten amendments are all federalism provisions that protect the states and the people from the federal government.

B. A High Wall Separates the Bill of Rights from the Fourteenth Amendment

One cannot overlook the fact that we find two clauses of due process in the same Constitution.[144] Both require the defining legislation of Congress. With respect to the former, we find federal rules of criminal procedure, etcetera; and with the second, we find Congressional acts of civil rights, etcetera.[145] The Court's role is implicitly limited in the first and expressly limited in the second.

Whatever the due process that the Fourteenth Amendment requires of the states, its process and scope must find definition from

144. The first, of course, is in the Fifth Amendment and the other in the Fourteenth. The added language of equal protection in the Fourteenth Amendment makes life, liberty and property due process functional for a specific group of people. The force of the Fourteenth Amendment is that the former slaves shall not be denied due process and, of course, process is meaningless unless all laws are applied equally. The Due Process Clause of the Fifth Amendment in the Bill of Rights provides protection from the power of the federal government. The unique Due Process Clause of the Fourteenth Amendment was voted on and ratified to extend federal power to protect a specific group from inequitable state law. There is no other reason for having two due process clauses in the same constitution. The Bill of Rights was meant to be an enduring safeguard for the states—to *incorporate* the religion clause is to surrender the very liberty the founders earnestly intended to secure.

145. Part of the Court's self-inflicted problem is that after Congress enacted the Civil Rights Act of 1875, the Supreme Court ruled a large amount of the act unconstitutional. *See supra* note 132 and accompanying text. The Court actually caused the Fourteenth Amendment problem it later set out to unilaterally resolve.

Congress; otherwise the Fourteenth Amendment could simply read as follows: "This amendment makes the Due Process Clause of the Fifth Amendment equally applicable to the states, incorporating all the rights and restrictions contained in the Bill of Rights." The first line of defense against the potential misuse of the Fourteenth Amendment rests with Congress and the Tenth Amendment.[146] Those two sources of authority were meant to be the twin guardians of the federalism provisions, ensuring that the Bill of Rights perpetually remains the *federalism* Bill of Rights. Otherwise, without distinct federalism provision and operation, our system of government goes from a federal republic to a centrally controlled oligarchy—rule (in the area of religious expression) by nine unelected officials. It was mentioned earlier that the tremors from the *Everson* ruling would lead to earth-shaking societal results, but first the Constitution itself would be shaken by the doctrine of incorporation.

The Supreme Court, as implied above, transgressed its boundary line and has gone on to write positive constitutional language. In order to cross the boundary line at the Bill of Rights, the Court miraculously parted the Tenth Amendment with its gavel and walked through on seemingly dry and solid ground. During its quick passage, the Court, on its way to ravage other amendments, stripped the Amendment of any real force and effect. The Court, in essence, eviscerated the power of the Tenth Amendment, girding itself up with its authority, leaving the amendment naked and empty of meaning.

146. The Tenth Amendment reads as follows: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

So while your present writer agrees with Justice Thomas that the Establishment Clause resists incorporation, I would argue that every clause in the Bill of Rights resists incorporation. Indeed, the Fourteenth Amendment is a provision that stands independent of the Bill of Rights which must be enforced by the legislation of Congress alone. Strict construction of the Constitution's language is necessary for the same reason the principle is necessary in all matters of judicial interpretation—the language represents the will of the people. Express legislative language must be followed and obeyed. It is the restraining yoke of democracy. The Court has declared substantial matters of state religious expression unconstitutional without the counsel of the real Constitution. Certainly, the Constitution would not have been ratified by the states with a version of the Bill of Rights as amended by the Court.[147]

"*Government of the people, by the people and for the people*"[148] is the battle-cry of the doctrine of federal judicial restraint.[149] Under that view, actual diversity can flourish. Religious values from state to state, city to city and county to county are free to diverge. Dissenters of a particular state's tradition or practice may work through the democratic process via the state's legislative body for change—or through city council or the local school board. In the alternative, dissenters are free to move to states (or to cities or counties) whose citizens have similar religious or non-religious values and beliefs.

147. The Constitution hardly would have been ratified without adding the assurance contained in the First Amendment that the federal government could never meddle with the religion of the states. The states were once armed with the power of the First Amendment to ensure their own religious freedoms. Presently, on the contrary, dissenters may employ the power of the federal government to use the Constitution to control the states, cities, counties and school districts across the entire country.

148. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863) (emphasis added).

149. Realizing that judicial restraint involves discretion, I concede that restraint is not used to convey what I ultimately argue, but inasmuch as the Court operates with unquestioned jurisdiction, it has opportunity to abstain from governing the religious affairs of the states.

VI

CONCLUSION

If following current Supreme Court precedent and thinking produces the compelling result that the United States Declaration of Independence contains language that is offensive and prohibited by the United States Constitution, then certainly, we have a fatal problem with the state of Establishment Clause doctrine. If that area of jurisprudence is in fact dead, then let the jurists of the country not seek to revive a lifeless body of law. Let the corpse be given a respectful burial and let us start afresh.[150]

As noted above, *Everson* was wrongly decided on two points.[151] The first was that the Establishment Clause is absorbable and applicable against the states. And the second was that the clause requires federal and state neutrality with religion. Rather than insistently attempting to put a square peg into a round hole, the Honorable Court will tread honorable ground in admitting the mistake of *Everson*.

Certainly, the Court will have to admit a mistake of titanic proportion and implication—much like it did, looking back to its early civil rights rulings.[152] "If you are on the wrong road," writes C. S. Lewis, "progress means doing an about-turn and walking back to the right road; and in that case the man who turns back soonest is the

150. Concurring in *Lamb's Chapel v. Union Free School District*, 508 U.S. 384, 398 (1993), Justice Scalia wrote that the *Lemon* test is "like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried . . . ." However, even nailing *Lemon's* coffin tightly will not solve the Court's problem unless the entire fallacious doctrine of government neutrality is buried with it.

151. *See supra* part III subsection A.

152. *See generally* Plessey v. Ferguson, 163 U.S. 537 (1896); Dred Scott v. Sanford 60 U.S. 393 (19 How. 393) (1857). Incidentally, application of the higher law of the Declaration would have compelled different results in the Court's early civil rights cases.

most progressive man."[153] The Court has inflicted Dred-ful wounds on the nation in the past and suppressing the religious expression of the nation and her communities for over five decades is likewise no small matter.[154]

The present Court must remedy its self-inflicted wound. The time has come for a majority of the Justices to lay hold of the helm of the federal bench and steer the Court back to navigable waters.

The practice of incorporation began selectively and grew incrementally. Likewise, the way back to restoring power to the states and the people must begin selectively and grow incrementally. Certainly, there is no better place to begin than with the clause that protects the religious rights of the individual states from the power of the centralized government. A declaration of non-jurisdiction over matters of state religious affairs is the sweet melody that must sound forth from the Court crier. Sometimes, as Justice Brandeis once said of the Court, "[t]he most important thing we do is not doing."[155]

True religious freedom and diversity will abound only after centralized control is relinquished. Attempts to immediately remedy perceived problems through autonomous decrees of the Supreme Court have caused religious repression, smothering the free expression that democracy requires.[156] When the Court circumvents

153. C. S. LEWIS, MERE CHRISTIANITY 28 (1980).

154. When the Court intervened in a certain political controversy, Justice Breyer, borrowing a phrase of Justice Hughes, was concerned about risking "a self-inflicted wound—a wound that may harm not just the Court, but the Nation." Bush v. Gore, 531 U.S. 98, 158 (Breyer, J., dissenting).

155. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 71 (1962).

156. It seems that the Court has been on a long-standing crusade in the area of individual rights (where the *heckler* is disproportionately exalted) in an effort, perhaps, to compensate for its initial, morally repulsive rulings on civil rights. Thus, when a heckler cries, "I'm offended," the Court sees the issue as an individual religious right (to not be offended) rather than as a community religious right of free expression of religion. *See generally* Engel v. Vitale, 370 U.S. 421 (1962); Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963); Stone v. Graham, 449 U.S. 39 (1980); Lee v. Weisman, 505 U.S. 577 (1992).

the expressed will of the people, its nine members set themselves up as omniscient philosopher-kings who must govern according to what only they know is best.

If the Supreme Court will not fix its epic constitutional crisis, then it may well be time for the People to fix the problem by limiting the jurisdiction of its nine robe-wearing public servants *via* their representative bodies. To the degree America has retained her conviction that her rights are from God, she will be able to stand against the overreaching rulings of the federal judicial branch.