

EQUAL PROTECTION PRINCIPLES AND THE ESTABLISHMENT CLAUSE: EQUAL PARTICIPATION IN THE COMMUNITY AS THE CENTRAL LINK

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The United States Supreme Court's modern Establishment Clause¹ jurisprudence began with *Everson v. Board of Education*² in 1947. It was also in this case that the Court held the Establishment Clause to be incorporated against the states via the Fourteenth Amendment.³ The Court came to that conclusion without much analysis of the purposes of either the Establishment Clause or the Fourteenth Amendment. Rather, the Court concluded that since the Free Exercise Clause of the First Amendment⁴ had already been incorporated,⁵ the incorporation of its counterpart, the Establishment Clause, must logically follow.⁶ Since that time, much of the Court's Establishment Clause jurisprudence has involved state, as opposed to federal, action but the Court has never justified its decision to incorporate the clause.

Some recent scholarship has sharply criticized the Court's original conclusion that the Establishment Clause is properly incorporated against the states.⁷ This school of thought asserts that the Establishment Clause was in-

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This Article is dedicated to the memory of my grandmother: "She carried the old world on her back across the ocean . . ." TONY KUSHNER, *ANGELS IN AMERICA—PART ONE: MILLENNIUM APPROACHES*, ACT 1, SC. 1 (1993).

1. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I.

2. 330 U.S. 1 (1947).

3. *Id.* at 8.

4. "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. CONST. amend. I.

5. See *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (stating that fundamental concept of liberty embodied in Fourteenth Amendment embraces First Amendment liberties).

6. See Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1702 (1992) (noting that *Everson* Court reasoned that since Free Exercise Clause was incorporated previously it was appropriate to give "same application and broad interpretation" to Establishment Clause).

7. Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157-58 (1991) (criticizing Justice Black's opinion in *Everson v. Board of Education* for invoking views of Madison and Jefferson on religious freedom while failing to address interconnected issue of federalism); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1206-07 (1990) (stating that Court's decision to import nonestablishment as fundamental right is nonsensical); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317 (1986) (criticizing Supreme Court for putting

tended primarily as a structural component of the Constitution. Specifically, the argument is that the Establishment Clause, like the Tenth Amendment,⁸ embodies a principle of federalism in that it was intended merely to prevent the *federal* government from legislating on the matter of religion, which was properly a *state* concern.⁹ Under this interpretation, the Clause certainly prevents the federal government from establishing a national religion; but it also prevents the federal government and its courts from interfering with state establishment of religion.¹⁰ The Clause prohibits federal *dis*-establishment as surely as it forbids federal establishment.¹¹ It is argued, therefore, that the incorporation of the Establishment Clause is at best unwieldy and at worst a logical impossibility.¹² Some recent scholarship has gone so far as to call for the “dis-incorporation” of the Establishment Clause.¹³

The arguments of these “anti-incorporationists” concentrate on the specific intent of the framers of the Establishment Clause and generally disregard two relevant aspects of the incorporation question. First, they fail to appreciate how the Reconstruction Amendments may have altered the function of the Establishment Clause. The anti-incorporationists have generally given inadequate attention to the complex process of incorporation, treating specific provisions of the Bill of Rights as either “in” or “out”; that is, as either applicable to the states in exactly the same fashion as they are to the federal government, or not applicable at all.¹⁴ In this regard, however, they

“square historical peg in a round hole by filing off a few of the more inconvenient sharp edges of history” when they incorporated Establishment Clause); Note, *supra* note 6, at 1708-12 (urging that incorporation of Establishment Clause is “logically possible”).

8. “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.

9. See Amar, *supra* note 7, at 1157 (stating that Establishment Clause not only prohibits Congress from establishing national church but also prohibits national legislature from interfering with state and local churches); AKHIL R. AMAR, *THE CREATION AND RECONSTRUCTION OF THE BILL OF RIGHTS* (forthcoming 1997) (manuscript at 41, on file with the *Temple Law Review*) (same).

10. Amar, *supra* note 7, at 1157; Paulsen, *supra* note 7, at 317.

11. See Amar, *supra* note 7, at 1157 (stating that Establishment Clause prohibited federal dis-establishment of state and local churches and prohibits federal establishment of national church); AMAR, *supra* note 9, at 40, 50-51 (same); Lietzau, *supra* note 7, at 1206-07 (arguing that Establishment Clause is specific prohibition on federal government’s ability to frustrate local religious matters); Paulsen, *supra* note 7, at 317 (arguing that intent behind Establishment Clause is to forbid establishment of national religion and prevent federal interference with state establishment of official religion).

12. See Amar, *supra* note 7, at 1158 (arguing that incorporation of Establishment Clause is awkward because it eliminates states’ rights to choose whether to establish official religion—a right explicitly confirmed by Establishment Clause); AMAR, *supra* note 9, at 41-42 (same); Lietzau, *supra* note 7, at 1207 (arguing that Establishment Clause incorporation is irrational because clause was designed to provide states with safeguard complementing Tenth Amendment, not substantive right); Note, *supra* note 6, at 1700 (arguing that incorporation of Establishment Clause is “incoherent”).

13. Lietzau, *supra* note 7, at 1225-33; Note, *supra* note 6, at 1714-18.

14. See, e.g., Note, *supra* note 6, at 1708 (asserting that “incorporation theory does not seek to change the nature of the right at issue”) (emphasis omitted). For this proposition, the author cites Louis Henkin, “*Selective Incorporation in the Fourteenth Amendment*,” 73 *YALE L.J.*

are not alone. The Supreme Court, in holding that the Establishment Clause was incorporated, has made the same mistake of treating incorporation as an “all or nothing” proposition.¹⁵

By contrast, some academics have advocated a “refined incorporation” method, which takes into account the purposes of the particular constitutional provision in question and how well those purposes resonate with those of the Reconstruction Amendments.¹⁶ According to this method, the Constitution must be looked at holistically, and any particular provision of the original Constitution and Bill of Rights must be reconciled with the Reconstruction Amendments. As one scholar has articulated the theory, constitutional interpretation implicates “an ongoing judicial effort to confront the tensions between Founding and Reconstruction in a self-conscious way, and then to elaborate doctrinal principles that do justice to the deepest aspirations of each.”¹⁷ It may be, therefore, that the Establishment Clause has been altered as it has been refracted through the lens of the Fourteenth Amendment,¹⁸ specifically the Equal Protection Clause.¹⁹

A second and related shortcoming of the anti-incorporationists’ arguments is that they emphasize the federalism concerns that led to the framing of the Establishment Clause without going back a step and discussing what motivated those federalism concerns in the first place. In the process of arguing that the Establishment Clause was essentially a states’ rights provision, anti-incorporationists tend to forget that the force behind the anti-federalist movement was a desire for local decisionmaking and autonomy, and that this in turn was motivated by a deep sense of community. The anti-federalists saw the local community as a source of virtue, and they saw participation in that community as an essential aspect of citizenship and as a good in itself.

74, 76 (1963). At this point in his article, however, Professor Henkin is merely restating the law. In fact, Professor Henkin later argues that *substantive* rights should be applied in an identical fashion against the states as against the federal government, *id.* at 86, while *procedural* protections of the Bill of Rights need not be incorporated in this manner. *See id.* at 79-80. As Professor Henkin states: “[I]ncorporation, by reference to ordered liberty, cannot claim that specific procedural provisions in the Bill of Rights are incorporated ‘whole.’ Ordered liberty, indeed, may for some safeguards require exactly what is required by the Bill of Rights. But it can as well require less, or more.” In any event, it is curious that the author of the Harvard Note accepts this principle as a matter of settled precedent, Note, *supra* note 6, at 1708, but has no qualms about proposing the overturning of almost fifty years of settled Establishment Clause precedent by abandoning *Everson*. *Id.* at 1714-17.

15. See Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1265 (1992) (criticizing “jot for jot” incorporation theory).

16. *Id.* at 1268.

17. Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 525 (1989). *See also* Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469, 475 (1993) (advocating holistic approach).

18. *See* Amar, *supra* note 7, at 1136-37 (analogizing Fourteenth Amendment as “lens” through which guarantees of original Bill of Rights have been “refracted”).

19. “No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

In constructing a "principled synthesis"²⁰ of the anti-federalists' Establishment Clause and the Equal Protection Clause, one finds a common theme: community participation. The Equal Protection Clause serves to ensure that all persons are afforded equal citizenship, a function that resonates nicely with the key value of community participation underlying the anti-federalists' states' rights concerns. This approach reconciles the classical republican sentiment that was at the heart of the anti-federalist argument for a Bill of Rights with the egalitarian concerns of the Reconstruction Republicans. While the anti-federalist aspect of the Establishment Clause is retained, permitting only the states to legislate on matters of religion, the Equal Protection Clause modifies this authority by limiting the states' power to determine who is allowed to be a member of the community. The two Clauses together command, at the very least, that religious distinctions not be used to deny some people equal participatory rights in the community. This interpretation jibes well both with the emergence of modern republicanism as an attempt to reconcile liberal and classical republican ideologies, and with the emerging line of thought in the Supreme Court that posits equal standing in the community as the central concern of the Establishment Clause.

This Article argues that the Equal Protection Clause and the Establishment Clause operate together essentially to impose on the states a prohibition against the establishment of religion that would hinder equal participation by religious minorities in the community.²¹ Whether or not this is stated in terms of the technical "incorporation" of the Establishment Clause through the Equal Protection Clause is irrelevant.²² The key idea is that such a prohibition of an establishment of religion is a reconciliation of the values underlying the anti-federalists' Establishment Clause and those that drive the Equal Protection Clause. Moreover, because this Article concedes for the sake of argument that the anti-incorporationist view of the original Establishment Clause is accurate, the meaning ascribed to the incorporated Establishment Clause by this Article describes only a constitutional minimum. It may well be that the anti-incorporationist view of the original Establishment Clause is underinclusive in that it neglects concerns about the mixing of government and religion that are based on general principles. In that case, the incorporated Establishment Clause may mean significantly more than just that religious classifications cannot be used to hinder the participatory rights of religious minorities. But assuming that the original Establishment Clause was based purely on federalism principles, it can and should be deemed to have been "incorporated" under this approach.

20. Ackerman, *supra* note 17, at 525.

21. For simplicity's sake, "minority religions" and "religious minorities," as used in this Article, refer to minority religious groups and their members, as well as those who do not practice religion at all. This choice is a conscious one and is defended *infra* Part II.C.3.

22. See Ira C. Lupu, *Keeping the Faith: Religion, Equality, and Speech in the U.S. Constitution*, 18 CONN. L. REV. 739, 743 (1986) (arguing that incorporation of Establishment Clause is unnecessary because application of Equal Protection Clause achieves same result).

Part I of this Article examines the parameters of the incorporation debate. It first discusses the case law from *Everson v. Board of Education*²³ to the present, which has treated the Establishment Clause as if it were incorporated through the Fourteenth Amendment. It then focuses on the emerging anti-incorporationist view. Part I closes by introducing the ideas of “refined incorporation” and “multigenerational synthesis.” Part II extracts and analyzes the main values underlying, on the one hand, the anti-federalists’ vision of federalism and, on the other, the modern Equal Protection Clause. Part II first discusses what the anti-incorporationists leave out of their arguments: the value of community participation as a driving force behind anti-federalist thought. Part II then discusses the value of equal citizenship that drives the Equal Protection Clause, and demonstrates that the equal citizenship principle applies with full force to religious minorities. Part III puts these pieces together, using the idea of equal community participation as the central linkage between the anti-federalists’ Establishment Clause and the Equal Protection Clause. It shows how the concept of equal participation in the community is represented in modern republican theory as a reconciliation of egalitarian and classical republican ideals. Part III then argues that, as a minimum constitutional requirement, this concept of equal participation in the community should be the touchstone of decisions regarding the “incorporated” Establishment Clause. Finally, Part III suggests that an entirely different standard be applied in “pure” Establishment Clause cases, those that involve the federal government’s dealings with religion.

I. THE INCORPORATION DEBATE

The incorporation debate is essentially one between the case law on the one hand and some recent commentary on the other over the meaning of the Establishment Clause as it stood in 1791. While both sides claim to have the better grasp of history, neither has come to terms with the possibility that, when the Establishment Clause is placed in the crucible with the Fourteenth Amendment, the resulting mixture is a substance admitting of far more complexity than either simple incorporation or non-incorporation.

A. *The Course of Establishment Clause Jurisprudence: Everson and Its Progeny*

The Supreme Court began its venture into Establishment Clause jurisprudence by hoisting the banner of strict separation. It later refined this view and established the *Lemon* test as a formulation of state neutrality toward religion²⁴ that still governs today, albeit precariously. The last few years have seen the emergence of a third view of Establishment—one concerned with the stigmatization of religious minorities—that has the potential for replacing the prescription of neutrality embodied in the *Lemon* test. Throughout, how-

23. 330 U.S. 1 (1947).

24. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (discussing elements of test).

ever, the Court has not re-examined its judgment that the incorporation of the Establishment Clause was based on a sound reading of history.²⁵

1. *Everson*

The Court first held the Establishment Clause to be incorporated against the states in *Everson v. Board of Education*²⁶ in which the Court upheld a New Jersey statute and a local resolution passed pursuant to the statute.²⁷ The statute authorized reimbursement to parents of children attending private schools, including religious schools, for money spent transporting them to these schools.²⁸ The Court surveyed the history of religious persecution that led to the drafting of the Religion Clauses,²⁹ and strongly implied that the two clauses worked in tandem toward the same goal of ensuring that such persecution would not exist again in this country.³⁰ Because the Free Exercise Clause had already been applied against the states via the Fourteenth Amendment,³¹ the Court easily took what seemed to be the next logical step and incorporated its complementary provision as well.³²

Having handily achieved incorporation of a key provision of the Bill of Rights, the Court went on to assign a meaning to that provision:

The "establishment of religion" clause of the First Amendment means at least this: *Neither a state nor the Federal Government* can set up a church. *Neither* can pass laws which aid one religion, aid all religions, or prefer one religion over another. *Neither* can force nor influence a person to go to or to remain away from a church against his [or her] will or force him [or her] to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. *Neither a state nor the Federal Government* can, openly, or

25. Like the anti-incorporationists, *see infra* Part I.B., the Court has relied almost exclusively on an original intent mode of analysis in its Establishment Clause decisions. *See Note, supra* note 6, at 1703 (recognizing Court's reliance on original intent to justify incorporation of its Establishment Clause decisions).

26. *Everson*, 330 U.S. at 1.

27. *Id.* at 3 n.1.

28. *See* N.J. REV. STAT. 18:14-8 (1941).

29. *Everson*, 330 U.S. at 8-14.

30. *Id.* at 14-15.

31. *See* *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

32. *See Everson*, 330 U.S. at 15 (stating that "same application and broad interpretation" given to Free Exercise Clause should be given to Establishment Clause due to interrelationship between two clauses).

It is not surprising that the Court took such a reflexive approach to the incorporation of the Establishment Clause given that the author of the opinion, Justice Black, was the champion of total incorporation and was only months away from writing his famous dissent in *Adamson v. California*, 332 U.S. 46, 68-92 (1947) (Black, J., dissenting) (arguing for total incorporation position).

secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."³³

The Establishment Clause, then, applied the identical standard to the states as it did to the federal government, a standard of strict separation. However, that constitutionally mandated separation was not so strict as to prevent the Court from upholding the New Jersey statute.³⁴ The four dissenters in *Everson* did not dispute the Court's judgment on incorporation,³⁵ or on strict separation,³⁶ but only the Court's application of the standard.³⁷

2. Toward Neutrality and the *Lemon* Test

As the result in *Everson* shows quite clearly, strict separation was not achievable in practice. In the post-New Deal regulatory state, total separation between the state and religion was an illusory goal. Accordingly, beginning in the early 1960s, the Court reached a new formulation of the Establishment Clause standard, focusing not on separation but on neutrality. This line of cases culminated in *Lemon v. Kurtzman*³⁸ which established a three-prong test to decide whether a governmental action accords with the Establishment Clause: "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.'"³⁹ The Court did not differentiate between state acts and federal acts. Indeed, in a companion case, *Tilton v. Richardson*,⁴⁰ the Court analyzed a federal statute under the selfsame *Lemon* test.⁴¹

33. *Everson*, 330 U.S. at 15-16 (quoting *Reynolds v. U.S.*, 98 U.S. 145, 164 (1878)) (emphasis added).

34. *Id.* at 16.

35. *See id.* at 22 (Jackson, J., joined by Frankfurter, J., dissenting) (implying that *entire* First Amendment had been incorporated); *id.* at 29 (Rutledge, J., joined by Frankfurter, Jackson, and Burton, JJ., dissenting) (same).

36. *See id.* at 26 (Jackson, J., joined by Frankfurter, J., dissenting) (stating that effect of First Amendment to remove "every form of propagation of religion out of the realm of things which could directly or indirectly be made public business"); *id.* at 31-32 (Rutledge, J., joined by Frankfurter, Jackson, and Burton, JJ., dissenting) (stating that object of Establishment Clause was to completely and permanently separate religious activity and civil authority by "comprehensively forbidding every form of public aid or support for religion").

37. *See id.* at 26-27 (Jackson, J., joined by Frankfurter, J., dissenting) (noting that Court's holding made public business of religious worship); *id.* at 60-62 (Rutledge, J., joined by Frankfurter, Jackson, and Burton, JJ., dissenting) (stating that majority opinion compromised religious freedom).

38. 403 U.S. 602 (1971).

39. *Id.* at 612 (citations omitted).

40. 403 U.S. 672 (1971).

41. *See id.* at 678-89 (plurality opinion) (analyzing Higher Education Facilities Act of 1963).

3. The Endorsement/Disapproval Standard

Although the Court has not yet discarded the *Lemon* test,⁴² it has developed a new spin on *Lemon*: the “endorsement or disapproval” test, which the Court has applied in at least some cases.⁴³ The approach purports to be an interpretation of *Lemon* rather than a completely new analysis. Under this approach, the Court looks to see if government has made “adherence to a religion relevant in any way to a person’s standing in the political community” by sending a message of either endorsement or disapproval of a religious belief or status.⁴⁴

In the words of Justice O’Connor, who developed the test: “Endorsement sends a message to nonadherents 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. Disapproval sends the opposite message.”⁴⁵ The test comprises both an objective element and a subjective element:

The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The 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.⁴⁶

A majority of the Court appears to have accepted this approach, at least in cases involving possible governmental endorsement of religious speech.⁴⁷

42. See *Lee v. Weisman*, 507 U.S. 577, 586 (1992) (applying *Lemon* test to determine that school graduation ceremony could not include prayer). See also *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2149-50 (1993) (Scalia, J., concurring) (likening *Lemon* test to “ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after repeatedly being killed and buried”). But see Akhil R. Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124, 125 (1992) (noting future uncertainty of *Lemon*).

43. See *County of Allegheny v. ACLU*, 492 U.S. 573, 594 (1989). See also *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O’Connor, J., concurring in the judgment) (proposing use of endorsement or disapproval test); *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O’Connor, J., concurring) (suggesting use of endorsement or disapproval test to clarify *Lemon* test).

44. *Lynch*, 465 U.S. at 687-88 (O’Connor, J., concurring).

45. *Id.* at 688 (O’Connor, J., concurring).

46. *Id.* at 690 (O’Connor, J., concurring).

47. In the Court’s most recent Establishment Clause opinion concerning possible governmental use of religious symbolism, *Capitol Square Review v. Pinette*, 115 S. Ct. 2440 (1995), it appeared that at least a majority of the Court had embraced the endorsement or disapproval approach. See *id.* at 2451-57 (O’Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment) (stating that government practices must be judged according to their “unique circumstances” to determine whether they endorse or disapprove of religion); *id.* at 2457-62 (Souter, J., joined by O’Connor and Breyer, JJ., concurring in part and concurring in the judgment) (noting Supreme Court’s adoption of endorsement test in prior cases); *id.* at 2466 n.5 (Stevens, J., dissenting) (accepting endorsement test); *id.* at 2474-75 (Ginsburg, J., dissenting) (discussing endorsement of religious message by state). Moreover, the plurality opinion also appeared to accept the endorsement test in principle, though declining to apply it on the facts presented, see *id.* at 2447-50 (opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy

The Court has also alluded to this approach in cases involving government support of religion in more tangible respects, such as through financial aid or the provision of meeting facilities,⁴⁸ although the Court has continued to apply the traditional *Lemon* test in such cases. The incorporation question has not arisen in the Court's opinions, nor has a distinction been suggested between the application of the endorsement or disapproval test to state, as opposed to federal, action. Indeed, since *Everson*, the Court has generally left the incorporation debate to the few academics who have taken up the issue.⁴⁹

B. *The Anti-Incorporationist Argument*

The argument against incorporating the Establishment Clause is not new,⁵⁰ but it has reemerged recently with renewed vigor.⁵¹ The anti-incorporationist position comprises two separate arguments: first, that the Establishment Clause was meant to embody a principle of federalism; and second, that the framers of the Fourteenth Amendment did not mean for the Clause to be incorporated. Both arguments rely extensively, if not entirely, on the original intent of the framers of each provision.

and Thomas, JJ.) (distinguishing cases that utilize endorsement test based on difference between government speech and private speech), indicating that the endorsement or disapproval approach may have found favor with all members of the current Court. *See also County of Allegheny*, 492 U.S. at 594 (utilizing endorsement or disapproval approach).

48. *See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2523 (1995) (noting lack of likelihood that state is endorsing or coercing speech in question); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2143 (1993) (reasoning that had school district allowed religious group to show religion-oriented film, no real danger of appearance that district endorsed religion); *Board of Educ. v. Mergens*, 496 U.S. 226, 252 (1990) (plurality opinion) (stating that school permitting student-initiated and led religious club to meet after school does not convey message of state approval or endorsement); *id.* at 264 (Marshall, J., concurring in the judgment) (noting possibility that school which does not "stand apart from religious speech" may convey endorsement rather than tolerance); *Witters v. Washington Dept. of Serv. for the Blind*, 474 U.S. 481, 488-89 (1986) (noting that use of neutrally-available state aid for religious education not message of state endorsement of religion); *Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (stating that public university's open forum "does not confer any imprimatur of state approval on religious sects or practices").

49. *See AMAR, supra* note 9, at 42 (noting that few scholars or judges "seem critical of, or even concerned about, the blithe manner in which the [E]stablishment [C]lause has come to apply against the states"). *But see School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 253-58 (1963) (Brennan, J., concurring) (supporting conclusion that Establishment Clause is incorporated).

50. *See generally* Clifton B. Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65 (1962) (asserting that Court's conclusion about historical meaning of First Amendment not justified); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371 (1954) (contending that First Amendment Free Exercise Clause and Establishment Clause are distinguishable and latter cannot logically be incorporated).

51. *See generally* Lietzau, *supra* note 7 (arguing that incorporation of Establishment Clause is flawed historically and analytically and proposing "roll back" of incorporation); Paulsen, *supra* note 7, at 317-22 (arguing that incorporation of Establishment Clause is "historically unjustified"); Note, *supra* note 6, at 1708-09 (asserting that incorporation of Establishment Clause is logically impossible and suggesting process of undoing incorporation of Establishment Clause).

1. The Original Understanding of the Establishment Clause

The Establishment Clause, just like the rest of the Bill of Rights, applies only against the federal government, both by its terms⁵² and as construed.⁵³ However, the anti-incorporationist argument goes further and asserts that the Clause was not merely prohibitory vis-a-vis federal establishment and neutral toward state establishment; instead, it affirmatively recognized and protected the states' power to establish their own religions.⁵⁴ As such, it granted states the "right" to establish a religion if they so chose.⁵⁵

This argument is based in large part upon a re-reading of the history that surrounded the adoption of the First Amendment. The *Everson* Court concentrated solely on the writings of James Madison and Thomas Jefferson in seeking out the meaning of the Establishment Clause.⁵⁶ This limited historical inquiry led the Court to believe that the Clause was concerned solely with protecting the rights of religious minorities. Therefore, no federalism-based rationale for the Clause was apparent to the Justices, which obviated the need for them to even consider whether the Clause, like the Free Exercise Clause which had already been incorporated, is properly incorporated against the states.

By contrast, the anti-incorporationists argue that by looking only at the opinions of Madison and Jefferson, the Court has essentially adopted the "position of only one party to a compromise."⁵⁷ They suggest instead that the Court consult all sides of the debate over the First Amendment—especially the anti-federalists who supported it—to determine its meaning.⁵⁸ A survey of the anti-federalist arguments demonstrates that one of their main goals in enacting the Bill of Rights, and especially the Establishment Clause, was to preserve state autonomy by limiting national power.⁵⁹ Conceding that

52. "Congress shall make no law respecting an establishment of religion . . ." U.S. CONST. amend. I (emphasis added).

53. See *Permoli v. Municipality No. 1*, 44 U.S. (3 How.) 589, 609 (1845) (noting that Constitution made no provision for protecting state citizens in their religious liberties); *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (noting that limitations on power contained in Constitution apply only to government created by that instrument, i.e., the federal government).

54. See *Lietzau*, *supra* note 7, at 1200 (noting consensus that church/state relations properly left to state and local governments).

55. See *Amar*, *supra* note 7, at 1158 (stating that Establishment Clause preserves states' right to choose religion—a right explicitly confirmed by Clause); *AMAR*, *supra* note 9, at 42 (comparing Establishment Clause to Treaty of Westphalia, which provided that local princes determined religion of their subjects).

56. See *Everson v. Board of Educ.*, 330 U.S. 1, 11-13 (1947) (recognizing Jefferson's and Madison's influence on drafting and adoption of First Amendment).

57. *Paulsen*, *supra* note 7, at 323.

58. See, e.g., *Lietzau*, *supra* note 7, at 1198-1202 (noting that Bill of Rights was designed to assuage fears of central government amassing too much power); *Paulsen*, *supra* note 7, at 321 (noting that First Amendment was added to Constitution at insistence of anti-federalists); Note, *supra* note 6, at 1705 (stating that collective intent of people who ratified Establishment Clause must provide interpretive meaning).

59. See *Lietzau*, *supra* note 7, at 1200 (noting that "[t]he only agreement [among the framers] was that the issue [of church/state relations] was properly left to state and local govern-

a peripheral concern of the Establishment Clause is the protection of religious minorities,⁶⁰ the anti-incorporationists contend that its core purpose is to act as a specific protection of federalism, similar to the general protection of federalism embodied in the Tenth Amendment.⁶¹

However, even assuming that the anti-incorporationists are correct in arguing that the anti-federalist perspective must inform any interpretation of the Establishment Clause, they generally fail to take the analysis a step further and inquire what values informed the anti-federalist position. The anti-federalists did not prize local autonomy for its own sake; rather, they valued local decisionmaking primarily because they placed a premium on the positive effects that community participation has on both the individual and society.⁶² It was this desire for participatory democracy that motivated the anti-federalist hostility toward centralized government, and it is this value that must be consulted in order for the more specific anti-federalist views on religious establishment to be given any weight by modern constitutional scholars.⁶³

2. The Fourteenth Amendment

Even assuming that the federalism-focused position of the anti-federalists greatly informs the original meaning of the Establishment Clause, it remains to be seen whether the anti-federalist position applies with the same force, and to the same extent, since the adoption of the Fourteenth Amendment in 1868. The anti-incorporationists address the question whether the Fourteenth Amendment “somehow transforms the federalist character of the [E]stablishment [C]lause,”⁶⁴ and answer with a resounding “No.” Conceding

ments”); Note, *supra* note 6, at 1704 (stating that Establishment Clause framers’ goal was preservation of “state sovereignty with respect to religion”). See also CHESTER J. ANTIEU ET AL., *FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES* 141 (1964) (noting that state religious relations was local matter, not federal matter).

It is unfortunate as a matter of syntax that the group that espoused as its main goal the preservation of federalism—meaning a sharp limitation on the powers of the national government in due regard for the power and autonomy of the individual states—came to be known as the “anti-federalists,” while the “federalists” favored a strong central government. See JOHN A. GARRATY, *1,001 THINGS EVERYONE SHOULD KNOW ABOUT AMERICAN HISTORY* 118 (1989) (distinguishing between federalist and anti-federalist appellations and respective political positions).

60. See, e.g., Paulsen, *supra* note 7, at 318.

61. See Lietzau, *supra* note 7, at 1201-02 (Establishment Clause is “primarily an embodiment of a principle of federalism with respect to Church/State relations”); Note, *supra* note 6, at 1709 (suggesting that Establishment Clause is “a specific application of the Tenth Amendment”).

62. See *infra* notes 92-111 and accompanying text for a discussion of benefits of community participation on individual and society.

63. See Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 19-20 (1986) (stating that “without substantial appeal in its own right, not just to ancients but also to moderns, antifederalist republicanism can have little explanatory or persuasive power in contemporary interpretive debate”).

64. Lietzau, *supra* note 7, at 1205.

that other provisions of the Bill of Rights may have been properly incorporated, they argue that the Establishment Clause must be distinguished on the grounds that its federalism-centered purpose makes its incorporation logically impossible. Since the Clause constituted a command to leave decisions regarding religious establishments up to the individual states, the only possible right it might confer is the “nonsensical” one “to have one’s state free to establish a religion.”⁶⁵

However, the anti-incorporationists fail to substantiate their conclusion that the Fourteenth Amendment did not change the meaning of the Establishment Clause.⁶⁶ Merely stating that “[t]he clause is a specific prohibition on the federal government which does not parallel an individual right, but a state right”⁶⁷ does not respond to the claim that the Clause was essentially changed in 1868; it only assumes that the Clause remained a specific prohibition on the federal government.

This assumption springs from observations concerning the Fourteenth Amendment’s framers’ lack of intent to incorporate the Establishment

65. *Id.* at 1206.

66. Although I classify Paulsen, *supra* note 7, as an anti-incorporationist, he abandons this argument early in his article, stating that “the doctrinal gymnastics of selective incorporation have removed the specific federalism limitation of the original intention” of the Establishment Clause. *Id.* at 323. Mr. Paulsen resignedly accepts incorporation as a “fait accompli,” *id.*, and concentrates his efforts on a reinterpretation of the Clause via the language of equality. *See id.* at 325-71 (discussing ways First Amendment is conceptually intertwined with equal protection doctrine). For him, this means understanding the Clause as guaranteeing “the equal protection of the free exercise of religion.” *Id.* at 325.

I disagree with Mr. Paulsen on three main counts. First, I do not view the Fourteenth Amendment as having “removed” all federalism concerns of the Establishment Clause, but rather as having modified and supplemented those concerns. Second, I do not passively accept incorporation as a matter of precedent, but actively argue that the best reading of the Constitution as a whole demands at least that the Equal Protection Clause act to impose Establishment Clause-like prohibitions on the states. Finally, and most importantly, I take issue with his formulation of “the equal protection of the free exercise of religion.” As stated, and as applied by Mr. Paulsen, the language does not guarantee any more than does the right to free exercise alone. *Id.* at 335-36. Simply appending equality language to a given provision of the Bill of Rights does not add anything to the rights guaranteed by the particular provision, but is simply an observation that everyone has the same non-comparative right. This is an example of lexical, or formal, equality. *Cf.* Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 393-416 (1985) (rejecting exclusively lexical interpretation of equality and claiming equality operates in legal and moral argument when it expresses comparative right). The Equal Protection Clause, by contrast, guarantees substantive equality—that is, it adds to our non-comparative rights by granting us the right to be treated equally with others without regard to certain criteria. *See id.* at 421-27 (noting that Equal Protection Clause is principal source of comparative rights). *See also* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 103 n.57, 104 n.60 (1990) (arguing that Paulsen ignores main concerns of equality). Moreover, Mr. Paulsen’s formulation of the equality right conceives of religion as purely a matter of *belief*, implying individual choice and autonomy, whereas this Article recognizes that religion can also be conceived of as *status*—a matter of classification that is largely beyond individual control. *See infra* notes 137-40 and accompanying text.

67. Lietzau, *supra* note 7, at 1206.

Clause.⁶⁸ Aside from the multifarious problems with using original intent as a guidepost,⁶⁹ this method of interpretation is especially problematic when applied to the Fourteenth Amendment, in light of our nation's deep commitment to the principles expounded in *Brown v. Board of Education*.⁷⁰ Even ardent supporters of the original intent mode of analysis have argued that the decision in *Brown* is legitimate, *despite* the fact that it is not supported by the intent of the framers of the Fourteenth Amendment.⁷¹ In short, it is not

68. See *id.* at 1207-11 (commenting on both 39th Congress and subsequent failure of Blaine Amendment, which would have explicitly applied prohibition against religious establishment to states); Paulsen, *supra* note 7, at 318 n.38 (citing defeat of Blaine amendment as strong evidence against intent of framers of Fourteenth Amendment to incorporate Establishment Clause); Note, *supra* note 6, at 1713-14 (same).

The argument that the defeat of the Blaine Amendment implies something about the meaning of the Fourteenth Amendment is unpersuasive. First, there was a time lag between the proposal of the Fourteenth Amendment and the proposal of the Blaine Amendment, so that most of the members of the 44th Congress (which proposed the Blaine Amendment) had not been in the 39th Congress (which proposed the Fourteenth Amendment). See *United States v. Price*, 361 U.S. 304, 313 (1960) (noting that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). Furthermore, this time lag coincided with a political change in the Congress, by which Democrats who read the Fourteenth Amendment narrowly replaced many of the Republicans who had participated in the framing of the Fourteenth Amendment and who read its provisions broadly. The Democrats' narrow reading of the Fourteenth Amendment may have been prompted in part by the Supreme Court's intervening decisions in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), *United States v. Cruikshank*, 92 U.S. 542 (1875), and *Walker v. Sauvinet*, 92 U.S. 90 (1875), all of which gave very limited readings of the Fourteenth Amendment. See MICHAEL K. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 169-70 (1986) (noting that both *Cruikshank* and *Walker* asserted unequivocally that Fourteenth Amendment Privileges or Immunities Clause had no significant meaning).

Even with regard to those who were members of both the 39th and the 44th Congress, the argument is unpersuasive. It assumes that constitutional language can never be repetitive without being superfluous. This overlooks the fact that two or more constitutional provisions can overlap or be mutually supportive, or derive substantial power from their symbolic force. To give a modern example, the failure of the proposed Equal Rights Amendment to become part of the Constitution has not prevented the Supreme Court from holding that a principle of gender equality resides in the Equal Protection Clause. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding gender classifications up to heightened scrutiny).

Finally, the argument proves too much, for the Blaine Amendment would have extended free exercise rights against the state, while even the anti-incorporationists concede that the Fourteenth Amendment by itself incorporated the Free Exercise Clause. See *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 257 (1963) (Brennan, J., concurring) (noting that Fourteenth Amendment unquestionably protects free exercise of religion).

69. Professor Cass Sunstein, for example, has said:

History does not supply conceptions of political life that can be applied mechanically to current problems. Circumstances change; theoretical commitments cannot be wrenched out of context without great risk of distortion; contemporary social and legal issues can never be resolved merely through recovery of features, however important and attractive, of the distant past.

Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1539 (1988).

70. 347 U.S. 483 (1954).

71. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 14-15 (1971). Judge Bork argues that the framers' specific commitment to public segregation coexisted with their more abstract commitment to equality. The *Brown* Court cor-

enough to look to the framers for evidence that they consciously intended for the Fourteenth Amendment to incorporate the Establishment Clause. A more sophisticated mode of analysis is necessary.

Furthermore, commentators have offered a false dichotomy in the original Bill of Rights, between judicially enforceable "individual rights" and non-enforceable "structural provisions."⁷² This overlooks the argument that a particular provision may have both "structural" and "individual rights" strands inextricably intertwined.⁷³

Finally, the anti-incorporationists have assumed that any constitutional provision that has been incorporated against the states via the Fourteenth Amendment must be incorporated in its entirety.⁷⁴ They do not give adequate attention to the argument that any particular constitutional provision might have a different application against the states as against the federal government, even though it is applicable to both.⁷⁵ In this regard, they fall into the same logical trap as those who have supported wholesale incorporation of the Establishment Clause.⁷⁶

C. *Refined Incorporation and Multigenerational Synthesis*

The argument over the incorporation of the Establishment Clause has involved the clash of these two extreme views that share a common error. One sees the Establishment Clause as having been fully incorporated by the Fourteenth Amendment, while the other sees its incorporation as being a logical impossibility. Both, however, assume that a particular provision of the Bill of Rights must either be incorporated entirely into the Fourteenth Amendment or not incorporated at all.

rectly recognized that these commitments were incompatible with each other and chose the more abstract principle of equality as the one that should predominate. *See id.* (advocating that Equal Protection Clause embodies general principle of "no-state-enforced-discrimination"). This Article makes a similar argument about the anti-federalists' rhetoric of inclusion and their practice of exclusion. *See infra* notes 168-79 and accompanying text.

To my knowledge, Professor Raoul Berger is the only contemporary commentator who continues to believe that *Brown* was wrongly decided. *See* RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 245 (1977) (arguing that *Brown* Court interpreted Fourteenth Amendment to mean precisely opposite of what framers intended it to mean).

72. *See, e.g.*, Note, *supra* note 6, at 1710 (arguing that Establishment Clause is structural limit on federal power and not a source of individual liberty).

73. *See* Amar, *supra* note 7, at 1132 (refuting notion that Bill of Rights and Constitution represented two different types of regulatory strategies).

74. *See, e.g.*, Note, *supra* note 6, at 1708 (arguing that when absorbed by Fourteenth Amendment states must respect "core" right and all doctrinal refinements imposed by federal courts).

75. *See* Henkin, *supra* note 14, at 79 n.18 (noting that the fact that a "particular provision of the Bill of Rights may not be incorporated at all, does not imply that other provisions, which may be incorporated, must be incorporated whole"); *see infra* notes 277-300 and accompanying text for an argument that different standards ought to apply to federal government than those that govern the states.

76. *See supra* notes 26-37 for a discussion of *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

A more realistic account treats the Constitution holistically, interpreting each provision in light of the others, and synthesizing them into sets of unified precepts based upon the underlying values of each. One such approach is the “refined incorporation” method advocated by Professor Akhil Amar.⁷⁷ Although Professor Amar appears to favor the anti-incorporationist position with respect to the Establishment Clause, he does concede that the “adoption of the Fourteenth Amendment appears to have transformed the nature of the Bill [of Rights].”⁷⁸ The Amendment has “powerfully” refracted what we see in the Bill of Rights,⁷⁹ so that “the gloss placed [on the original Bill] by the Fourteenth Amendment may have inverted the ‘core’ and the ‘peripheral’ applications.”⁸⁰ He therefore leaves open the possibility that the Fourteenth Amendment, and specifically the Equal Protection Clause, has “inverted” two of the main themes of the original Establishment Clause—the “core” federalism-based concern and its “peripheral” concern with the rights of religious minorities. Stopping short of attempting to articulate an answer in this particular debate over incorporation, he does offer a theory of refined incorporation, by which one must “‘synthesize’ the meanings of chronologically separated ‘constitutional moments,’” an undertaking which “requires extraordinary historical sensitivity.”⁸¹

Professor Amar borrows the language from Professor Bruce Ackerman. The Reconstruction Amendments, according to Professor Ackerman, were not merely “superstatutes,” or minor changes in the constitutional landscape

77. See Amar, *supra* note 15, at 1260-72 (discussing benefits of and problems with incorporation theory).

78. Amar, *supra* note 7, at 1201.

79. See *id.* at 1137 (examining Bill of Rights before Reconstruction to assess whether originally conceived features survived later constitutional developments).

80. *Id.* at 1202 n.311. See also *id.* at 1136 (stating that “[o]riginally centered on protecting a majority of the people from a possibly unrepresentative government, the Bill has been pressed into the service of protecting vulnerable minorities from dominant social majorities. Given the core concerns of the Fourteenth Amendment, all this is fitting . . .”).

This is also the argument made by another recent commentator. See Stuart D. Poppel, *Federalism, Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 275-76, 284-85 (1994-1995) (arguing that Religion Clauses should be deemed applicable against states via “modified incorporation”). However, Mr. Poppel fails to support his conclusion that religious nonestablishment is an aspect of “fundamental fairness” that ought to be imputed to the Due Process Clause of the Fourteenth Amendment. *Id.* at 285 (stating that “the fundamental fairness approach mandates incorporation of . . . fundamental rights, such as the right not to have government establish religion”). By contrast, this Article stresses the effect of the Equal Protection Clause on the original Bill of Rights, and the principle of equal citizenship that bridges the gap between that Clause and the Establishment Clause, thereby providing a more principled basis for incorporation. See *infra* Part III.B. for a discussion of the equal citizenship principle as applied to state religious establishments.

81. *Id.* at 1202. In his forthcoming work, Professor Amar concedes that regardless of its status in 1789, perhaps by 1866, the [E]stablishment [C]lause had come to be viewed as affirming an individual right against establishments rather than an agnostic federal rule.” AMAR, *supra* note 9, at 51. Ultimately, he will argue that the Free Exercise and Equal Protection Clauses separately place Establishment Clause-like constraints on the states, mooted the incorporation question. Telephone interview with Akhil R. Amar, Southmayd Professor of Law, Yale Law School (Dec. 11, 1995).

consistent with all that had come before,⁸² as the anti-incorporationists argue with regard to the Establishment Clause.⁸³ However, neither were they a self-conscious and comprehensive restatement of the ideals of the Bill of Rights, to be applied in their entirety against the states,⁸⁴ as the Court has implied. Instead, they were something in-between: They were “transformative amendments”⁸⁵ that added a new layer of principles onto the existing structure of society.

Although “the people of the nineteenth century broke decisively with Founding premises—importing new nationalistic, egalitarian, and libertarian strains into our higher law”⁸⁶—they did not throw away the old Constitution and begin anew, as the Founders had done with the Articles of Confederation. Instead, the transformative amendments should be seen as “the culminating expression of a generation’s critique of the status quo—a critique that finally gains the considered support of a mobilized majority of the American people.”⁸⁷

The interpreter takes on the task of “multigenerational synthesis”—a process of reconciling the new principles with the old.⁸⁸ With respect to evaluating the changes that the Reconstruction Amendments wrought, the synthesis comprises two steps: first, one must “identify which aspects of the earlier Constitution had survived Republican reconstruction”;⁸⁹ second, one must “synthesize them into a new doctrinal whole that [gives] expression to the new ideals affirmed by the Republicans in the name of the People.”⁹⁰ The process is one of *abstraction* and *reconciliation*.

82. Ackerman, *supra* note 17, at 521-22.

83. *See id.* at 522-24 (criticizing Raoul Berger’s theory that Fourteenth Amendment aim was merely to constitutionalize Civil Rights Act of 1866).

84. *See id.* at 521 (criticizing Justice Black for adhering to this view in his dissent in *Adamson v. California*).

85. *See id.* at 524-26.

86. *Id.* at 517.

87. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 92 (1991). Professor Ackerman stresses that the transformation occurred gradually: “As lived experience of Reconstruction faded, the courts took a more comprehensive approach—trying to interpret the meaning of both Founding and Reconstruction on the same level of abstraction and to integrate the deeper meaning of each into a doctrinal whole.” *Id.* at 141. This explains the result in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), in which the Court failed to see the deeper significance of the Fourteenth Amendment five years after it was ratified. *See* ACKERMAN, *supra*, at 94-97.

88. *See* ACKERMAN, *supra* note 87, at 161 (noting that Court must integrate in comprehensive way new principles into older tradition). *See also* Brownstein, *supra* note 66, at 91-92 (noting that interpretation of certain constitutional provisions, such as religion clauses, must adapt to changes in “constitutional matrix”).

89. ACKERMAN, *supra* note 87, at 88-89.

90. *Id.* at 89. *See also id.* at 160 (stating that Court must confront and then reconcile “disparate historical achievements of the American people”).

Although several commentators have been critical of other aspects of Professor Ackerman’s work, his explication of constitutional interpretation via multigenerational synthesis has been generally approved. *See, e.g.,* William W. Fisher III, *The Defects of Dualism*, 59 U. CHI. L. REV. 955, 962 (1992) (book review) (noting that Ackerman’s contributions are successful effort to “synthesize” republican and liberal schools of constitutional thought); Suzanna Sherry, *The*

In salient terms, Professor Ackerman lays out the traditions that must be reconciled:

[O]n the one side, the Federalist ideal of a decentralized republic—in which American citizens could expect only limited assistance from the national government in protecting their personal freedoms against state politics; on the other, the Republican assertion of a more nationalistic Union that would no longer tolerate the enslavement of any American by a dominant state majority but insisted on the equal protection of the laws.⁹¹

The task, then, is to discover the values underlying the Founders' "ideal of a decentralized republic," and then to articulate those underlying the Reconstruction Republicans' concern with equality, and finally to find the common interface for the two sets of values, so that they can be reconciled and synthesized.

II. DISTILLING THE VALUES OF THE ANTI-FEDERALISTS' ESTABLISHMENT CLAUSE AND THE EQUAL PROTECTION CLAUSE

Similar values underlie the Equal Protection Clause and the anti-federalist position on establishment. The value of community participation, which the anti-incorporationists tend to overlook, was a driving force behind anti-federalist doctrine. This dovetails with the principle of equal citizenship that undergirds the Equal Protection Clause. Moreover, the equal citizenship principle is as applicable in the context of religious minorities as it is in the context of racial and ethnic minorities, which the Equal Protection Clause traditionally has addressed.

A. *Participation in the Community: What the Anti-incorporationists Leave Out*

The anti-incorporationists argue that the Establishment Clause was initially intended as a protection of federalism principles. In that sense, it was a more specific application of the Tenth Amendment. The anti-incorporationists, however, fail to articulate the values that underlie the anti-federalists' promotion of federalist principles in general. When those values are uncovered, it becomes apparent that the concern for widespread participation in community decisionmaking was a crucial strain in anti-federalist thought.

The anti-federalists favored local, decentralized government over distant, centralized government mainly because the former style of decisionmaking would enable the people to participate more directly, through debate and dialogue, in the decisions that would affect their lives.⁹² According to

Ghost of Liberalism Past, 105 HARV. L. REV. 918, 919 (1992) (book review) (disagreeing with Professor Ackerman's thesis of dualist democracy, but conceding that his constitutional synthesis analysis "provides valuable insights").

91. ACKERMAN, *supra* note 87, at 99-100.

92. See *Address of a Minority of the Maryland Ratifying Convention*, (BALTIMORE) MARYLAND GAZETTE, May 6, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST 93 (Herbert J. Storing ed., 1981) [hereinafter STORING] (noting assertion by the thirteen elected delegates at

classical republicanism, "citizenship was above all a mode of *action* and of practicing the *active* life."⁹³ This active participation, in turn, would lead to enhanced self-definition for the community and the strengthening of the virtue of its citizenry.⁹⁴ Moreover, active participation was not merely one way among many to nurture civic virtue; rather, "many Anti-federalists argued that genuine virtue *requires* active participation in public life since political participation enables persons to realize their essential nature as self-governing, rational beings."⁹⁵

Participation is essential to individuals because it respects their right to have a voice in the direction of the polity, which affects their lives directly.⁹⁶ To a large extent, our lives and our futures depend on the collective action of the polity. Just as the liberal ideal of autonomy respects the important effects that *individually*-reached decisions have on a person's life,⁹⁷ the classical republican ideal of active participation respects the important consequences that *collectively*-reached decisions have on the individual's life.⁹⁸ Hanna Pitkin aptly summarized the position:

state ratifying convention that they were bound strictly to follow their constituents' instruction); JOHN ARTHUR, *THE UNFINISHED CONSTITUTION: PHILOSOPHY AND CONSTITUTIONAL PRACTICE* 21 (1989) (stating that republican anti-federalists advocated enabling citizens "to participate more fully in the lives of their communities"); GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 5-6 (1986) (noting that model for republican government is town meeting which enables frequent participation and inculcates virtue, both important in democratic self-government); Sunstein, *supra* note 69, at 1555-56 (stating that concern for participation is motivating force behind "decentralization, local control, and local self-determination").

93. J.G.A. Pocock, *Virtues, Rights, and Manners: A Model for Historians of Political Thought*, 9 *POL. THEORY* 353, 358 (1981) (emphasis added). See also Hanna F. Pitkin, *Justice: On Relating Private and Public*, 9 *POL. THEORY* 327, 344 (1981) (stating that "[w]hat distinguishes public life . . . is action—the possibility of a shared, collective, deliberate, active intervention in our fate . . .").

94. See ARTHUR, *supra* note 92, at 22 (stating that local government is conducive to these goals); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. CHI. L. REV.* 1484, 1510 (1989) (book review) (noting that "public spiritedness is a product of participation in deliberation over the public good").

95. ARTHUR, *supra* note 92, at 25 (emphasis added). See also STONE ET AL., *supra* note 92, at 6 (noting that face-to-face process of deliberation inculcates civic virtue for benefit of individual and community); Frank Michelman, *Law's Republic*, 97 *YALE L.J.* 1493, 1503 (1988) (noting that "[i]n the strongest version of republicanism, citizenship—participation as an equal in public affairs, in pursuit of a common good—appears as a primary, indeed constitutive, interest of the person"); Michelman, *supra* note 63, at 22 (noting that classical republicans saw participation as positive good in itself); Pitkin, *supra* note 93, at 349 (arguing that joining with others for purposes of community self-determination is essential to personhood); Sunstein, *supra* note 69, at 1556 (stating that participation is both instrumental good and good in itself).

96. See *Letters from The Federal Farmer to the Republic* (Oct. 12, 1787), in 2 STORING, *supra* note 92, at 249 (noting importance in free countries that "common people" have share of influence).

97. See Michelman, *supra* note 95, at 1503 n.36 (noting that classical liberals, such as Rousseau and Kant, "stressed the ethical importance of governing oneself").

98. As Hanna Pitkin stated:

Political life . . . is the activity through which relatively large and permanent groups of people determine what they will collectively do, settle how they will live together, and

[T]he distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly shaping its policy, its way of life. From this perspective, to say that we are political animals is to say that we have the power to take charge of the forces which shape and limit us, *and that our full development as human beings depends on our exercising that power*. Only citizenship enables us jointly to take charge of and take responsibility for the social forces that otherwise dominate our lives and limit our options, even though we produce them.⁹⁹

Participation by the individual is also a great teacher. It “teaches us justice and political judgment,”¹⁰⁰ enabling us to relate not just to other individuals, but to the collective itself and to one’s role as member of it.¹⁰¹ Community participation allows us to go beyond Kantian moral autonomy, by which the individual decides on general principles to guide his or her own life,¹⁰² and learn how to make general rules with other individuals, each of whom has his or her own distinctive interests.¹⁰³ This learning is all the more valuable because it takes place “in a context of responsibility, not in abstract thought, but in action which will have broad and tangible consequences.”¹⁰⁴

Active participation is not only necessary for the fulfillment and personal growth of the individual, but for the prosperity of the community as well.¹⁰⁵ These two goals are intertwined: because the anti-federalists felt that individuals are defined primarily by their communities, they stressed the interconnections and interdependencies between individual and society.¹⁰⁶ In addition, when people feel more involved in public decisionmaking, they

decide their future, to whatever extent that is within human power. Public life in this sense is of the utmost seriousness and importance

Pitkin, *supra* note 93, at 343. See also LETTER FROM BRUTUS TO THE CITIZENS OF THE STATE OF NEW YORK (Oct. 18, 1787), reprinted in 2 STORING, *supra* note 92, at 370-71 (arguing that public participation enhances human dignity).

99. Pitkin, *supra* note 93, at 344 (emphasis added).

100. *Id.* at 345.

101. See *id.* (advocating political participation for betterment of oneself and one’s relationship with community).

102. See IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 44-45 (James W. Ellington trans., 3d ed. 1993) (articulating “categorical imperative,” which commends that one act in such a way that the maxim’s underlying one’s actions may be willed as universal law).

103. See Pitkin, *supra* note 93, at 345 (contrasting Kantian “metaphorical legislation” with actual “public deliberation, debate, and action” as part of republican citizenship).

104. *Id.* See also *Letters from the Federal Farmer in 2 STORING*, *supra* note 92, at 250 (noting that position of people “as jurors and representatives, enables them to acquire information and knowledge in the affairs and government of the society”).

105. See ARTHUR, *supra* note 92, at 28-29 (claiming that republican anti-federalists stress importance of community life and necessity of political participation as way for community to constitute itself).

106. See *id.* at 25 (explaining anti-federalist philosophy that because individuals are product of community they cannot separate individual identity from community’s identity); Michelman, *supra* note 63, at 32 (arguing that individuals’ identities are inseparable from that of the community, and considering one without other is incomprehensible). See also *Letters from the Federal Farmer*, in 2 STORING, *supra* note 92, at 320 (writing that “[t]he body of the people bear, principally, the burdens of the community; they of right ought to have a controul [sic] in its important

have more of a stake in the outcome for their community and will concern themselves with public, as opposed to private, issues.¹⁰⁷ Moreover, participation in governance fosters confidence in the laws that government produces,¹⁰⁸ leading to a more stable polity.

Finally, participation is not limited to political activity in the narrow sense. It includes all of the “arenas of citizenship in the comparably broad sense in which citizenship encompasses not just formal participation in affairs of state but also respected and self-respecting presence—distinct and audible voice—in public and social life at large.”¹⁰⁹ All of public life—and not just the traditional spheres of the explicitly political—involve encounters with other individuals that have the potential for shaping our world views.¹¹⁰

The anti-federalists’ general concern with fostering community participation was particularly strong with regard to religion, and this specific concern found expression in the Establishment Clause. To allow a central government to control such an important intermediate organization as religion was an anathema to the anti-federalists. Instead, they felt that “allowing state and local establishments to exist would encourage participation and community spirit among ordinary citizens at the grass roots.”¹¹¹

B. *Distilling the Values of the Equal Protection Clause—The Equal Citizenship Principle*

Although scholars have ascribed several meanings to the concept of equality under the Constitution, one that has long endured is the conception of equality as “a principle of *equal citizenship*, which presumptively guarantees to each individual the right to be treated by the organized society as a

concerns, both in making and in executing the laws, otherwise they may, in a short time, be ruined”).

107. See McConnell, *supra* note 95, at 1510 (asserting that when people participate in public debate they have vested stake in community and when debate is too distant they will revert to private matters); Pitkin, *supra* note 93, at 347 (claiming that people involved in community affairs initially focus on individual interests but this eventually matures into awareness of “the long-range and large-scale significance of what we want and are doing”).

108. See 1 STORING, *supra* note 92, at 16-17 (arguing that only when people create and administer government and laws will they respect laws).

109. Michelman, *supra* note 95, at 1531.

110. See *id.* (noting “potentially transformative dialogue” that occurs in arenas of public life apart from legislative assemblies); Pitkin, *supra* note 93, at 346 (stating that all public life is potentially political). See also Amar, *supra* note 15, at 1280 (stating that “the exclusion of blacks from formal political rights like voting underscored the importance of their participation in other organizations like churches . . .”); Kenneth L. Karst, *The Supreme Court, 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 45 (1977) (claiming that “we are a community in much more than the political sense”); Carol M. Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on “Monarchism” to Modern Localism*, 84 NW. U. L. REV. 74, 97 (1989) (arguing that “voting may well be a relatively minor aspect of local civic participation” and listing other less formal examples of participation).

111. Amar, *supra* note 7, at 1162.

respected, responsible, and *participating* member.”¹¹² Inequality, by contrast, “excludes people from full membership in the community.”¹¹³

Although acts of government that overtly prevent certain people from participating in the community may be the most egregious violations of the equal citizenship principle, actual interference with freedom is not necessary to constitute discrimination.¹¹⁴ The equal citizenship principle also guards against the imposition of stigma.

This idea—that stigmatic harm affecting people’s “hearts and minds” is a cognizable injury under the Equal Protection Clause—is at least as old as *Brown v. Board of Education*.¹¹⁵ While a formalistic analysis of segregation viewed it as merely a neutral separation of people according to race,¹¹⁶ the Court in *Brown* took a realistic and pragmatic approach and saw segregation for what it was: a powerful message that one caste is not fit to associate in public with the other by virtue of the former’s inherent inferiority vis-a-vis the latter.¹¹⁷ The conclusion that *Brown* was grounded in a belief that public

112. Karst, *supra* note 110, at 4 (emphasis added). Professor Gary Leedes takes essentially the same approach, but emphasizes the citizenship declaration of the Fourteenth Amendment, see U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside.”), rather than the Equal Protection Clause. See Leedes, *supra* note 17, at 509 n.267 (stating that while equal protection principles are relevant, citizenship declaration is paramount). In my view, where exactly in the Fourteenth Amendment the prescription of equal citizenship is located is not as important as the fact that it is widely recognized that the Fourteenth Amendment does demand equal citizenship.

Leedes’s argument is persuasive in that it may be that the citizenship declaration uniquely protects against actions that detract from equal citizenship, while the Equal Protection Clause may be concerned with other, comparatively less important kinds of inequality. For example, inequalities that also stigmatize by race may be held up to strict scrutiny because they implicate both provisions, while affirmative action programs might implicate only the Equal Protection Clause because they do not stigmatize, and so should be held up to a lesser standard of scrutiny. Nonetheless, because the Supreme Court has not adopted this position, see, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989) (plurality opinion) (applying strict scrutiny to city affirmative action program based on race), this Article treats the command of equal citizenship as residing in the Equal Protection Clause.

113. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 4 (1989).

114. See John H. Garvey, *Freedom and Equality in the Religion Clauses*, 1981 SUP. CT. REV. 193, 212 n.77 (1982); Kenneth L. Karst, *The First Amendment, the Politics of Religion and the Symbols of Government*, 27 HARV. C.R.-C.L. L. REV. 503, 518-19 (1992) (stating that exclusion means more than taking away one’s right to speak and vote).

115. 347 U.S. 483, 494 (1954).

116. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) (asserting that if segregation “stamps the colored race with a badge of inferiority,” it is “solely because the colored race chooses to put that construction on it”), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1954). As Professor Charles Black has noted with regard to this reasoning, “[t]he curves of callousness and stupidity intersect at their respective maxima.” Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 422 n.8 (1960).

117. See Black, *supra* note 116, at 427 (stating that feelings of inferiority and hurt are factual results of segregation); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439-49 (1990) (interpreting *Brown* as holding segregation unconstitutional because of message of inferiority it conveys).

segregation is inherently stigmatizing and therefore violative of the Fourteenth Amendment, and not just that segregation in the public schools results in a poorer education for African-American children, is supported by later cases that outlawed segregation in all public facilities.¹¹⁸

The imposition of stigma keeps people from "belonging" in more subtle, but no less real, ways than outright exclusion.¹¹⁹ First, the stigmatized individual may lack the self-respect and the self-confidence to actually participate because he or she has been convinced that his or her views and interests are worth less than those of "full" members of the community. Second, the stigmatized individual may feel that participation would be useless because "full" members of the community would devalue or ignore his or her views and interests. Finally, to the extent that the stigmatized individual actually attempts to participate, his or her views and interests may actually be devalued or ignored by "full" members.¹²⁰

Because of the effects that stigma may have on full participation, "[e]quality and belonging are inseparably linked: to define the scope of the ideal of equality in America is to define the boundaries of the national community."¹²¹ The real harm of Jim Crow, for example, was not merely in the denial of specific rights to particular African-Americans, but in the total ex-

118. See, e.g., *Johnson v. Virginia*, 373 U.S. 61, 62 (1963) (per curiam) (courtrooms); *New Orleans City Park Imp. Ass'n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (public parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (golf courses); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (beaches). See also Black, *supra* note 116, at 426 (asking rhetorically, "can a system which, in all that can be measured, has practiced the grossest inequality, actually have been equal in intent, *in total social meaning and impact?*") (emphasis added); *id.* at 427 (arguing that question of whether segregation constitutes discrimination in abstract is irrelevant and that "[o]ur question is whether discrimination inheres in that segregation which is imposed by law in the twentieth century in certain specific states in the American Union"); Edmond Cahn, *Jurisprudence*, 30 N.Y.U. L. REV. 150, 158 (1955) (noting that involuntary physical separation is ancient and commonly-practiced form of stigmatization).

119. See Neal R. Feigenson, *Political Standing and Governmental Endorsement of Religion: An Alternative to Current Establishment Clause Doctrine*, 40 DEPAUL L. REV. 53, 80 (1990) (stating that standing in political community encompasses both legal status and *de facto* perceptions of individual's position in community); Karst, *supra* note 110, at 6 (claiming that effects of stigmatization are both psychological and intangible); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248-49 (1983) (arguing that mutual respect is primary element of citizenship and imposing stigma directly destroys critical component); Karst, *supra* note 114, at 518 n.56 (asserting that "the stigma of official symbolic exclusion is itself a denial of equal citizenship"); Leedes, *supra* note 17, at 514 (stating that equal citizenship principle protects both status and liberty of individuals). See also Black, *supra* note 116, at 427 (noting that stigmatization and outright exclusion from community often go hand-in-hand); Scott J. Ward, Note, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.J. 1739, 1748 (1989) (stating that stigmatization is "weaker form of governmental compulsion").

120. See Feigenson, *supra* note 119, at 69 (arguing that once government establishes religion as relevant to political debate disfavored religions will feel less able to participate in debate).

121. KARST, *supra* note 113, at 2. See also *id.* at 181 (arguing that "political community and political equality are congruent" and that equal citizenship means equal membership in the political community"); *id.* at 195 (noting logical connection between community and equality).

clusion of a single group from membership in the national community and various local communities.¹²²

The goal of equality, then, is to open up previously exclusionary communities to those who have been historically excluded from them. To some extent, it is a matter of redefining the community itself. In order to treat others unequally, "insiders" merely have to define the relevant community in a way that excludes subordinated groups.¹²³ In order to equalize, no adverse action need to be taken against the particular community; rather, its boundaries simply need to be expanded. As Professor Kenneth Karst has noted with regards to the civil rights movement of the 1950s and '60s:

When the Supreme Court and Congress imposed a uniform national principle of racial nondiscrimination on the South, they did not destroy the functions of local communities. Rather they opened new opportunities for citizen participation in local public life. Localism was not suppressed; it was set free from the stifling effects of a racially exclusive definition of community.¹²⁴

Put another way, the equal citizenship principle may erode those communities based on exclusion, but it fosters those based on inclusion.¹²⁵

C. *Extension of the Equal Citizenship Principle to Religious Minorities*

It has been widely noted that there is an equality component to the Establishment Clause.¹²⁶ Reading an equality principle into the Establishment Clause is sensible because so much of constitutional law relies on equality-based concerns.¹²⁷ It is not surprising, then, that although (or perhaps be-

Although Professor Karst tends to speak of the *national* community, all of his arguments apply equally well when speaking of local communities. *Id.* at 181-84.

122. Karst, *supra* note 114, at 519.

123. See KARST, *supra* note 113, at 2.

124. *Id.* at 187. See also *id.* at 197 (quoting Michael Walzer as saying, "Moral progress implicates, not new principles, but inclusion of outsiders into old principles").

125. See Kenneth L. Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME LAW. 183, 203 (1980) (concluding that recognition of equal citizenship will diminish communities that disdain outsiders but promotes creation of other forms of intermediate community).

126. See, e.g., Garvey, *supra* note 114, at 209 (arguing that Establishment Clause demands equality); Lupu, *supra* note 22, at 743 (stating that principles of Equal Protection Clause "parallel" those underlying nonestablishment); William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 166-70 (1987) (arguing that basic ideal of even-handedness in Establishment Clause jurisprudence derives, at least in part, from Equal Protection Clause); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 380-81 (1949) (suggesting that Establishment Clause be read as if it were type of Equal Protection Clause); Jonathan E. Nuechterlein, Note, *The Free Exercise Boundaries of Permissible Accommodation Under the Establishment Clause*, 99 YALE L.J. 1127, 1129-34 (1990) (comparing Equal Protection Clause and Establishment Clause).

127. See Timothy L. Hall, *Religion, Equality, and Difference*, 65 TEMP. L. REV. 1, 6 (1992) (arguing that "[v]iewing the Religion Clauses through the lens of equality creates an orderly vision of constitutional law, because the principle of equality is a common point of reference for a number of constitutional provisions"). Cf. *Railway Express Agency, Inc. v. New York*, 336

cause) "there is very little constitutional case law directly applying the [E]qual [P]rotection [C]lause to religious minorities,"¹²⁸ the first two prongs of the Supreme Court's *Lemon* test attempt to ensure that the government treats the religious and the secular equally.¹²⁹ In fact, one commentator has noted that "the [E]stablishment [C]lause has become a *de facto* substitute for an independent equal protection analysis of the treatment of religious minorities by the state."¹³⁰

It is also not surprising that much of the recent case law on the Establishment Clause has emphasized that there is an equal citizenship strand to that clause¹³¹ which is similar to the one that has been found in the Equal Protection Clause proper.¹³² The Court has at least implicitly recognized that government actions that stigmatize people based on their religious status or beliefs can be just as harmful, and can have similar exclusionary effects, as stigmatization based on race, gender, or other suspect and quasi-suspect characteristics.¹³³

However, this conclusion depends on several premises that must be supported. First, it must be shown that religion is similar enough to traditional suspect and quasi-suspect classifications that stigmatization based on religion rises to a level of affront similar to other types of stigma. Second, it must be argued that government endorsement of a particular religion necessarily implies its disapproval of other religions and non-religion. Finally, it must be shown that, not only does the equal citizenship principle protect members of

U.S. 106, 112-13 (1949) (Jackson, J., concurring) (arguing that command of equality is best safeguard against majoritarian tyranny).

128. Brownstein, *supra* note 66, at 102-03.

129. See *supra* notes 38-41 and accompanying text for a discussion of the *Lemon* test. See also *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (opinion of Harlan, J.) (claiming that application of neutrality "requires an equal protection mode of analysis").

130. Brownstein, *supra* note 66, at 103.

131. See *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989) (opinion of Blackmun, J., joined by Stevens, J.) (accepting endorsement or disapproval test); *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389-90 (1985) (subsuming endorsement or disapproval test within *Lemon* test); *Wallace v. Jaffree*, 472 U.S. 38, 69-70 (1985) (O'Connor, J., concurring in the judgment) (proposing use of endorsement or disapproval test); *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring) (introducing endorsement or disapproval test for evaluating constitutionality of government activity under Establishment Clause).

132. See *supra* Part II.B for a discussion of the equal citizenship principle residing in the Equal Protection Clause.

133. See Brownstein, *supra* note 66, at 112 (claiming that concerns underlying application of equality principles to laws classifying on basis of racial, gender or nationality also arise in religion cases); Garvey, *supra* note 114, at 212 (stating that both Establishment Clause and Equal Protection Clause concern "psychic and moral affronts from discrimination"); William W. Van Alstyne, *What is "An Establishment of Religion?"*, 65 N.C. L. REV. 909, 914 (1987) (noting "devastating" effect of government "distinctions of superior and inferior citizenship" based on affiliation with specific religion). See also *Board of Educ. v. Grumet*, 114 S. Ct 2481, 2504 (1994) (Kennedy, J., concurring in the judgment) (arguing that danger of "stigma and stirred animosities" equally "acute" for religious and racial divisions); Lupu, *supra* note 22, at 745-46 (arguing that Establishment Clause parallels equal respect principle of Equal Protection Clause).

minority religions, but it also protects individuals who profess no religious beliefs at all.

1. Religion as a Suspect Classification

There are very few, if any, Supreme Court cases that explicitly treat religion as a suspect classification under the Equal Protection Clause.¹³⁴ However, the Court has often noted, albeit in dicta, that religious classifications are one of the few types that are suspect under the Equal Protection Clause.¹³⁵ The academic literature also supports this conclusion.¹³⁶

It could be argued that religious affiliation, unlike race or gender, is a completely voluntary association. Not only do we choose our religion, but we can alter that choice at any time. However, this argument ignores how many people view their own religious beliefs. For many, one's religion is seen not as a matter of autonomous human choice, but as a matter of compulsion.¹³⁷ For these people, one's "[r]eligion is a core part of one's sense of self."¹³⁸ This is especially true in the United States, where identity according to national origin becomes clouded through widespread inter-marriage and by the "new national allegiance" we adopt upon attaining citizenship.¹³⁹ As Alan Brownstein wrote: "Many religious persons place an enormously high

134. See *supra* note 128 and accompanying text. *But see* *Larson v. Valente*, 456 U.S. 228, 246 (1982) (using Equal Protection analysis to strike down law favoring one religion over others); see *infra* notes 150-52 and accompanying text for a discussion of *Larson*.

135. See, e.g., *Burlington Northern R.R. Co. v. Ford*, 112 S. Ct. 2184, 2186 (1992) (stating that since state venue rules did not "classify along suspect lines like race or religion," they do not deny equal protection (emphasis added)); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (stating that classifications "drawn upon inherently suspect distinctions such as race, religion, or alienage" are presumptively invalid) (emphasis added); *Edwards v. California*, 314 U.S. 160, 185 (1941) (Jackson, J., concurring) (stating that indigence, as with race or creed, constitutionally irrelevant).

136. See, e.g., Tussman & tenBroek, *supra* note 126, at 356 (stating that application of rigid scrutiny "will depend upon the area in which the principle of equality is struggling against the recurring forms of claims to special and unequal status—whether along racial, religious, economic, or even political lines") (emphasis added); *id.* at 355 (asserting that classifications that should be treated as suspect can be identified easily as race, alienage, color, creed). See also Brownstein, *supra* note 66, at 135 (assuming that religious groups are protected under Equal Protection Clause because religious segregation or miscegenation laws are surely unconstitutional); Kent Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CAL. L. REV. 753, 756-57 (1984) (stating that implicit in religion clauses is idea that religious classifications are suspect).

137. See Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 283 (1989) (asserting that, from perspective of individual with religious convictions, one's religion may be fundamental obligation rather than product of choice).

138. Brownstein, *supra* note 66, at 147. See also *id.* at 148 (noting that religious commitments are "contemporary ongoing part" of person); ANDREW M. GREELEY, *THE DENOMINATIONAL SOCIETY: A SOCIOLOGICAL APPROACH TO RELIGION IN AMERICA* 231 (1972) (postulating that "denominations are superethnic groups providing means of identification and location within the larger American social structure").

139. Brownstein, *supra* note 66, at 147. Moreover, where racial and ethnic differences do exist and are emphasized by people, they often correlate highly with religious differences. Karst, *supra* note 114, at 510-11.

value on their adherence to their faith, even including a willingness to die to maintain it. For these individuals it is unrealistic to view this characteristic as mutable except perhaps for the most egregious of burdens."¹⁴⁰

Of course, a classification's suspectness does not depend solely upon its immutability. In determining what classifications they will treat as suspect, "[t]he focus of the courts is to identify situations in which majoritarian decisionmaking cannot be trusted to operate with some minimum level of fairness and efficiency."¹⁴¹ However, of the several factors that have been identified as correlative with suspect classification status for a particular characteristic—historical subjugation, political powerlessness, distinct attributes, immutability, and irrelevance of the characteristic for most state concerns¹⁴²—all are demonstrably present in the context of minority religious groups in this country.¹⁴³

2. The Implication of Government Endorsement of Religious Belief

The second objection that can be raised is that government endorsement of one religion does not necessarily imply disapproval of other religions, resulting in stigma to their adherents. However, this overlooks the simple fact that "the promotion of one religious belief is often a direct repudiation of another faith."¹⁴⁴ Belief in any religion inherently refutes the validity of all other religions.¹⁴⁵ To give an obvious example, a proclamation asserting the divinity of Jesus Christ is also an implicit declaration that all religions that do not embrace this idea are simply wrong.

This is true even assuming that the person making the hypothetical proclamation is not attempting to disparage other religions, but is merely attempting to display his or her pride in being a Christian. It is analogous to leading a classroom of white children in a recitation of all the virtues of being

140. Brownstein, *supra* note 66, at 109-10.

141. *Id.* at 105-06. See also *United States v. Carolene Prod. Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 152-53 (1980) (supporting *Carolene Products* formulation).

142. Brownstein, *supra* note 66, at 104-05. See also DAVID A. J. RICHARDS, *FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* 281 (1989) (listing "immutability, salience, degrading prejudice, irrelevance to legitimate state purposes, and powerlessness" as five elements of suspect classification).

143. See Brownstein, *supra* note 66, at 106-07 (discussing anti-religious sentiments at various times in American history); *id.* at 107-08 (stating that many minority religions are discrete and insular); Tussman & tenBroek, *supra* note 126, at 353 (noting irrelevance of differences in color, creed, birth or status); *supra* notes 137-40 and accompanying text (arguing that religion often immutable in very real sense to believers).

144. Brownstein, *supra* note 66, at 149.

145. See *id.* at 110-11. See also Amar, *supra* note 42, at 151 n.150 (arguing that "[t]o be an adherent of religion A is almost necessarily to be anti-religion B").

white.¹⁴⁶ This practice most assuredly would violate the Equal Protection Clause even if the ceremony were solely designed to instill “racial pride,” and even if children of all other races were excused from the practice. The exercise implies that people of other races are not worthy of similar pride in their racial identities, and the practice therefore stigmatizes them. Furthermore, when the speaker is the *government*—an entity with no capacity to feel pride in a particular racial identity or religious belief—the conclusion that the message also contains an implicit disparagement of outsiders is all but inevitable.¹⁴⁷ Therefore, for example, the Court has observed that the practice of organized prayer in public schools has an invidious, stigmatizing effect on all non-believers,¹⁴⁸ similar to the effect that forced segregation by race had on children of the “disfavored” race.¹⁴⁹

3. The Equal Citizenship Principle and Non-Believers

Finally, even if one accepts these arguments in the context of controversies among different religious groups, it may be argued that they are inapplicable when the controversy is one pitting religion against non-religion. The Supreme Court’s decision in *Larson v. Valente*,¹⁵⁰ the only Establishment Clause case to use the language of strict scrutiny, could be cited to support this view. In that case, the Court held that a law that discriminates among different religious sects is to be held up to strict scrutiny.¹⁵¹ This view is consistent with the “nonpreferentialist” school of thought, which argues that government may aid religion in general and is prohibited by the Establishment Clause only from preferring one religion over others.¹⁵²

However, *Larson* aside, the Supreme Court has generally eschewed any distinction between government actions that distinguish among religions and those that distinguish between religion and non-religion, and for good reason.¹⁵³ First, even supposedly “nonpreferentialist” establishments are rarely truly unbiased because they are heavily influenced by the majority view,

146. See Garvey, *supra* note 114, at 212 n.77 (comparing school prayer to daily chanting of “White is Right”).

147. See Brownstein, *supra* note 66, at 149 (asserting that a different interpretation is untenable). *But see* Lynch v. Donnelly, 465 U.S. 668, 692-93 (1984) (O’Connor, J., concurring) (using endorsement or disapproval test and concluding that city’s display of creche was not religious display but display of publicly-celebrated holiday and thus did not disparage non-Christians).

148. See School Dist. of Abington Township v. Schempp, 374 U.S. 203, 292 (1963) (concluding that children excused from school prayer stigmatized for adhering to personal belief).

149. See Brownstein, *supra* note 66, at 136 (comparing school prayer cases to *Brown v. Board of Educ.*); *id.* at 119 (comparing racist government speech to anti-religious government speech).

150. 456 U.S. 228 (1982).

151. *Id.* at 246.

152. See, e.g., Wallace v. Jaffree, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) (interpreting Establishment Clause as non-mandatory of government neutrality towards religion).

153. See, e.g., Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (noting that First Amendment mandates government neutrality between religion and religion, and between religion and non-religion).

Christianity.¹⁵⁴ For example, even the “non-denominational” prayer offered in *Lee v. Weisman*¹⁵⁵ implicitly favored those religions, like Judaism and Christianity, that utilize spoken prayer to a single deity, over those that do not.¹⁵⁶ Some have gone so far as to argue that a nonpreferentialist approach to religion is impossible.¹⁵⁷

More fundamentally, however, the purposes of the equal citizenship principle, as applied to minority religions, applies equally well to those who hold no religious beliefs.¹⁵⁸ Many people who profess no religious beliefs certainly feel that their non-belief is an inherent part of their personalities. Moreover, there is little doubt that there is at least as much prejudice against professed atheists as there is against members of minority religious sects.¹⁵⁹ Anytime the government acts on the basis of religion, whether the affected “disbeliever” has different religious beliefs or different *non*-religious beliefs from the majority faith, the government “discriminates against those who do not ‘believe’ in the governmentally-fixed manner.”¹⁶⁰ Norman Dorsen, in summarizing this position, explicitly makes the comparison to equal protection principles and the command of equal citizenship located therein:

Similarly [to the Equal Protection Clause], the core purpose of the religion clauses applies to nonbelievers as well as believers. The key objective in both situations is to safeguard minorities and outsiders with respect to religious beliefs—an objective consonant with the overriding goal of the Bill of Rights to protect vulnerable groups in American society, thereby assuring that there are no outsiders in our polity.¹⁶¹

154. Russel M. Mortyn, Note, *The Rehnquist Court and the New Establishment Clause*, 19 HASTINGS CONST. L.Q. 567, 587 (1992). See also Feigenson, *supra* note 119, at 75 (arguing that when government promotes religion in general, it will often be understood as promoting whatever religion predominates in society).

155. 112 S. Ct. 2649, 2652-53 (1992).

156. For a particularly egregious example of a preferentialist approach to non-preferentialism, see Lietzau, *supra* note 7, at 1230 (stating that many states in nineteenth century adopted “nonpreferentialist approach which to a greater or lesser degree promoted Judeo-Christian principles”) (emphasis added).

157. See, e.g., Douglas Laycock, “Nonpreferentialist” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 920 (1986).

158. See Norman Dorsen, *The Religion Clauses and Non-Believers*, 27 WM. & MARY L. REV. 863, 867 (1986) (noting importance of considering purposes and values of clause at issue). But see Brownstein, *supra* note 66, at 112 (stating that rationale for protecting minority religious groups under Equal Protection Clause does not apply with full force to non-religious).

159. See Dorsen, *supra* note 158, at 866 (stating that many people foster deep antagonism toward atheists).

160. *Id.* at 871. See also Feigenson, *supra* note 119, at 75 (arguing that “every attempt to define a community of believers, no matter how ecumenical, necessarily excludes those who do not share in the belief”).

161. Dorsen, *supra* note 158, at 868.

III. EQUAL PARTICIPATION IN THE COMMUNITY AS THE CENTRAL LINK BETWEEN THE ESTABLISHMENT AND EQUAL PROTECTION CLAUSES

Once one has identified the central strands of the Establishment Clause and the Equal Protection Clause it becomes easier to mesh the two into a coherent whole. Assuming that the core meaning of the Establishment Clause is to be defined solely in terms of the federalism-based concerns of its anti-federalist progenitors, as the anti-incorporationists have argued, the value of equal participation in community affairs stands out as the central link between the two clauses. Modern republican political theory, which emphasizes both participation and equality, is the analytical framework that best explicates this central link. By looking at how modern republicanism generally accomplishes a reconciliation of liberalism and communitarianism, one can tentatively map out the contours of the “incorporated” Establishment Clause,¹⁶² which closely resembles recent Supreme Court doctrine. This can then be contrasted to the “pure” Establishment Clause, applicable only to the federal government, which requires a higher degree of separation between church and state.

A. *Modern Republicanism and Equal Participation*

Proponents of modern republicanism have attempted to intertwine the strands of classical republicanism and modern liberalism.¹⁶³ Specifically, the modern republicans have taken up the task of reconciling the often exclusionary practices of the anti-federalist republicans with the modern notions of equality and inclusion embodied in the equal citizenship principle.¹⁶⁴ A look at the attempted reconciliation of these two strains of thought provides a useful framework for the scope of the incorporated Establishment Clause, one that remains faithful to both classical republicanism and liberal egalitarianism.

162. It is important to keep in mind, however, that this tentative sketch of the incorporated Establishment Clause assumes at all times that the anti-incorporationist vision of the Establishment Clause, as driven predominantly by federalism-based concerns, is completely accurate. The principles attributed to the incorporated Establishment Clause by this Part, in other words, describe only a constitutional minimum: the Establishment and Equal Protection Clauses demand *at least* that states not use religious classifications to deny members of religious minorities equal participatory rights in the community. To the extent that the Establishment Clause also includes a prohibition on the mixing of government and religion based on general principles, it may be incorporated to a much greater extent than is contemplated here.

163. See Sunstein, *supra* note 69, at 1567-71 (arguing that, on many points, liberalism meshes with republicanism); *id.* at 1569 (noting that “republican thought, understood in a certain way, is a prominent aspect of the liberal tradition”).

164. See *id.* at 1589 (arguing that task is to “integrat[e] aspects of traditional republican thought with . . . emerging “theories of social subordination of various groups”); *id.* at 1569 (arguing that it is essential to view republicanism in terms of both occasional exclusionary practices of the Founders and more inclusionary Civil War amendments).

Most modern republicans see the anti-federalists as having been quite exclusionary.¹⁶⁵ Others have seen the anti-federalists, because of their emphasis on widespread community participation,¹⁶⁶ as having been highly egalitarian.¹⁶⁷ However, the difference of opinion is explainable by juxtaposing the rhetoric of the anti-federalists with their actual practice.¹⁶⁸ For example, historian Gordon S. Wood, quoting from one prominent anti-federalist, the Federal Farmer, summarizes the prevailing anti-federalist views of widespread and equal political participation, but unwittingly shows how narrow those views actually were:

[T]he only 'fair representation' in government . . . ought to be one where 'every order of *men* in the community . . . can have a share in it.' . . . Only an explicit form of representation that allowed *Germans, Baptists, artisans, farmers, and so on* each to send delegates of its own kind into the political arena could embody the democratic particularism of the emerging society of the early Republic.¹⁶⁹

It is true that the anti-federalists spoke of extending suffrage, but only to " 'every order of *men*,' " not to women; they spoke of political equality regardless of one's chosen occupation ("artisans [and] farmers")¹⁷⁰ but not with regard to those whose labor was not their own to sell; and they extolled the representation of different ethnic and religious groups, but limited it to those of European descent ("Germans") and those within the Protestant Christian tradition ("Baptists"). Let it not be underestimated how radical the anti-federalist vision of equality was for its time;¹⁷¹ yet the anti-federalists were willing to extend the boundaries of the community only so far.

In this way, the anti-federalists knew that "[t]he very idea of community implies at least that members are equal in their membership,"¹⁷² but they defined the community in such a way as to exclude effectively large portions

165. See *id.* (noting exclusion of blacks, women and non-propertied white men as part of republican tradition).

166. See *supra* Part II.A.

167. See GORDON S. WOOD, CREATION OF THE AMERICAN REPUBLIC 70 (1969) (stating that equality was central principle in Revolutionary era republican thinking) [hereinafter WOOD, CREATION]; GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 233 (1991) (noting that [e]quality lay at the heart of republicanism") [hereinafter WOOD, RADICALISM]. See also Michelman, *supra* note 63, at 20 (stating that there is some controversy over how egalitarian anti-federalists were).

168. See Sunstein, *supra* note 69, at 1552 n.63 (noting that republican practice violated their own aspiration to political equality).

169. WOOD, RADICALISM, *supra* note 167, at 259 (emphasis added).

170. See *id.* at 234-35, 239-40 (stating that republicans had faith in common people to decide issues for themselves because they had the "moral sense" necessary to do so); WOOD, CREATION, *supra* note 169, at 71 (claiming that republicans eschewed subordination not based on "difference of capacity, disposition, and virtue").

171. See WOOD, RADICALISM, *supra* note 167, at 232 (assessing equality as "most radical and most powerful ideological force let loose in the Revolution").

172. KARST, *supra* note 113, at 196.

of the populace.¹⁷³ Their emphasis on social hierarchy and tradition “coexisted awkwardly with the republicans’ own commitment to political equality.”¹⁷⁴ To this extent, they were not true to their own ideals.¹⁷⁵

In as much as the republicans’ exclusionary practices were inconsistent with their egalitarian rhetoric,¹⁷⁶ and with the later-enacted Equal Protection Clause, those portions of republican practice that contradict their higher ideals must be discarded in favor of more modern interpretations of those ideals.¹⁷⁷ Given the plurality of modern society and our commitment to respecting that plurality, represented by modern equal protection doctrine,¹⁷⁸ the task that the modern republicans have undertaken is one of reclaiming the notion of community, with its traditional implications of hierarchy and homogeneity, “for the modern context of equality of respect, liberation from ascriptive social roles, and indissoluble plurality of perspective.”¹⁷⁹

The Equal Protection Clause allows us to rediscover the deeper political commitments of classical republicanism, as opposed to the more superficial

173. *But see* WOOD, *RADICALISM*, *supra* note 167, at 258 (arguing that some anti-federalists recognized and appreciated diversity already present in eighteenth-century America).

174. Sunstein, *supra* note 69, at 1565.

175. *Cf.* Pitkin, *supra* note 93, at 346 (noting that *polis* citizen failed to see and count as persons slaves and women and thus “did not know himself or his community well”).

176. *See* Sunstein, *supra* note 69, at 1581 (noting that “the premises of republican thought furnish an aspiration that turns out to provide the basis for criticism of republican traditions”). *See also* Wilson C. McWilliams, *The Anti-Federalists, Representation, and Party*, 84 *Nw. U. L. REV.* 12, 26 (1989) (discussing anti-federalists’ adherence to “Christian teaching [which] insisted on a recognition of human equality, *at least in principle*”) (emphasis added).

177. *See* Sunstein, *supra* note 69, at 1563-64 (arguing that portions of republicanism without contemporary relevance should be dropped).

Professor Sunstein adds that “[t]here is nothing especially unusual in th[e] phenomena” of the idealistic premises of republican thought contradicting, and providing a position from which to criticize, the republicans’ actual practices. *Id.* at 1581. Another example might be the contradiction between the concrete intentions of the framers of the Fourteenth Amendment in favor of public school segregation and their deeper, and more abstract, commitment to racial equality. Judge Bork has argued that these two commitments coexisted in the minds of the framers, and that it was only in 1954 that the two were shown to be contradictory. Therefore, it was proper for the Supreme Court, in *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954), to have discarded the more specific commitment to segregation in favor of the deeper commitment to equality. *See supra* note 71 and accompanying text for a discussion of Robert Bork’s stance that by 1954, it was clear that segregation and equality could not co-exist.

178. *See, e.g.*, *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding classifications based on illegitimacy up to intermediate scrutiny); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding gender classifications up to intermediate scrutiny); *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (holding classifications based on alienage up to strict scrutiny); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (holding racial classifications up to strict scrutiny). *See also* *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 442, 450 (1985) (striking down classification based on mental retardation under rational basis test); *Steffan v. Aspin*, 8 F.3d 57, 63-70 (D.C. Cir. 1993) (declining to decide whether sexual orientation is suspect classification but striking down Defense Department regulations excluding homosexuals from military based on rational basis review under Fifth Amendment).

179. Michelman, *supra* note 95, at 1526.

attempts at manifesting those commitments made by the American anti-federalists. The mandate of Equal Protection according to modern republicanism is nothing less than the re-definition of community by including those who have been heretofore excluded. This re-definition actually "enhances everyone's political freedom."¹⁸⁰ This is because bringing different perspectives to bear on the deliberation of important social and political issues, and adding to the information available to decide those issues, can only enhance the legitimacy of the results of the jurisgenerative process.¹⁸¹ Perhaps more importantly, political equality enhances the validity, or the "correctness," of the decisions reached by that process.¹⁸² Because objective knowledge is unattainable by any single person thinking and acting individually, a more truthful and more "objective" result can be achieved only by a coming together of a multiplicity of differing perspectives.¹⁸³ Furthermore, only real political equality is consistent with a deliberative process that relies on persuasion; in a hierarchical system, persuasion is unnecessary because of the availability of rule by fiat and brute force.¹⁸⁴ For these reasons, the emphasis of classical republicanism on political equality must go hand-in-hand with a respect for cultural diversity.¹⁸⁵

Traditional republican thought has favored homogeneity because it has posited that people ought to put aside their pre-political commitments when deliberating public issues.¹⁸⁶ However, the modern republicans argue, experience has shown this not to be necessary.¹⁸⁷ In fact, basic disagreement can be a very productive and creative force, one that is necessary for deliberation to occur at times,¹⁸⁸ as long as the participants are willing to alter their perspectives temporarily without abandoning completely their pre-political commitments.¹⁸⁹ For example, a political community that is dominated by men

180. *Id.* at 1495.

181. See Pocock, *supra* note 93, at 359 (stating that equality of participation is imperative to make deliberation of issues "truly public, and not private masquerading as public"); S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 707 (1991) (noting that without political equality, republicans could not ask citizens to sacrifice individual desires for common good).

182. See Sunstein, *supra* note 69, at 1549 (noting that required deliberation leads to "uniquely correct outcomes" in some cases). See also Hoke, *supra* note 181, at 706 (arguing that lack of substantive political equality leads to distortion of deliberative process); Pitkin, *supra* note 93, at 348 (arguing that allowing "alienated" and "oppressed" to join discussion allows them to alter political landscape).

183. See Hoke, *supra* note 181, at 708 (discussing feminist epistemology's rejection of concept of objective knowledge).

184. See *id.* at 707 (noting that absence of discussion and persuasion in political realm implies obedience to hierarchy).

185. See *id.*

186. See Sunstein, *supra* note 69, at 1556 (noting that, according to classical republicanism, homogeneity makes it easier to deliberate about common good).

187. See *id.* at 1562 (asserting that plurality and disagreement foster creativity).

188. See *id.* at 1575 (noting that disagreement is often "indispensable" to political dialogue).

189. See Michelman, *supra* note 95, at 1527 (noting that participants can "come to 'hold the same commitments in a new way'"). Professor Michelman refers to this alteration in political perspective as an example of "political empathy." *Id.* at 1555.

and that is planning a particular course of action would benefit from the perspectives of women. Disagreement with the majority opinion would add further to the deliberative process by forcing those in the majority to come to terms with the arguments of the opposition. Those in the majority can temporarily “role-play” in the position of a political minority to more fully assess the costs and benefits to all citizens of the proposed plan of action. If the minority were excluded in the first instance, whether actually or constructively through the regular imposition of stigma, the minority opinion and minority interests might never make it into the calculus.

“Thus might a modern republican conception of political freedom make a virtue of plurality.”¹⁹⁰ And thus might the common principle distilled from the competing traditions of classical republicanism and modern egalitarianism stand out in bold relief: “Citizenship is *direct participation, as an equal*, in the determination of public affairs.”¹⁹¹ This principle is the springboard to an understanding of the incorporated Establishment Clause that reconciles anti-federalist doctrine with the egalitarian principles inherent in the Equal Protection Clause.

*B. Equal Community Participation and Religious Minorities—
Establishment and the States*

The principle of equal citizenship, implying equal participatory rights, is the modern republican reconciliation of classical republican and modern egalitarian principles. Assuming *arguendo* that the Establishment Clause was purely the result of the classical republican anti-federalists,¹⁹² and combining their principles with the egalitarian notions underlying modern Equal Protection doctrine, one ends up with an incorporated Establishment Clause that embodies a more specific application of the equal citizenship principle. According to this principle, any action by a state that stigmatizes members of the community based on their religious status or belief by endorsing or disapproving of religion should be held up to strict scrutiny.¹⁹³

As in the race context, blatant, coercive discrimination that prevents people from participation based on a religious classification is forbidden. However, as in the race context,¹⁹⁴ coercion is unnecessary to state a claim.¹⁹⁵ In other words, allowing only Christians to vote or to attend town

190. *Id.* at 1528; *see id.* at 1536 (noting that “[t]he argument recollects the authorities and recasts the tradition along the axes of self-formation and diversity rather than those of dominant social expectation and conformity”).

191. Michelman, *supra* note 63, at 27 (emphasis added).

192. *See supra* note 162.

193. *Cf.* Nuechterlein, *supra* note 126, at 1133 (arguing that all religious classifications should be strictly scrutinized).

194. *See supra* notes 119-22 and accompanying text for a discussion of harm caused by imposition of stigma.

195. *See* Brownstein, *supra* note 66, at 135 (noting that “literal coercion” not necessary to find constitutional violation). Those who argue that violations of the Establishment Clause are predicated on actual coercion, *see* *Lee v. Weisman*, 112 S. Ct. 2649, 2684 (1992) (Scalia, J., dissenting) (finding no cause for extending coercion concept beyond acts backed by threat of pen-

meetings would be sufficient, but not necessary, to violate the incorporated Establishment Clause. Action by a state that has the intended *effect* of excluding or hindering the participation of non-Christians from local political life, such as placing a sign that reads "Jesus is Lord" on all governmental buildings, is similarly prohibited. Just as state action that affects the "hearts and minds" of members of minority races is actionable under the Equal Protection Clause,¹⁹⁶ state action that stigmatizes members of minority religions is also forbidden by the incorporated Establishment Clause.

Additionally, the effects on a group's or individual's freedom to worship is irrelevant for purposes of the incorporated Establishment Clause, as opposed to the incorporated Free Exercise Clause, except to the extent that the hindrance on the freedom to worship imposes or implies a stigma.¹⁹⁷ The focus of the equal citizenship approach to state religious establishments is on religion as status, not religion as belief or practice. Thus, the incorporated Establishment Clause ensures not "the equal protection of the free exercise of religion,"¹⁹⁸ but freedom from discrimination and stigmatization based on religious status.

Accordingly, state governments *can* accommodate religion without endorsing or disapproving of it; that is, if it is done in a manner that has no stigmatizing effect on adherents or non-adherents¹⁹⁹ and that therefore has no adverse effects on their right to equal participation. For example, a state that exempts members of a Native American religion from drug laws so that they may smoke peyote²⁰⁰ would probably not be seen as endorsing that religion, unless perhaps the state legislature were controlled by its adherents.²⁰¹

alty), miss the point that endorsement may itself be seen as a type of coercion, Ward, *supra* note 119, at 1748-49, or, perhaps more precisely, that coercion and endorsement differ only in degree and not in kind. For example, in *County of Allegheny v. ACLU*, 492 U.S. 573, 661 (1989) (Kennedy, J., concurring in part and dissenting in part), even the dissent conceded that the display of a large Latin cross on a government building would violate the Establishment Clause, on the grounds that such a display would amount to coercion. Nuechterlein, *supra* note 126, at 1132 n.31.

196. See *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954) (holding that segregation creates feelings of inferiority which may irreversibly affect the hearts and minds of its victims).

197. Compare Brownstein, *supra* note 66, at 134 (arguing that equal protection of group's status "involves a much broader mandate than protecting the right to worship) with Paulsen, *supra* note 7, at 325 (stating that Establishment Clause provides for equal protection of free exercise of religion).

198. Paulsen, *supra* note 7, at 325.

199. See Brownstein, *supra* note 66, at 140-41 (stating that government may "accommodate religious autonomy issues in a way that is consistent with equal protection guarantees"); Leedes, *supra* note 17, at 513 (noting that citizenship declaration only comes into play if state action stigmatizes).

200. I have intentionally chosen an example of state action that is decidedly *not* mandated by the incorporated Free Exercise Clause. See *Employment Div. Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872, 878-82 (1990) (holding denial of unemployment benefits consistent with Free Exercise Clause where firing resulted from Native American's use of peyote for religious purposes).

201. Cf. *Board of Educ. v. Grumet*, 114 S. Ct. 2481, 2511-12 (1994) (Scalia, J., dissenting) (asserting that legislature's accommodation of religion, "particularly a minority sect" is com-

On the other hand, if the same state allowed a *majority* religion the privilege of not abiding by an otherwise generally applicable law, it is more likely (though certainly not inevitable) that this action would be perceived as endorsing the religion, thus stigmatizing non-adherents, and, in that event, the action should be strictly scrutinized.

It is debatable whether actions that appear to advance minority religions (or inhibit majority religions) should ever be treated as endorsing the minority religion. If one were to analogize to the race context, then all governmental action that appears to favor any religion, even a minority one, would be subject to the strictest scrutiny.²⁰² However, by focusing on whether a religious classification imposes a stigma instead of merely on whether such a classification has been made at all, the approach endorsed here is fundamentally at odds with current case law regarding affirmative action programs that classify according to race or ethnicity. It therefore would not be advisable simply to incorporate the "affirmative action" jurisprudence from the race context into the religion context.

On the other hand, any action that favors a minority religion has the potential for stigmatizing members of the non-religious minority. For example, a state might accommodate a minority religion by allowing its members to perform an activity which is mandated by the religion but which is otherwise forbidden by state law. Such an accommodation, however, could be seen by non-religionists who would like to participate in the activity as imposing a stigma on them, inasmuch as the state is favoring a religion-based versus a non-religion-based reason for the exemption. Seen in this way, the accommodation does not favor one religious minority over another but rather favors the religious majority (consisting of adherents of all religions) over the non-religious minority, which might stigmatize the non-religious. Importantly, any accommodation of a minority religious group can be seen in this way. Therefore, any such accommodation should be considered at least a candidate for strict scrutiny,²⁰³ depending, of course, on whether the accommodation could stigmatize any group.

Under the incorporated Establishment Clause, state and local governments could take action that appears to endorse or disapprove of religion only if there is a compelling reason for doing so and the action is narrowly tailored to effect the government interest.²⁰⁴ For example, just as prison officials may segregate prisoners by race in order to avert an imminent race

mendable) (emphasis added). But see *infra* notes 202-03 and accompanying text for a discussion of whether actions accommodating minority religions should ever be strictly scrutinized.

202. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-98 (1989) (plurality opinion) (holding race-conscious affirmative action program up to strict scrutiny).

203. Cf. Brownstein, *supra* note 66, at 143 (arguing that preferential treatment of minority religions, like affirmative action programs, should receive some form of heightened scrutiny, but not strict scrutiny).

204. Leedes, *supra* note 17, at 513 n.295. See also Feigenson, *supra* note 119, at 101-113 (advocating intermediate scrutiny for government endorsement of religion).

riot,²⁰⁵ so too could they segregate Muslim from Christian prisoners to prevent imminent religious warring, even if such an action can be seen as stigmatizing to the minority Muslims.²⁰⁶ However, as in the race context, such compelling interests will be few and far between.²⁰⁷

This approach resonates nicely (and not coincidentally) with the endorsement or disapproval test developed by Justice O'Connor,²⁰⁸ which has found expression in several Supreme Court opinions.²⁰⁹ According to this test, one looks at whether the challenged state action is intended to send a message to adherents that they are political insiders and to non-adherents that they are political outcasts (or vice versa), and whether the action has that effect.²¹⁰ By appealing not to a misreading of the history behind the Establishment Clause, but to principles of American constitutionalism that derive from more than one "constitutional moment," the principle of equal

205. See *Lee v. Washington*, 390 U.S. 333, 334 (1968) (Black, Harlan, and Stewart, JJ., concurring) (allowing authorities right to consider racial tensions in maintaining security and discipline in prisons).

206. Indeed, it may be that the justification for the strict scrutiny standard is that when there is a compelling government reason for a racial or religious classification, and the classification is necessary to effect the government's interest, the classification is by definition non-stigmatizing according to any reasonable view.

207. Professor Leedes lists five possible compelling interests to justify religious classifications by a state. He states:

[N]oncoercive, nonpreferential aid to religion . . . could be justified if it: (1) facilitates the free exercise of religion without hardship to others, (2) increases options for a parent subject to a compulsory education law in a school district where the public education provided does not meet the religious beliefs of a reasonable parent, (3) is an essential part of a program of equal access to government property, (4) is an accommodation deemed necessary to accord religious persons or entities the same treatment as others similarly situated, or (5) is a precaution necessary to avoid the appearance of hostility or callous indifference toward religion(s).

Leedes, *supra* note 17, at 517 (citations omitted).

I would classify these scenarios not as "compelling interests" but as situations in which the governmental action would not be seen as stigmatizing, or more precisely, the government action would be seen as less stigmatizing than contrary government action. For example, allowing religious groups to meet on public property might be perceived as an endorsement of religion by non-religious people, but it seems more reasonable to perceive *not* allowing the groups to meet as being hostile to religion. See *Board of Educ. v. Mergens*, 496 U.S. 226, 248 (1990) (plurality opinion) (holding that if state refused to allow religious groups to use public facilities, it would demonstrate hostility toward religion); Douglas Laycock, *Formal, Substantive, and Desegregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1004-08 (arguing that goal of substantive neutrality is not to *eliminate* encouragement or discouragement of religion but to choose the option that *minimizes* encouragement or discouragement).

I would also not differentiate between preferential and nonpreferential aid. See *supra* part II.C.3. for a discussion of the extension of the equal citizenship principle to the non-religious.

208. Cf. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 592-95 (1986) (noting that Justice O'Connor's endorsement or disapproval test accords with feminine jurisprudence in general, in stressing communitarian concerns).

209. See *supra* part I.A.3 for a discussion of the endorsement or disapproval standard.

210. See *supra* text accompanying notes 44-46.

citizenship grounds the Court's incipient endorsement or disapproval test on a more settled constitutional foundation.²¹¹

The determination of whether any particular action by a state is an endorsement or disapproval is necessarily based upon people's subjective viewpoints.²¹² Using the approach that Justice O'Connor has advocated, a two-step inquiry is necessary. First, one must look to whether the state's actual purpose is to treat some members of the relevant community as outsiders and others as insiders.²¹³ Second, if it is not, one must ask whether the state's action nonetheless has that effect.²¹⁴ While the "purpose" prong is amenable to more objectively obtainable evidence, such as the minutes from meetings of local governing bodies,²¹⁵ the majority of cases will probably hinge on the effect prong, as they have under the *Lemon* test.²¹⁶ This means that, in most cases, the question of whether a state measure amounts to a constitutional violation will depend upon how the action is perceived by the community.²¹⁷ At first blush, this appears to make for unusual legal reasoning: An action violates the Constitution if people *think* it violates the Constitution. However, such an approach is not only inevitable, but is already used in such diverse areas of constitutional law as: obscenity (to determine whether material is "patently offensive" or "lacks serious literary, artistic, political, or scientific value");²¹⁸ fighting words (to determine whether words constitute a "direct personal insult");²¹⁹ the Fourth Amendment (to determine whether people have a "reasonable expectation of privacy");²²⁰ and the Eighth Amendment (to determine whether a punishment contravenes evolving stan-

211. See Brownstein, *supra* note 66, at 137 (criticizing Justice O'Connor for failing to identify origins of test).

212. Feigenson, *supra* note 119, at 98-99.

213. *Lynch v. Donnelly*, 465 U.S. 668, 689-90 (1984) (O'Connor, J., concurring).

214. *Id.*

215. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217, 2227-31 (1993) (using wording of city ordinance outlawing "animal sacrifice" and minutes of city council meetings to conclude that ordinance was aimed primarily at stopping practices of minority religious group).

216. See Abner S. Greene, *Kiryas Joel and Two Mistakes About Equality*, 96 COLUM. L. REV. 1, 71 (1996) (noting that Court has invalidated state measures based on purpose prong of *Lemon* test only four times); *supra* notes 38-41 and accompanying text for a discussion of the *Lemon* test.

217. One implication of the emphasis on perceptions of the members of the community is that the relevant perspective will belong to one who is familiar with the "history and context of the community and forum in which the religious display appears," *Capital Square Review v. Pinette*, 115 S. Ct. 2440, 2455 (1995) (O'Connor, J., concurring in part and concurring in the judgment), and not "passerby, including . . . travelling salesmen and tourists," *id.* at 2470 n.14 (Stevens, J., dissenting).

218. *Miller v. California*, 413 U.S. 15, 24 (1973).

219. *Cohen v. California*, 403 U.S. 15, 20 (1971). See also Michael J. Mannheimer, Note, *The Fighting Words Doctrine*, 93 COLUM. L. REV. 1527, 1551 (1993) (stating that "direct personal insult" is one element necessary to render a speech act unprotected under fighting words doctrine).

220. *Katz v. United States*, 389 U.S. 347, 361-62 (1967) (Harlan, J., concurring).

dards of decency).²²¹ Ultimately, questions such as these are unavoidably fact-intensive²²² and are answerable only with reference to "the background knowledge of educated [people] who live in the world."²²³ In any event, appellate courts exercise de novo review of such issues, and therefore have final say over what constitutes endorsement or disapproval as a matter of law.²²⁴ Moreover, as more cases arise, a body of law will develop that will more definitively demarcate the line between appropriate and inappropriate state action toward religion.²²⁵

The Supreme Court's two latest Establishment Clause cases, decided on the final day of the 1994-95 Term, demonstrate that the Court has relied upon public perceptions of state governmental action when reaching its decisions. One of the cases, *Capitol Square Review v. Pinette*,²²⁶ involved a question of state endorsement of religious speech, while the other, *Rosenberger v. Rector and Visitors of the University of Virginia*,²²⁷ involved state aid to religion in a more tangible form. These decisions demonstrate that both types of

221. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

222. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2525-26 (1995) (O'Connor, J., concurring) (stating that resolution of Establishment Clause cases requires "sifting through the details" and judging each case individually); *Capital Square Review v. Pinette*, 115 S. Ct. 2440, 2454 (1995) (O'Connor, J., concurring in part and concurring in the judgment) (noting that courts must "examine the history and administration of a particular practice to determine whether it operates as . . . an endorsement").

223. Black, *supra* note 116, at 426. Professor Greenawalt has cogently observed:

The[] cases illustrate forcefully the relevance for establishment purposes of public perceptions. If everyone has come to regard Santa Claus as a nonreligious symbol, the government's employment of a public Santa Claus or its depictions of Santa Claus in holiday decorations would not be religious. On the other hand, if everyone thought seriously of Santa Claus as a Christian saint *and the government's use of the symbol were taken to promote that view*, the government's acts would support religion [S]ociety's view of the symbol per se matters less than its view of what the government's action signifies about the symbol.

Greenawalt, *supra* note 136, at 794 (emphasis added).

224. See Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 239-47 (1985) (noting that appellate courts maintain de novo review of findings of constitutional fact). See also *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring) (noting that judgment of whether government activity endorses religion is "in large part answered a legal question on the basis of judicial interpretation of social facts").

225. See Monaghan, *supra* note 224, at 236-37 (stating that development of legal standards typically involves periods of law application by fact-finders, punctuated by episodes of "norm elaboration" by judges). For some valid public policy concerns regarding the uncertainty and inconsistency that inevitably would arise if constitutional norms were tied to public perceptions, see *Pinette*, 115 S. Ct. at 2450 n.3 (plurality opinion). Aside from the points mentioned in the text, it should be noted that uncertainty and inconsistency would be major problems only in marginal cases. Moreover, uncertainty on the part of local governments may be a positive influence in as much as it forces them to take a closer look at the interests of religious minorities, and may prevent them from taking what would amount to unconstitutional actions in close cases. Finally, it is important to remember that federal courts tend to give great deference to the judgment of local governments.

226. 115 S. Ct. 2440 (1995).

227. 115 S. Ct. 2510 (1995).

cases hinge on public perceptions of state action toward religion and the possibility of stigmatic harm that may result.

In *Pinette*, the State of Ohio, citing Establishment Clause concerns, refused to allow a local chapter of the Ku Klux Klan to erect an unattended cross on state-owned property adjacent to the statehouse in Columbus.²²⁸ The District Court held that the Klan's expression was protected by the Free Speech Clause and would not violate the Establishment Clause, and ordered the State to allow the display.²²⁹ Both the Sixth Circuit²³⁰ and the Supreme Court²³¹ affirmed. Seven members of the Court held that such a display would not violate the Establishment Clause.²³² However, the Court split four-to-three and produced no majority opinion on the rationale.

The plurality opinion, authored by Justice Scalia and joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, found that the case did not involve governmental speech at all, but rather was a case involving tangible state aid to religion.²³³ In the plurality's view, the case was simply about the government providing a forum for speakers.²³⁴ It termed the test that the state advocated "a 'transferred endorsement' test."²³⁵ The test focused on whether religious speech, although emanating from private speakers, can be imputed to the state so as to signify state endorsement of religion and thereby violate the incorporated Establishment Clause.²³⁶ It declined to adopt that approach. Instead, relying heavily on the open nature of the forum and the state's neutral treatment of speech in that forum,²³⁷ the plurality advocated a bright-line test: "Religious expression cannot violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."²³⁸

The three concurring Justices,²³⁹ on the other hand, applied the endorsement or disapproval test and found that the display did not convey a message

228. *Pinette*, 115 S. Ct. at 2444-45.

229. *Pinette v. Capitol Square Review*, 844 F. Supp. 1182, 1187-88 (S.D. Ohio 1993), *aff'd*, 30 F.3d 675 (6th Cir. 1994), *aff'd*, 115 S. Ct. 2440 (1995).

230. *See Pinette v. Capitol Square Review*, 30 F.3d 675 (6th Cir. 1994), *aff'd*, 115 S. Ct. 2440 (1995).

231. *See* 115 S. Ct. 2440 (1995).

232. *Id.* at 2447-50 (plurality opinion); *id.* at 2456-57 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2461-62 (Souter, J., concurring in part and concurring in the judgment).

233. *Id.* at 2448 (plurality opinion).

234. *Id.* at 2447 (plurality opinion).

235. *Id.* at 2448 (plurality opinion).

236. *Id.* (plurality opinion)

237. *Id.* at 2447 (plurality opinion).

238. *Id.* at 2450 (plurality opinion).

239. Justice O'Connor and Justice Souter each wrote an opinion concurring in part and concurring in the judgment. Each joined in the opinion of the other, and Justice Breyer joined in both.

of governmental endorsement of religion.²⁴⁰ The concurrences noted that, while there is a difference between private speech and government speech,²⁴¹ that difference is only one factor among several that must be considered when applying the endorsement or disapproval test. Other factors include those that the plurality itself relied upon in fashioning its bright-line rule—that the expression was made in a public forum²⁴² and that the religious group was treated the same way as any other group.²⁴³ The concurring Justices also noted that there was an explicit disclaimer of government endorsement attached to the religious symbol.²⁴⁴

As Justice O'Connor recognized in her concurrence,²⁴⁵ the plurality and the concurring Justices agreed to a greater extent than was apparent. All looked at the context of the religious speech at issue in determining whether a message of religious endorsement could be imputed to the state government. Specifically, all seven Justices attached great weight to the fact that the speech occurred in a public forum, where all manner of expression was free to find acceptance among the "consumers" of ideas. This was not a case in which religious speech had been privileged by gaining admission to a forum that was closed to other forms of expression.²⁴⁶ Similarly, all seven Justices emphasized that it was not alleged that religious speech was treated differently from any other form of speech through governmental manipulation of that public forum.

Thus, the plurality and the concurrences arrived at the same conclusion using two supposedly different paths. However, what the concurrences relied on explicitly was largely implicit in the plurality opinion as well.²⁴⁷ The touchstone of the constitutionality of the cross display, for both the plurality and the concurrences, was the perceptions of the members of the community. All relevant factors—namely, that the forum was public and equally avail-

240. *Pinette*, 115 S. Ct. at 2451 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2457 (Souter, J., concurring in part and concurring in the judgment).

241. *See id.* at 2452 (O'Connor, J., concurring in part and concurring in the judgment).

242. *Id.* at 2447 (plurality opinion); *id.* at 2453 (O'Connor, J., concurring in part and concurring in the judgment).

243. *Id.* at 2447 (plurality opinion); *id.* at 2453 (O'Connor, J., concurring in part and concurring in the judgment).

244. *Id.* at 2453 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2457, 2461-62 (Souter, J., concurring in part and concurring in the judgment). *Cf. id.* at 2450 (plurality opinion) (noting that State may, but need not, require such disclaimer). *But see id.* at 2475 (Ginsburg, J., dissenting) (arguing that since District Court did not *require* disclaimer, and because disclaimer used was "unsturdy," display violated Establishment Clause).

245. *See id.* at 2453 (O'Connor, J., concurring in part and concurring in the judgment) (considering many of same factors as plurality).

246. *Cf. Allegheny County v. ACLU*, 492 U.S. 573, 599-600 (1989) (holding that grand staircase of county courthouse not public forum).

247. *See Pinette*, 115 S. Ct. at 2453 (O'Connor, J., concurring in part and concurring in the judgment) (stating that "as I read the plurality opinion, a case is not governed by its proposed per se rule where . . . circumstances are otherwise—that is, where preferential placement of a religious symbol in a public space or governmental manipulation of the forum is involved"); *id.* at 2448-49 (plurality opinion) (validating this reading).

able, and (at least for the concurring Justices) that a disclaimer was attached to the display—pointed to the conclusion that reasonable observers in the community would view the display as private speech rather than government endorsement.²⁴⁸ Thus, all seven Justices in the majority held, effectively, that the display was acceptable because it would not lead to the constructive exclusion of non-Christians from the community.²⁴⁹

While the relevant factors *Pinette* indicated that the community would not perceive the government's action as an endorsement of religion, at least as far as seven Justices were concerned, the Court in *Rosenberger v. Rector and Visitors of the University of Virginia*²⁵⁰ was split five-to-four because the two relevant factors in that case cut in opposite directions. This produced a direct conflict between two "bedrock principles" of Establishment Clause jurisprudence: the importance of neutrality and the prohibition on direct funding of religious groups.²⁵¹ The majority stressed the former while the dissent emphasized the latter. Because *Rosenberger* involved tangible assistance to religion rather than purely symbolic aid, the endorsement or disapproval approach was merely a hidden undercurrent. However, both the majority and the dissent relied on the impact that the government action in question had on the perceptions of the members of the community and the consequent danger of exclusion of religious minorities.

In *Rosenberger*, the University of Virginia funded certain student groups by having those groups submit bills from their creditors which the University would then pay.²⁵² However, the "religious activities" of student groups could not be reimbursed.²⁵³ As in *Pinette*, the State justified its discriminatory policy based on the compelling state interest of complying with the Establishment Clause.²⁵⁴ The Supreme Court disagreed, holding that defraying the costs of religious activities by student groups would not violate the Establishment Clause.²⁵⁵

248. *But see id.* at 2467 (Stevens, J., dissenting) (stating that state's allowance of "uncensored expressive activities in front of the capitol building" does not eradicate inference of endorsement flowing from unattended, freestanding cross); *id.* at 2475 (Ginsburg, J., dissenting) (asserting that because District Court did not require disclaimer and because disclaimer used "did not identify the Klan as sponsor; . . . failed to state unequivocally that Ohio did not endorse the display's message; and . . . was not shown to be legible from a distance[,] [t]he relief ordered by the District Court . . . violated the Establishment Clause").

249. One interesting question is whether the relevant "community" is the City of Columbus or, because the public square abutted the Statehouse, the entire state of Ohio.

250. 115 S. Ct. 2510 (1995).

251. *Id.* at 2528 (O'Connor, J., concurring).

252. *Id.* at 2515.

253. *Id.* at 2514.

254. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 18 F.3d 269, 281 (4th Cir. 1994), *rev'd*, 115 S. Ct. 2510 (1995). The University abandoned this argument in the Supreme Court, *Rosenberger*, 115 S. Ct. at 2520-21, but it was this point upon which the dissent relied. *See id.* at 2533-47 (Souter, J., dissenting) (stating that university's refusal to fund religious activities "is compelled by the Establishment Clause").

255. *Rosenberger*, 115 S. Ct. at 2524.

In reaching that conclusion, the Court relied upon the neutrality of a program that would fund *all* types of activities, religious or otherwise.²⁵⁶ Despite the fact that student groups were funded from a general student activities fund, to which contributions were mandatory, the Court distinguished these contributions from an exaction for the "direct support of a church" based on the fact that the funds went to support a wide diversity of student speech and inquiry.²⁵⁷ Thus, any benefit to religion was "incidental."²⁵⁸

As further support for the notion that the University's program was neutral, the Court stated:

In this case, "the government has not willfully fostered or encouraged" any mistaken impression that the student newspapers speak for the University. The University has taken pains to disassociate itself from the private speech involved in this case. . . . [T]here is no real likelihood that the speech in question is being either endorsed or coerced by the State.²⁵⁹

Finally, the Court noted that no funds would flow *directly* to the religious student groups,²⁶⁰ and therefore the case was similar to those in which a state had merely provided access to its facilities to all groups on a neutral basis.²⁶¹ Since the Court had already upheld the provision of access to facilities by religious groups in those cases, it was all but bound to uphold a program whereby the University pays a third party to provide facilities or services that the University could simply provide by itself.²⁶² As the Court stated, "[t]here is no difference in logic or principle, and no difference of constitutional significance, between a school using its funds to operate a facility to which students have access, and a school paying a third-party contractor to operate the facility on its behalf."²⁶³

256. *See id.* at 2521 (stating that "the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse").

257. *Id.* at 2522.

258. *Id.* at 2524.

259. *Id.* at 2523 (citations omitted).

260. *Id.* at 2523-24. *See also id.* at 2527 (O'Connor, J., concurring) (noting indirect distribution of funds which go directly to third party vendor without first passing through student organization coffers).

261. *See, e.g.,* *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993) (holding that permitting religious organization to use school district property does not violate Establishment Clause when large variety of other organizations also have equal access); *Board of Educ. v. Mergens*, 496 U.S. 226, 252 (1990) (holding that permitting student religious club to meet on school property after school like any other student group, does not violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding that Establishment Clause does not bar policy of equal access in which facilities open to all kinds of organizations including religious ones).

262. *Rosenberger*, 115 S. Ct. at 2524.

263. *Id.* at 2524. Justice O'Connor, in her concurrence, relied on the additional ground that each student group contained in its publications written notice disclaiming any connection between the views of the University and those of the student group. *Id.* at 2526-27 (O'Connor, J., concurring). *See also* *Capitol Square Review v. Pinette*, 115 S. Ct. 2440, 2453 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 2457 (Souter, J., concurring in part and

The dissent, on the other hand, focused on the direct nature of the aid that would go from the University to the religious group.²⁶⁴ Justice Souter explained that the neutrality principle, upon which the Court heavily relied, was but a “marginal criterion,” which came into play only when the government provided aid to religion that was incidental rather than direct.²⁶⁵ In the dissent’s view, “the core constitutional principle [is] that direct aid to religion is impermissible.”²⁶⁶ Thus, even a perfectly neutral program could not be saved if it involved direct government aid to religion.

In disputing that the aid in this case was indirect, the dissent noted that the Court’s reasoning would allow states to circumvent the Establishment Clause by simply paying “all the bills of a religious institution.”²⁶⁷ Additionally, Justice Souter attempted to distinguish *Lamb’s Chapel v. Center Moriches Union Free School District*,²⁶⁸ *Board of Education v. Mergens*,²⁶⁹ and *Widmar v. Vincent*²⁷⁰ by arguing that these cases did not simply involve provision of facilities on a neutral basis, but that the particular facilities in question constituted an open forum that the state had created, akin to a street corner or park.²⁷¹ Once the state goes beyond this “baseline” provision of facilities and provides such benefits as printing services, evenhandedness will not save such a program from invalidation under the Establishment Clause.

Thus, the Court and the dissent focused their attention on two aspects of the aid in question: the neutrality of the program and the directness or indirectness of the aid. However, these aspects are relevant only to the extent that they affect the underlying consideration: whether the University program would be seen as an endorsement of religion and would therefore stigmatize the non-religious.

The Court relied on three grounds for its conclusion that the University program did not violate the Establishment Clause: that the student fund supported a wide variety of groups; that the support was indirect rather than direct; and that the University support would not be interpreted as endorsement.²⁷² What the Court failed to realize, however, was that it was really holding that the University support would not be seen as an endorsement *because* of the evenhanded nature of the benefits. Justice O’Connor implicitly brought this out in her concurrence when she stated: “The widely divergent viewpoints of the[] many purveyors of opinion, all supported on an

concurring in the judgment) (finding possibility of affixing adequate disclaimer of any government endorsement as reason sufficient to pass muster under Establishment Clause).

264. *Rosenberger*, 115 S. Ct. at 2538-39 (Souter, J., dissenting).

265. *Id.* at 2540-44 (Souter, J., dissenting).

266. *Id.* at 2544 (Souter, J., dissenting).

267. *Id.* at 2545 (Souter, J., dissenting).

268. 113 S. Ct. 2141 (1993).

269. 496 U.S. 226 (1990).

270. 454 U.S. 263 (1981).

271. *Rosenberger*, 115 S. Ct. at 2545-46 (Souter, J., dissenting).

272. *See supra* notes 256-63 and accompanying text for a discussion of the Court’s reasoning.

equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University."²⁷³

Likewise, the directness or indirectness of the aid is relevant only to the question of what the community would perceive the University as doing in implementing its program. The Court was correct in noting that paying a third party contractor for the provision of printing services was the economic equivalent to providing those services itself.²⁷⁴ On the other hand, the dissent was equally accurate when it noted that paying for the religious group's printing costs was also the economic equivalent of making a direct subsidy to the group.²⁷⁵ What both sides failed to take account of is that the proper issue when discussing the provision of facilities by the state versus expenditures for the provision of facilities by third parties versus direct monetary aid by the state is not whether the three are *economically* equivalent, but whether they are *symbolically* equivalent as well. Both sides failed to see that, although all three options are functionally equivalent in an economic sense, they do not all strike people the same way.²⁷⁶

Similarly, what was really driving the dissent's arguments concerning the public forum nature of the facilities in previous cases, as distinguished from the printing services made available here, was a presumption about the level of government services that the community is ready to accept as the "baseline." Since the provision of facilities and services from the government ranges from police protection to direct financial subsidies, and since there is no other principled basis by which to choose the baseline, that baseline can be determined only by reference to the perceptions and expectations of the community. Thus, even in a case involving tangible state assistance to religion, the analysis hinges on whether such assistance is reasonably perceived

273. *Id.* at 2527 (O'Connor, J., concurring).

274. *See id.* at 2524.

275. *See id.* at 2545 (Souter, J., dissenting) (finding that distinguishing between direct payment to student organization so it can pay printing bill, and simply paying the printing bill itself is only formalistic). *See also id.* at 2531-32 & n.5 (Thomas, J., concurring) (stating that tax exemption is typically "economically and functionally indistinguishable from direct monetary subsidy").

276. Several members of the Court have stated that the relevant perspective for purposes of determining whether symbolic governmental speech violates the Establishment Clause is that of the "reasonable observer." *See Capitol Square Review v. Pinette*, 115 S. Ct. 2440, 2452 (1995) (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment) (stating that endorsement test focuses on perception of reasonable, informed observer); *id.* at 2458 (Souter, J., joined by O'Connor and Breyer, JJ., concurring in part and concurring in the judgment) (discussing circumstances under which intelligent observer would reasonably perceive government endorsement of private religious expression in public forum); *id.* at 2466 (Stevens, J., dissenting) (finding "reasonable observer" to be best judge of whether state is "appearing to take a position" when religious symbols are involved). As the foregoing discussion makes clear, however, the *reasonable* observer need not be completely *rational*, insofar as he or she may perceive differences among situations that are functionally equivalent in an economic sense.

as an endorsement of religion, and thus acts as a stigmatizing and exclusionary influence on the non-religious.

C. *Establishment and the Federal Government*

Although the Supreme Court has never accepted the idea that a different standard should apply to state, as opposed to federal, action vis-a-vis the protections of the Bill of Rights,²⁷⁷ the notion is hardly a new one. No fewer than three Justices in this century have advocated, or at least suggested, the idea with respect to the free speech provisions of the First and Fourteenth Amendments. In the very first case to decide that the Free Speech Clause of the First Amendment had been incorporated into the Fourteenth Amendment, Justice Holmes stated:

The general principle of free speech . . . must be taken to be included in the Fourteenth Amendment, in view of the scope that has been given to the word "liberty" as there used, although perhaps it may be accepted with a somewhat larger latitude of interpretation than is allowed to Congress by the sweeping language that governs or ought to govern the laws of the United States.²⁷⁸

Several years later, Justice Jackson expressed a similar sentiment, opining in dissent *Beauharnais v. Illinois*²⁷⁹ that "Fourteenth Amendment 'liberty' in its context of state powers and functions has meant and should mean something quite different from 'freedom' in its context of federal powers and functions."²⁸⁰ He went on to explain at length why a consideration of the different functions of state and federal government might lead to different constraints being placed on their respective actions by the Constitution:

The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right of tranquility. Neither of

277. Indeed, the Court has recently reaffirmed the notion that the Equal Protection Clause of the Fourteenth Amendment, applicable only to the states, is coextensive with the equal protection component of the Due Process Clause of the Fifth Amendment, applicable only to the federal government. See *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097, 2106-08 (1995) (discussing cases which treat Fourteenth and Fifth Amendment equal protection obligations as indistinguishable). See also *infra* note 303 for a criticism of this aspect of *Adarand*. The Court has indicated that a dualist standard of review exists in one area: the treatment of aliens by states on the one hand and the federal government on the other. Compare *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) (applying strict scrutiny to state denial of welfare benefits to aliens) with *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100-01 (1976) (holding that "overriding national interests" justify citizenship requirement in federal service despite fact that same requirement would violate Constitution if promulgated by state). For a further discussion of this aspect of *Hampton*, see *infra* note 303.

278. *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting). See Poppel, *supra* note 80, at 276 (discussing Justice Holmes' views).

279. 343 U.S. 250, 266 (1952) (upholding constitutionality of Illinois group defamation statute).

280. *Id.* at 288 (Jackson, J., dissenting).

these are objects of federal cognizance except when necessary to the accomplishment of some delegated power, such as protection of interstate commerce. When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting state or press can and should be weighed against and reconciled with these conflicting social interests.²⁸¹

The most outspoken advocate for a dualist standard with respect to free speech was the second Justice Harlan. In the area of the regulation of obscenity,²⁸² he felt that differing state and federal functions made it appropriate to apply a more lenient First Amendment standard to the states. Because the regulation of sexual morality is uniquely a state concern, Justice Harlan would have allowed greater freedom on the part of states to prohibit the dissemination of obscene materials than he would have allowed to the federal government, whose interest in regulating morality is more attenuated. Thus, he dissented in *Roth v. United States*²⁸³ because the federal regulation of obscenity was being exercised merely incidentally to Congress' postal power. This incidental concern with morality, tenuously attached to a legitimate, enumerated power, was not strong enough to overcome the strictures of the First Amendment.²⁸⁴ However, he concurred in upholding a state conviction for obscenity in the companion case of *Alberts v. California*,²⁸⁵ citing the states' direct concern for maintaining morality as important enough to withstand the vague limitations of the Fourteenth Amendment.²⁸⁶

With regard to the freedoms of speech and press, it is debatable whether a different standard should apply to the states than to the federal government. The concern in free speech and press cases has shifted from the protection of locally popular critics of the central government, which was the focus of the anti-federalists' First Amendment, to include the protection of those speakers who are unpopular on the local level, which is a concern more in line with the minority-protective approach of the Fourteenth Amend-

281. *Id.* at 294-95 (Jackson, J., dissenting). See Poppel, *supra* note 80, at 277 (discussing Justice Jackson's views).

282. In other areas touching on "First Amendment" freedoms, Justice Harlan apparently advocated a monolithic approach. See Alfred Hill, *The Bill of Rights and the Supervisory Power*, 69 COLUM. L. REV. 181, 190 (1969) (noting that Justice Harlan would allow states more latitude in obscenity cases but not in political arena). See also *Cohen v. California*, 403 U.S. 15, 20-25 (1971) (Harlan, J.) (applying strict standard to state suppression of offensive yet purely political speech).

283. 354 U.S. 476, 492 (1957) (upholding conviction under federal obscenity statute).

284. See *id.* at 504 (Harlan, J., dissenting). See also Poppel, *supra* note 81, at 277-98 (discussing Justice Harlan's views).

285. 354 U.S. 476 (1957).

286. See *id.* at 501 (Harlan, J., concurring) (stating that inquiry is whether state action "so subverts the fundamental liberties implicit in the Due Process Clause" that state power is irrational). See also *A Book Named "John Cleland's Memoir of a Woman of Pleasure" v. Massachusetts*, 383 U.S. 413, 456-60 (1966) (Harlan, J., dissenting) (advocating more deferential standard in judging state obscenity laws).

ment.²⁸⁷ However, the general concern is identical: protecting society's "outsiders,"²⁸⁸ those whose views are met with disdain by society, whether on a local or national scale. Whether the censoring body is the central government or a local community, the freedoms of speech and press "set an outer limit on governmental measures of a repressive character."²⁸⁹ Arguably, therefore, the differing duties and functions of the states and the federal government notwithstanding, the concern for protecting unpopular viewpoints, especially those critical of government, necessitates an identical interpretation of free speech and press for purposes of both the First *and* the Fourteenth Amendments.

However, one could also argue that, while the Fourteenth Amendment sharply curtails the states' power to interfere with speech, the First Amendment emphatically denies any such power whatsoever to the federal government.²⁹⁰ The states' police power to limit dissent concededly exists, but it is sharply limited by the Fourteenth Amendment's protection of outsiders and the Constitution's general theme of fostering republican government constituted of "We the People." In contrast, the federal government has no police power to censor or limit dissent and thus the First Amendment may be read in an even more absolute fashion than the Fourteenth.²⁹¹ The First Amendment, as the anti-incorporationists have pointed out,²⁹² operates with the Tenth Amendment as a more specific prohibition on federal power.²⁹³ Thus, while states may, within limits, enact and enforce libel laws,²⁹⁴ because protecting "personal reputation [and] local tranquility"²⁹⁵ is a valid state func-

287. See Amar, *supra* note 15, at 1277-78 (discussing impact of incorporation as catalyst for subtle redefinition of freedom of speech, press and assembly). John Peter Zenger—a relatively popular publisher—and the defendants convicted under the Alien and Sedition Acts are examples of the former type of speaker, while flag burners and cross burners are examples of the latter type. *Id.*; see also Amar, *supra* note 9, at 28 (noting that First Amendment was designed originally "to safeguard the rights of popular majorities (such as the Republicans of the late 1790's)").

288. See Amar, *supra* note 15, at 1277-78.

289. Hill, *supra* note 282, at 190.

290. See WILLIAM W. VAN ALSTYNE, INTERPRETATIONS OF THE FIRST AMENDMENT 45 (1984) (stating that different standards might tightly control Congress while leaving states some more (but not too much more) flexibility).

291. See Amar, *supra* note 15, at 1274 (noting that First Amendment absolutism is rooted in lack of Article I, Section 8 power to censor).

292. See *supra* notes 57-61 and accompanying text for a discussion of the arguments made by anti-incorporationists.

293. See VAN ALSTYNE, *supra* note 290, at 44-45 (asserting that First Amendment may operate with Tenth Amendment to restrict scope of Congress's enumerated powers when Tenth Amendment alone would not do so).

294. See, e.g., *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 758-61 (1985) (plurality opinion) (holding presumed and punitive damages constitutional in libel suit based on speech not of public concern); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347-48 (1974) (holding that private plaintiff must show at least negligence in libel suit based on speech of public concern); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (holding that public figure plaintiff must prove actual malice to recover for libel).

295. *Beauharnais v. Illinois*, 343 U.S. 250, 295 (1952) (Jackson, J., dissenting).

tions, the federal government utterly lacks that power, even with regard to speech that is not of "public concern." Even if Congress were to base its authority to enact a federal libel law on one or more of its enumerated powers, such as the commerce power or the postal power, these powers should be read more narrowly than usual in light of the First Amendment's express limitations.²⁹⁶

Such, perhaps, is also the case when it comes to the Establishment Clause. While the equal citizenship approach to the incorporated Establishment Clause limits the use of religious classifications by the *state*,²⁹⁷ the Establishment Clause of the First Amendment itself, as it has since 1791, absolutely denies the *federal* government any power whatsoever to legislate with regard to religion. If, as the anti-incorporationists have argued, the original purpose of the Establishment Clause was to leave matters of religion wholly up to the states,²⁹⁸ there is no reason to conclude that that purpose has changed, even given the fact that the states themselves are restricted by the Fourteenth Amendment in acting with regard to matters of religion. In other words, the same republican values that force local communities to open themselves up to widespread participation still deny the large central government the power to legislate regarding certain issues, religion being one of them.

Appropriately enough, a dualistic Establishment Clause standard was suggested by Justice Harlan. He wrote: "It may . . . be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement—on a neutral basis—than the Federal Government."²⁹⁹ To paraphrase Justice Harlan's differentiation between proper state and federal action in the field of religion, but interpreting "neutrality" in terms of the equal citizenship principle: The states, while bound to observe strict neutrality with regard to who is permitted to be a participating member of the community, based on religious status, should be free to experiment with involvement in religious matters; the Federal Government, however, should enjoy no such freedom.³⁰⁰

296. See William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 139-40 (1984) (asserting that there personal liberty guaranteed by Bill of Rights is at stake, Congress's "implied powers" should be construed narrowly). See also *Roth v. United States*, 354 U.S. 476, 505 (1957) (Harlan, J. dissenting) (holding postal power too attenuated to support federal obscenity statute in light of language of First Amendment).

297. See *supra* part III.B. for a discussion of the equal citizenship approach to state religious establishments.

298. See *supra* part I.B.1 for a discussion of the anti-incorporationists' arguments. This Article assumes, without deciding, that the anti-incorporationist's historical arguments are accurate. See *supra* note 162.

299. *Walz v. Tax Comm'n*, 397 U.S. 664, 699 (1970) (Harlan, J., concurring). See Poppel, *supra* note 80, at 278.

300. At least to some extent, Congress appears to agree with this notion, given the number of federal statutes that specifically exclude sectarian activity from the diverse array of spending programs. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2544 n.9 (1995) (Souter, J., dissenting) (citing statutes). A different "two-track" model for the Establishment Clause is advocated by Poppel, *supra* note 80, at 286-98.

An apparent problem arises when one considers that the Federal Government is bound by equal protection principles as well by virtue of the Due Process Clause of the Fifth Amendment.³⁰¹ Given that government inaction may be as stigmatizing as government action, a failure of the federal government to fund a religious project on the same basis as similarly-situated non-religious projects may itself be perceived as hostile to religion and therefore stigmatizing to religionists. Thus, arguably, by adhering to the strict mandate of the Establishment Clause, the federal government would violate the Fifth Amendment's equal protection component.

However, there are a number of responses to this argument. First, when government action appears to stigmatize, it will almost always be because the action benefits a majority religion, or religion in general, not because it favors non-religion over religion.³⁰² Second, in keeping with the general tenor of this Section, there is no reason to interpret identically the Fifth Amendment's equal protection component and the Equal Protection Clause of the Fourteenth Amendment.³⁰³ Given that the Fifth Amendment is a limit on federal power, it is quite reasonable to believe that it is concerned far less with avoiding the imposition of stigma and promoting community participation than is the Fourteenth Amendment's Equal Protection Clause. Third, since there is, according to the anti-incorporationist interpretation of the Establishment Clause, absolutely no federal power over religion, it ought not be construed as stigmatizing as a matter of law when the federal government fails to fund a religious project on the same basis as similar non-religious projects. It is merely declining to act in a sphere where it has no power in the first place.

301. See *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954) (holding segregated schools in District of Columbia unconstitutional under Fifth Amendment).

302. See *supra* note 203 and accompanying text.

303. *But see* *Adarand Constructors Inc. v. Peña*, 115 S. Ct. 2097, 2106-08 (1995) (concluding from review of case law that the two standards are identical). In reaching this conclusion, the *Adarand* Court relied on cases that either merely assumed that the standards were identical without expressly saying so, *see, e.g.*, *Frontiero v. Richardson*, 411 U.S. 677, 682-84 (1973) (plurality opinion) (Fifth Amendment case citing Fourteenth Amendment cases); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (Fourteenth Amendment case citing Fifth Amendment cases); *McLaughlin v. Florida*, 379 U.S. 184, 191-92 (1964) (same), or simply stated so without any hint of analysis, *see* *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality opinion) (stating that reach of equal protection guarantee of Fifth Amendment is coextensive with Equal Protection Clause of Fourteenth Amendment); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (same); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (same). *Cf. Adarand*, 115 S. Ct. at 2123-26 (Stevens, J., dissenting) (discussing "the difference between Congress' institutional competence and constitutional authority to overcome historical racial subjugation and the states' lesser power to do so"); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976) (stating that "[a]lthough both Amendments require the same type of analysis . . . the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State") (citations omitted); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974) (upholding Congressional benefits to Native Americans, in part because of Congress' plenary power to legislate on behalf of Native American tribes).

IV. CONCLUSION

Both the Supreme Court, which has held the Establishment Clause to be incorporated against the states, and commentators who have disagreed with this position, have taken a rather reductionist approach to incorporation and to constitutional adjudication generally. A proper view of the Constitution sees it as an organic instrument, whose parts are interrelated and mutually supportive, rather than as a list of separable clauses, each with independent meaning. Rather than treating the supposed original meaning of the Establishment Clause as having been unchanged, as the anti-incorporationists do, or as having been "trumped" by the Fourteenth Amendment, as the Court implicitly has done, a holistic approach seeks to reconcile the two provisions to resolve the incorporation debate.

Such an approach must uncover the values represented by the Establishment Clause, and then reconcile these with the values behind the Equal Protection Clause. Even assuming that the anti-incorporationists are entirely correct in their assessment of the purposes of the Establishment Clause, their conclusion of non-incorporation simply does not follow. Rather, the Constitution demands at a minimum that the principle of equal citizenship, implicating a right to equal community participation, applies when the state makes religious classifications. This constitutional minimum is a less stringent standard than that applicable to the federal government by virtue of the "pure" Establishment Clause.

This dualistic approach may not sit well with many people. If we are to accept it, we must stop thinking about what level of governmental involvement with religion is permissible and must instead view that involvement in the context of state versus federal power. While this dualistic standard is a form to which we are as yet unaccustomed, it may prove to be truer than our current doctrine is to the deepest aspirations of both the First and the Fourteenth Amendments.