

# THE CASE FOR THE SELECTIVE DISINCORPORATION OF THE ESTABLISHMENT CLAUSE: IS *EVERSON* A SUPER-PRECEDENT?

## INTRODUCTION

In 1789, the drafters of the First Amendment penned the words “*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.*”<sup>1</sup> Throughout the subsequent century and a half, the Supreme Court applied a two-tiered standard to religious free exercise and establishment issues.<sup>2</sup> On the one hand, Congress could not establish religion or prohibit free exercise.<sup>3</sup> On the other hand, the states were free to regulate religion according to their own constitutions.<sup>4</sup> As a result, the Court adjudicated only thirty-one religious liberty cases during the nation’s first 150 years.<sup>5</sup>

In the 1940s, however, the Court consolidated this two-tiered standard into a national law of religion, subjecting the states to the same First Amendment limitations as Congress.<sup>6</sup> In the 1920s and 1930s, the Court used the Fourteenth Amendment to create national protection of several individual liberties by selectively incorporating various provisions of the Bill of Rights into the Due Process Clause and applying them to the states.<sup>7</sup> Applying this technique to the First Amendment religion clauses, in 1940, the Court in *Cantwell v. Connecticut* incorporated the Free Exercise Clause and began

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<sup>1</sup> U.S. CONST. amend. I (emphasis added).

<sup>2</sup> See *Barron v. Mayor of Baltimore*, 32 U.S. 243, 250 (1833) (holding that the Bill of Rights only applies to the federal government).

<sup>3</sup> See U.S. CONST. amend. I.

<sup>4</sup> See *Permolli v. First Municipality of New Orleans*, 44 U.S. 589, 609 (1845) (“The constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the state constitutions and laws; nor is there any inhibition imposed by the constitution of the United States in this respect on the states.”).

<sup>5</sup> JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT* 143 (2d ed. 2005).

<sup>6</sup> See *Cantwell v. Connecticut*, 310 U.S. 296, 304 (1940) (applying the Free Exercise Clause against the states); *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (applying the Establishment Clause against the states).

<sup>7</sup> See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (incorporating the Free Press Clause); *DeJonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating the Free Assembly Clause).

applying it to state action.<sup>8</sup> Seven years later, the Court incorporated the Establishment Clause in *Everson v. Board of Education*.<sup>9</sup> In the six decades since the incorporation of the religion clauses, the Court has adjudicated over 130 religious liberty cases, most of which involved action by state and local governments.<sup>10</sup>

Today, the Court's Establishment Clause jurisprudence is complex, inconsistent, and unpredictable, as evidenced most recently by the 2005 Decalogue cases.<sup>11</sup> In back-to-back cases decided the same day, a 5–4 Court struck down a display of the Decalogue in a Kentucky courthouse but upheld a display of the Decalogue on Texas's State Capitol grounds.<sup>12</sup> Each case yielded both discordant concurring and bitter dissenting opinions—ten opinions in total on this simple question of a religious display.<sup>13</sup>

In response to the Court's erratic Establishment Clause jurisprudence, Justice Thomas has increasingly challenged the Court's foundational decision in *Everson* to incorporate the Clause against the states.<sup>14</sup> Thomas suggests that the Court should consider returning to its pre-1947 two-tiered application of the First Amendment Establishment Clause:

[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. “States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government. Thus, while the Federal Government may “make no law respecting an

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<sup>8</sup> 310 U.S. at 304.

<sup>9</sup> 330 U.S. at 8.

<sup>10</sup> WITTE, *supra* note 5, at 143.

<sup>11</sup> *Van Orden v. Perry*, 545 U.S. 677, 697 (2005) (Thomas, J., concurring). Thomas also notes: “The unintelligibility of this Court's precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections.” *Id.*; see also Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 18–19 (1979) (describing the Court's inconsistencies with respect to school aid).

<sup>12</sup> *Van Orden*, 545 U.S. at 677 (upholding the constitutionality of a six-foot-high monolith inscribed with the Decalogue that stood outside the Texas State Capitol); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (holding unconstitutional the display of a copy of the Decalogue in the hallway of a Kentucky county courthouse).

<sup>13</sup> See Linda Greenhouse, *Justices Allow a Commandments Display, Bar Others*, N.Y. TIMES, June 28, 2005, at A1.

<sup>14</sup> See *Van Orden*, 545 U.S. at 692 (Thomas, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

establishment of religion,” the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.<sup>15</sup>

In effect, Thomas is calling for the Court to selectively disincorporate the Establishment Clause and thereby allow states to once again regulate the establishment of religion without the restrictions of the First Amendment Establishment Clause.<sup>16</sup> Justice Thomas thus joins a number of scholars who contend that the *Everson* Court ignored the original intent of the drafters of the First and Fourteenth Amendments when it incorporated the Establishment Clause.<sup>17</sup> This Comment synthesizes and evaluates the historical arguments against incorporation, agreeing with Justice Thomas that the Establishment Clause “resists incorporation.”<sup>18</sup>

Insofar as the historical record supports disincorporation of the Establishment Clause, the Court must consider whether it should take such action.<sup>19</sup> Two theories of judicial decision making challenge Thomas’s interpretation of the Establishment Clause: policy and precedent. Policy arguments for and against disincorporation have been addressed in the growing body of disincorporation literature.<sup>20</sup> Commentators, however, have yet to consider whether *Everson*’s status as precedent should prevent the Court from reinstating the original intent of the Constitution’s authors.

Although the Supreme Court always has the authority to overrule its prior decisions, scholars have recently suggested that some deeply entrenched precedents are beyond reversal.<sup>21</sup> Scholars dispute the meaning and legitimacy

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<sup>15</sup> See *Zelman*, 536 U.S. at 678–79 (Thomas, J., concurring) (citations omitted).

<sup>16</sup> See *id.* Thomas, as a structuralist, accepts the Court’s incorporation of the Free Exercise Clause because it guarantees an individual right. *Id.* at 679.

<sup>17</sup> See, e.g., 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, 66 (1962) (“History does not justify the Court’s interpretation of the Establishment Clause applied as it is to state governmental action in matters of religion.”).

<sup>18</sup> *Newdow*, 542 U.S. at 45–46 (Thomas, J., concurring in the judgment).

<sup>19</sup> But see Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1116 (1988) (defending the Court’s activism).

<sup>20</sup> See, e.g., William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990) (presenting policy reasons in favor of disincorporation); Kathryn Elizabeth Komp, *Unincorporated, Unprotected: Religion in an Established State*, 58 VAND. L. REV. 301 (2005) (presenting policy reasons for upholding incorporation).

<sup>21</sup> Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 MINN. L. REV. 1173 (2006); Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204 (2006); Randy E. Barnett, *It’s a Bird, It’s a Plane, No, It’s Super Precedent: A Response to Farber and Gerhardt*, 90 MINN. L. REV. 1232 (2006). See generally

of these “super-precedents,” however. Some contend that super-precedent is a legitimate theory of constitutional interpretation that should influence the Court’s decision making.<sup>22</sup> Others employ the term “super-precedent” merely to designate precedents that the Court is unlikely to overrule.<sup>23</sup> Still others refute the theory of super-precedent altogether, arguing that the Constitution alone is authoritative, not the Court’s prior interpretations of that text.<sup>24</sup>

Insofar as *Everson* has controlled the Court’s Establishment Clause jurisprudence for nearly six decades, originalist arguments for disincorporation must address whether *Everson* is a super-precedent.<sup>25</sup> This Comment, therefore, evaluates both the originalist arguments for disincorporation of the Establishment Clause and the precedent arguments for upholding incorporation. It concludes the following: The Court should selectively disincorporate the Establishment Clause, but it is likely to defer to *Everson*’s status as precedent and refuse to revisit the original meaning of the First and Fourteenth Amendments. Part I of this Comment evaluates the originalist criticisms of the Court’s incorporation of the Establishment Clause in *Everson*. Next, Part II examines the notion of super-precedent and explores factors the Court considers when choosing to overrule or adhere to precedent. Finally, Part III examines whether *Everson*, in which the Court decided to incorporate the Establishment Clause, is a super-precedent.

## I. ORIGINALIST ARGUMENTS AGAINST INCORPORATION: A HISTORICAL TASK

Justice Thomas’s criticism of *Everson*’s decision to incorporate the Establishment Clause is one of originalism, the theory that the Court should interpret the Constitution according to the intent of those who drafted and adopted it.<sup>26</sup> Originalist arguments for disincorporation of the Establishment Clause rest upon two premises. The first premise is that the drafters of the Bill of Rights intended to reserve to the states the power to establish religion.<sup>27</sup>

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Symposium, *The Future of the Supreme Court: Institutional Reform and Beyond*, 90 MINN. L. REV. 1147 (2006).

<sup>22</sup> See, e.g., Farber, *supra* note 21, at 1176.

<sup>23</sup> See, e.g., Gerhardt, *supra* note 21, at 1205.

<sup>24</sup> See, e.g., Barnett, *supra* note 21, at 1233.

<sup>25</sup> *But see* Lietzau, *supra* note 20, at 1234 (“The only justification then remaining is precedent, and, by itself, precedent is no justification.”).

<sup>26</sup> See Conkle, *supra* note 19, at 1119.

<sup>27</sup> See Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 373 (1954).

The second premise is that the drafters of the Fourteenth Amendment did not intend to eliminate state power over establishment.<sup>28</sup> In sum, originalists contend that if the First Congress intended the Establishment Clause to reserve power over establishment to the states, and if no subsequent Congress ever intended to retract such power, then the Court, by applying the Establishment Clause against the states, overreached its authority and improperly amended the Constitution through *Everson* and subsequent decisions.<sup>29</sup>

### A. *Two Originalist Theories of Disincorporation*

Advocates of disincorporation subscribe to one of two originalist theories to explain why the Fourteenth Amendment did not abolish state power over establishment. The first theory, which this Comment designates the “intent theory,” simply maintains that the drafters of the Fourteenth Amendment did not intend to apply the First Amendment Establishment Clause against the states.<sup>30</sup> Although this theory has been advanced primarily by scholars, at least one federal court has subscribed to the argument. In 1983, an Alabama district court in *Jaffree v. Board of School Commissioners*—the case that eventually gave rise to the famous Supreme Court case of *Wallace v. Jaffree* on moments of silence—abandoned the *Everson* precedent and held that the Fourteenth Amendment did not prohibit state establishment.<sup>31</sup> The Eleventh Circuit Court of Appeals emphatically reversed the opinion,<sup>32</sup> and the Supreme Court did not address the merits of what it considered the “remarkable conclusion” of the Alabama district court.<sup>33</sup>

A second theory of disincorporation, which this Comment designates the “structural theory,” maintains that the drafters of the Fourteenth Amendment at

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<sup>28</sup> See Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1, 3 (1998).

<sup>29</sup> William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 510 (1998).

<sup>30</sup> See *Jaffree v. Bd. of Sch. Comm’rs*, 554 F. Supp. 1104 (S.D. Ala. 1983); Conkle, *supra* note 19, at 1136; Gray, *supra* note 29, at 524–25; Kruse, *supra* note 17, at 115; F. William O’Brien, *The States and “No Establishment”*: Proposed Amendments to the Constitution Since 1798, 4 WASHBURN L.J. 183, 209–20 (1965); Alfred W. Meyer, Comment, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939, 941 (1951).

<sup>31</sup> 554 F. Supp. at 1104. The court prophetically noted its tenuous position: “Perhaps this opinion will be no more than a voice crying in the wilderness and this attempt to right that which this Court is persuaded is a misreading of history will come to nothing more than blowing in the hurricane.” *Id.* at 1128.

<sup>32</sup> *Jaffree v. Wallace*, 705 F.2d 1526 (11th Cir. 1983).

<sup>33</sup> *Wallace v. Jaffree*, 472 U.S. 38, 48 (1975). The Court merely noted “how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.” *Id.* at 48–49.

most only intended to prohibit the states from infringing the individual rights listed in the Bill of Rights.<sup>34</sup> Advocates of this theory observe with Justice Thomas that the Establishment Clause is “best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.”<sup>35</sup> Thus, the Establishment Clause was originally only a *structural* limitation on the federal government, not a substantive guarantee of an *individual right*.<sup>36</sup> Insofar as the only Bill of Rights provisions that are candidates for incorporation under the Fourteenth Amendment are those that guarantee individual rights, the Establishment Clause was never an appropriate candidate for incorporation.<sup>37</sup> For this reason, the Establishment Clause “resists incorporation.”<sup>38</sup> The structural “square peg” cannot fit into the liberty “round hole” that is the gateway to incorporation.<sup>39</sup>

To summarize, originalism poses two challenges to the Court’s incorporation of the Establishment Clause in *Everson*. The merits of these criticisms depend upon the original intent of the drafters of the First and Fourteenth Amendments. Because discerning original intent is a historical task, the following sections review the events surrounding the passage of the

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<sup>34</sup> Brose, *supra* note 28, at 3.

<sup>35</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring in the judgment).

<sup>36</sup> Several authors have argued this point. JAMES McCLELLAN, *JOSEPH STORY AND THE AMERICAN CONSTITUTION* 156 (1971); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* 26 (1995); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *YALE L.J.* 1131, 1157–60 (1991); Brose, *supra* note 28, at 3; Conkle, *supra* note 19, at 1141; Kruse, *supra* note 17, at 66; Lietzau, *supra* note 20, at 1206–07; Snee, *supra* note 27, at 372–73; Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 *HARV. L. REV.* 1700, 1704 (1992) [hereinafter *Rethinking the Incorporation*]. *But see* *Sch. Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 258 (1963) (Brennan, J., concurring) (arguing that religious liberty requires both state and federal establishment); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 168 (1986) (“[F]reedom from establishment . . . is an indispensable attribute of liberty.”); Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 *CREIGHTON L. REV.* 761, 767–68 (2005) (arguing that federalism “was not [the] primary or overriding impetus behind the call for or drafting of the First Amendment”); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 *ARIZ. ST. L.J.* 1085, 1153–54 (1995) (arguing that by 1866 the Establishment Clause had been reinterpreted to secure an individual liberty).

<sup>37</sup> Conkle, *supra* note 19, at 1141.

<sup>38</sup> *Newdow*, 542 U.S. at 45–46 (Thomas, J., concurring in the judgment).

<sup>39</sup> Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 *NOTRE DAME L. REV.* 311, 317–18 (1986); *see also* GERARD V. BRADLEY, *CHURCH STATE RELATIONSHIPS IN AMERICA* 95 (1987) (asserting that incorporation of the Establishment Clause is logically incoherent).

First Amendment in 1789 and the Fourteenth Amendment in 1866, evaluating the two arguments against incorporation.

*B. 1789: The Original Intent of the Drafters of the Bill of Rights*

Advocates of disincorporation appeal to the history of the First Amendment for two reasons. First, it demonstrates that the drafters of the First Amendment intended to reserve power over religion to the states.<sup>40</sup> Second, it demonstrates that the Establishment Clause was originally only a structural limitation on the federal government, not a substantive guarantee of a personal right.<sup>41</sup> To evaluate these two claims, this section will examine the relevant texts of the Bill of Rights, the constitutional ratification debates, the legislative history of the Establishment Clause, state establishments, and noteworthy reflections on the First Amendment.

*1. Text of the Bill of Rights*

A plain reading of the Constitution confirms that the Bill of Rights originally reserved power over religion to the states.<sup>42</sup> The First Amendment states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>43</sup> On its face, the text restrains only *Congress* from legislating in the area of religious establishment and exercise.<sup>44</sup> The text does not mention state governments.<sup>45</sup> The Tenth Amendment, however, states: “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.”<sup>46</sup> The Constitution neither *delegates* power over religious establishment to the federal government nor *prohibits* states from establishing religion. Therefore, it follows that the Constitution initially reserved to state governments the power to establish religion.

*2. Constitutional Ratification Debates*

A survey of the events prior to the drafting of the Bill of Rights and a reexamination of its legislative history suggest that the First Congress intended

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<sup>40</sup> SMITH, *supra* note 36, at 21; Kurland, *supra* note 11, at 9.

<sup>41</sup> Snee, *supra* note 27, at 373.

<sup>42</sup> *Rethinking the Incorporation*, *supra* note 36, at 1706–07.

<sup>43</sup> U.S. CONST. amend. I.

<sup>44</sup> *See id.*

<sup>45</sup> *See id.*

<sup>46</sup> U.S. CONST. amend. X.

to reserve establishment decisions to the states.<sup>47</sup> The Constitution that the Continental Congress sent to the states for ratification in 1787 created a federal government of enumerated powers.<sup>48</sup> The states retained all other powers not explicitly delegated to the federal government, including regulation of most individual rights.<sup>49</sup> Although delegate George Mason suggested adding a declaration of rights to the document, the Federalists considered such an appendix superfluous, and the Constitutional Convention voted down the proposal unanimously.<sup>50</sup>

Nevertheless, during the ensuing state ratification debates, opponents of ratification feared federal encroachment on state powers and infringement of individual rights.<sup>51</sup> Several delegates worried that Congress might use its treaty powers or the Necessary and Proper Clause to legislate in areas not enumerated to the federal government.<sup>52</sup> Consequently, they clamored for explicit demarcation of constitutional limits—an express bill of rights—to restrict the powers of the federal government.<sup>53</sup>

Federalists countered with assurances that such fears were ungrounded.<sup>54</sup> Any rights or powers not surrendered in the Constitution implicitly remained with the states.<sup>55</sup> The Constitution did not address freedom of conscience and establishment; thus, according to the Federalists, states retained authority in these areas.<sup>56</sup> For example, during the Virginia ratification debate, James Madison responded to Patrick Henry's concerns about religious freedom: "There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."<sup>57</sup> Similarly, in the North Carolina convention, James Iredell proclaimed:

[Congress] certainly ha[s] no authority to interfere in the establishment of any religion whatsoever; and I am astonished that

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<sup>47</sup> Snee, *supra* note 27, at 373, 379.

<sup>48</sup> See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 540 (1969).

<sup>49</sup> See *id.*

<sup>50</sup> MCCLELLAN, *supra* note 36, at 145.

<sup>51</sup> LEVY, *supra* note 36, at 66.

<sup>52</sup> See SMITH, *supra* note 36, at 30–31 (discussing the Necessary and Proper Clause); Kruse, *supra* note 17, at 75 (discussing the treaty power).

<sup>53</sup> See generally 2 *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 627–980* (Bernard Schwartz ed., 1971) (surveying documentary evidence from the state ratifying conventions).

<sup>54</sup> See WOOD, *supra* note 48, at 537.

<sup>55</sup> *Id.* at 539–40.

<sup>56</sup> Snee, *supra* note 27, at 377.

<sup>57</sup> 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 330 (Jonathan Elliot ed., 2d ed. 1836).

any gentleman should conceive they have. Is there any power given to Congress in matters of religion? Can they pass a single act to impair our religious liberties? . . . If any future Congress should pass an act concerning the religion of the country, it would be an act which they are not authorized to pass, by the Constitution . . . .<sup>58</sup>

Iredell continued:

Had Congress undertaken to guaranty religious freedom, or any particular species of it, they would then have had a pretence to interfere in a subject they have nothing to do with. Each state, so far as the clause in question does not interfere, must be left to the operation of its own principles.<sup>59</sup>

Therefore, even before the drafting of the First Amendment, the Constitution was understood to reserve power over religion to the states.

As the ratification debates concluded, anti-Federalist fears prevailed, and the states ratified the Constitution upon the condition that the First Congress immediately draft a bill of rights.<sup>60</sup> To achieve this end, the states proposed various constitutional amendments, several regarding religious matters.<sup>61</sup> New Hampshire, which had an established Congregational church, proposed the following amendment: “Congress shall make no Laws touching Religion, or to infringe the rights of Conscience.”<sup>62</sup> Other states with religious establishments, such as South Carolina, Georgia, Massachusetts, and Connecticut, ratified the Constitution without proposing religious amendments.<sup>63</sup> And some states, such as Maryland, had minorities who called for religious amendments but were outnumbered by Federalists who wished to ratify the Constitution unconditionally in order to demonstrate confidence in the new government.<sup>64</sup>

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<sup>58</sup> 4 *id.* at 194.

<sup>59</sup> *Id.* at 194–95.

<sup>60</sup> MCCLELLAN, *supra* note 36, at 145.

<sup>61</sup> WITTE, *supra* note 5, at 79–80 (including New Hampshire, Virginia, New York, North Carolina, and Rhode Island).

<sup>62</sup> THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 12 (Neil H. Cogan ed., 1997).

<sup>63</sup> LEONARD W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 174–75 (1972).

<sup>64</sup> *Id.* at 175.

### 3. *Legislative History of the First Amendment*

The First Congress fulfilled its mandate from the states by drafting the Bill of Rights. On June 8, 1789, James Madison proposed several amendments to the House of Representatives, two of which concerned religion.<sup>65</sup> Madison's fourth resolution stated: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any *national* religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>66</sup> His fifth resolution stated: "No *State* shall violate the equal rights of conscience."<sup>67</sup> The House referred the amendments to a committee and finally considered a modified version of Madison's fourth resolution on August 15, 1789: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>68</sup> The fifth proposal, which bound the states, was ultimately rejected by the Senate.<sup>69</sup>

Unfortunately, records of the House's activity are incomplete, consisting merely of paraphrases from a news reporter in attendance.<sup>70</sup> Several of the entries, however, confirm that the drafters only intended to restrict the federal government.<sup>71</sup> The record relates that Representative Sylvester of New York feared that the proposed language "might be thought to have a tendency to abolish religion altogether."<sup>72</sup> Elbridge Gerry of Massachusetts preferred only that "[n]o religious *doctrine* shall be established by law."<sup>73</sup> Representative Huntington of Connecticut expressed concern that the amendment would prevent the federal courts from enforcing state establishment taxes:

[H]e feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion . . . . He hoped, therefore,

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<sup>65</sup> 1 ANNALS OF CONG. 451–52 (Joseph Gales ed., 1789).

<sup>66</sup> *Id.* at 451 (emphasis added).

<sup>67</sup> *Id.* at 452 (emphasis added).

<sup>68</sup> *Id.* at 757.

<sup>69</sup> JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES, *reprinted in* 1 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: SENATE LEGISLATIVE JOURNAL 117, 121 (Linda Grant De Pauw ed., 1972) [hereinafter SENATE JOURNAL]. In his motion to strike the phrase during the House debates, Representative Tucker stated: "[This amendment] goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much." ANNALS OF CONG., *supra* note 65, at 783–84. Although Tucker's objections were temporarily overruled, the Senate later rejected the resolution. Kruse, *supra* note 17, at 70–71.

<sup>70</sup> See LEVY, *supra* note 36, at 187–89 (summarizing the deficiencies of the legislative history of the Bill of Rights).

<sup>71</sup> Snee, *supra* note 27, at 379.

<sup>72</sup> ANNALS OF CONG., *supra* note 65, at 757.

<sup>73</sup> *Id.* (emphasis added).

the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.<sup>74</sup>

Madison responded to Huntington's concerns by reintroducing the proposal that no *national* religion be established by law.<sup>75</sup> Gerry, however, opposed the use of the term "national," and Madison withdrew his proposal.<sup>76</sup> Tabling the discussion, the House temporarily adopted a draft from Samuel Livermore: "Congress shall make no laws touching religion, or infringing the rights of conscience."<sup>77</sup>

On August 20, 1789, Fisher Ames of Massachusetts proposed yet another draft: "Congress shall make no law establishing religion or to prevent the free exercise thereof, or to infringe the rights of conscience."<sup>78</sup> The House adopted Ames's draft, slightly revised, and submitted it to the Senate.<sup>79</sup>

The Senate did not record its debates, but it recorded various motions to amend the proposal.<sup>80</sup> On September 9, 1789, the Senate approved its own draft: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."<sup>81</sup> The House, however, rejected the Senate's changes.<sup>82</sup> Subsequently, the House and Senate appointed a joint committee to resolve the various disagreements over the Bill of Rights.<sup>83</sup> The committee proposed the final text, which Congress passed and sent to the states for ratification.<sup>84</sup>

The legislative history of the First Amendment demonstrates intent to limit only federal power over establishment.<sup>85</sup> First, throughout the drafting, the terms "national" and "Congress" are frequently juxtaposed with "establishment."<sup>86</sup> The legislative process commenced with Madison's "nor

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<sup>74</sup> *Id.* at 758.

<sup>75</sup> *Id.* at 759.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* Livermore's draft mirrored the proposed amendment of his home state of New Hampshire. *See supra* note 62 and accompanying text.

<sup>78</sup> ANNALS OF CONG., *supra* note 65, at 796

<sup>79</sup> SENATE JOURNAL, *supra* note 69, at 136.

<sup>80</sup> LEVY, *supra* note 36, at 187.

<sup>81</sup> SENATE JOURNAL, *supra* note 69, at 166.

<sup>82</sup> *Id.* at 181.

<sup>83</sup> *Id.* at 181–82.

<sup>84</sup> *Id.* at 192.

<sup>85</sup> *See Snee, supra* note 27, at 389.

<sup>86</sup> *See supra* notes 66, 81 and accompanying text.

shall any *national* religion be established” and concluded with the First Amendment’s statement that “*Congress* shall make no law respecting an establishment of religion.”<sup>87</sup> Only the short-lived August 15th draft (“no religion shall be established by law”) was ambivalent toward the role of state governments.<sup>88</sup> Second, Huntington sought to secure the New England states’ established ability to assess taxes to support ministers and churches.<sup>89</sup> At this juncture, the representatives did not explicitly discuss the validity of state establishments. Instead, Madison and Livermore altered the language of the amendment to prohibit only the federal government from establishing religion.<sup>90</sup> These actions reflected the drafters’ intentional exclusion of state establishment altogether, agreeing only to restrict the federal government.<sup>91</sup>

In addition, the legislative history of the First Amendment also supports construing the Establishment Clause only as a structural provision and not as a guarantee of an individual right.<sup>92</sup> As noted, Madison’s original fifth proposal restrained the *states* from infringing the rights of conscience.<sup>93</sup> The recommendation did not prohibit state establishment of religion, just state infringement on the rights of conscience.<sup>94</sup> In Madison’s two proposals, a deliberate bifurcation of the religion clauses is present.<sup>95</sup> Madison sought to secure the individual rights of conscience at both the federal and state level, but only sought to proscribe establishment at the federal level.<sup>96</sup> This distinction supports Justice Thomas’s interpretation of the original intent of the First Amendment religion clauses: The Free Exercise Clause is *both* a structural provision and a liberty guarantee, but the Establishment Clause is *only* a structural provision.<sup>97</sup> Furthermore, one may conclude that at least for Madison and Huntington, state establishment and liberty of conscience can coexist.<sup>98</sup>

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<sup>87</sup> See *supra* notes 66, 81 and accompanying text.

<sup>88</sup> See ANNALS OF CONG., *supra* note 65, at 757.

<sup>89</sup> See *id.* at 758. Professor Green contends that while Huntington does express a federalism concern, it is of a “narrow nature,” directed toward the federal courts’ enforcement of full faith and credit, not Congressional interference with state establishments. Green, *supra* note 36, at 789.

<sup>90</sup> See ANNALS OF CONG., *supra* note 65, at 758–59.

<sup>91</sup> SMITH, *supra* note 36, at 21.

<sup>92</sup> See Snee, *supra* note 27, at 389.

<sup>93</sup> ANNALS OF CONG., *supra* note 65, at 452.

<sup>94</sup> See *id.* at 452.

<sup>95</sup> See Snee, *supra* note 27, at 380–81.

<sup>96</sup> *Id.*

<sup>97</sup> See *supra* note 36 and accompanying text.

<sup>98</sup> See Snee, *supra* note 27, at 384.

#### 4. *State Establishments*

The existence of state establishments from 1789 until 1833 also confirms that the First Amendment reserved to states the power to regulate religious establishment according to their own constitutions.<sup>99</sup> On the eve of the American Revolution, most of the colonies maintained an establishment.<sup>100</sup> Although several states disestablished before the First Congress convened, a few establishments remained.<sup>101</sup> Connecticut and New Hampshire were officially established until 1818 and 1819, respectively.<sup>102</sup> Massachusetts became the last state to disestablish officially in 1833.<sup>103</sup> Despite the nationwide cessation of official establishment, however, only seven state constitutions contained an explicit disestablishment clause before *Everson* in 1947.<sup>104</sup>

Before 1789, states governed religion by means of their own legislatures, constitutions, and courts. The First Amendment prohibited Congress from interfering with religion but retained the status quo at the state level.<sup>105</sup> This explains the willingness of established states to ratify the First Amendment and the continuation of state establishment after its ratification.<sup>106</sup> State establishments did eventually dissipate.<sup>107</sup> Disestablishment was gradual, however, and it was initiated by the states, not the Supreme Court.<sup>108</sup>

#### 5. *Noteworthy Reflections on the First Amendment*

After the promulgation of the First Amendment, several noteworthy figures commented that the Bill of Rights effectively reserved power over religious matters to the states. In his Kentucky Resolutions against the Alien and Sedition Act, Thomas Jefferson stated:

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<sup>99</sup> See *Rethinking the Incorporation*, *supra* note 36, at 1706.

<sup>100</sup> See LEVY, *supra* note 36, at 10. In Virginia, Maryland, North Carolina, South Carolina, and Georgia, the Church of England was established. *Id.* at 1. Congregationalism was established in Massachusetts, Connecticut, and New Hampshire. *Id.* New York generally established Protestantism. *Id.* at 10.

<sup>101</sup> BRADLEY, *supra* note 39, at 20. Scholars disagree as to the exact number of establishments in 1789, their counts varying from two to six. *Id.* Leonard Levy identifies six state establishments: Massachusetts, Connecticut, New Hampshire, Maryland, Georgia, and South Carolina. LEVY, *supra* note 63, at 197–98.

<sup>102</sup> LEVY, *supra* note 63, at 198.

<sup>103</sup> WITTE, *supra* note 5, at 114.

<sup>104</sup> *Id.* at 94, 114.

<sup>105</sup> See *supra* note 91 and accompanying text.

<sup>106</sup> BRADLEY, *supra* note 39, at 12.

<sup>107</sup> See LEVY, *supra* note 63, at 198–99.

<sup>108</sup> Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 28 (2006).

“[T]he 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;” and that, no power over the freedom of religion . . . being delegated to the United States by the Constitution, nor prohibited by it to the states, . . . were reserved to the states . . . .<sup>109</sup>

Jefferson reiterated this position in a letter explaining his refusal to issue Thanksgiving proclamations: “Certainly, no power to prescribe any religious exercise or to assume authority in religious discipline has been delegated to the General Government. It must then rest with the States, as far as it can be in any human authority.”<sup>110</sup> Despite these statements affirming state power over religion, it was ultimately Jefferson’s “wall of separation between Church and State” rhetoric—developed in the context of discussions over the *federal* power of religion—that was the maxim by which the Court in *Everson* justified its proscription of state establishment.<sup>111</sup>

In the same vein as Jefferson, Joseph Story noted: “[T]he whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions.”<sup>112</sup> The Supreme Court also affirmed state control of religion in *Permoli v. First Municipality of New Orleans*: “[P]rotecting the citizens of the respective states in their religious liberties . . . is left to state constitutions and laws; nor is there any inhibition imposed by the [C]onstitution of the United States in this respect on the States.”<sup>113</sup> Finally, the Court in *Everson* affirmed states’ power prior to 1866:

Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups.<sup>114</sup>

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<sup>109</sup> Kentucky Resolutions (Nov. 10, 1798 & Nov. 14, 1799), reprinted in 5 THE FOUNDERS’ CONSTITUTION 131, 132 (Philip B. Kurland & Ralph Lerner eds., 1987).

<sup>110</sup> Letter from Jefferson to Rev. Mr. Millar (Jan. 23, 1808), in 5 WRITINGS OF THOMAS JEFFERSON 236, 237 (H.A. Washington ed., 1853).

<sup>111</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

<sup>112</sup> 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (Da Capo Press 1970) (1833).

<sup>113</sup> 44 U.S. 589, 609 (1845).

<sup>114</sup> *Everson*, 330 U.S. at 13–14.

In sum, the observations of those who interpreted the Bill of Rights clearly demonstrate that its drafters intended to reserve power over religion to the states.

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The overwhelming evidence, both from the debates of the First Congress and from those who subsequently reflected on the Bill of Rights, confirms that the drafters of the First Amendment intended to preclude only federal involvement in religious matters.<sup>115</sup> The Establishment Clause achieved this intention in the form of a federalist provision.<sup>116</sup> The Tenth Amendment, also a federalist provision, reserved the power over religion for the states.<sup>117</sup> The drafters thus intended for the states to continue governing free exercise liberties and establishment.<sup>118</sup>

### *C. 1866: The Original Intent of the Drafters of the Fourteenth Amendment*

The original implications of the First Amendment are merely nostalgia if the drafters of the Fourteenth Amendment intended to prohibit state actions “respecting an establishment of religion.”<sup>119</sup> Disincorporation, therefore, is only plausible if the drafters of the Fourteenth Amendment did not intend to apply the Establishment Clause against the states.

Both theories of disincorporation contend that the drafters of the Fourteenth Amendment lacked the intent necessary to incorporate the Establishment Clause.<sup>120</sup> The “intent theory” of disincorporation maintains that the drafters simply did not intend for the religion clauses to apply against the states.<sup>121</sup> Advocates of this theory derive three main arguments from the historical record of the Fourteenth Amendment.<sup>122</sup> First, the legislative history of the Fourteenth Amendment does not clearly demonstrate the intent to apply any

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<sup>115</sup> See Kurland, *supra* note 11, at 9; O’Brien, *supra* note 30, at 186.

<sup>116</sup> AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 246 (1998).

<sup>117</sup> See *supra* note 46 and accompanying text.

<sup>118</sup> Kurland, *supra* note 11, at 9.

<sup>119</sup> U.S. CONST. amend. I.

<sup>120</sup> See *supra* Part I.A.

<sup>121</sup> See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 134–65 (1977). Included as advocates of the “intent theory” are those scholars who claim that the drafters of the Fourteenth Amendment did not intend to include any provisions of the Bill of Rights against the states. *Id.*

<sup>122</sup> See, e.g., Gray, *supra* note 29, at 529–30.

provisions of the Bill of Rights against the states.<sup>123</sup> Second, few contemporaries, if any, recognized that the Fourteenth Amendment applied any provisions of the Bill of Rights against the states.<sup>124</sup> Finally, Congress attempted to apply the religion clauses against the states by constitutional amendment twenty times after promulgating the Fourteenth Amendment.<sup>125</sup>

Alternatively, the “structural theory” maintains that even if the drafters of the Fourteenth Amendment intended to incorporate some provisions of the Bill of Rights, they only intended to incorporate the provisions that secured individual liberties.<sup>126</sup> Because the Establishment Clause was only a structural provision, it follows that the drafters of the Fourteenth Amendment did not intend to apply it to the states.<sup>127</sup> The proponents of this theory use the legislative history of the Fourteenth Amendment to demonstrate that the drafters stopped short of applying the entire Bill of Rights against the states.<sup>128</sup> Adhering to the methodology of the previous section, this section reviews the events surrounding the adoption of the Fourteenth Amendment in order to ascertain the original intent of the 39th Congress.

### 1. *Legislative History of the Fourteenth Amendment*

The legislative history of the Fourteenth Amendment does not conclusively confirm or disprove whether Congress intended to apply the Bill of Rights against the states.<sup>129</sup> On February 13, 1866, Representative John Bingham of Ohio introduced a draft of the Fourteenth Amendment to the House of Representatives.<sup>130</sup> Defending his proposal, Bingham proclaimed:

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<sup>123</sup> See *infra* Part II.B.2.

<sup>124</sup> See *infra* Part II.B.3.

<sup>125</sup> See O’Brien, *supra* note 30, at 207.

<sup>126</sup> See, e.g., Kruse, *supra* note 17, at 114–15.

<sup>127</sup> See Snee, *supra* note 27, at 373. *But see* Lash, *supra* note 36, at 1153–54 (arguing that by 1866, the Establishment Clause had been reinterpreted to secure an individual liberty).

<sup>128</sup> See, e.g., Kruse, *supra* note 17, at 114–15.

<sup>129</sup> Section 1 of the Fourteenth Amendment states,

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. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

<sup>130</sup> CONG. GLOBE, 39th Cong., 1st Sess. 1088 (1866). Bingham was one of fifteen members of the Joint Committee of Reconstruction charged with developing a congressional program for reconstruction. Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 19 (1949).

I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to . . . take away from any State any right that belongs to it . . . . This proposition pending before the House is simply a proposition to arm the Congress . . . with the power to enforce the bill of rights as it stands in the Constitution today. It “hath that extent—no more.”<sup>131</sup>

After three days of debate, the House postponed Bingham’s proposal, never to reconsider it again.<sup>132</sup> Three months later, Bingham’s second draft was introduced to the House, prompting another round of debate.<sup>133</sup> Concluding the discussion, Bingham explained his proposal: “Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it.”<sup>134</sup>

The House voted in favor of the amendment, and Senator Jacob Howard of Michigan introduced the proposal to the Senate on May 23, 1866.<sup>135</sup> After referring to several privileges and immunities listed in *Corfield v. Coryell*,<sup>136</sup> Howard stated: “To these privileges and immunities . . . should be added the *personal rights* guaranteed and secured by the first eight [A]mendments of the Constitution.”<sup>137</sup> Senator Poland subsequently declared, however, that the amendment “secures nothing beyond what was intended by the original [privileges and immunities] provision in the Constitution.”<sup>138</sup> Also contradicting Howard’s interpretation of the proposal, several Congressmen maintained that the amendment only enacted the equal protection goals of the Civil Rights Bill.<sup>139</sup>

Five years after drafting the Fourteenth Amendment, however, Bingham explicitly claimed before the House that the Fourteenth Amendment applied the first eight amendments to the states.<sup>140</sup> In response to Bingham’s claim, Representative Storm of Pennsylvania asserted:

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<sup>131</sup> CONG. GLOBE, *supra* note 130, at 1088.

<sup>132</sup> Fairman, *supra* note 130, at 37.

<sup>133</sup> *Id.* at 42–43.

<sup>134</sup> CONG. GLOBE, *supra* note 130, at 2542.

<sup>135</sup> BERGER, *supra* note 121, at 147–48. Senator Fessenden, the Chairman of the Joint Committee, was originally supposed to introduce the amendment, but he became ill, and Howard became his substitute. *Id.*

<sup>136</sup> 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

<sup>137</sup> CONG. GLOBE, *supra* note 130, at 2765 (emphasis added).

<sup>138</sup> *Id.* at 2961.

<sup>139</sup> See BERGER, *supra* note 121, at 149–50.

<sup>140</sup> CONG. GLOBE, 42d Cong., 1st Sess. 86 (1871).

Sir, if the views now announced by gentlemen on the other side of the House had then been promulgated, that amendment would never have been ratified. If the monstrous doctrine now set up as resulting from the provisions of that fourteenth amendment had then been hinted at, that amendment would have received an emphatic rejection at the hands of the people.<sup>141</sup>

Although Bingham's remarks in 1871 support the Court's doctrine of incorporation, they completely contradict the assurances of state sovereignty he made to the House when pressed to explain his amendment during the 1866 debates.<sup>142</sup> Given the fact that Bingham's affirmation of state sovereignty occurred *during* the drafting of the Fourteenth Amendment, it is more indicative of Congress's intent than his remarks *after* ratification of the amendment.

In sum, the legislative history of the Fourteenth Amendment does not conclusively demonstrate whether the 39th Congress intended to apply the Bill of Rights against the states.<sup>143</sup> Senator Howard's single reference to the first eight amendments is the strongest argument for the intent to incorporate the Bill of Rights.<sup>144</sup> But Howard only refers to the "personal rights" secured by the first eight amendments, and the Establishment Clause is only a structural limitation on Congress.<sup>145</sup> Moreover, Bingham repeatedly assured the House that the Amendment did not affect state power.<sup>146</sup> Thus, according to the author of the Fourteenth Amendment, the states should have retained power over establishment.<sup>147</sup>

## 2. *Public, Political, and Judicial Responses to the Fourteenth Amendment*

The response to the promulgation of the Fourteenth Amendment by the states, politicians, and courts also fails to demonstrate clearly that the 39th Congress intended to apply the Bill of Rights to the states.<sup>148</sup> As one

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<sup>141</sup> *Id.* at 87.

<sup>142</sup> See Fairman, *supra* note 130, at 137.

<sup>143</sup> See Gray, *supra* note 29, at 521.

<sup>144</sup> See *supra* note 137 and accompanying text.

<sup>145</sup> But see LEVY, *supra* note 36, at 168 ("[F]reedom from establishment . . . is an indispensable attribute of liberty."); Lash, *supra* note 36, at 1153–54.

<sup>146</sup> See *supra* notes 131, 134 and accompanying text.

<sup>147</sup> See *supra* notes 131, 134 and accompanying text.

<sup>148</sup> See HORACE EDGAR FLACK, THE ADOPTION OF THE FOURTEENTH AMENDMENT 153 (1908); Fairman, *supra* note 130, at 68. But see William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954).

commentator notes: “The one statement in Howard’s speech that looms so large . . . seems at the time to have sunk without leaving a trace in public discussion.”<sup>149</sup> None of the contemporary newspapers suggested that the Fourteenth Amendment applied the Bill of Rights to the states.<sup>150</sup> Horace Flack observes:

[T]he general opinion held in the North . . . was that the Amendment embodied the Civil Rights Bill . . . . There does not seem to have been any statement at all as to whether the first eight amendments were to be made applicable to the States or not, whether the privileges guaranteed by those amendments were to be considered as privileges secured by the Amendment.<sup>151</sup>

Also, none of the members of the 39th Congress who campaigned for reelection in 1866 claimed that the Fourteenth Amendment applied the Bill of Rights to the states, even though the reconstruction program was the predominant issue in the campaigns.<sup>152</sup> Furthermore, none of the states that ratified the Fourteenth Amendment objected to the large diminution of their sovereignty.<sup>153</sup> The silent ratification of the Fourteenth Amendment provides a stark contrast to the heated debates over state sovereignty between the Federalists and anti-Federalists only eighty years earlier. Such silence supports the conclusion that the states did not perceive the Bill of Rights as applying to them.<sup>154</sup>

Finally, the Supreme Court did not apply the Bill of Rights against the states.<sup>155</sup> In 1869, one year after the ratification of the Fourteenth Amendment, the Court unanimously held in *Twitchell v. Pennsylvania* that the Fifth and Sixth Amendments did not apply to the states.<sup>156</sup> The following year, the Court held in *Justices v. Murray* that the Seventh Amendment did not apply to

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<sup>149</sup> Fairman, *supra* note 130, at 69.

<sup>150</sup> See FLACK, *supra* note 148, at 153; Fairman, *supra* note 130, at 68.

<sup>151</sup> FLACK, *supra* note 148, at 153.

<sup>152</sup> See Fairman, *supra* note 130, at 69–70, 78.

<sup>153</sup> See *id.* at 84–132. Unfortunately, most states only kept records of motions and votes, not the debates. *Id.* at 82. Charles Fairman, however, thoroughly reviewed the activity of each state and concluded that the states failed to recognize incorporation. *Id.* at 84–132.

<sup>154</sup> See FLACK, *supra* note 148, at 237 (“[N]o doubt [Storm] was right in saying that had the people been informed of what was intended by the Amendment, they would have rejected it.”); Gray, *supra* note 29, at 524–25 (“It is inconceivable that the people of the several states would have remained silent in the face of the Fourteenth Amendment’s purported draconian usurpation of the states’ policy making power.”).

<sup>155</sup> Fairman, *supra* note 130, at 132.

<sup>156</sup> 74 U.S. (7 Wall.) 321 (1869).

the states.<sup>157</sup> For nearly *six decades* after these decisions, the Court failed to hold that the Fourteenth Amendment applied any provisions of the Bill of Rights to the states.<sup>158</sup>

### 3. *The Blaine Amendment*

In 1875, seven years after the ratification of the Fourteenth Amendment, Senator James Blaine proposed the following constitutional amendment to the 44th Congress:

No state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.<sup>159</sup>

The proposal came at the request of President Grant in response to a movement to fund parochial schools with state taxes.<sup>160</sup> The text nearly copies verbatim the First Amendment religion clauses, substituting “state” for “Congress.”<sup>161</sup>

Twenty-five members of the 44th Congress, including Blaine, were members of the 39th Congress, and three had served on the committee that drafted the Fourteenth Amendment.<sup>162</sup> Furthermore, at least fifty members of the 44th Congress were state legislators during the ratification of the Fourteenth Amendment.<sup>163</sup> *None* of the Congressman commented that the Fourteenth Amendment already prohibited state establishment.<sup>164</sup> Instead, they understood the states’ authority over religion to be the same after the ratification of the Fourteenth Amendment as it was before: States had the power to establish or disestablish religion.<sup>165</sup>

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<sup>157</sup> 76 U.S. (9 Wall.) 274 (1870).

<sup>158</sup> The Free Speech Clause became the first provision in the Bill of Rights to be incorporated against the states in 1925. *Gitlow v. New York*, 268 U.S. 652 (1925).

<sup>159</sup> H.R. Res. 1, 44th Cong. (1875).

<sup>160</sup> Meyer, *supra* note 30, at 941.

<sup>161</sup> See H.R. Res. 1, 44th Cong. (1875).

<sup>162</sup> O’Brien, *supra* note 30, at 190.

<sup>163</sup> See *id.*

<sup>164</sup> *Id.* at 187.

<sup>165</sup> *Id.*

Proponents of the Blaine Amendment did not believe that the Fourteenth Amendment prohibited state establishment, for if they had, the proposal would have been superfluous.<sup>166</sup> Congressman Banks, an original member of the 39th Congress, foresaw the changes the Amendment would entail: “If the Constitution is amended so as to secure the object embraced in the principle part of this proposed amendment it prohibits the States from exercising the power they now exercise.”<sup>167</sup> Blaine described the current state of affairs more explicitly: “A majority of the people in any state in this Union can, therefore, if they desire it, have an established church.”<sup>168</sup> Senator Frederick Frelinghuysen, the Amendment’s sponsor and chief advocate in the Senate, articulated: “[The Blaine Amendment] very properly extends the prohibition of the first amendment of the Constitution to the States . . . [and] prohibits the States, for the first time, from the establishment of religion . . . .”<sup>169</sup>

As noted above, the lack of opposition to the Fourteenth Amendment is conspicuous if the drafters intended to drastically reduce state sovereignty.<sup>170</sup> Opponents of the Blaine Amendment, however, emphatically objected to the proposed elimination of state power over religion. Senator Stevenson remarked:

Friend as [Jefferson] was of religious freedom, he would never have consented that the States . . . should be degraded and that the Government of the United States, a Government of limited authority, the mere agent of the States with prescribed powers, should undertake to take possession of their schools and of their religion . . . .<sup>171</sup>

Senator Bogy, also in opposition, stated: “I am opposed to this amendment because . . . it takes from the State that which belongs to it . . . .”<sup>172</sup> Senator Whyte likewise rejected the amendment:

[T]he first amendment to the Constitution prevents the establishment of religion by congressional enactment; it prohibits the interference of Congress with the free exercise thereof, and leaves the whole

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<sup>166</sup> See Gray, *supra* note 29, at 526–27.

<sup>167</sup> 4 CONG. REC. 5191 (1876).

<sup>168</sup> Letter from James G. Blaine, N.Y. TIMES, Nov. 29, 1875, at 2, *reprinted in* O’Brien, *supra* note 30, at 188.

<sup>169</sup> 4 CONG. REC. 5561 (1876).

<sup>170</sup> See *supra* notes 148–54 and accompanying text.

<sup>171</sup> 4 CONG. REC. 5589 (1876).

<sup>172</sup> *Id.* at 5591.

power for the propagation of it with the States exclusively; and so far I am concerned I propose to leave it there also.<sup>173</sup>

These statements demonstrate the perceived effect of the Fourteenth Amendment in 1875, just seven years after its ratification.<sup>174</sup> One commentator humorously notes: “The only reference to the Fourteenth Amendment during the Blaine Amendment debate was in referring to an example of another poorly drafted amendment, lacking in specificity.”<sup>175</sup>

The Blaine Amendment passed the House by a landslide vote, but it failed in the Senate by a close margin.<sup>176</sup> After the failure of the Blaine Amendment, similar proposals were introduced another *nineteen times* between 1875 and 1947.<sup>177</sup> Therefore, Congressmen initiated twenty unsuccessful attempts to eliminate state authority over religion by the Constitution’s amendment procedure during the eighty-one years following the promulgation of the Fourteenth Amendment before the Court accomplished the task by constitutional interpretation in *Everson*.<sup>178</sup>

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The historical record of the Fourteenth Amendment is more open to different interpretations than the record of the First Amendment. The legislative history includes statements that demonstrate intent to prohibit the states from infringing the rights described in the Bill of Rights,<sup>179</sup> but it also includes statements that demonstrate intent to preclude application of the Bill of Rights to the states.<sup>180</sup> Ironically, statements by the Amendment’s author serve as fodder for both sides of the debate.<sup>181</sup> The record is ambiguous enough to ask not only “Whose intent is the most relevant?,” but also “Which of two contradictory statements by the same person is an accurate expression of his intent?”<sup>182</sup> Therefore, considering the Fourteenth Amendment’s

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<sup>173</sup> *Id.* at 5583.

<sup>174</sup> See Raoul Berger, *Incorporation of the Bill of Rights: A Reply to Michael Curtis’ Response*, 44 OHIO ST. L.J. 1, 16–18 (1983). *But see* AMAR, *supra* note 116, at 254–55; Lash, *supra* note 36, at 1145–50.

<sup>175</sup> Lietzau, *supra* note 20, at 1210 n.104.

<sup>176</sup> Meyer, *supra* note 30, at 942, 944.

<sup>177</sup> O’Brien, *supra* note 30, at 207.

<sup>178</sup> *Id.*

<sup>179</sup> See *supra* note 137 and accompanying text.

<sup>180</sup> See *supra* notes 134, 138 and accompanying text.

<sup>181</sup> See BERGER, *supra* note 121, at 144.

<sup>182</sup> *Id.*

legislative history alone, the original intent of the 39th Congress is inconclusive.

The public, political, and judicial responses to the Fourteenth Amendment strongly suggest that the 39th Congress did not intend to apply the Bill of Rights to the states. The states did not object to the limitation on their sovereignty.<sup>183</sup> The Court did not incorporate any provisions of the Bill of Rights against the states for nearly six decades.<sup>184</sup> Also, Congress unsuccessfully attempted to apply the religion clauses against the states twenty times by constitutional amendment before the Court determined that the Fourteenth Amendment already achieved the task.<sup>185</sup>

The historical record of the Fourteenth Amendment supports both the “intent” and “structural” theories of disincorporation. There is little evidence that the 39th Congress intended to apply any provisions of the Bill of Rights against the states.<sup>186</sup> But even when the historical record demonstrates intent to apply some provisions of the Bill of Rights against the states, it only demonstrates intent to apply those provisions that secure personal rights.<sup>187</sup> Therefore, when the Court considered incorporating the Establishment Clause against the states in 1947, history did not support incorporation.<sup>188</sup>

#### *D. 1947: Everson’s Neglect of Original Intent*

Although history did not support incorporation of the Establishment Clause, it was history to which Justice Black turned to justify the Court’s proscription of state establishment.<sup>189</sup> First, he referred to the colonization of America, observing that a large number of colonists immigrated to escape the religious coercion and persecution prevalent in Europe.<sup>190</sup> Next, he cited the history of religious coercion and persecution in Colonial America.<sup>191</sup> He claimed that such practices “shock[ed] the freedom-loving colonials into a feeling of abhorrence,” a feeling that “found expression in the First Amendment.”<sup>192</sup> Finally, he cited the history of Virginia’s decision to

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<sup>183</sup> See *supra* Part I.C.2.

<sup>184</sup> See *supra* Part I.C.2.

<sup>185</sup> See O’Brien, *supra* note 30, at 207.

<sup>186</sup> See Jaffree v. Bd. of Sch. Comm’rs, 554 F. Supp. 1104, 1119 (S.D. Ala. 1983).

<sup>187</sup> See Kruse, *supra* note 17, at 114–15.

<sup>188</sup> See Conkle, *supra* note 19, at 1139.

<sup>189</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–15 (1947).

<sup>190</sup> *Id.* at 8–9.

<sup>191</sup> *Id.* at 9–11.

<sup>192</sup> *Id.* at 11.

disestablish.<sup>193</sup> Justice Black equated Virginia's disestablishment with the meaning of the First Amendment, noting: "[T]he provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."<sup>194</sup>

Regrettably, Justice Black's review of the Establishment Clause constituted a "dismal historical performance."<sup>195</sup> First, he improperly attributed the abuses of religious coercion and persecution to religious establishment.<sup>196</sup> The European and Colonial American abuses stemmed not from government endorsement of religion, but rather from denial of free exercise and liberty of conscience. Although religious coercion and persecution can exist in an established state, "[o]fficial establishment is . . . not necessarily incompatible with freedom of worship and religious toleration . . . ."<sup>197</sup> Massachusetts maintained an establishment for fifty years while securing individual religious liberties.<sup>198</sup> Even today, England, although officially established, ensures toleration and freedom of worship.<sup>199</sup> Thus, Justice Black erroneously conflated the function of the Free Exercise Clause with the function of the Establishment Clause.

Secondly, Justice Black overstated the Framers' response to the European and Colonial American religious abuses.<sup>200</sup> Although he claimed that the "freedom-loving colonials" expressed their abhorrence to prior practices in the First Amendment, the legislative history of the Amendment does not support Justice Black's sweeping generalization. Madison, whose theory of government formed part of the basis for Justice Black's reading of the religion clauses, specifically attempted to secure the rights of conscience *against the states*.<sup>201</sup> Madison's proposal, however, was clearly rejected by the drafters of the Bill of Rights.<sup>202</sup> Therefore, the drafters of the First Amendment deliberately gave states the option of infringing religious liberties.<sup>203</sup> Justice

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<sup>193</sup> *Id.* at 11–13.

<sup>194</sup> *Id.* at 13.

<sup>195</sup> SMITH, *supra* note 36, at 5.

<sup>196</sup> *See supra* notes 190–91 and accompanying text.

<sup>197</sup> Amar, *supra* note 36, at 1159.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *See supra* note 192 and accompanying text.

<sup>201</sup> *See supra* note 67 and accompanying text.

<sup>202</sup> *See supra* note 68–69 and accompanying text.

<sup>203</sup> *See supra* note 92–98 and accompanying text.

Black thus misconstrues the effect of religious persecution on the drafters of the First Amendment.

Finally, Justice Black ignores the principles of federalism by projecting the intent of the Virginia legislature onto the First Amendment.<sup>204</sup> The First Amendment was promulgated by representatives from every state, including established states as well as disestablished states.<sup>205</sup> Virginia's decision to disestablish is no more indicative of the original intent of the drafters of the First Amendment than Massachusetts's decision to remain established.<sup>206</sup> Therefore, Justice Black should have considered the original intent of all the drafters of the First Amendment rather than just the intent of the drafters of Virginia's disestablishment statute.<sup>207</sup>

Justice Black's review of history was not only dismal, but also exceedingly irrelevant. He proscribed state establishment by interpreting the First and Fourteenth Amendments, yet he did not review the legislative history of either. He did not consider the response of the states that ratified the Amendments or the courts that first interpreted them. Furthermore, he did not consider the twenty attempts of Congress to proscribe state establishment in the sixty years preceding *Everson*. Instead, he simply surveyed the history of European and Colonial American religious oppression and concluded that the states could not establish religion. Because the *Everson* Court considered the wrong historical sources, it failed to discern the original intent of the drafters of the First and Fourteenth Amendments.

Part I of this Comment has demonstrated that if the Court had faithfully considered the intent of the Constitution's drafters, it would not have incorporated the Establishment Clause. Parts II and III examine whether the Court should correct its error.

## II. THE ROLE OF PRECEDENT IN CONSTITUTIONAL INTERPRETATION

As author of the majority opinion in *McCreary County v. ACLU of Kentucky*, Justice Souter responded to originalist claims that the Establishment Clause did not require government neutrality toward religion.<sup>208</sup> He alluded to

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<sup>204</sup> See *supra* notes 193–94 and accompanying text.

<sup>205</sup> See *Rethinking the Incorporation*, *supra* note 36, at 1705.

<sup>206</sup> See *id.*

<sup>207</sup> See *id.*

<sup>208</sup> 545 U.S. 844, 874–82 (2005).

the possibility that the precedent of neutrality also promulgated by the *Everson* Court had become so entrenched that it superseded original intent:

Surely if expressions like these . . . were all we had to go on, there would be a good case that the neutrality principle has the effect of broadening the ban on establishment beyond the Framers' understanding of it (although there would, of course, still be the question of whether the historical case could overcome some 60 years of precedent taking neutrality as its guiding principle).<sup>209</sup>

Justice Souter's statement, discussing the Establishment Clause precedent of neutral principles, correlates directly to the issue addressed by this Comment, namely, whether originalism can overcome some sixty years of precedent incorporating the Establishment Clause against the states. If originalism is to overrule the Court's incorporation of the Establishment Clause, it must engage the issue of precedent. The remainder of this Comment addresses whether the doctrine of precedent precludes disincorporation of the Establishment Clause.

#### A. *The Emergence of Super-Precedent*

In the fall of 2005, *stare decisis* became a popular topic when President George W. Bush selected nominees to fill the Rehnquist and O'Connor vacancies on the Supreme Court.<sup>210</sup> Senate Judiciary Committee members attempted to predict how the nominees would decide politically charged issues of constitutional law by questioning the nominees' willingness to follow precedent.<sup>211</sup> These attempts to discern nominees' predispositions added new terms to the vocabulary of constitutional law. For example, Senator Arlen Specter famously inquired of then-nominee John Roberts: "I don't want to coin any phrases on super-precedents. We will leave that to the Supreme Court. But would you think that *Roe* might be a super-duper precedent in light of 38 occasions to overrule it?"<sup>212</sup>

Courts and commentators have increasingly used the terms "super-precedent" and "super-*stare decisis*," particularly in the context of abortion rights.<sup>213</sup> For example, one scholar observes:

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<sup>209</sup> *Id.* at 877.

<sup>210</sup> See Jeffrey Rosen, *So, Do You Believe in 'Superprecedent'?*, N.Y. TIMES, Oct. 30, 2005, § 4, at 1.

<sup>211</sup> See *id.*

<sup>212</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 145 (2005) (statement of Sen. Arlen Specter, Chairman, S. Comm. on the Judiciary).

<sup>213</sup> See Rosen, *supra* note 210.

In essence, [the *Casey* Court] asserts that if one side can take control of the Court on an issue of major national importance, it can not only use the Constitution to bind other branches of government to its position, but also have that position protected from later judicial action by a kind of super-stare decisis.<sup>214</sup>

Similarly, Judge Michael Luttig remarked in *Richmond Medical Center for Women v. Gilmore*, “I understand the Supreme Court to have intended its decision in . . . *Casey* . . . to be a decision of super-stare decisis with respect to a woman’s fundamental right to choose whether or not to proceed with a pregnancy.”<sup>215</sup>

References to super-precedent raise important questions in constitutional law. Are some decisions immune to reversal? Are they immune even when a majority of the Court believes them to be wrongly decided? If so, why, and what are the criteria for such immunity? How does one reconcile the constitutional theory of originalism with strong notions of stare decisis? The following sections consider these questions.

## B. Defining Super-Precedent

### 1. Definition of Precedent and Stare Decisis

A precedent is a “decided case that furnishes a basis for determining later cases involving similar facts or issues.”<sup>216</sup> The practice of following precedents derives from the Latin maxim *stare decisis et non quieta movera*, that is, to “stand by things decided, and not to disturb settled points.”<sup>217</sup> Stare decisis has two forms, vertical and horizontal.<sup>218</sup> Vertical stare decisis requires lower courts to adhere to the precedents of higher courts.<sup>219</sup> Horizontal stare decisis refers to the duty of a court to follow its own precedents.<sup>220</sup> This Comment only concerns the duty of the Supreme Court to adhere to its own precedents.

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<sup>214</sup> Earl M. Maltz, Essay, *Abortion, Precedent, and the Constitution: A Comment on Planned Parenthood of Southeastern Pennsylvania v. Casey*, 68 NOTRE DAME L. REV. 11, 26 (1992).

<sup>215</sup> 219 F.3d 376, 376 (4th Cir. 2000).

<sup>216</sup> BLACK’S LAW DICTIONARY 1214 (8th ed. 2004).

<sup>217</sup> *Id.* at 1443.

<sup>218</sup> SAUL BRENNER & HAROLD J. SPAETH, STARE INDECISIS: THE ALTERATION OF PRECEDENT ON THE SUPREME COURT, 1946–1992, at 1 (1995).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

## 2. *Precedent and Judicial Decision Making*

Precedent relates to the Court's decision making in one of four ways. First, a precedent may support the Court's decision without factoring into it.<sup>221</sup> If the Court's adjudication of an issue as a case of first impression would be the same as if it were controlled by the precedent, then the Court is not actually deciding the issue *because of* the precedent.<sup>222</sup> Rather, the current resolution of the case incidentally corresponds to the historical resolution of the case.<sup>223</sup>

Second, a precedent can constrain the Court from overruling a past decision.<sup>224</sup> In this model, the Court's adjudication of an issue as a case of first impression differs from adjudication controlled by the precedent, but the Court defers to the precedent.<sup>225</sup> Chief Justice Rehnquist demonstrated this phenomenon in a concurring opinion: "I was in dissent in *Edmonson v. Leesville Concrete Co.* . . . and continue to believe that case to have been wrongly decided. But so long as it remains the law, I believe it controls the disposition of this case . . . ."<sup>226</sup>

Third, a precedent can constrain the Court from reexamining an issue as a case of first impression.<sup>227</sup> In this model, the Court forms no opinion as to the validity of the controlling precedent; it merely applies the precedent to the instant case.<sup>228</sup> This model typifies the certiorari process.<sup>229</sup> Professor Gerhardt observes:

The Justices' respect for the Court's precedents and historical practices is most evident in their choices of which matters not to hear. Thus, in the certiorari process, the Justices often demonstrate

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<sup>221</sup> Larry Alexander, *Constrained by Precedent*, 63 S. CAL. L. REV. 3, 6 (1989).

<sup>222</sup> HAROLD J. SPAETH & JEFFREY A. SEGAL, MAJORITY RULE OR MINORITY WILL: ADHERENCE TO PRECEDENT ON THE U.S. SUPREME COURT 3 (1999) ("When prior preferences and precedents are the same it is not meaningful to speak of decisions as being determined by precedent. For precedent to matter as an influence on decisions, it must achieve results that would not otherwise have been obtained.").

<sup>223</sup> See *id.*

<sup>224</sup> See Michael Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 77 (1991) ("If the rules of law precedents embody do not constrain, then they do not function as a conventional source of decision.").

<sup>225</sup> See *id.*

<sup>226</sup> *Georgia v. McCollum*, 505 U.S. 42, 59 (1992) (Rehnquist, C.J., concurring).

<sup>227</sup> See Gerhardt, *supra* note 224, at 78.

<sup>228</sup> See *id.*

<sup>229</sup> See *id.*

most clearly their desire to adhere to the precedents they might not have decided the same way in the first place.<sup>230</sup>

Precedent thus forecloses reconsideration of constitutional issues that are “so far settled that they are simply off the agenda.”<sup>231</sup>

Finally, a precedent may be overruled in favor of a new rule. This occurs when the Court’s adjudication of an issue as a case of first impression differs from adjudication controlled by the precedent. The Court in turn follows its current resolution of the case rather than its previous resolution.

### 3. *Definition of Super-Precedent*

No one would assert that *all* precedents *always* bind the Court. As an empirical matter, the Court overrules some cases every year. Overruling bad decisions is a necessary component of the rule of law. Even ancient precedents, if they are harmful, must be corrected to comply with society’s notions of justice.<sup>232</sup> But, one must inquire, do *any* precedents *always* bind the court? That is, are some decisions immune from overruling?

Commentators have recently begun referring to potentially immune decisions as “super-precedents” and adherence to them as “super-stare decisis.”<sup>233</sup> Michael Gerhardt defines super-precedents as “constitutional decisions whose correctness is no longer a viable issue for courts to decide . . . . [They are] landmark opinions, so encrusted and deeply embedded in constitutional law that they have become practically immune to reconsideration and reversal.”<sup>234</sup> Daniel Farber employs a similar term, “bedrock precedents,” to designate rulings that the Court should not overturn without “compelling reasons.”<sup>235</sup> And other scholars, such as Henry Monaghan, have alluded to super-precedents prior to the advent of the term.<sup>236</sup>

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<sup>230</sup> *Id.*; see also Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 745 (1988) (“The operation of stare decisis in these contexts is agenda limiting in nature. The Court could not fairly look at these issues *res nova*. Regardless of whether the Court thought these issues rightly decided, consciously or unconsciously any challenge would be screened out *in limine*.”).

<sup>231</sup> Monaghan, *supra* note 230, at 744.

<sup>232</sup> See, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a Louisiana statute that required only “separate but equal” accommodations for whites and nonwhites).

<sup>233</sup> See *supra* Part II.A.

<sup>234</sup> Gerhardt, *supra* note 21, at 1205–06.

<sup>235</sup> Farber, *supra* note 21, at 1176.

<sup>236</sup> Monaghan, *supra* note 230, at 740 (“While most, if not all, of the Supreme Court’s decisions noted above are highly suspect, it seems almost unquestionable that these decisions are now beyond judicial recall.”).

Central to every definition of super-precedent is immunity from overruling. In other words, when a super-precedent governs an issue, the Court only chooses from the first three decision-making models listed above.<sup>237</sup> Furthermore, a super-precedent is immune from overruling regardless of the merits of its original adjudication. The promulgating court may have egregiously misread the Constitution or misinterpreted the original intent of its drafters, but subsequent developments have elevated the decision beyond review.<sup>238</sup> In sum, the *status* of a super-precedent, not its *merits*, controls.<sup>239</sup>

#### 4. *Descriptive and Normative Connotations of Super-Precedent*

References to super-precedent may be either descriptive or normative.<sup>240</sup> When used as a descriptive term, super-precedent merely refers to the *phenomenon* of the Court's refusal to overrule a precedent and the likelihood of similar abstention in the future.<sup>241</sup> Per this descriptive connotation, a classification of *Brown v. Board of Education* as a super-precedent is merely an observation that the Court is not entertaining proposals to overrule *Brown* and that it is unlikely to do so in the future. Thus, the descriptive connotation constitutes the "is" or the "actual."<sup>242</sup> Descriptively speaking, *Brown* "is" here to stay.

Conversely, when used as a normative term, super-precedent refers to the Court's *duty* to follow a precedent regardless of how it would adjudicate the issue as a case of first impression.<sup>243</sup> Per this normative connotation, classifying *Brown* as a super-precedent is to claim that the Court should not overrule it. Thus, the normative connotation of super-precedent constitutes the "ought" or the "necessary."<sup>244</sup> Normatively speaking, the Court "ought" to follow *Brown*.

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<sup>237</sup> See *supra* Part II.B.2.

<sup>238</sup> See Gerhardt, *supra* note 21, at 1213–14 (suggesting that the decision in the *Legal Tender Cases*, which many scholars believe erroneously authorized the use of paper money, is virtually impossible to overrule due to economic reliance on the decision).

<sup>239</sup> See *id.* at 1214.

<sup>240</sup> See Barnett, *supra* note 21, at 1241–48 (distinguishing between descriptive and normative uses of the term super-precedent).

<sup>241</sup> See Gerhardt, *supra* note 21, at 1205–06.

<sup>242</sup> See Barnett, *supra* note 21, at 1241–42.

<sup>243</sup> See Farber, *supra* note 21, at 1180–81 ("It is not simply that it would be imprudent to overrule these doctrines . . . [I]t would run against the purposes of constitutionalism.").

<sup>244</sup> See Barnett, *supra* note 21, at 1241–42.

As a practical matter, the Court may freely follow or overrule precedents as it wishes.<sup>245</sup> The normative use of super-precedent, however, creates a standard for evaluating the merits of the Court's decision. One can categorize a decision as right or wrong depending on its conformity to the super-precedent. Used in this normative sense, the doctrine of super-precedent competes with originalism as a theory of constitutional interpretation.

### C. *Searching for the Characteristics of a Super-Precedent*

Identifying a super-precedent is a speculative endeavor given that the Court has yet to explicitly address the issue. Commentators and Justices will disagree as to the criteria of a super-precedent, and they will disagree as to which precedents satisfy those criteria. In order to ascertain which precedents might constitute super-precedents, this section reviews various factors the Court considers when choosing to follow or overrule a precedent. It also surveys several factors proposed by scholars, including political, social, and judicial acceptance.<sup>246</sup>

#### 1. *Subject Matter, Merits, and Workability of the Original Decision*

A precedent's weight depends upon its subject matter, that is, whether the precedent is statutory, common law, or constitutional.<sup>247</sup> For example, the Court noted in *Payne v. Tennessee*<sup>248</sup> that stare decisis is strongest in property and contract decisions.<sup>249</sup> In matters of constitutional law, however, the Court is typically less deferential to precedent.<sup>250</sup> Justice Brandeis observed: "Stare decisis is usually the wise policy . . . even where error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is

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<sup>245</sup> See John Wallace, Comment, *Stare Decisis and the Rehnquist Court: The Collision of Activism, Passivism, and Politics in Casey*, 42 BUFF. L. REV. 187, 192 (1994).

<sup>246</sup> See, e.g., Gerhardt, *supra* note 21, at 1206.

<sup>247</sup> See William N. Eskridge, *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1362 (1988).

<sup>248</sup> 501 U.S. 808 (1991) (holding that the Eighth Amendment did not erect a per se bar to admission of victim impact evidence).

<sup>249</sup> *Id.* at 828 ("Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved . . . [but] the opposite is true in cases . . . involving procedural and evidentiary rules.").

<sup>250</sup> *Id.* ("Stare decisis is not an inexorable command . . . . This is particularly true in constitutional cases."); see also Eskridge, *supra* note 247, at 1362.

practically impossible, this Court has often overruled its earlier decisions.”<sup>251</sup> Thus, the Court should be willing to reconsider constitutional precedents given that the amendment process is the only way to correct erroneous decisions.<sup>252</sup>

The strength of a precedent also depends upon its merits.<sup>253</sup> To state the obvious, the precedents most susceptible to being overruled are those that the Court believes to be wrong. Thus, the Court in *Payne* stated: “[W]hen governing decisions are . . . badly reasoned, this Court has never felt constrained to follow precedent.”<sup>254</sup>

Workability also factors into a precedent’s strength.<sup>255</sup> For instance, the *Seminole Tribe* Court noted that *Union Gas* was a “deeply fractured decision” that confused lower courts.<sup>256</sup> Similarly, the Court in *Payne* observed that the controlling precedent had “defied consistent application by the lower courts.”<sup>257</sup> Finally, in overruling *National League of Cities v. Usery*,<sup>258</sup> the Court cited the difficulty of defining “traditional governmental functions”—a term central to the application of that case’s holding.<sup>259</sup> In sum, strong precedents are typically well reasoned and capable of consistent application.

## 2. *Judicial Acceptance*

The strength of a precedent is also determined by its acceptance within the judicial community.<sup>260</sup> For example, the Court often gives less precedential

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<sup>251</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406–07 (1932) (Brandeis, J., dissenting); see also William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949) (“The place of *stare decisis* in constitutional law is even more tenuous.”).

<sup>252</sup> *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 66 (1996) (“The case involved the interpretation of the Constitution and therefore may be altered only by constitutional amendment or revision by this Court.”).

<sup>253</sup> See Philip P. Frickey, *A Further Comment on Stare Decisis and the Overruling of National League of Cities*, 2 CONST. COMMENT. 341, 342 (1985).

<sup>254</sup> *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotations omitted).

<sup>255</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (noting that when reexamining a precedent, the Court “may ask whether the rule has proven to be intolerable simply in defying practical workability”); see also *Payne*, 501 U.S. at 828.

<sup>256</sup> *Seminole Tribe*, 517 U.S. at 64.

<sup>257</sup> *Payne*, 501 U.S. at 830.

<sup>258</sup> 426 U.S. 833 (1976) (holding that Congress could not enforce federal minimum-wage and overtime provisions against the States under the Commerce Clause).

<sup>259</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 539 (1985) (“[T]his Court itself has made little headway in defining the scope of governmental functions deemed protected under *National League of Cities*.”).

<sup>260</sup> See Gerhardt, *supra* note 21, at 1206.

weight to 5–4 decisions.<sup>261</sup> The Court noted in *Payne* that the controlling precedents were decided “by the narrowest of margins.”<sup>262</sup> Similarly, concurring in the *Legal Tender Cases*, Justice Bradley favored reexamining the precedent at issue inasmuch as it was “only made by a bare majority of the court.”<sup>263</sup> And the *Garcia* Court noted that *National League of Cities* was decided “by a sharply divided vote.”<sup>264</sup> At least one commentator objects to this consideration, however, given that 5–4 decisions may encourage resistance by the lower courts and undermine interests relying on the precedent.<sup>265</sup>

The vigor of the initial dissent also indicates judicial acceptance. For example, the *Payne* Court noted that the controlling precedents were decided “over spirited dissents.”<sup>266</sup> Similarly, the Court in *Seminole Tribe v. Florida* claimed that *Union Gas*’s value as precedent was “questionable” because “a majority of the Court expressly disagreed with the rationale of the plurality.”<sup>267</sup>

The Court’s response to a precedent in later decisions also reflects its strength. In *Payne*, the Court reversed controlling precedent after observing that it “ha[d] been questioned by Members of the Court in later decisions.”<sup>268</sup> Conversely, in *Union Gas*, Justice Scalia supported the controlling precedent, noting that it “ha[d] been reaffirmed . . . often unanimously and by exceptionally strong Courts.”<sup>269</sup>

### 3. Political and Social Acceptance

The strength of a precedent also depends upon its political and social acceptance.<sup>270</sup> Professor Gerhardt observes: “The more each of the branches, including the Court, accepts the Court’s historiography, the more entrenched the precedents become structurally and the less likely the Court will revisit or

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<sup>261</sup> Amy L. Padden, Note, *Overruling Decisions in the Supreme Court: The Role of a Decision’s Vote, Age, and Subject Matter in the Application of Stare Decisis After Payne v. Tennessee*, 82 GEO. L.J. 1689, 1708 (1994).

<sup>262</sup> *Payne*, 501 U.S. at 829.

<sup>263</sup> 79 U.S. (12 Wall.) 457, 569–70 (1870) (Bradley, J., concurring).

<sup>264</sup> *Garcia*, 469 U.S. at 530.

<sup>265</sup> See Padden, *supra* note 261, at 1708.

<sup>266</sup> *Payne*, 501 U.S. at 828–29.

<sup>267</sup> 517 U.S. 44, 66 (1996).

<sup>268</sup> *Payne*, 501 U.S. at 829–30.

<sup>269</sup> *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 34–35 (1988) (Scalia, J., concurring in part and dissenting in part) (quoting *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 494 n.27 (1986)).

<sup>270</sup> Gerhardt, *supra* note 224, at 84–85.

overrule them.”<sup>271</sup> Thus, when the other political branches initiate the precedent, as they did the New Deal cases, the precedent presumably carries more weight.<sup>272</sup> On the other hand, when the political branches attack a Supreme Court decision, the precedent is presumably weaker. *Roe v. Wade*, for example, has been the subject of political scrutiny for decades.<sup>273</sup>

Although political response to judicial decisions is typically indicative of social acceptance, a variety of media convey public approval or disapproval, including the news press, scholarly literature, and public opinion polls, to name a few.<sup>274</sup> It follows that a precedent widely accepted by society is unlikely to be overruled, though the Court will often give less deference to socially acceptable precedents that endanger individual rights.<sup>275</sup>

#### 4. *Judicial and Social Reliance*

Another indicator of a precedent’s strength is the number and weight of cases that have followed it. The more times the Court has affirmed a precedent, the more likely that the law in that area is “settled” and therefore less susceptible to being overruled.<sup>276</sup> For example, overruling the Court’s broad interpretation of Congress’s Commerce Clause power during the New Deal era would cripple the economy.<sup>277</sup> Thus, one commentator remarks: “Surely a judge need not vote to overrule an erroneous precedent if to do so would pitch the country into the abyss.”<sup>278</sup>

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<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 88–89.

<sup>273</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (“Joining the respondents as *amicus curiae*, the United States, as it has done in five other cases in the last decade, again asks us to overrule *Roe*.”).

<sup>274</sup> See, e.g., Evelyn Nieves, *Judges Ban Pledge of Allegiance from Schools, Citing ‘Under God,’* N.Y. TIMES, June 27, 2002, at A1.

<sup>275</sup> See Wallace, *supra* note 245, at 197–98.

<sup>276</sup> See *Casey*, 505 U.S. at 999 (Scalia, J., dissenting) (“[T]he Justices should do what is legally right by asking two questions: (1) Was *Roe* correctly decided? (2) Has *Roe* succeeded in producing a settled body of law? If the answer to both questions is no, *Roe* should undoubtedly be overruled.”) (internal emphasis omitted).

<sup>277</sup> See Wallace, *supra* note 245, at 196–97.

<sup>278</sup> Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 410 (1988).

Equally significant is the degree to which the public relies on the precedent.<sup>279</sup> On the one hand, the Court has historically been most willing to protect commercial reliance, given that “advance planning of great precision is . . . a necessity.”<sup>280</sup> On the other hand, the Court has typically given less deference to reliance in the context of individual rights.<sup>281</sup> Overruling *Bowers v. Hardwick*,<sup>282</sup> the Court determined that “there ha[d] been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding.”<sup>283</sup> The *Casey* Court, however, found reliance interests sufficient to warrant adherence to *Roe*.<sup>284</sup>

### 5. *Judicial Legitimacy*

The Court also considers the extent to which reversing a precedent would undermine the public’s perception of the Court as a legitimate and neutral decision maker.<sup>285</sup> Justice Stewart articulated the need for this consideration:

A basic change in the law upon a ground no firmer than a change in our membership invites the popular misconception that this institution is little different from the two political branches of the Government. No misconception could do more lasting injury to this Court and to the system of law which it is our abiding mission to serve.<sup>286</sup>

Additionally, the *Casey* Court noted that frequent overruling would “overtax the country’s belief in the Court’s good faith”<sup>287</sup> and risk the appearance of “surrender[ing] to political pressure.”<sup>288</sup>

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<sup>279</sup> *Casey*, 505 U.S. at 854. In *Casey*, the court considered “whether the [precedent] is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.” *Id.*

<sup>280</sup> *Id.* at 855–56; see also *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (“Considerations in favor of stare decisis are at their acme in cases involving property and contract rights.”).

<sup>281</sup> *Wallace*, *supra* note 245, at 197–98.

<sup>282</sup> 478 U.S. 186 (1986) (holding that the Constitution does not confer a right to engage in private, consensual sodomy).

<sup>283</sup> *Lawrence v. Texas*, 539 U.S. 558, 577 (2003).

<sup>284</sup> *Casey*, 505 U.S. at 856.

<sup>285</sup> See Monaghan, *supra* note 230, at 749–50; *Wallace*, *supra* note 245, at 199–200. The *Lawrence* Court notes: “The doctrine of stare decisis is essential to the respect accorded to the judgments of the Court and to the stability of the law.” 539 U.S. at 577.

<sup>286</sup> *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 636 (1974) (Stewart, J., dissenting).

<sup>287</sup> *Casey*, 505 U.S. at 867.

<sup>288</sup> *Id.* at 866.

#### D. Identifying a Super-Precedent

Although a survey of the Court's jurisprudence fails to describe conclusively which precedents are permanent and which are ripe for overruling, it does provide a helpful matrix for analyzing the efficacy of a precedent. The variables listed above allow us to create an equation that describes a precedent's strength. For example, the Court is most likely to overrule a constitutional precedent that is poorly reasoned, unworkable, and rejected by the judiciary, the government, and society. Conversely, the Court is most likely to uphold a common law precedent that is well reasoned, workable, and accepted by the judiciary, the government, and society. These latter precedents satisfy the definition of "super-precedent."

The factors that demarcate a precedent's strength are myriad, but a few observations simplify the analysis. First, several factors follow naturally from each other. For example, a precedent that is accepted by society is likely to be accepted by society's political representatives. Similarly, the judiciary is most likely to oppose a poorly reasoned or unworkable precedent. Second, some of the factors are likely to contradict each other and thus offset one another. For instance, overruling a precedent that is highly accepted or attacked by the government and society would likely undermine the Court's reputation as a legitimate and neutral decision maker. Finally, a precedent's age is likely to affect its status. For example, an old precedent is likely to have gained social and political acceptance. Similarly, an old precedent is likely to have a large progeny of cases following it.

Identifying a super-precedent is not an exact science. The one certainty is disagreement. Courts and commentators will not only disagree over how to resolve each factor, but also they will also disagree over how much weight to give each factor. Some believe that poorly reasoned constitutional decisions should never be immune from being overruled.<sup>289</sup> Others argue that super-precedents should serve as the starting point for resolving future cases.<sup>290</sup> Regardless, the doctrine of precedent will continue to factor into the Court's decision making.

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<sup>289</sup> See, e.g., Barnett, *supra* note 21, at 1248 ("[T]he meaning of the written Constitution must remain the same until it is properly changed by an equally written amendment.").

<sup>290</sup> See, e.g., Farber, *supra* note 21, at 1183 ("Adherence to precedent does not mean simply refusing to overrule past decisions—it means taking them seriously as starting points for analysis of future cases.").

### III. IS *EVERSON* A SUPER-PRECEDENT?

Part I demonstrated that the Court's incorporation of the Establishment Clause contravened the original intent of the drafters of the First and Fourteenth Amendments. Part II examined how a precedent's status can immunize it from being overruled. This section engages the two competing theories of originalism and super-precedent in a case study of *Everson* to determine whether the Court should or will disincorporate the Establishment Clause. Applying the super-precedent factors from Part II, this section concludes that *Everson's* status as precedent should not prevent the Court from disincorporating the Establishment Clause, but that it likely will.

#### A. *Applying the Super-Precedent Factors*

##### 1. *Subject Matter, Merits, and Workability of Everson*

*Everson's* status as an interpretation of the Constitution, rather than an interpretation of common law contract or property rights, for example, weighs against construing it as a super-precedent.<sup>291</sup> Absent a constitutional amendment, only the Court can undo application of the First Amendment Establishment Clause to the states. *Everson* demonstrates the power inherent in the Court's interpretation of the Constitution, accomplishing a feat that eluded James Blaine and his successors for seventy-two years.<sup>292</sup> Because it wields such power, the Court should remain open minded.

The merits of *Everson* also weigh against construing it as a super-precedent. Part I of this Comment outlined the two originalist criticisms of the Court's decision to incorporate the Establishment Clause.<sup>293</sup> As Part I described, the *Everson* Court ignored the historical record and failed to discern the original intent of the drafters of the First and Fourteenth Amendments.<sup>294</sup> Insofar as *Everson* was wrongly decided, the Court should give it little precedential weight.

*Everson's* workability neither favors nor disfavors construing it as a super-precedent. Procedurally, *Everson's* incorporation of the Establishment Clause is workable; the Court simply applies the same substantive standards to both

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<sup>291</sup> See *supra* Part II.C.1.

<sup>292</sup> See *supra* Part I.C.3.

<sup>293</sup> See *supra* Part I.A.

<sup>294</sup> See *supra* Part I.D.

federal and state action respecting an establishment of religion.<sup>295</sup> Substantively, however, the current national standard is arguably unworkable. As noted above, the 2005 Decalogue cases highlight the unpredictability and inconsistency of the Court's Establishment Clause jurisprudence.<sup>296</sup> The cases involved two copies of the Decalogue, each displayed at a state building.<sup>297</sup> The Court upheld one and struck the other down, issuing "two more hairsplitting, migraine-inducing decisions."<sup>298</sup> Given the strong factual similarities of the two cases and their opposite results, the Court appears incapable of tailoring its Establishment Clause jurisprudence to satisfactorily govern local support of religion.<sup>299</sup> Incorporation is technically feasible, but it is wholly problematic.

## 2. *Judicial Acceptance*

Generally, courts have accepted *Everson's* incorporation of the Establishment Clause.<sup>300</sup> Although *Everson* was a 5–4 decision, none of the dissenting justices objected to the Court's application of the Establishment Clause to the states.<sup>301</sup> Rather, they claimed that the Court's holding—allowing religious school students to use the public school bus—contradicted its strict separationist interpretation of the Establishment Clause.<sup>302</sup> Since 1947, the Court has routinely followed *Everson*, noting that it "has confirmed and endorsed [incorporation of the Establishment Clause] time and time again."<sup>303</sup> Furthermore, Justice Brennan defended *Everson*, pointedly dismissing both of the originalist arguments outlined in this Comment.<sup>304</sup> Brennan contended that the "structural theory" fails to acknowledge that the

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<sup>295</sup> *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985) ("[The Fourteenth] Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power.").

<sup>296</sup> *Van Orden v. Perry*, 545 U.S. 677, 697–98 (2005) (Thomas, J., concurring).

<sup>297</sup> *Id.* (Texas State Capitol grounds); *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (Kentucky county courthouse hallway).

<sup>298</sup> George F. Will, *Thou Shalt Split Hairs*, WASH. POST, June 28, 2005, at A15.

<sup>299</sup> See *Greenhouse*, *supra* note 13.

<sup>300</sup> See *Sch. Dist. of Abingdon Twp. v. Schempp*, 374 U.S. 203, 215 (1963) ("[T]his Court has decisively settled that the First Amendment's mandate . . . has been made wholly applicable to the States by the Fourteenth Amendment.").

<sup>301</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947). Justice Jackson wrote a dissenting opinion, which Justice Frankfurter joined. *Id.* at 18. Justice Rutledge issued a separate dissenting opinion, which Justices Frankfurter, Jackson, and Burton joined. *Id.* at 28.

<sup>302</sup> *Id.* at 63 (Rutledge, J., dissenting).

<sup>303</sup> *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

<sup>304</sup> See *Schempp*, 374 U.S. at 253–58 (Brennan, J., concurring).

First Amendment religion clauses function as co-guarantors of religious liberty.<sup>305</sup> And he dismissed the “intent theory” by claiming that the liberty provision of the Fourteenth Amendment mandates state disestablishment, regardless of whether the 39th Congress perceived the connection between the First and Fourteenth Amendments.<sup>306</sup>

Arguments against incorporation have gained a toehold in the courts, however.<sup>307</sup> As noted, Justice Thomas has frequently asserted that the Establishment Clause “resists incorporation.”<sup>308</sup> Similarly, Justice Stewart, although accepting the Court’s incorporation of the Establishment Clause, observed: “[I]t is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy.”<sup>309</sup> But the most direct challenge to incorporation came from an Alabama district court in the case that gave rise to *Wallace v. Jaffree*.<sup>310</sup> The lower court summarily rejected the Court’s incorporation of the Establishment Clause before the Eleventh Circuit Court of Appeals unanimously reversed it.<sup>311</sup> Due to the doctrine of vertical stare decisis, however, lower courts typically adhere to the Court’s precedents.<sup>312</sup>

### 3. *Political and Social Acceptance*

*Everson*’s incorporation of the Establishment Clause likely received widespread political and social acceptance in 1947. When Justice Black recounted the stories of religious persecution that “shock[ed] the freedom-loving colonials into a feeling of abhorrence,” the entire country was similarly shocked into abhorrence by the recent discovery of the genocide of millions of European Jews during World War II.<sup>313</sup> Acutely aware of the danger of unchecked religious bigotry, Americans may have agreed with Justice Black that “[t]here is every reason to give the same application and broad

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<sup>305</sup> *Id.* at 256.

<sup>306</sup> *Id.* at 257–58.

<sup>307</sup> *See supra* Part I.A.

<sup>308</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment).

<sup>309</sup> *Schempp*, 374 U.S. at 310 (Stewart, J., dissenting).

<sup>310</sup> 472 U.S. 38, 49 (1985).

<sup>311</sup> *Jaffree v. Bd. of Sch. Comm’rs*, 554 F. Supp. 1104, 1124 (S.D. Ala. 1983), *aff’d in part, rev’d in part*, *Jaffree v. Bd. of Sch. Comm’rs*, 705 F.2d 1526 (11th Cir. 1983).

<sup>312</sup> *See supra* note 219 and accompanying text.

<sup>313</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

interpretation” to the Establishment Clause as the Court gave to the Free Exercise Clause.<sup>314</sup>

Nearly six decades later, however, *Everson’s* acceptance is highly questionable given that politicians and religious interest groups regularly challenge the Court’s invalidation of state and local religious action.<sup>315</sup> When the Ninth Circuit Court of Appeals held that a California school district could not require elementary students to recite the Pledge of Allegiance because of the phrase “under God,”<sup>316</sup> dozens of Congressmen joined together to publicly sing “God Bless America” and recite the Pledge.<sup>317</sup> In 2005, conservative political and religious leaders staged large “Justice Sunday” rallies in which numerous speakers condemned the Court’s restrictions on public religious expression.<sup>318</sup> And Focus on the Family leader James Dobson harshly equated the black-robed Supreme Court justices with the white-robed Ku Klux Klan on his syndicated radio show.<sup>319</sup> Although politicians and religious activists do not specifically lobby for disincorporation, responses such as these demonstrate political and social preference for more flexible establishment standards at the local level, which disincorporation would accomplish.

#### 4. *Judicial and Social Reliance*

Although the Court has routinely applied the Establishment Clause against the states since *Everson*, disincorporation of the Establishment Clause will not paralyze the judicial system or endanger individual liberties.<sup>320</sup> First, the Court can retain all of its post-*Everson* jurisprudence for application to Congress.<sup>321</sup> Second, the Court can continue to protect individual religious liberties by applying the First Amendment’s Free Exercise Clause against the states.<sup>322</sup> Finally, states already govern local establishment issues according to their own constitutions, statutes, and jurisprudence.<sup>323</sup> Although the Supreme Court has been the most significant stage for litigating establishment claims since

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<sup>314</sup> *Id.* at 15.

<sup>315</sup> See, e.g., Adam Cohen, *The Church-State Wall Is the Best Protection Against Religious Strife*, N.Y. TIMES, July 4, 2005, at A12.

<sup>316</sup> *Newdow v. U.S. Cong.*, 328 F.3d 466, 490 (9th Cir. 2002), *rev’d*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 5.(2004).

<sup>317</sup> Nieves, *supra* note 274.

<sup>318</sup> Cohen, *supra* note 315.

<sup>319</sup> *Id.*

<sup>320</sup> See *Rethinking the Incorporation*, *supra* note 36, at 1717.

<sup>321</sup> See *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring).

<sup>322</sup> See *id.*

<sup>323</sup> WITTE, *supra* note 5, at 143.

*Everson*, states have continued to adjudicate local establishment controversies.<sup>324</sup> Therefore, disincorporation of the Establishment Clause will not pitch the nation into disarray. Rather, it will return regulation of establishment into capable (and perhaps eager) hands.

### 5. *Judicial Legitimacy*

Disincorporation of the Establishment Clause is also unlikely to undermine public confidence in the Court. First, the Court will not appear fickle. The composition of the Court has changed numerous times in the six decades since *Everson*, but the Court has yet to reconsider its incorporation of the Establishment Clause, much less vacillate on the issue. Second, the Court will not appear to be too closely aligned with the political branches of the government. Few, if any, members of the executive or legislative branches have called for disincorporation of the Establishment Clause. Third, the Court will not be susceptible to charges of judicial activism. Instead of thwarting democracy, the Court will promote democracy by allowing state and local governments to regulate establishment.<sup>325</sup> Perhaps disincorporation can even be construed as judicial *de*-activism.

### B. *Everson's Precedential Status*

Part II noted the distinction between normative and descriptive uses of the term super-precedent. If one normatively construes a precedent as a super-precedent, then he argues that the Court should not overrule it.<sup>326</sup> On the other hand, if one descriptively construes a precedent as a super-precedent, then he merely predicts that the Court is unlikely to overrule it.<sup>327</sup> Asserting that the Court *should* adhere to a precedent is different than suggesting that the Court *will* do so, and vice versa. Thus, one of these nuanced terms is necessary when using the term super-precedent.

Normatively speaking, *Everson's* incorporation of Establishment Clause is not a super-precedent. Thus, its status should not prevent the Court from overruling it. The *Everson* Court ignored the intent of the drafters of the First and Fourteenth Amendments and erroneously applied the Establishment

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<sup>324</sup> *Id.*

<sup>325</sup> See *Rethinking the Incorporation*, *supra* note 36, at 1717.

<sup>326</sup> See *supra* Part II.B.4.

<sup>327</sup> See *supra* Part II.B.4.

Clause against the states.<sup>328</sup> The Court's constitutional error, however, has not obtained the requisite judicial, political, and social acceptance to elevate it beyond review.<sup>329</sup> Moreover, returning to the pre-*Everson*, two-tiered establishment standard will resolve many of the current inconsistencies in the Court's establishment jurisprudence without sacrificing individual free exercise liberties.<sup>330</sup> Disincorporation will preclude the need for a uniform establishment standard and allow states to regulate religion locally.<sup>331</sup> Any benefits of adhering to *Everson* are not so substantial that it should be exempt from reconsideration. Therefore, *Everson's* status as precedent should not dissuade the Court from disincorporating the Establishment Clause.

Descriptively speaking, however, *Everson's* incorporation of the Establishment Clause likely qualifies as a super-precedent. That is, *Everson's* status will likely prevent the Court from overruling it. The Court has followed *Everson* for nearly sixty years, repeatedly affirming its incorporation of the Establishment Clause.<sup>332</sup> In addition, the Court in *Wallace v. Jaffree* refused to reexamine the merits of *Everson* despite the Alabama district court's persuasive originalist arguments against incorporation.<sup>333</sup> And although Justice Thomas has repeatedly asserted that the Establishment Clause "resists incorporation," none of the other justices have yet to subscribe to his argument.<sup>334</sup> Inasmuch as the Court has expressed little interest in disincorporation, it is likely to continue to defer to *Everson* and apply the Establishment Clause against the states.

## CONCLUSION

In 1947, two years removed from the devastation of World War II and the horror of the Holocaust, the Court first applied the First Amendment Establishment Clause against the states. At the time, the harsh consequences of unchecked religious bigotry likely persuaded everyone—Justices, commentators, and citizens alike—of the need for national protection of religious freedoms. Nearly sixty years later, however, incorporation of the

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<sup>328</sup> See *supra* Part III.A.1.

<sup>329</sup> See *supra* Part III.A.2–3.

<sup>330</sup> See *Rethinking the Incorporation*, *supra* note 36, at 1716–17.

<sup>331</sup> *Id.* at 1717.

<sup>332</sup> See *supra* Part III.A.2.

<sup>333</sup> 472 U.S. 38, 48–49 (1985).

<sup>334</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring in the judgment).

Establishment Clause appears to have been both unwise and unnecessary. The Court simply cannot define a consistent constitutional framework for addressing traditional affirmation of religion in the public square. Each new case fosters more dissension within the Court and within society. The Court is at an impasse.

But the Court has an escape route. By returning to the original intent of the drafters of the Constitution, the Court can secure religious free exercise liberties while simultaneously allowing the states to address local establishment issues. Justice Brennan, however, suggested that it is “too late in the day” to reconsider the original intent of the drafters of the Fourteenth Amendment.<sup>335</sup> But is it too late? The Court reevaluated the foundations of its Establishment Clause jurisprudence in 1947.<sup>336</sup> It should do so again today.

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<sup>335</sup> Sch. Dist. of Abingdon Twp. v. Schempp, 374 U.S. 203, 257 (1963) (Brennan, J., concurring).

<sup>336</sup> Everson v. Bd. of Educ., 330 U.S. 1 (1947).

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