SIX

"Engines of the Ruling Party"

Political Correctness, 9/11, and the Politics of Culture

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> Constitutional lawsuits are the stuff of power politics in America. The Court may be, and usually is, above party politics and personal politics, but the politics of power is a most important and delicate function, and adjudication of litigation is its technique.
>
> —Attorney General Robert H. Jackson (1941)[1]

"Cultural accountability" is a concept used in the business community to describe an organizational culture in which "results-based leaders define their roles in terms of practical action. They articulate what they want to accomplish and thus make their agendas clear and meaningful to others."[2]

This paper will use the lens of "cultural accountability" to explore the impact that the organizational culture of the Supreme Court of the United States has had on the "cultural politics" of religion and race in the United States since it decided *Dred Scott v. Sandford*[3] in 1857.

I have chosen the Court's jurisprudence on race and religion for two reasons. The first is that the Court's messages about religion and race in our own pluralistic, liberal democracy can accurately be described as "a mess—both hopelessly confused and deeply contradictory." [4]

The second is that the Court's "hopelessly confused and deeply contradictory" messages about race and religion have created and sustained a deeply entrenched political culture that made it possible for our government to miss important clues about the gathering storm in the Middle East, South Asia, and Africa prior to 9/11. In my view, the situa-

tion has not improved. We seem unable or unwilling to take a hard look at the ways in which our own cultural presuppositions about the role of religion and ethnicity affect our foreign, development, and defense policies in these volatile regions.

" Cultural accountability" is a useful organizing concept in this context because it encourages us to look at the organizational culture of the Court itself as a potential cause of the confusing and contradictory character of the case law. Judges who are "culturally accountable" strive to "articulate what they want to accomplish and thus make their agendas clear and meaningful to others." They "define their roles in terms of practical action"—the prompt resolution of the grievances pending before them—and view judicial leadership as simply their duty to "administer justice without respect to persons, and do equal right to the poor and to the rich."[5]

The bulk of this paper is an extended discussion of the role that the organizational culture of the Supreme Court has played in the formation of an American "religion of civility." In keeping with that discussion, my conclusion is that "the most fundamental challenge facing judiciaries in liberal democracies" is the "counter-majoritarian difficulty" itself.[6] From a cultural-accountability perspective, the judiciary serves either as "an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority,"[7] or it serves as an "Engine of the Ruling Party."

"POLITICAL CORRECTNESS" AND CIVIL RELIGION IN A POST-9/11 ENVIRONMENT

There are two ways in which to understand the First Amendment's command that "Congress shall make no law respecting an establishment of religion": (1) an "establishment of religion" is the public expression or physical manifestation of individual or associational religious commitments, including individual or communal prayer, worship, preaching and teaching, the publication and distribution and use of sacred texts, or the placement of sacred symbols; the formation and maintenance of religious associations such as churches, synagogues, mosques, religious schools, charities, and mutual-benefit societies; and attempts by religiously motivated individuals or associations to shape public policy or civic culture; or (2) an "establishment of religion" is a *group*, that is, a faction or group of factions who seek to use the power of the state to control access to public space, programs, and funds for the sake of ad-

vancing or protecting its interests, especially the major culture-forming and political institutions of the community.

The case law since *Everson v. Board of Education*[8] was decided in 1947 is clear: an "establishment of religion" is the public expression or physical manifestation of individual or associational religious commitments:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.[9]

The goal of this paper is to argue that "an establishment of religion" is a *group* (or faction) whose point of view regarding religion (or lack thereof) is, by operation of law or political convention, "politically correct."[10] A "structure of racism"[11] is, by the same reasoning, a faction whose points of view regarding the proper uses of race in polite society are, by operation of law or political convention, "politically correct."

I acknowledge at that outset that the concept of "political correctness" is notoriously slippery, but its relationship to the qualifications clauses of Articles I and II of the U.S. Constitution,[12] to the oath and test clauses of Article VI, and to the citizenship clause of the Fourteenth Amendment is as obvious as it is elementary. Read together, these and other equality guarantees[13] were designed to ensure that *all* American citizens are equally eligible to participate in the processes and programs of their government. It is therefore the duty[14] of those who wield the legislative, executive, and judicial powers of the United States to take citizens as they find them, religious and cultural differences notwithstanding.

POLITICAL CORRECTNESS, EQUAL CITIZENSHIP, AND THE ESTABLISHMENT CLAUSE

Though there is no *official* "ruling class" that governs religious matters in the United States, the Supreme Court does enforce a series of legal and cultural norms that define the ways in which the members of a "polite," pluralistic society think and speak about controversial topics like religion and race. Part and parcel of what sociologists have called the American "civil religion,"[15] these norms seek to encourage social cohesiveness by fostering conformity and political "safe-thinking."

In a very helpful turn of phrase, John Murray Cuddihy referred to these norms as the core doctrines of a "religion of civility" that, "under cover of its prim title [it is], in its rites and practices, activist, aggrandizing, subversive, intrusive, [and] incivil."[16] Drawing on the experience of

former president Jimmy Carter's "encounter [with] the civil religion that Americans, more and more, practice, whatever they profess,"[17] Cuddihy observes that:

> This complex code of rites instructs us in the ways of being religiously inoffensive, of giving "no offense," of being *religiously* sensitive to religious differences. To be complexly aware of our religious appearances *to others* is to practice the religion of civility. Thus, civil religion is the social choreography of tolerance. It dances out an attitude.[18]

EVERSON AND THE ORGANIZATIONAL CULTURE OF THE SUPREME COURT OF THE UNITED STATES

"Managing Diversity"

This paper suggests that, when viewed through the lens of cultural accountability, many of the Supreme Court's most important substantive due-process cases since *Dred Scott v. Sandford*[19] are best understood as efforts as efforts to "manage" diversity and social change by ensuring that the nation's most important culture-forming institutions are controlled by factions whose attitudes are at least consistent with "the general sentiment of the community,"[20] if not with the views of "the thoughtful part of the Nation."[21]

The Court's establishment-clause cases fit squarely into this mold and provide at least prima facie evidence of a pattern and practice of judicial deference to the political power of factions whose views on race and religion in the public sphere are consistent with the Court's own view of "the enlightened sentiment of mankind."[22]

The factional infighting within the Court in these cases also provides prima facie evidence that the justices have been willing, for *raisons d'état*, to subordinate the rights and duties of the litigants before them to the interests of factions whose interests are at odds with those of the aggrieved parties who filed the cases. The available evidence thus supports a charge that the Court has been (and remains) willing, as an institution, to sacrifice liberty, political equality, and for that matter even pluralism whenever acceptance of a litigant's arguments might threaten a loss of control of important culture-forming institutions like the public schools.

Based on outcomes and reasoning patterns, an "objective observer"[23] of the Court's decisions could rationally conclude that the Court's view of its own power to "manage diversity" is far broader than John Marshall's claim in *Marbury v. Madison* that "it is emphatically the province and duty of the judicial department to say what the law is."[24] In case after case, the Court has claimed the power to strike "sensible balances" between and among the interests of the competing factions that are in-

volved in these cases as litigants, as amici curiae, or as political factions seeking to defend a hard-won political victory.[25]

The Cultural Politics of the Court's Establishment Clause Jurisprudence

If we assume, for purposes of this discussion, that an "establishment of religion" is a group of people having sufficient political power to impose its views about the "proper" relationship of religion and religious believers to the political culture, our analysis of establishment-clause cases would be much more focused than it is today. We would not need to concern ourselves with "three-pronged" tests,[26] or need to use our tape measures to establish the distances between crèches, Santa Clauses, plastic reindeer, and other "seasonal" trappings that have become so ubiquitous in community "holiday displays."[27] Nor would we need to worry about the reaction of hypothetical "objective observers" hiking in the Mojave Desert[28] or strolling in the Capitol Square in Columbus, Ohio,[29] for fear that they might perceive an implicit message of government "endorsement" of religion if they see a public display of a large Latin cross and learn that it rests on public property.

If a faction can be defined as "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community,"[30] we would focus almost exclusively on the intended behaviors *of those who are making the rules*. We would also be intensely interested in learning about the process by which the rules were developed, their application in practice, and especially the *outcomes* of the policies they make and enforce. All of this information would be useful to determine the intent behind the rules promulgated (or "found") and to learn whether or not the rule imposed actually operates in practice to promote equality of citizenship. We would not be concerned at all about the beliefs, affiliations, or actions of private citizens seeking equal access to public programs, opportunities, funds, or spaces.

Once we take this step, there is no going back. For the first time since 1947, we can see clearly that the Supreme Court's establishment-clause jurisprudence is not about the relationship "between church and state" at all. It is about "the politics of power" that Justice Jackson mentioned in the quote at the beginning of this paper. So too is "the most celebrated footnote in constitutional law,"[31] footnote 4 of *United States v. Carolene Products Co*.[32]

At least four generations of American lawyers and judges have been taught that the Supreme Court of the United States has a unique obligation to "particular religious, or national, or racial minorities." They also assume that the Court should not hesitate to intervene on their behalf whenever it appears the majority culture harbors "prejudice against dis-

crete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[33]

One does not question "politically correct" assumptions such as these. They are part and parcel of the often subtle, but culturally coercive, influence of the "legal establishment" on "the intellectual framework of law and the legal profession." Dean Roger Cramton's important article, *The Ordinary Religion of the Law School Classroom*,[34] describes the process as follows:

> A sophisticated observer of the typical classroom in most American law schools would hear a variety of views, and see many differing methods. But he could also detect certain fundamental value assumptions unconsciously presupposed by most faculty and student participants. This intellectual framework is almost never openly articulated, but it lurks behind what is said and done. As Whitehead noted, fundamental assumptions "appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them." Occasionally, cardinal tenets of this normally unarticulated value system are stated in a fashion suggesting that they are the common framework of the entire discipline. The process of socialization by which a law student becomes a lawyer involves the identification and acceptance of these accepted truths about law and lawyering. . . . The "ordinary religion of the law school classroom," of course, serves as a shorthand expression for this value system. . . . It includes not only the more or less articulated value systems of law teachers but also the unarticulated value assumptions communicated to students by example or by teaching methods, by what is *not* taught, and by the student culture of law schools.[35]

And thus, we lawyers are taught that the *Carolene Products* footnote is a "great and modern charter for ordering the relation between judges and other agencies of government."[36] We simply internalize Bruce Ackerman's view that the Court's declaration should be viewed as a "constitutional moment" in which "the ideals of the [New Deal's] victorious activist Democracy serve as a primary foundation for constitutional rights in the United States."[37]

But when we put those assumptions on the table, and view them through the lens of factional power politics, our famous footnote and the Court's establishment-clause jurisprudence looks more like a power grab, during which the Court rewrote the power equation drawn by the First and Fourteenth Amendments to support a claim of judicial authority[38] to manage nearly every type of "diversity" that academics can devise: racial,[39] political,[40] religious,[41] gender,[42] social,[43] socioeconomic,[44] and cultural.[45]

The only way to know for certain is to examine the evidence. We must, as Judge John T. Noonan Jr. observes, "immerse ourselves in history":

> "A page of history is worth a volume of logic." "The life of the law has not been logic but experience." These two axioms of Holmes—always given lip service by law schools but rarely taken seriously in academic milieus where the arts of logic flourish—are here, if anywhere, the keys of understanding. It is not only a matter of grasping the intentions of the Founding Fathers (a necessity if our national notion of a written Constitution as bedrock is to have validity.) It is also a matter of empathetically appropriating the experience that undergirds the constitutional principles of free exercise and no establishment. The experience that made the law is capturable only through history. To know the price other systems have exacted, to know the prize we have, we must immerse ourselves in history.[46]

Everson *and the Politics of Diversity Management*

As always, the devil is in the details. In this field, as in so many others, it is the exception that proves the rule.

We must therefore examine how the Court's concern for "minorities" since 1937 expresses itself in the case law. It should come as no surprise that much of our understanding of the First Amendment[47] "in general"—and of the role of civil-rights laws "in particular"—is framed by our concern for those who dissent, by word or deed, from the "conventional wisdom," (or zeitgeist) of the community. Because they are dissenters, those who refuse to accept "traditional" moral, social, or cultural norms have come to rely on the courts as the primary forum in which to seek redress of their grievances.

Whether the issue is flag-burning,[48] profanity within the public spaces of a courthouse,[49] the in-your-face Evangelical message of the itinerant missionary,[50] the publication of classified or sensitive data that will embarrass or indict the powers-that-be,[51] or the below-the-radar organizing of those who seek to "speak truth to power,"[52] the Court's speech and press cases focus—quite rightly—on the task of ensuring that individuals who set themselves apart have equal access to the public spaces, to the public forum, to public employment, and to public benefits, whether acting alone or in coalition with their like-minded, fellow citizens.[53]

The Court's jurisprudence of the religion clauses is different. Though its free-exercise-clause cases have long insisted that public officials owe *at least* the same duty to accommodate religiously motivated individuals and institutions as they owe to others,[54] the Supreme Court's establishment-clause cases start from a very different premise: that the rights of religious dissenters are best protected by an activist court that strives to preserve the "secular" character of public spaces, programs, or benefits

by *excluding* anything (or anyone) with a religiously identifiable character.[55]

A page of this history is indeed worth a volume of logic. Before 1947, the Supreme Court had addressed the meaning of the ban on laws "respecting an establishment of religion" on only two occasions. In both cases, the Court refused to exclude identifiably religious institutions from participating in public programs or benefits.[56]

If the Bill of Rights is really about the protection of "minorities," however, the Supreme Court's first post-1937 foray into establishment-clause analysis should have been easy. Catholics were unquestionably a "minority" in the United States in 1947, and there was a long and well-documented history of discrimination against Catholics, both generally and in public schools.

From the Civil War onward, "Catholics in many parts of the Northeast and Midwest opened a campaign to eliminate the Protestant tinge that Bible-reading gave to the public schools, [and] to secure for their own parochial schools a share of the funds that the states were providing for education."[57] The response to this campaign was a classic example of factional power politics.

Control of the schools became a galvanizing issue in the 1876 presidential campaign, with both Rutherford B. Hayes and Ulysses S. Grant railing against the nefarious plot by Catholics and others to destroy the ideal of "of a good common school education, unmixed with sectarian, pagan or atheistical dogmas."[58] In 1875, Grant and James G. Blaine, another potential candidate in the 1876 election, proposed a constitutional amendment, as did Senator Henry W. Blair of New Hampshire in 1888. Had they been adopted, either of these amendments would have ensured that control the publicly funded educational environment in schools remained safely in the hands of those who would ensure that they provided for "the education of all the children living [in every state], between the ages of six and sixteen years, inclusive, in the common branches of knowledge, and in virtue, morality, and the principles of the Christian religion."[59]

The culture war continued into the early part of the twentieth century. In the early 1920s, the state of Oregon attempted to close all private schools,[60] arguing that "sectarian" schools were a "pretext" to divide "our children . . . based upon money, creed or social status . . . into antagonistic groups, there to absorb the narrow views of life, as they are taught."[61]

Arch Everson, the plaintiff in *Everson v. Board of Education*, appears to have shared those views. In 1942, Everson challenged a town resolution authorizing reimbursements for bus fares paid by parents to send their children to public and private high schools in Trenton. He did not object to the payments to parents whose children attended public schools but only to those made to parents who had chosen Catholic schools.

In order to understand the legal and cultural dimensions of the case, one must first examine the New Jersey statute that authorized the payments:

> Whenever in any district there are children living remote from any schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, including the transportation of school children to and from school other than a public school, except such school as is operated for profit in whole or in part.[62]

As originally drafted, the New Jersey law applied only to "schoolhouses" operated by the public schools. A 1941 amendment broadened its coverage to include *any* schoolhouse and any child attending nonprofit, private schools.[63] Because Ewing Township, New Jersey (a suburb of Trenton), had no high school at the time, it was inevitable that *all* of the township's children would be commuting into Trenton to attend high school. The only question was: who would pay the bill?

On September 21, 1942, the Ewing Township trustees adopted the following resolution:

> The Transportation Commtt. [*sic*] recommended the Transportation of Pupils of Ewing to the Trenton High and Pennington High and Trenton Catholic schools, by way of public carriers as in recent years. On Motion of Mr. R. Ryan, seconded by Mr. French, the same was adopted.[64]

The record in *Everson* does not tell us much about the factional politics that led to the adoption of this resolution by the township trustees, but it certainly does tell us about the factions who opposed it. Even though Trenton High was a public school and Pennington High was affiliated with the Methodist Episcopal Church,[65] Mr. Everson told the Supreme Court that:

> All of the said schools are Roman Catholic Parochial Schools in the City of Trenton, and religion is taught as part of the curricula in each of said schools. A priest of the Catholic Church is the Superintendent of said schools.[66]

Stripped to its essentials, Everson's claim was that the establishment clause makes parents and children *ineligible* to participate in publicly funded educational programs unless they submit to state control of their entire educational experience. This was so, he argued, because "the courts of this country have been unanimous in prohibiting a use of public funds to pay, directly or indirectly, tuition fees of pupils in private or sectarian schools."[67]

More to the point of this book was his cultural argument: education, he argued, is a purely "private enterprise" if it is "not under the control of the town authorities."[68]

Everson lost this particular battle, but it is arguable that he won the first and most important rhetorical battle of the ongoing culture war over factional control of funds for education. The principle he espoused—that public financial support necessarily requires that government control the curriculum and textbook content, teacher perspective, and the physical and social environment of the school—has become one of those "fundamental assumptions [that] 'appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them.'"[69] It would take fifty years for the Court to permit *any* tax funds to be used in elementary and secondary schools that are not controlled by the government.[70] The battle rages on.

Everson *and the Culture of the Public-School Classroom*

By this point in the discussion, it should be obvious that any concern for "discrimination" against "minorities" has disappeared from the analysis altogether. The issue is one of factional control of the schools. Justice Robert Jackson's dissent in *Everson* hits the cultural nail on the head:

> It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task.
>
> Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values. It is a relatively recent development dating from about 1840. *It is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion*. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion. Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.[71]

The history of education in the United States thus shows, beyond a reasonable doubt, that political control of the schools has *always* been understood to be the primary means by which the state shapes the acculturation of children. When the private-school parents sought the assistance of the Ewing Township trustees, they unquestionably sought to increase the cultural *and* religious pluralism available in publicly sup-

ported education programs.[72] Rather than endorse the effort, the Court gave notice that it would stop future efforts in their tracks.

The same pattern holds true in cases where the Court has immersed itself in earnest discussions about the "proper" role of race in educational programs. Viewed through a cultural lens, the Court's commitment to "managing" racial and cultural pluralism is even more obvious in racial-discrimination cases than it is in religion cases. Like *Everson*, *Brown v. Board of Education I* and *II*[73] are about cultural control of the educational environment. The damage done to Louise Brown and the other children who were enrolled in the segregated public schools of Topeka, Kansas, the District of Columbia, and elsewhere was serious enough to warrant judicial intervention on their behalf but insufficient to warrant an immediate remedy. *Brown* was filed in the district court in 1951.[74] It was not fully concluded for nearly forty-five years![75]

There is no need (and certainly not enough room) to multiply the examples here, but the pattern is striking. In case after case, we see the justices explicitly seeking to be "carriers of the set of traditional values which command authority because they represent the aspirations of both the elite and the rest of the population."[76] Reading the cases through this "cultural" lens also shows us the classic indicators of a cultural establishment that seeks to be "essentially traditional and authoritative" as it invokes the great principles that animated the founding generation, rather than "coercive or authoritarian."[77] The outcomes, however, tell a very different story.

WILLFUL BLINDNESS: SUBTLE COERCION, "CIVIL RELIGION," AND POLITICAL CORRECTNESS

We now return to John Murray Cuddihy's concept of a "religion of civility." Is it true that the "civil religion" has morphed into a "complex code of rites [that] instructs us in the ways of being religiously inoffensive, of giving "no offense," of being *religiously* sensitive to religious differences?"[78] It is. Consider the following situations and legal cases:

Nampa Classical Academy v. Goesling

The State of Idaho has adopted a series of curriculum content standards for grades 6–9 that require, among other things, that "students in World History and Civilization explain the rise of human civilization, trace how natural resources and technological advances have shaped human civilization, build an understanding of the cultural and social development of human civilization, and identify the role of religion in the development of human civilization."[79] The following goals were specified:

Goal 1.9: Identify the role of religion in the development of human civilization.

Objective(s): By the end of World History and Civilization, the student will be able to:

6–9.WHC.1.9.1	Explain the relationship between religion and the peoples' understanding of the natural world. (462.07c)
6–9.WHC.1.9.2	Explain how religion shaped the development of Western civilization. (462.07a)
6–9.WHC.1.9.3	Discuss how religion influenced social behavior and created social order. (462.07b)
6–9.WHC.1.9.4	Describe why different religious beliefs were sources of conflict.

Objective(s): By the end of World History and Civilization, the student will be able to:

6–9.WHC.5.1.1	Explain common reasons and consequences for the breakdown of order among nation-states, such as conflicts about national interests, ethnicity, and religion; competition for resources and territory; the absence of effective means to enforce international law[80]

It has also adopted content standards for high-school students in the humanities. The "interdisciplinary" standards for grades 9–12 include the following:

Objective(s): By the end of high school, the student will be able to:

9–12.I.2.2.1	Analyze an artifact or idea and debate its meaning in the context of its societal values.
9–12.I.2.2.2	Describe the influence of religion on government, culture, artistic creation, technological development, and/or social conduct.
9–12.I.2.2.3	Discuss ways in which the arts and humanities both break through and create class barriers.
9–12.I.2.2.4	Discuss the significance of artworks in a society.[81]

From 2008 to 2010, the Nampa Classical Academy (NCA) was a not-for-profit charter school incorporated under the laws of the state of Idaho. Its curriculum was structured in a "classical, liberal arts format, and focuses its study not on textbooks but rather on primary sources as a method of educating its students." Teachers at NCA utilized a variety of original/primary source documents for teaching their courses. These primary sources included both secular and religious materials such as the Bible, Koran, the Book of Mormon, the Hadith, the classics of Greek and Norse mythology, and other classics. NCA's staff believed that they could better teach students about a wide variety of subjects by using primary-source documents.

The Idaho Board of Education approved NCA's charter petition in September 2008. In July 2009, however, a complaint was lodged with the commission alleging that, under the Idaho Constitution, the Bible and other sacred texts could not be used as part of NCA's curriculum. The United States Court of Appeals for the Ninth Circuit affirmed a district court ruling that the state of Idaho could revoke the school's charter because the use of "sectarian" books "would allow religion into the curriculum of the public schools."[82]

Idaho public-school teachers may not, therefore, assign readings from the Qur'an, the Bible, the Book of Mormon, or any other primary religious text, even as "literature," and Idaho public-school children cannot learn (in school at least) *from primary sources*[83] about how *any* religious tradition perceives important questions.

The Pakistan Madrasa Project

The United States government purchases and distributes Pashto, Dari, and Urdu copies of the Qur'an for use as teaching materials in Pakistani madrasas.[84] It also pays for "teacher training and capacity-building programs that promote curricular and pedagogical enhancement, with a strong emphasis on religious tolerance, human rights, conflict resolution, and critical thinking skills." The program is considered by its sponsors to be a very successful means of teaching often-illiterate teachers and children how to read and a very effective way of providing them with an understanding of how Islam deals with basic questions of human rights, religious pluralism, and the laws of war.

Christian Legal Society Chapter, University of California, Hastings College of Law v. Martinez

The University of California's Hastings College of Law[85] has a nondiscrimination policy that forbids "legally impermissible, arbitrary or unreasonable discriminatory practices," including unlawful discrimination "on

the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation."[86] In accordance with this policy, Hastings requires all student organizations, including religious groups, to have an "open" membership policy. Under this policy, "all registered student organizations must allow *any* student to participate, become a member, or seek leadership positions in the organization, regardless of status or beliefs."[87]

The Christian Legal Society (CLS) "is a membership organization of Christian attorneys, judges, paralegals, law students, and other legal professionals dedicated to serving Jesus Christ through the practice of law, defense of religious freedom, and provision of legal aid to the needy."[88] It requires its members to sign a "Statement of Faith" assenting to the religious teachings that define the group[89] and affirm its "Community Life Statement" that requires its members to "renounce unbiblical attitudes, including . . . unjust prejudice such as that based on race, sex, ethnicity, appearance, disability, or socio-economic status" and "unbiblical behaviors, including deception, malicious speech, drunkenness, drug abuse, stealing, cheating, and other immoral conduct such as using pornography and engaging in sexual relations other than within a marriage between one man and one woman."[90] When an organization of Christian law students at Hastings decided to affiliate with CLS, and sought recognition as a "Registered Student Organization," the law school denied their application on the grounds that it went against the school's "all-comers" policy, which it enforced because "it brings together individuals with diverse backgrounds and beliefs, encourages tolerance, cooperation, and learning among students."[91]

Fisher v. University of Texas at Austin

The University of Texas at Austin has a two-tiered admissions policy.[92] Under Texas law, students in the top 10 percent of their high-school graduating classes are admitted if they meet certain academic requirements.[93] Students who do not qualify for admission under the Top Ten Percent Law are selected on the basis of two factors: an admissions index (AI), which includes standardized test scores, class rank, and high-school curriculum, and a personal achievement index (PAI), which includes an "holistic review of an applicant's leadership qualities; extracurricular activities; awards/honors; work experience; service to school or community; and special circumstances."[94]

Among the factors considered in the PAI are race and other "diversity" measures, a practice that, according to the university, "permits the consideration of diversity within racial groups" and increases the potential that students chosen using race as a factor will serve as "'bridge[s]' in promoting cross-racial understanding, as well as in breaking down racial stereotypes."[95]

A RELIGION OF CIVILITY?

What do the last four cases have in common? The most obvious answer is that each arises in a school, an institution whose mission is to transmit knowledge, develop skills, and shape the values of its students. Controlling them is a high priority for any community that seeks to maintain its language, faith, values, and culture.

In each case reported here, administrators and faculty have made value judgments about the content and perspective of education they will provide to their students. They have developed lesson plans that will convey and develop a working knowledge of the material, and, like all serious teachers, they seek as best they can to control the environment in which the lessons are to be modeled and practiced.

Nampa Classical Academy and the Pakistani madrasa project are thus struggles about control of the content of the curriculum and the perspectives from which that content will be considered. *Fisher* and *Christian Legal Society* are about control of the educational environment. Read together, they are current examples of an ongoing factional power struggle over control of the nation's major culture-forming institutions.

The Supreme Court of the United States has claimed nearly complete jurisdiction to resolve these issues since 1947. From Justice Robert Jackson's concurrence in *Everson v. Board of Education*[96] through Justice Elena Kagan's dissenting opinion in *Arizona School Tuition Organization v. Winn*,[97] a majority of the justices and the majority of academic and political commentators have essentially viewed the establishment clause as a device by which "the thoughtful part of the Nation" can maintain control over the major culture-forming institutions of American society.

There is real cognitive dissonance here. The Court has held that the "heart of liberty is the right to define one's *own* concept of existence, of meaning, of the universe, and of the mystery of human life" and that "beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[98] Public education is, according to the Court, a controlled environment in which neither teachers nor students can assert First Amendment claims that conflict with the school's decisions regarding content, perspective, materials, or environment.[99] Why, then, is it legitimate to require *as a matter of constitutional doctrine* that publicly funded educational institutions must scrub the educational environment of religious ideas? The only conceivable answer is that views rooted in scriptural truth-claims will inevitably offend or influence those who do not share them or (worse) stunt the orderly development of the person.[100]

The outcomes in *CLS*, *Fisher*, and *Nampa Classical Academy* are perfectly consistent with a reading of the establishment clause that authorizes the Court to continue its ongoing experiment with diversity management, the *sine qua non* of which appears to be a policy that excludes

religious messages and any citizen-believers who take them seriously enough to bear witness to their truth by word or deed.

The Pakistani madrasa project is the exception that proves the rule. Congress, like the teachers at the Nampa Classical Academy, takes religion and religious beliefs very seriously and requires the federal government to take religious believers as it finds them. For Congress, the choice was clear: either educate illiterate Muslim youth about a peaceful interpretation of the Qur'an, or leave them to be recruited as child soldiers by extremists who will teach them that it requires the slaughter of innocents.

If the judge chooses to follow the conventional wisdom expressed in Justice Jackson's words in *Everson* above, he or she will rule that *all* publicly funded education—even for the Taliban and their children—*must* be organized "on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion." If the judge understands the true meaning of "diversity," he or she will abstain.

THE REAL WORLD IMPLICATIONS OF AMERICA'S "RELIGION OF CIVILITY"

Let us now briefly consider two concrete examples: (1) the duty that governments owe persons who form associations and (2) the duty that governments, as associations of their citizens, owe to one another in the sphere of public international law. As we consider these examples, we assume, as Andreas Føllesdal suggests, "that political authority must be justified in terms of the effects on individuals' best interests, as units of ultimate moral concern in the global order."[101]

In Domestic Affairs: Creating Comparative "Structural Burdens"

I begin this discussion of domestic affairs with James Madison's admonition, in *The Federalist*, No. 10, concerning the power of faction:

> By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community. . . .
>
> The latent causes of faction are thus sown in the nature of man; and we see them everywhere brought into different degrees of activity, according to the different circumstances of civil society. A zeal for different opinions concerning religion, concerning government, and many other points, as well of speculation as of practice; an attachment to different leaders ambitiously contending for pre-eminence and power; or to persons of other descriptions whose fortunes have been interest-

> ing to the human passions, have, in turn, divided mankind into parties, inflamed them with mutual animosity, and rendered them much more disposed to vex and oppress each other than to co-operate for their common good. So strong is this propensity of mankind to fall into mutual animosities, that where no substantial occasion presents itself, the most frivolous and fanciful distinctions have been sufficient to kindle their unfriendly passions and excite their most violent conflicts. . . . The regulation of these various and interfering interests forms the principal task of modern legislation, and involves the spirit of party and faction in the necessary and ordinary operations of the government. . . .
>
> If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote. It may clog the administration, it may convulse the society; but it will be unable to execute and mask its violence under the forms of the Constitution. When a majority is included in a faction, the form of popular government, on the other hand, enables it to sacrifice to its ruling passion or interest both the public good and the rights of other citizens. To secure the public good and private rights against the danger of such a faction, and at the same time to preserve the spirit and the form of popular government, is then the great object to which our inquiries are directed. Let me add that it is the great desideratum by which this form of government can be rescued from the opprobrium under which it has so long labored, and be recommended to the esteem and adoption of mankind.[102]

If, as I suggest at the outset of this paper, "an establishment of religion" is a *faction* that uses its access to (or control of) political power to manipulate the rules to advance its agenda, we should find some evidence in constitutions, statutes, and case law. Just like the plaintiffs in *Schuette v. Coalition to Defend Affirmative Action and Immigrant Rights and Fight for Equality by any Means Necessary (BAMN)*,[103] we would attempt to show that the majority has used its power to create "a comparative structural burden" that makes it difficult, if not impossible, for factions that do not share the majority's view to accomplish their goals through ordinary political channels.

I have already mentioned two examples. The first, and most obvious, case in which an organized political faction that includes the majority created "a comparative structural burden" is found in the Blaine Amendments enshrined in thirty-seven state constitutions.[104] These amendments—one of which (Idaho's) was involved in the *Nampa Classical Academy* case—sought to ensure that the Protestant majority would control not only the curriculum and environment of the public schools but also the funding streams that ensure that elementary and secondary students are educated at public expense.

The case law since *Everson v. Board of Education* is the second example. By 1947, the year in which *Everson* was decided, Catholics had reached what cultural sociologists call a "critical mass" in several states that did

not have Blaine Amendments, including New York, New Jersey, Pennsylvania, and Ohio. *Everson* and its progeny changed the rules, converting an ordinary political question (viz., concerning which schools shall be funded) into a constitutional question that *requires* the Court to examine the content, perspective, and environment of schools to ensure that there is no impermissible "sectarian" content.

By this measure, the Court's decision to permit taxpayer standing in *Flast v. Cohen*[105] is more of the same. In establishment-clause cases, the Court had long practiced what Judge Guido Calabresi of the United States Court of Appeals for the Second Circuit once called "a form of affirmative action" in favor of some, but not all, religious dissenters.[106]

The example on which I focus in this section, however, is the recent battle within the Supreme Court of the United States over the First Amendment rights of associations.

It is often forgotten that nation-states are, themselves, political associations. In Aristotle's conception, the *polis* is not only composed of households and villages, but also it is "fundamentally comprised of individual citizens (*politai*), formed into a self-sufficing unity."[107]

The United States Constitution proceeds from the same assumptions. Its famous Preamble "We, the People of the United States" begins with the collective pronoun, "We," a reference to a collection of individual citizens—"the People"—who have formed *themselves* to "a self-sufficing unity" *of communities*: the several states, whose union is "the United States." The phrase refers not to the citizens of a unitary nation-state but rather to the citizens of the several states whose civil and political rights and obligations are defined, first and foremost, by the constitutions and laws of the states "in which they reside."[108]

In article after article, the United States Constitution affirms not only the importance and integrity of the states themselves[109] but also the need to protect the "lesser," "foundational" communities that exist within their boundaries, whether formed by contract,[110] commercial enterprise,[111] religion,[112] or politics.[113] But the words of those provisions are almost never unpacked in light of the language and structure of the Constitution itself.[114] They are construed, instead, to authorize a massive transfer of power from the states and the Congress to the branch of the federal government that has, over time, been *least* responsive to the needs and demands of these "foundational" communities: the Supreme Court of the United States.[115]

It should come as no surprise, therefore, that one of the most heated, current, constitutional controversies in recent years arose in 2010, when the Court held in the *Citizens United* case that nonprofit corporations (and, by implication, political parties) have the same First Amendment right to unfettered political speech as individuals and for-profit media corporations.[116] It arose again during the Court's 2013 term in *Burwell v. Hobby Lobby Stores, Inc.* and *Conestoga Specialty Wood Products v. Bur-*

well,[117] in which the U.S. government argued that associations of citizens forfeit the protections of the Religious Freedom Restoration Act (RFRA) when they organize as "for profit" corporations.

While the specific issue in the *Citizens United* case was whether the federal government could assert the "corrupting" influence of corporate spending as its justification for banning the distribution of a video that was critical of then senator Hillary Clinton,[118] and the issue in *Hobby Lobby* was whether the federal government may compel the owners of a closely held corporation to contribute to the cost of certain birth-control devices and drugs (i.e., those which are abortifacient), the underlying conceptual issue is fairly simple: do individuals lose their right to constitutional and statutory protections for their liberty and quality when they organize themselves as a corporation? In both the *Citizens United* and the *Hobby Lobby* cases, the Court said "no." Both cases have provoked a sense of political outrage so intense and so sustained that we need an analytical model with sufficient candlepower to illuminate every nook and cranny of the controversy.

Madison's brilliant defense of the concept of separation of powers in *The Federalist*, No. 51 is that analytical model:

> If men were angels, . . . neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. . . . This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public.[119]

Abraham Kuyper's concept of "sphere sovereignty"[120] makes the point explicitly. With the concept of sphere sovereignty, Kuyper in effect argues for the separation of powers, not primarily within government, but across the entire society:

> God established institutions of various kinds, and to each of these He awarded a certain measure of power. He thus divided the power that He had available for distribution. He did not give all his power to one single institution but gave to every one of these institutions the power that coincided with its nature and calling.[121]

Kuyper's observation that, "God . . . gave to every one of these institutions *the power that coincided with its nature and calling*"[122] shows us where to begin: with the basic unit of the *polis*, the individual citizen *as person and as elector*.

And it is here that we can see the wisdom of Patrick McKinley Brennan's observation that "the modern mind must resist, as [Luigi] Taparelli [D'Azeglio] did, the philosophical prejudice according to which only individual rational substances, *but not groups or societies*, are the subject of

right and of rights."[123] Why? Because a philosophical or political orientation that denies the social nature of human beings is inconsistent with the very concept of *human* rights.

Human beings are, by nature, social. Our formation as persons, citizens, and electors is accomplished in close association with others: parents, siblings, extended family, friends, teachers, and mentors, to name only a few. So too is the expression of our most sincerely held opinions about faith, politics, economics, and one another. *Each* of the freedoms guaranteed by the First Amendment presupposes a *social* context in which it can be enjoyed. Without that social context, they are meaningless words on a page.

Citizens who elect to organize themselves as an association do so because joint effort is conducive to attaining their otherwise-lawful purposes. They understand that associations create complex webs of personal relationships and that these relationships are dynamic. A *community* emerges from that interaction, with its own organizational identity, with its own "original rights of self-governance,"[124] and becomes a constituent part of the larger community—the *polis*. Jonathan Chaplin's essay "Subsidiarity and Social Pluralism"[125] correctly suggests that state intervention in the internal decision making of private associations is legitimate only insofar as it is designed to protect the rights that the members of the association *have given themselves* to participate in its self-governance.[126]

By starting with the individual constituents who create and sustain the "lesser" communities of the *polis*, we can see why the federal government was so committed to its argument in *Citizens United* that *associational* "expenditures [must] reflect actual public support for the political ideas [they] espouse."[127] Prior restraints come in many guises. In essence, the government's claim was that unless the members of an association can prove to the satisfaction of a government agency (or bureaucrat) that a majority *of the public* supports the political ideas they espouse, they are free to talk among themselves, but are forbidden to spend money collectively to share that message with the rest of us.

In Foreign Affairs

In a post-9/11 environment, America's "religion of civility" is not only unrealistic—it is dangerous. Does it affect our behavior? The record of the State Department, CIA, FBI, and Department of Justice, both prior to 9/11 and since, makes it abundantly clear that it does.

Let us begin the sorry tale with the sociological framework in which this debate takes place. As sociologist Peter Berger puts it, the world today is "as furiously religious as it ever was, and in some places more so than ever."[128] Dr. Thomas F. Farr, former head of the State Department's Office of International Religious Freedom, observes:

> The reappearance of public religion on the world stage has complex implications. Religion has both bolstered and undermined stable self-government. It has advanced political reform and human rights but also induced irrationality, persecution, extremism, and terrorism. Radical Islam may dominate the headlines, but the importance of religion is hardly confined to Muslim-majority countries or the Muslim diaspora. An explosion of religious devotion among Chinese citizens increasingly worries communist officials. Religious ideas and actors affect the fate of democracy in Russia, relations between the nuclear powers India and Pakistan, and the consolidation of democracy in Latin America. Even in Western Europe—which has seen itself as a laboratory for secularization—religion, in the form of Islam and pockets of Christian revival, simply will not go away.[129]

Nor, I might add, will the believers who are fueling the resurgence of public religion, either on the world stage or here in the United States. Neither of these factions is much inclined to pretend or act in a way that is *designed* to convey the impression that beliefs about God, religious duty, and the role of religion in public life simply "do not matter much."

Nor should they so pretend. The late professor Harry Kalven observes that the "'religion clauses' of the First Amendment have provided the basis for 'a first great principle of consensus,' which is that 'In America, there is no heresy, no blasphemy.'"[130] The Supreme Court of the United States makes much the same point:

> Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.[131]

The Court's establishment-clause jurisprudence, however, stands as a stark exception to its lofty prose. It is one thing to use the free-exercise clause to accommodate "discrete and insular minorities" whose "freedom to differ" does not "matter much" in the Court's view of the cosmic scheme of things.[132] It is quite another when "the right to differ as to things that touch the heart of the existing order" is asserted by religious groups with real political power *and* the motivation to use it to change important aspects of that "existing order."[133]

In these cases, the First Amendment analysis is quite different, and the reasoning is much like of a late "Citizen of Philadelphia," who condemned such exclusionary devices as those used by "a ruling party to entrap and punish such people as they suppose inimical to themselves."[134] Justice Jackson's description of the role that constitutional litigation plays in this process, quoted at the outset of this paper, is worth

repeating here: "The politics of power is a most important and delicate function, and adjudication of litigation is its technique."

Consider now the outcomes that flow from the "organizational culture" of political correctness created by the Court's jurisprudence on religion and race. The following well-documented examples should suffice for present purposes:

1. The State Department *and* the CIA "missed" the Islamic Revolution in Iran.[135]
2. FBI headquarters ignored warnings of field reports about the presence of the 9/11 bombers, one of whom wanted to learn how to fly big jets but did not care about learning how to land them.[136] It also banished its highly decorated and highest-rated Arabic-speaking agent, Bassem Youssef, to a detail that would not allow him to use his Arabic-language skills to parse the ramblings of the now-deceased Osama bin Laden. His colleagues feared that he and other Arabic speakers were Muslims.[137]
3. Our foreign intelligence and diplomatic services were quite late to the party when the "Arab Spring" broke out in early 2011 but know little to nothing about the religious dynamics of Egypt at precisely the point when that knowledge would have made a difference.[138] Reports from Cairo indicated that our diplomats alienated key reformers because we backed the Muslim Brotherhood's efforts to take control.[139]
4. In 2007, two senior U.S. officials fretted aloud that State Department support for Norwegian efforts to create and sustain a Council of Religious Institutions of the Holy Land that includes the leaders of all of that war-torn region's religious groups would not only violate the establishment clause but also cause great angst among the leaders of America's own faith communities.[140]

Question: *what is wrong here? Hint*: consider the *culture* of the institutions that educate and socialize American diplomats. *Answer*: as recently as early January 2013, a distinguished former ambassador, who must, for present purposes, remain nameless, remarked that our State Department is "pathologically anti-clerical" and could not be counted upon to recognize, much less to seize, opportunities to create and sustain significant networks among religious leaders in the Middle East, North and sub-Saharan Africa, and South Asia.

The reaction of a group of senior policy officials at the Pentagon in December 2011 provided unequivocal confirmation of that ambassador's thesis: in their view, the principle of separation of church and state does not permit the United States to deal with ayatollahs! And this is so, I inquired, even if we need the signature of one such ayatollah to resolve the nuclear standoff with Iran? They had not thought about the question. Worse, they were in denial. In one memorable conversation, I was forced

to take out a copy of the Iranian Constitution to "prove" to a key U.S. government official that the supreme leader, rather than its president, was Iran's actual head of state.

"Official Washington" is not (as some people claim) "clueless." It is *willfully blind*.

With a few notable exceptions, the liberal and conservative political commentators and pundits who are part and parcel of America's foreign-policy "establishment" are even further behind the curve. While they are overjoyed at the prospect of democracy in the predominantly Muslim, tribal societies of North Africa and the Middle East, and the more "progressive" among them remain fully committed to multiculturalism at home, they seem *culturally* unable to break out of the cultural straightjacket in which they find themselves.

Like the FBI and CIA, they are missing important stories because the subjects are religious—and thus *culturally* unfamiliar. Go look for the stories that describe the importance of the political rift between the Muslim Brotherhood and the Salafists. You will not find them in the "mainstream" American press. Nor will you find many stories about the complexities of the religious proxy war between Iran and Saudi Arabia going on in Syria—a war that has Syrian Christians allied with Alawites, who are supported by Iran, the Russian Orthodox Church, and Vladimir Putin. Did our policymakers learn nothing from what happened to the Christians in Iraq who supported Saddam Hussein as "protection" against Muslim extremists? Apparently, they did not. We appear to be supporting some of those extremists.

These scenarios are depressingly familiar. In the years leading up to World War II, senior diplomats described themselves as members of a "Pretty Good Club."[141] Like much of the "establishment" at the time, that "club" had very distinct attitudes about religion, both here in the United States and abroad. It was unquestionably anti-Semitic and anti-Catholic.[142]

Are we repeating the same mistakes today—with equally lethal consequences? We are, without a doubt.[143] Former secretary of state Hillary Rodham Clinton was sufficiently concerned about the situation that she ordered her staff to set up a process that would reshape the attitudes about the role of religion in foreign policy held by the senior staff of her own State Department and USAID.[144]

It will take years. For the foreseeable future, the dominant worldview that the Department of State, the Department of Defense, USAID, and the intelligence community remains mired in is shaped by a judicial view of the establishment clause that simply makes no sense, either at home or abroad:

> The response of U.S. diplomacy to the religious scaffolding that bestrides the international order has been at best inconsistent and often

> incoherent. A recent study by the Center for Strategic and International Studies concludes, "U.S. government officials are often reluctant to address the issue of religion, whether in response to a secular U.S. legal and political tradition . . . or simply because religion is perceived as too complicated or sensitive. Current U.S. government frameworks for approaching religion are narrow, often approaching religions as problematic or monolithic forces, overemphasizing a terrorism-focused analysis of Islam and sometimes marginalizing religion as a peripheral humanitarian or cultural issue."[145]

The situation has been so bad at times that "a memorandum to the Secretary of State [in the late 1990s] on the subject of religion was returned by a senior official with a stern note saying that this was not an appropriate subject for analysis."[146]

Such blindness has consequences. Without serious analysis, we assume that the cultures into which we are attempting to insert our values appreciate our efforts to convert them to our way of thinking about religion. Apparently our friends in the Middle East, South Asia, and Africa did not get the memo that establishes, as a matter of human-rights law, that the "heart of liberty is the right to define one's *own* concept of existence, of meaning, of the universe, and of the mystery of human life."[147] Perhaps they, too, believe that American funding should not be used to replace their Islamic and tribal cultures with those that are less offensive to our "tolerant" religious tastes.

Consider the recent reaction of those in other countries to the following: "Attempts to 'reach out' to Muslim youth have often centered on American pop music; a chair of the U.S. Broadcasting Board of Governors once solemnly declared that the pop star Britney Spears 'represents the sounds of freedom.'"[148] In June, 2011,[149] the United States Embassy in Islamabad sponsored Pakistan's "first ever gay, lesbian, bisexual and transgender pride celebration."[150]

It should therefore come as no surprise that many religious and political leaders in Eastern Europe, Central and South Asia, and Africa vehemently oppose attempts by U.S. officials to transplant America's secular culture and values into their own. From the perspective of conservative, religious, social, and political leaders who *also* want to manage the pace of cultural change, America's official policy is one of cultural and political hegemony. Criticizing the United States at one of the rallies protesting the above U.S. embassy's efforts on behalf of Islamabad's LGBT community, Mohammad Hussain Mehnati, a leader of Pakistan's *Jamaat-e-Islami*, complains:

> They have destroyed us physically, imposed the so-called war on terrorism on us and now they have unleashed cultural terrorism on us. This meeting shows [that] cruel America has unleashed a storm of immoral values on our great Islamic values, which we'll resist at all costs.[151]

Viewed from an "organizational culture" perspective, America's critics are not too far off the mark. They are correct that many American policy makers, experts, and journalists have no interest in Islam on its own merits and that they consider it to be a threat to "American values" and world peace. It would be so much easier if, as a third-grader once said, they all spoke and thought as we do.

But they don't. The fundamental assumptions of senior American officials, academics, and media experts "appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them." Like little Louise Brown (the lead plaintiff in *Brown v. Board of Education*) and the school kids in *Everson* who needed bus fare get to school in Trenton, the *citizens* involved in these cases hardly matter. Dr. Farr makes much the same point:

> The persistent belief that religion is inherently emotive and irrational, and thus opposed to modernity, precludes clear thinking about the relationship between religion and democracy. Insufficient policy attention is paid to the work of social scientists, such as Brian Grim and Roger Finke, that suggests religious freedom is linked to the well-being of societies. Most U.S. officials were weaned on a strict separation-of-church-and-state philosophy and simply resist thinking about religion as a policy matter. . . . Although some U.S. actions in the realm of religion may raise constitutional issues, the U.S. Constitution neither mandates ignorance about religion nor proscribes its public practice.[152]

CONCLUSION

This very cursory exploration of the utility of using a concept such as "cultural accountability" to analyze a body of case law suggests two potentially fruitful areas for multidisciplinary research.

The first is the need for a sustained, multidisciplinary examination of the legal and cultural assumptions that support the Supreme Court's case law on race and religion. The second is a frank examination of *who benefits* when the Court succumbs to the temptation to use litigation between citizens to resolve broad cultural controversies . Hundreds of millions of dollars have been spent on school desegregation cases, and hundreds of millions more have redirected as a result of establishment-clause litigation. Trillions have been spent trying to pacify the Middle East, North Africa, and South Asia. What did all that money buy *and for whom*? *Cui bono*?

In the end, what we want to know is whether the rules judges find in the Constitution are designed to foster equality of citizenship, pluralism, and freedom for individuals and the associations they form *and whether they actually do so*.[153] We also want to know whether the rules made and enforced by the judiciary are "neutral rules of general applicability"[154] or

whether they have the intended effect of helping political factions to assert or maintain control over the nation's culture-forming institutions: schools, political associations, unions, fraternal organizations, churches, and families.

It is safe to predict that the findings of well-designed outcome and process evaluations of hotly contested constitutional cases and cultural policies will not be popular. One does not lightly trespass into the precincts of those who are practicing the craft of cultural Realpolitik.[155]

And thus, the conclusion is inescapable: the "most fundamental challenge facing judiciaries in liberal democracies" is the "counter-majoritarian difficulty" itself.[156] Judges are charged with the solemn duty to ensure that every citizen has an equal opportunity to participate in the political, economic, social, and cultural life of the community. In accordance with this view, we vest Supreme Court justices and federal appellate judges with enormous and largely unreviewable discretion, not because they represent the values and insights of "the thoughtful part of the nation"[157] but rather because liberal democracies need impartial arbiters who will "administer justice without respect to persons, and do equal right to the poor and to the rich."[158]

I conclude with the same observation with which I began. From a cultural-accountability perspective, the judiciary serves either as "an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority,"[159] or it serves as an "Engine of the Ruling Party."

NOTES

1. Robert H. Jackson, *The Struggle for Judicial Supremacy: A Study of a Crisis in American Power Politics* (1941), 287–88.**[AQ18: Could the city of publication and publisher's name be added here and for Lockhart in note 31 as well as notes 38, 57?]**

2. "Cultural accountability" is a term used in the business community to describe an organizational culture in which "results-based leaders define their roles in terms of practical action. They articulate what they want to accomplish and thus make their agendas clear and meaningful to others." William Q. Judge, *Building Organizational Capacity for Change: The Leader's New Mandate* (New York: Business Expert, 2011), 95, quoting Dave Ulrich, Jack Zenger, and Norm Smallwood, *Results-Based Leadership* (Boston: Harvard Business Rev. Press, 1999), 21.

3. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). Professor David Currie has written that Dred Scott "was at least very possibly the first application of substantive due process in the Supreme Court, and in a sense, the original precedent for *Lochner v. New York* and *Roe v. Wade*." David P. Currie, "The Constitution in the Supreme Court: Article IV and Federal Powers, 1836–1864," *Duke L aw J ournal* 1983 (September 1983): 695, 735–36, and nn. 255–64.

4. Steven G. Gey, "Reconciling the Supreme Court's Four Establishment Clauses," *J ournal of Const itutional L aw* 8 (2006): 725.

5. The text of the judicial oath is found in 28 U.S.C. § 453 (2013). It provides: "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the

poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.'"

6. For an extended discussion of this topic, see Robert A. Destro, "Federalism, Human Rights, and the Realpolitik of Footnote Four," *Widener Law Review* 12 (2003): 373–457.

7. Alexander Hamilton, *The Federalist*, No. 78, 231.

8. *Everson v. Board of Education*, 330 U.S. 1 (1947).

9. Ibid., 15–16.

10. Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," *W illia m and Mary L aw Rev iew* 44 (2003): 2105, 2131: "An establishment is the promotion and inculcation of a common set of beliefs through governmental authority. An establishment may be narrow (focused on a particular set of beliefs) or broad (encompassing a certain range of opinion); it may be more or less coercive; and it may be tolerant or intolerant of other views. During the period between initial settlement and ultimate disestablishment, American religious establishments moved from being narrow, coercive, and intolerant to being broad, relatively noncoercive, and tolerant."

11. Professor William M. Wiecek defines "structural racism [a]s a complex, dynamic system of conferring social benefits on some groups and imposing burdens on others that results in segregation, poverty, and denial of opportunity for millions of people of color." William M. Wiecek, "Structural Racism and the Law in America Today: An Introduction," *K entucky Law Journal* 100 (2012): 1, 5.

12. U.S. Const. art. I §2 cl. 1: "and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature"; §2, cl. 2: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen"; §3 cl 3: "No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen"; U.S. Const. art. II §5: "No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States".

13. See, e.g., U.S. Const. art. I §9, cl. 8, titles of nobility; §10, cl. 1–2, ex post facto laws, impairment of contracts, titles of nobility; U.S. Const. art. IV §2 cl. 1, Interstate Privileges and Immunities Clause; U.S. Const. amends. XV, XIX, XXIII, XXIV, voting rights.

14. Cf. Robert M. Cover, "A Jewish Jurisprudence of the Social Order," *J ournal of Law and Religion* 5 (1987): 65, noting that "in Jewish law, an entitlement without an obligation is a sad, almost pathetic thing."

15. The classic definition is that of Robert Bellah, who defines "civil religion" as a construct "alongside of and rather clearly differentiated from the churches." Robert N. Bellah, "Civil Religion in America," in *Beyond Belief*: *Essays on Religion in a Post-Traditional World* (New York: Harper and Row, 1970), 68.

16. John Murray Cuddihy, *No Offense: American Civil Religion and Protestant Taste* (New York: Seabury, 1978), 1–2.

17. Ibid., 2.

18. Ibid.

19. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856). Professor David Currie has written that Dred Scott "was at least very possibly the first application of substantive due process in the Supreme Court, and in a sense, the original precedent for *Lochner v. New York* and *Roe v. Wade*." Currie, "The Constitution in the Supreme Court," 695, 735–36, and nn. 255–64.

20. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).

21. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864–65 (1992). (Justices Kennedy, O'Connor, and Souter concurring): "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty. Because the cases before us present no such occasion it could be seen as no such response." See generally, Wilson Ray Huhn, "The Constitutional Jurisprudence of Sandra Day O'Connor: A Refusal to 'Foreclose the Unanticipated,'" *Akron L aw Rev iew* 39 (2006): 373, 415.

22. In the *Late Corp. of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890), Justice Joseph Bradley writes that "The State has a perfect right to prohibit . . . all . . . open offenses against the enlightened sentiment of mankind, notwithstanding the pretense of religious conviction by which they may be advocated and practiced," ibid., 50.

23. *Wallace v. Jaffree*, 472 U.S. 38, 68, 76, Justice O'Connor concurring in the judgment.

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

25. See, e.g., *Employment Division v. Smith* , 494 U.S. 872, 901 (1990) , Justice O'Connor concurring, with whom Justices Brennan, Marshall , and Blackmun concurred in part; *Texas Monthly v. Bullock* , 489 U.S. 1, 28 (1989) , Justices Blackmun and O'Connor concurring in the judgment. For the j ustices who joined the majority opinion in *Smith* (Justices Scalia, Kennedy, Stevens, White, and Chief Justice Rehnquist), most of the criteria relevant to striking such a balance are simply irrelevant: the degree of burden, the "centrality" of the belief, the importance of the s tate's interest, and one's status in the community (i.e., as a "minority," however defined). When the task is striking "balances" of this sort, their preference (at least in some cases) appears to be for the legislature. The dissenters, including Justices O'Connor and Souter as to this point, vehemently disagreed. Part 2 of Justice O'Connor's opinion in *Smith* (which was joined by Justices Blackmun, Brennan , and Marshall) contains an extensive discussion of the values underlying the respective clauses and the role of both "categorical" reasoning and "balancing" in the Court's analysis. See 494 U.S. at 901 – 02 , Justice O'Connor concurring.

26. *Lemon v. Kurtzman*, 403 U.S. 602 (1971), established a standard of review for establishment clause cases known as the "Lemon test." In order to pass muster against an establishment-clause challenge, the state action (1) must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it cannot result in an excessive government entanglement with religion. Each of these factors is best understood as a synthesis of the "cumulative criteria developed by the Court over many years," *Lemon*, 403 U.S. 612.

27. See *Lynch v. Donnelly*, 465 U.S. 668 (1984), examining the context in which the nativity scene appears; *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), same.

28. *Salazar v. Buono*, 559 U.S. 700 (2010), establishment-clause challenge to continued presence on federal land of a Latin cross placed there in 1934 to honor soldiers who died during World War I.

29. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 780 (1995), refusal by the board to grant a permit to the Ku Klux Klan to erect a temporary display that included a large Latin cross on the grounds surrounding the Ohio State Capitol.

30. James Madison, *The Federalist*, No. 10.

31. See, e.g., William B. Lockhart et al., *The American Constitution*, 5th ed. (1996), 17; Felix Gilman, "The Famous Footnote Four: A History of the Carolene Products Footnote," *S outh Tex as L aw Rev iew* 46 (2004): 163, 165. Observing: "When courts and commentators deal with some question about the role of the courts in democratic society, or the rights of minorities, they immediately turn back to *Carolene Products*. Almost no one cites it without paying tribute to its fame and influence. It has been called "the great and modern charter for ordering the relation between judges and other agencies of government," and if this is something of an optimistic overstatement, it is at least partly true."

32. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) (citations omitted): "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. . . . It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote . . . on restraints upon the dissemination of information . . . on interferences with political organizations . . . as to prohibition of peaceable assembly. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or racial minorities . . . [or] whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." Three cases recently before the Court are classic examples of how these assumptions operate in practice: *Fisher v. University of Texas at Austin*, 570 U.S. _____ (2013), an important affirmative-action case, and the two same-sex marriage cases of 2013, *U.S. v. Windsor*, 570 U.S. 12 and *Hollingsworth v. Perry*, 570 U.S. _____. *Fisher* is discussed in the text at notes 33, 87, and 89 *infra*.

33. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n. 4 (1938) (citations omitted). The three cases referred to in note 32 *supra* are classic examples of how these assumptions operate in practice. The lower-court citations for those cases are: *Fisher v. University of Texas at Austin*, 631 F.3d 213 (5th Cir. 2011), *Windsor v. United States*, 699 F.3d 169 (2012), and *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Calif., 2010), *aff'd Perry v. Brown*, 671 F.3d 1052 (9th Cir., 2012), which came to the Supreme Court as *Hollingsworth v. Perry*, as noted.

34. Roger C. Cramton, "The Ordinary Religion of the Law School Classroom," *Journal of Legal Education* 29 (1978): 247.

35. Ibid., 247, emphasis in the original, footnote omitted. Dean Cramton acknowledges that the phrase "ordinary religion" is a "rhetorical device" and emphasizes that the "current intellectual framework of legal education is not a developed philosophy of life much less a theology," ibid., 247n2.

36. Owen M. Fiss, "Foreword: The Forms of Justice," *Harvard Law Review* 93 (1979): 1, 6.

37. Bruce A. Ackerman, "Beyond Carolene Products," *Harv ard L aw Rev iew* 98 (1985): 713, 715.

38. *See* Bruce Ackerman, *Foundations*, vol. 1 of *We the People* (1991), distinguishing periods of ordinary lawmaking from "constitutional moments" in which the political branches, acting in furtherance of a popular political mandate, effect a major reallocation in the operational distribution of power.

[6n39]

39. See, e.g., *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 134 S.Ct. 1623 (2014), containing an extended debate among the justices about the Court's role in affirmative action cases.

40. See, e.g., *Davis v. Bandemer*, 478 U.S. 109 (1986), holding that an equal-protection-clause challenge to political gerrymandering is justiciable but rejecting the vote dilution claim of the Indiana Democratic Party.

41. *Town of Greece, NY v. Galloway*, 134 S.Ct. 1811 (2014), reversing a lower-court decree requiring the town of Greece "search beyond its borders for non-Christian prayer givers in an effort to achieve religious balancing" among those who routinely offer the invocation at town meetings.

42. See, e.g., *Johnson v. Board of Regents of the University System of Georgia*, 106 F.Supp.2d 1362 (S.D. Ga. 2000), *aff'd* 263 F.3d 1234 (11th Cit. 2001), rejecting a "diversity" rationale for gender preferences in university admissions.

43. See *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 130 S.Ct. 2971 (2010).

44. See, e.g., Richard H. Sander, "Class in American Education" *Denver University Law Review* 88 (2011): 631, 633; Danielle Holley-Walker, "Race and Socioeconomic Diversity in American Legal Education: A Response to Richard Sander" *Denver University Law Review* 88 (2011): 845.

45. See, e.g., *County of Allegheny v. ACLU*, Greater Pittsburgh Chapter, 492 U.S. 573, 619–20, opinion of the Court respecting how the display of a menorah in a holiday display reflects "cultural diversity."

46. John T. Noonan Jr., *The Believer and the Powers That Are* (New York: Macmillan 1987), xiii, quoted in Robert A. Destro, "The Structure of the Religious Liberty Guarantee," *Journal of Law and Religion* 11 (1994–1995): 355, 391–92.

47. U.S. Const., amend. I (1787): "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

48. *Texas v. Johnson* , 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).

49. *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780 (1971), reversing the conviction of defendant for breach of the peace under a California statute prohibiting disturbance of the peace by offensive conduct. Defendant had walked through a courthouse corridor wearing a jacket bearing the words "Fuck the Draft" in a place where women and children were present.

50. See, e.g., *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002), invalidating an ordinance regulating activities of solicitors and canvassers in a village, on the basis that the ordinance interfered with exercise of free-speech and free-exercise rights protected by First Amendment.

51. See, e.g., Brief of Intervenors, *Amici Curiae Public Citizen and California First Amendment Coalition in Opposition to Injunctive Relief and in Support of Dismissal for Lack of Subject Matter Jurisdiction, Bank Julius Baer & Co. Ltd. v. Wikileaks*, No. 3:2008cv00824 (N.D. Cal. 2008, filed February 26, 2008),http://docs.justia.com/cases/federal/district-courts/california/candce/ 3:2008cv00824/200125/70/.

52. *National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 83 S. Ct. 328 (1963), invalidating Virginia rules proscribing the practice of referring prospective litigants to particular attorneys and making it a crime for a person to advise another that his legal rights have been infringed and to refer him to particular attorney or group of attorneys; *National Association for the Advancement of Colored People v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163 (1958), an order requiring an association to produce records including names and addresses of all its members and agents was a substantial restraint upon the members' exercise of their right to freedom of association.

53. Alexander Hamilton, John Jay, James Madison, *The Federalist*, Nos. 10 and 51 (1787) (James Madison), discussing the role of faction and the division of authority. In *The Federalist*, No. 51, Madison notes that the preservation of liberty depends upon the separation of powers that arises when the sovereign power of the people is divided among the three branches of the federal government, and among the states: "by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places." http://www.constitution.org/fed/federa51.htm (accessed March 13, 2013).

54. See, e.g., *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006); *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993); *Employment Division v. Smith*, 494 U.S. 872 (1990); *Sherbert v. Verner*, 374 U.S. 398 (1963).

55. See, e.g., *Arizona Christian Schools Tuition Organization v. Winn*, 563 U.S. ___ (2011).

56. *Bradfield v. Roberts*, 175 U.S. 291 (1899), was a challenge by dissenting taxpayers to an appropriation by Congress for the construction of "an isolating building or ward for the treatment of minor contagious diseases" on the grounds of Providence Hospi-

tal in Washington DC. The Court rejected the establishment-clause challenge by concluding that the hospital's legal charter made it a secular corporation, and the fact that the hospital was operated by a religious organization did not make it a religious corporation. In *Quick Bear v. Leupp*, 210 U.S. 50 (1908), the Court rejected a claim by members of the Sioux Tribe that the establishment clause and federal statute law forbade the payment of tribal funds held in trust by the Bureau of Indian Affairs for the education of Sioux children could not be paid to a religiously affiliated school, even though the children enrolled there were otherwise eligible to benefit under the trust fund.

57. John Higham, *Strangers in the Land: Patterns of American Nativism, 1860 – 1925*, 2nd ed. (1988), 28.

58. Anson Phelps Stokes, *Church and State in the United States: Historical Development and Contemporary Problems of Religious Freedom u nder the Constitution*, 3 vols. (Westport, CT: Greenwood, 1950), 68.

59. Christian Education Amendment §2. 19 Cong. Rec. 4615 (May 25, 1888).

60. In *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court had relied on a generalized concept of religious liberty, rather than the free-exercise clause to invalidate Oregon's attempt to close religious schools and Nebraska's attempt to stop religious schools from teaching foreign languages. Since *Everson*, the litigation of religious liberty cases in federal courts has become "a continuation of cultural politics by other means"; see Kenneth L. Karst, "Paths to Belonging: The Constitution and Cultural Identity," *N orth C arolina L aw Rev iew* 64 (1986): 303, 340.

61. State of Oregon, Official Ballot Summary, quoted in Brief of Appellee, *Pierce v. Society of Sisters*, 268 U.S. 466 (1925) at 97.

62. New Jersey Rev. Stat. § 18:14-8 (1941).

63. Chapter·191, New Jersey Laws of 1942, quoted in Statement of Jurisdiction of Arch R. Everson, Appellant, in *Everson v. Board of Education*, No. 52 (October Term, 1946).

64. Statement of Jurisdiction of Arch R. Everson, Appellant, in *Everson v. Board of Education*, No. 52 (October Term, 1946), 3, quoting Resolution of the Ewing Township Board of Trustees, September 21, 1942.

65. See "Trenton Central High School," *Wikipedia*, http://en.wikipedia.org/wiki/Trenton_Central_High_ School (accessed March 10, 2013); "History," The Pennington School, http://www.pennington.org/history/index.aspx (accessed March 10, 2013).

66. Statement of Jurisdiction of Arch R. Everson, Appellant, in *Everson v. Board of Education*, No. 52 (October Term, 1946), 4.

67. Ibid., 9.

68. Ibid., 7, quoting *Curtis v. Whipple*, 24 Wis. 350, 1 Am.Rep. 187 (1869), invalidating a local levy for the construction of a nonreligious school that was, in the court's view, "a private educational institution, controlled exclusively by the stockholders, through a board of trustees," rather than the local school board.

69. See Cramton *supra* note 34.

70. Footnote omitted, emphasis added. During the fifty years that elapsed between *Everson,* decided in 1947, and *Agostini v. Felton,* 521 U.S. 203 (1997), the Court relied repeatedly on factual assumptions and generalizations outside the trial record to support a conclusive (or "irrebuttable") presumption that any generalized support for the educational mission of a religiously affiliated elementary or secondary school would inevitably have the impermissible effect of advancing religion. *Mitchell v. Helms*, 530 U.S. 793, 858 (2000) (Justice O'Connor concurring), tracing the development of the "presumption of indoctrination". See *Meek v. Pittenger*, 421 U.S. 349, 365–366 (1975): "It would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many . . . church-related elementary and secondary schools"; *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 767 (1973), using "a number of pertinent generalizations" about religious schools because no record had been developed in the district court. As a result, lower

courts and litigators now commonly assume that they "need not refer to the parties' evidentiary submissions alone in [an] Establishment Clause analysis" (*Brooks v. City of Oak Ridge*, 222 F.3d at 264 n. 4).**[AQ19: This was deleted: See also Chapter Six ("Religion in the Classroom"). Is that OK?]**

71. *Everson v. Board of Education*, 330 U.S. 1, 23–24 (1947) (Justice Jackson dissenting).

72. Justice Jackson's dissenting opinion vehemently disagreed with the proposition stated in the text. In his view, the township of Ewing was not furnishing transportation to the children in any form; it was not operating school busses itself or contracting for their operation; and it was not performing any public service of any kind with this particular taxpayer's (Everson's) money. All school children were left to ride as ordinary paying passengers on the regular busses operated by the public transportation system. What the township did—and what Everson complained of—was at stated intervals to reimburse parents for the fares paid, provided that the children attended either public schools or Catholic Church schools. Everson did not, however, seek to stop reimbursement of *public*-school parents for the costs of bus transportation; he sought to stop reimbursement of *Catholic*-school parents. He pointed out that the New Jersey statute in question made the character of the school, not the needs of the children, determine the eligibility of parents for reimbursement. Jackson asked, "If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination?" The characterization of the constitutional issue is telling. The facts of the case indicate that *all* students enrolled in public and Catholic schools were eligible for reimbursement. We cannot tell from the opinion whether there were schools in Ewing Township that were run by other denominations, or by private parties with no discernible religious beliefs. The Court thus had a choice: it could characterize the case as one involving "one specified denomination," or it could have characterized the issue as one involving the constitutionality of a decision by the township to "provide equal subsidies for children enrolled in public and Catholic schools." It is clear, however, that the petitioner was not the parent of a child who was ineligible because of the school in which he or she was enrolled but rather a taxpayer who objected when parents sought equal treatment for their children.

73. 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955) (*Brown II*).

74. See Complaint, *Brown v. Board of Education*, No. T-316, United States District Court, First District of Kansas, filed February 28, 1951, http://www.clearinghouse.net/chDocs/public/SD-KS-0001-0008.pdf (accessed March 11, 2013).

75. See *Brown v. Unified School District No. 501, Shawnee County, Kansas*, 56 F.Supp.2d 1212, 1213–14 (1999), holding that district's good-faith compliance with judicially imposed "guidelines which have prevented any school from being identified as a majority or minority school on the basis of the race of its faculty and staff," and which mandated that "the majority and minority student population at each elementary school, middle school and high school be within 15% of the majority and minority percentages for all elementary school, middle school, and high school students in the district" required the court to declare the district "unitary" and thus in compliance with the mandate of *Brown I* and *II*.

76. In colonial Virginia, the political and cultural establishment was traditional, authoritative, *and* authoritarian. Its members and political supporters operated as a classic "control faction" that aspired to be, and was, a de jure ruling class that was more than willing to enforce its own version of political correctness (orthodoxy) with both force and violence. See generally, Jacob M. Blosser, "Pursuing Happiness in Colonial Virginia," *Virginia Magazine of History and Biography*, 118:3 at ____ & n. 12 (2010):**[AQ20: Should a number be filled in this blank?]** "It is important to note that Virginia's legal code contributed to the pervasive culture of crowded churches. Laws mandating bimonthly, and later monthly, church attendance were in plaice [*sic*] throughout much of the colonial period, and truancy from Virginia's established churches resulted in fines"; Rhys Isaac, "Evangelical Revolt: The Nature of the Baptists' Challenge to the Traditional Order in Virginia, 1765 to 1775," *W illia m and Mary*

Q uarterly 31 (1974): 345. Professor Isaac's article notes the important cultural components of the Virginia experience and their relationship to "assumptions concerning the nature of community religious corporateness that underlay aggressive defense against the Baptists," (ibid., 368). That the Revolution's republican ideology played a major role in rendering such assumptions illegitimate, and led to the eventual adoption of a policy of "accommodation in a more pluralist republican society" in Virginia, is significant for both a structural and substantive understanding of the establishment clause (ibid.). At the structural level, the concern for the maintenance of the integrity of individual political and faith communities was an important reason why the antifederalists and the states were so insistent on the adoption of a Bill of Rights. The Civil War and later voting-rights amendments make it clear at the substantive level that all citizens are members of those "pluralistic, republican communities" and each is entitled to equal protection of his or her civil and political rights. See also Elizabeth Mensch, " Religion, Revival, and the Ruling Class: A Critical History of Trinity Church," *Buff alo L aw Rev iew* 36 (1987): 427, 429: "Trinity began in the 1690s as the officially established Anglican Church in provincial New York, structured by the British expressly to quell democratic disorder and promote hierarchy and authority in the province."

77. E. Digby Baltzell, *The Protestant Establishment: Aristocracy and Caste in America* (New York: Vintage Books, 1964), 7–8, the original's emphasis of the word "authority" is omitted.

78. Ibid.

79. *Nampa Classical Academy v. Goesling*, 447 Fed. Appx. 776 (2011) (unreported), *aff' d* 714 F.Supp.2d 1079, (D. Idaho, 2010), cert. denied 132 S.Ct. 1795 (2012).

80. Idaho State Department of Education, Social Studies Content Standards, Idaho Content Standards, World History and Civilization, Grades 6–9, https://www.sde.idaho.gov/site/content_standards/ss_standards.htm (accessed April 4, 2014).

81. Idaho State Department of Education, Social Studies Content Standards, Idaho Content Standards, Humanities Standards, Grade 9–12 Interdisciplinary, https://www.sde.idaho.gov/site/content_standards/humanities.htm (accessed April 4, 2014).

82. *Nampa Classical Academy v. Goesling*, 714 F.Supp.2d 1079, 1093 (D. Idaho, 2010).

83. See Susan H. Veccia, *Uncovering Our History: Teaching with Primary Sources* (Chicago: American Library Association, 2003), 1: "Nearly every state in the nation requires the use of primary sources at some level in K–12 education. New York, for example, requires primary sources from kindergarten through twelfth grade. In Virginia, primary sources are introduced in the fourth grade. Sometimes these requirements surface in state history or social studies frameworks; sometimes in the library and information literacy competencies. Sometimes both. Increasingly, teachers are obliged to teach to these standards across the curriculum."

84. See International Center for Religion and Diplomacy, "engaging Pakistan's madrasas (private Islamic religious schools)," http://icrd.org/pakistan (accessed April 5, 2013).

85. *Christian Legal Society Chapter, University of California, Hastings College of Law v. Martinez*, 130 S.Ct. 2971 (2010).

86. Ibid., 130 S.Ct. at 2979. University of California, Hastings College of Law, "Faculty Statement on Pluralism," adopted May 1, 1989, in "Academic Regulations and Other Rules Applicable to Students (2012–13)," 39, http://www.uchastings.edu/about/admin-offices/academic-dean/docs/REGS12-13.pdf (accessed March 15, 2013).

87. *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, *supra*, 2982, quoting Joint Appendix, 221 (Joint Stipulation §18), emphasis added; citations omitted; hereafter, *CLS v. Martinez*.

88. Christian Legal Society, "Welcome to Christian Legal Society," http://www.clsnet.org/ (accessed March 15, 2013).

89. Christian Legal Society, "Statement of Faith," http://www.clsnet.org/page.aspx?pid=367 (accessed March 15, 2013).

90. Christian Legal Society, "Community Life Statement," http://www.clsnet.org/page.aspx?pid=494 (accessed March 15, 2013).

91. *CLS v. Martinez*, *supra*, 130 S.Ct. at 2990, quoting Joint Appendix, 349.

92. See *Fisher v. University of Texas at Austin*, No. 11-345, Transcript of Oral Argument, 6–12. The transcript is available at: http://www.supremecourt.gov/oral_arguments/argument_transcripts/11-345.pdf (accessed March 11, 2013). The audio is available at: http://www.oyez.org/cases/2010-2019/2012/2012_11_345 (accessed, March 11, 2013).

93. Vernon's Texas Statutes §51.803 (2013).

94. *Fisher v. University of Texas at Austin*, Brief for Respondent, University of Texas, No. 11-345, 2012 WL 3245488 at 14 (U.S., 2012).

95. Ibid., 2012 WL 3245488 at 34, giving as an example of such a student an "African-American or Hispanic child of successful professionals in Dallas who has strong SAT scores and [who] has demonstrated leadership ability in extracurricular activities but falls in the second decile of his or her high school class (or attends an elite private school that does not rank) [and who] cannot be admitted under the top 10% law."

96. *Everson*, 330 U.S., 80–81.

97. Compare, *Arizona School Tuition Organization v. Winn*, 131 S.Ct. 1436, 1449 (2011) (Justices Scalia and Thomas concurring) with ibid., 131 S.Ct., 1451 (Justices Kagan, Ginsburg, Breyer, and Sotomayor).

98. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992).

99. See, e.g., *Lane v. Franks*, 134 S.Ct. 2369 (2014), drawing a distinction between protected "citizen speech" and unprotected "employee speech"; *Morse v. Frederick*, 551 U.S. 393 (2007), student speech; *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), student speech; *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37 (1983), teacher speech.

100. Consider, e.g., Justice Douglas's comments in his dissent in the Amish compulsory education case, *Wisconsin v. Yoder*, 406 U.S. 205, 242, 245–46 (1972): "If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. . . . It is the future of the student, not the future of the parents, that is imperiled by today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. The child may decide that that is the preferred course, or he may rebel. It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed. The child, therefore, should be given an opportunity to be heard before the State gives the exemption which we honor today."

101. Andreas Føllesdal, "Subsidiarity and the Global Order," in *Global Perspectives on Subsidiarity*, ed. Michelle Evans and Augusto Zimmermann (New York: Springer, 2014), 218.

102. Alexander Hamilton, James Madison, John Jay, *The Federalist*, No. 10 (Madison).

103. *Schuette v. Coalition to Defend Affirmative Action and Immigrant Rights and Fight for Equality by any Means Necessary (BAMN)*, 134 S.Ct. 1623 (2014), reversing *Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN) v. Regents of the Univ. of Mich.*, 701 F.3d 466, 470 (6th Cir. 2012).

104. See generally, Kyle Duncan, "Secularism's Laws: State Blaine Amendments and Religious Persecution," *Fordham L aw Rev iew* 72 (2003): 493.

105. *Flast v. Cohen* 392 U.S. 83 (1968). In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Court held that federal taxpayers did not have standing to challenge the constitution-

ality of a federal statute, but in *Flast*, the Court "decide[d that] the *Frothingham* barrier should be lowered when a taxpayer attacks a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment" (ibid., 85).

106. Guido Calabresi, "The Supreme Court: 1990 Term, Foreword: Antidiscrimination and Constitutional Accountability (What The Bork–Brennan Debate Ignores)," *Harv ard L aw Rev iew* 105 (1991): 80, 101 n. 63, citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Edwards v. Aguillard*, 482 U.S. 578, 593–94 (1987); *School District v. Ball*, 473 U.S. 373, 397–98 (1985). He notes that "such rules could be viewed as examples of the dominant majority accepting burdens on itself for the benefit of outcasts" (ibid.).

107. See H. Jaffa, "Aristotle," *History of Political Philosophy*, 2nd., ed. L. Strauss and J. Cropsey (Chicago 1972), 94–96, and compare Plato, *Republic*, II, 369a–c. On the composition of the *polis* in terms of households and villages as well as individuals, see also W. L. Newman, *Politics of Aristotle* (Oxford: Oxford University Press, 1887–1902; reprint, Salem, NH: Ayer, 1985), 2:111, 114; 3:130, 132, 208. There may not altogether be a contradiction as between the individual citizen and the household, since although Aristotle referred to free women as well as free men as citizens, he seems generally to have assumed that the citizen who participates in the rule of the city will typically be an adult, male, head of a household. On this assumption, each citizen represents a household, and thus, the city might be viewed quite consistently as both a composition of individual citizens and a composition of households.

108. U.S. Const. amend. XIV §1, cl. 1 (1868): "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." See U.S. Const. art. I §2, cl. 2: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

109. U.S. Const. art. IV §§ 3-4 (1787) (§3): "New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress"; §4: "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

110. U.S. Const. art. I §10, cl. 8 (1787): "No State shall . . . pass any Law impairing the Obligation of Contracts."

111. U.S. Const. art. I §9, cl. 5 – 6 : "No Tax or Duty shall be laid on Articles exported from any State. No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another . "

112. U.S. Const. art. VI cl. 3 (1787): "No religious Test shall ever be required as a Qualification to any Office or public Trust under the United States"; U.S. Const. amend. I, cl. 1: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

113. U.S. Const. amend. I, cl. 2: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

114. See generally, Destro, "Federalism, Human Rights, and the Realpolitik of Footnote Four," 373, 379, arguing that "the Founders' vision of a 'compound' American republic was lost when the Supreme Court of the United States used the New Deal controversy over the limits of judicial review to accomplish one of the most far-reaching power grabs in the history of the Republic."

115. Ibid., 440–50, discussing the Court's abysmal record on race, sex, and religious discrimination issues.

116. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

117. *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. ____ (2014).

118. Brief for Appellant, *Citizens United v. Federal Election Commission*, 2009 WL 61467(U.S.), 29: "If there existed a substantial governmental anti-corruption interest in pro-hibiting the Video On Demand distribution of biographical documentary films, it would not extend to films, like Hillary, that are funded overwhelmingly by individuals."

119. James Madison, *The Federalist*, No. 51 (February 8, 1788), http://thomas.loc.gov/home/histdox/fed_51.html (accessed June 30, 2014).

120. Lael Daniel Weinberger, "The Relationship between Subsidiarity and Sphere Sovereignty," in *Global Perspectives on Subsidiarity*, ed. Michelle Evans and Augusto Zimmermann (New York: Springer, 2014), chap. 4.

121. Ibid., 54, quoted in Johan D. van der Vyver, "The Jurisprudential Legacy of Abraham Kuyper and Leo XIII," *Journal of Markets and Morality* 5 (2002): 214.

122. Emphasis added.

123. Patrick McKinley Brennan, "Subsidiary in Catholic Social Teaching," in Global Perspectives on Subsidiarity, ed. Michelle Evans and Augusto Zimmermann (New York: Springer, 2014), 34.

124. Indeed, *all* of the interests protected by the First Amendment and no religious test clause are among these aspects of "self-governance": freedom of religious exercise and from the impositions of an establishment of religion, test oaths, freedom to assemble into public and private associations, and to petition the government for a redress of grievances. U.S. Const. art. VI, cl. 3 (1787); amend. I (1791).

125. Jonathan Chaplin, "Subsidiarity and Social Pluralism," in *Global Perspectives on Subsidiarity*, ed. Michelle Evans and Augusto Zimmermann (New York: Springer, 2014), 71.

126. In *Pembina Consolidated Silver Mining and Milling Co. v. Pennsylvania*, 125 U.S. 181, 189 (1888), the Supreme Court observed that corporations are "merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution." It has also called them "artificial entities." *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 154 (1897).

127. *Citizens United v. Federal Election Commission*, 558 U.S., 348–359 (Justices Stevens, Ginsburg, Souter, and Sotomayor dissenting), quoting *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 660 (1990), emphasis added.

128. Thomas F. Farr, "Diplomacy in an Age of Faith: Religious Freedom and National Security," *Foreign Affairs* 87, no. 2 (2008), 110, quoting Peter Berger.

129. Ibid., 112.

130. Harry Kalven, *A Worthy Tradition: Freedom of Speech in America* (1988), 7, quoted in Robert C. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment," *Cal ifornia L aw Rev iew* 76 (1988): 297, 335. I am indebted to Dean Post. The insights he offers on this very difficult—and controversial—subject are just as relevant today as when he published the article as a response to "feminists" who had "recently sought the regulation of pornography on the grounds that pornography injures women as a group" (ibid., 297).

131. *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1942).

132. See, e.g., *Wisconsin v. Yoder*, *supra*, Amish parents and children; *Sherbert v. Verner*, 374 U.S. 398 (1963), Seventh-Day Adventists. Compare, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), relying on the principle of liberty to support the right of parents to select a religious school (Catholic immigrants and parents and children who chose private schools); *Meyer v. Nebraska*, 262 U.S. 390 (1923), teaching a foreign language in a religious school as an aspect of personal liberty (German-speaking immigrants).

133. In *Gillette v. United States*, 401 U.S. 437 (1971), the Supreme Court held that Congress's limitation of conscientious-objector status to those whose religious beliefs forbade participation in any form of war was constitutional as against a challenge by

draftees whose religious beliefs forbade them from participating in "unjust" wars. This distinction meant that Roman Catholics and others who are not pacifists without regard to context, but whose reasons for opposing the Vietnam War were clearly religious, were unable to obtain the same conscientious-objector status as those who were pacifists in all cases but whose beliefs were assuredly nonreligious. Does this make sense? For a criticism, see Kent Greenawalt, "All or Nothing at All: The Defeat of Selective Conscientious Objection," *Sup reme C our t Rev iew* 1971 (1971): 31.

134. Letter of "A Citizen of Philadelphia," in *Pennsylvania Gazette*, January 12, 1785, quoted in Owen S. Ireland, *Religion, Ethnicity , and Politics* (University Park: Penn State University Press, 2005).

135. Torrey Froscher, "Intelligence in Public Literature," review of "Why Intelligence Fails: Lessons from the Iranian Revolution and the Iraq War," by Robert Jervis (Ithaca, NY: Cornell University Press, 2010), https://www.cia.gov/library/center-for-the-study-of-intelligence/csi-publications/csi-studies/studies/vol.-54-no.-3/why-intelligence-fails-lessons-from-the-iranian.html (accessed July 10, 2014), noting that CIA "analysts didn't understand the nature of the opposition, particularly the religious dimension—which was dismissed as an anachronism."

136. Robert Baer, "How Washington Missed 9/11," *Time Magazine*, Friday, August 24, 2007, http://content.time.com/time/politics/article/0,8599,1655995,00.html (accessed July 10, 2014).

137. *Youssef v. Federal Bureau of Investigation*, 687 F.3d 397 (D.C. Cir., 2012), remanding for trial on the issue of whether discrimination could reasonably be inferred from reassignment.

138. Peter Bergen, review of *The Way of the Knife: The CIA, a Secret Army, and a War at the Ends of the Earth*, by Mark Mazzetti (New York: Penguin, 2013), http://www.washingtonpost.com/opinions/book-review-the-way-of-the-knife-the-cia-a-secret-army-and-a-war-at-the-ends-of-the-earth-by-mark-mazzetti/2013/04/0588e07306-9af8-11e2-9a79-eb5280c81c63_story_2.html (accessed July 8, 2014), noting that the increasing militarization of the CIA has damaged the agency's intelligence-gathering role.

139. Compare, Daniel L. Byman and Tamara Cofman Wittes, "Muslim Brotherhood Radicalizes" in *Big Bets and Black Swans: A Presidential Briefing Book: Policy Recommendations for President Obama in 2014*, ed. Ted Piccone, Steven Pifer, and Thomas Wright, (Brookings Institution, January 2014), http://www.brookings .edu/research/papers/2014/01/muslim-brotherhood-radicalizes-byman-wittes (accessed July 8, 2014), arguing for active intervention on behalf of the Muslim Brotherhood; Doug Bandow, "Egypt and American Hubris," *National Interest*, July 5, 2014, http://nationalinterest.org/commentary/egypt-american-hubris-8692 (accessed July 8, 2014). "Instead of embracing the illusion of Washington's omniscience, Washington officials should acknowledge the limitations on their power and influence."

140. For a history of the council, see http://www.crihl.org/content/crihl-history (accessed July 10, 2014).

141. Martin Weil, *A Pretty Good Club: The Founding Fathers of the U.S. Foreign Service* (New York: Norton, 1978).

142. See Erik Larsen, *In the Garden of Beasts* (New York: Crown, 2011). Larsen's book presents a gripping account of the tenure of Ambassador William Dodd, who was appointed by President Franklin Delano Roosevelt to serve as American ambassador in Berlin in 1933, the year that Hitler came to power. Larsen, through the eyes of Ambassador Dodd and his daughter, presents the ruthless process by which Hitler consolidated power. Dodd's correspondence and that of his key aides in Berlin and at the Department of State in Washington provide a fascinating glimpse of the attitudes of the "Pretty Good Club"—the professional diplomats in the department—and of the Roosevelt administration, regarding anti-Semitism in the United States and the increasing persecution and detention of Jews in Germany. It also provides interesting insights into the ways in which the anti-immigrant fervor during 1933 affected the American government's approach to these challenges. I do not intend by these comments to enter the highly contentious thicket regarding the question of *why* the United

States did not act during those critical years. Notwithstanding the conventional wisdom, hindsight is emphatically *not* 20/20. The point here is that cultural attitudes within the Foreign Service and the executive branch were influential *factors* that must be taken into account when researchers and scholars examine the United States' unwillingness to respond in a meaningful way to entreaties by the Jewish community at the time.

143. See, e.g., Douglas Johnston, ed., *Religion, t he Missing Dimension of Statecraft* (New York: Oxford University Press, 1995).

144. On Tuesday, October 18, 2011, the State Department hosted the first meeting of the Religion and Foreign Policy Working Group, a federal advisory committee to the secretary. In addition to the members of the working group itself, the State Department chose a number of experts in the field (including this writer) to serve in an advisory capacity on the secretary's Strategic Dialogue with Civil Society. Among the issues discussed by the working group were: religious engagement and conflict prevention / mitigation (CPM); international religious freedom, stability, and democracy (IRF/SD); and faith-based groups and development and humanitarian assistance (DHA).

145. Farr, "Diplomacy in an Age of Faith," 112.

146. Ibid., 115.

147. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 851.

148. Ibid., 114.

149. Office of the Press Spokesperson, "Gay, Lesbian, Bisexual and Transgender Pride Event Hosted by U.S. Embassy in Islamabad, Pakistan," "Question Taken at the July 7, 2011 Daily Press Briefing," http://www.state.gov/r/pa/prs/ps/2011/07/167864.htm (accessed March 11, 2013). The question posed was: "Did we receive any official complaints from the Pakistani government over the gay pride event held at the Embassy? What was the nature of the event?" Answer: "On June 26, the United States Embassy in Islamabad, Pakistan hosted a gay, lesbian, bisexual, and transgender (GLBT) Pride event. This gathering, attended by U.S. Mission personnel, representatives of the diplomatic community, and Pakistani civil society leaders, demonstrated continued U.S. Embassy support for human rights, including GLBT rights, in Pakistan. We have not received any official complaint from the Pakistani government over the event."

150. "U.S. Sponsored Gay Pride Day Parade in Pakistan Draws Controversy," LiveLeak.com, http://www.liveleak.com/view?i=d78_1309953999 (accessed March 11, 2013).

151. Ibid.

152. Farr, "Diplomacy in an Age of Faith," 115.

153. See Nathaniel Branden, "A Culture of Accountability" (1996), http://mol.redbarn.org/objectivism/Writing/NathanielBranden/ACultureOfAccountability.html (accessed March 15, 2013): "As a first step toward a freer society, by stimulating new thinking about the best ways to solve social problems, here is one concrete suggestion. Let us bring the paying-attention-to-outcomes philosophy of the business world to our legislative practices. First, every piece of legislation and every government agency must spell out what it aims to accomplish and in what time frame. Next, it must be monitored periodically, and the public must be informed concerning its progress, or lack of progress, toward its goal. When the time set for the accomplishment of specific goals is up, the legislation or agency must go on trial for its life just as in business. It must not be allowed to remain in force merely because it exists. It must demonstrate results, and if it has failed in what it promised to deliver, it *should be abolished*. This policy alone will not lead us to a fully free society, and you do not have to be an unreserved advocate of laissez-faire to appreciate its merits. What it will do is raise public consciousness concerning the workings of our present system and perhaps introduce some element of accountability. As matters stand now, once a political institution is in place, it is notoriously difficult to get rid of, even when almost everyone agrees it is a disaster. . . . The difficulty, of course, is that the judiciary has no

effective way to "sunset" a constitutional ruling on its own initiative (*sua sponte*). It must wait until an appropriate case arises and makes its way through the appeals process, and, even then, it may not be possible to remedy the damages."

154. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

155. The official title of the proposal we now know as the "Court-packing" plan was a "Recommendation to Reorganize the Judicial Branch of the Federal Government," H.R. Doc. No. 75-142 (1937). The Constitution prescribes that there shall be a "Supreme Court," and assumes that the Supreme Court of the United States will have a chief justice, U.S. Const. art. I, § 3, cl. 6: "When the President of the United States is tried [after impeachment], the Chief Justice shall preside," and an unspecified number of associate justices. U.S. Const. art. II, § 2, cl. 2: conferring upon the president the power to "nominate, and by and with the Advice and Consent of the Senate . . . appoint . . . Judges of the supreme [*sic*] Court." Roosevelt's proposal to Congress relied on history to make the point that it was not a radical attempt to usurp the powers of the judicial branch: "In almost every decade since 1789 changes have been made by the Congress whereby the numbers of judges and the duties of judges in the Federal courts have been altered in one way or another. The Supreme Court was established with 6 members in 1789; it was reduced to 5 in 1801; it was increased to 7 in 1807; it was increased to 9 in 1837; it was increased to 10 in 1863; it was reduced to 7 in 1866; it was increased to 9 in 1869," H.R. Doc. No. 75-142, at 2 (1937).

156. For an extended discussion of this topic, see Destro, "Federalism, Human Rights, and the Realpolitik of Footnote Four," 373–457.

157. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864–65 (1992) (Justices Kennedy, O'Connor, and Souter concurring): "In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty. Because the cases before us present no such occasion it could be seen as no such response." See generally, Huhn, "The Constitutional Jurisprudence," 373, 415.

158. The text of the judicial oath is found in 28 U.S.C. § 453 (2013). It provides: "Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: 'I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God.'"

159. Alexander Hamilton, *The Federalist*, No. 78, 231.