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Questioning Strict Separationism in Unsettled Times: Rethinking the Strict Separation of Church and State in United States Constitutional Law

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Abstract: Contemporary case law in the United States surrounding the establishment clause of the federal Constitution has entered a period of remarkable uncertainty. Now is an appropriate time to revisit the legal foundations of the Supreme Court's seminal cases of *Everson v. Board of Education* (1947) and *McCollum v. Board of Education* (1948). These cases initiated the Court's strict separationist construction of the establishment clause. In response to critics who see these cases as without judicial warrant, I argue that the holdings rest on a particular form of substantive due process. Further, I defend the methodology the Court deploys in these cases. Recognizing the legal foundations of *Everson* and *McCollum* and the tenability of the method the Court deploys in these cases improves our understanding of important Supreme Court case law. However, it also highlights new lines of critique of the Court's strict separationist jurisprudence—a conclusion especially relevant today, given the Court's willingness to revise long-standing precedents.

Keywords: church and state; establishment clause; *Everson*; *McCollum*; separationism; accommodationism; substantive due process; Justice Hugo Black

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1. Introduction

Contemporary legal and political theorists frequently advocate for a strict separation of church and state. That is, many jurists and social and political thinkers argue there must be no meaningful connection between church and state and, therefore, not only must the church be free of state intervention, but the state must be free of religious influences of every (or almost every) sort.[1] Strict separation requires not merely the absence of religious coercion; it requires the state to be uninvolved in almost every matter relating to the religious life of the nation.[2] It is just this strict disassociation of church and state that a large number of contemporary writers strongly applaud.[3]

In a relatively short period of time, the strict separationist position has become deeply entrenched in American law. Its originating legal foundations emerged following World War II, in the 1947 decision in *Everson v. Board of Education of Ewing Township* and its

1 For especially sharp expressions of the principle that religion should have no influence on public law, see Nehushtan (2015) and Sajo (2008). Other expressions of strict separationism concede the principle underlying the so-called *Lemon* Test: that although religion may well influence lawmaking, it should never be the primary basis for public law. See *Lemon v. Kurtzmann* (1971), and Audi (2000).

2 The precise manner in which strict separation has been understood in the United States has varied across time, and has never been construed so tightly as to preclude access by religious organizations to public fire or police services or to the court system to adjudicate land titles and other legal matters; nor has it been construed to re-create the strong claims prominent in the Middle Ages of the *libertas ecclesiae*, according to which religious bodies alone monitor and discipline their members for violations of secular law. See Kauper (1961).

3 David Sehat, for example, argues that the absence of a strict separation is "dangerous", as it "eviscerates" the "compelling interests of democratic and equal government" (Sehat 2015, pp. 298–99). His sentiments are echoed by a range of prominent legal and political writers, including Leiter (2013), Boston (2014), and Gillman and Chemerinsky (2022).

successor, the 1948 decision in *Illinois ex rel. McCollum v. Board of Education of Champaign*. In these twin cases—cases that together created the basis for subsequent strict separationist rulings, including those banishing voluntary state-sanctioned prayer from public schools and extra-curricular events like football games and commencement exercises—the Court applied for the first time the establishment clause of the First Amendment, which bans laws "respecting an establishment of religion", to actions of state governments. Additionally, the Court defined non-establishment, so applied, in terms of a strict separation of church and state.

However, in the past two decades strict separationism has come to be seriously questioned. A line of cases has seen the Supreme Court, in the words of one commentator, "dismantling the separation of church and state"(Biskupic 2022). In the majority opinion in *Town of Greece v. Galloway* (2014), for example, the Court advanced, on the basis of a form of originalism, an accommodationist conception of the establishment clause. Accommodationism is an approach to the relationship between church and state that, in the words of distinguished constitutional scholar Alpheus Mason, permits "government acknowledgement of and sometimes support for religion" (Mason and Stephenson 1996, pp. 530–31). In *Town of Greece*, this took the form of permitting meetings of the city government to be opened with prayers, on the condition that the opportunity to lead prayers remain open, on a non-preferential basis, to all religious leaders in the community. In *Kennedy v. Bremerton School District* (2022), the majority emphasized free expression, and the need not to impose heavier restrictions on religious speech than on non-religious speech. On this basis, the Court upheld a public school coach's right to pray on the playing field immediately before and after games. By allowing more flexibility in the application of the establishment clause, the *Kennedy* ruling, like the *Town of Greece* holding, entails a greater accommodation of religion against a strict separationist challenge. The law on church and state has begun to shift, leaving the meaning of the establishment clause increasingly uncertain.[4]

An additional feature of the rising uncertainty in establishment clause jurisprudence relates to the concept of the incorporation of the Bill of Rights. Incorporation is the process by which most of the provisions of the Bill of Rights, which originally applied only to the federal government,[5] have been rendered applicable to the actions of state governments by means of the 14th Amendment's prohibition on state governments denying life, liberty or property without due process of law (a provision often called the Due Process clause). Incorporation assumes that a violation by state governments of the restraints listed in the Bill of Rights constitutes a denial by the states of liberty without "due process of law", and thus violates the 14th Amendment. On the incorporationist view, the establishment clause of the Bill of Rights applies to the states. The majority decisions in *Town of Greece* and *Kennedy* have continued to assume just this. In addition, these cases also assume that the establishment clause must apply in the exact same way, and with the precise same meaning, to actions of the federal government and actions of the states.

However, Justice Clarence Thomas has articulated a different position. In a number of cases, Justice Thomas has questioned the application of the federal Constitution's establishment clause to the states. Thomas has argued that the establishment clause was not intended by its drafters to apply a restriction on the actions of the states; moreover, the establishment clause was not only not intended to restrain the states, it was intended to restrain the federal government from intervening in the ways states choose to associate religion and government. "[T]he Establishment Clause . . . protects state establishments from federal interference", Thomas writes in his concurrence in *Elk Grove Unified School District v. Newdow* (2004). Following this line of thinking, in his concurring opinion in *Zelman v. Simmons-Harris* (2002) Thomas calls the incorporation of the establishment clause a legal "perversity". For Thomas, the original point of the establishment clause was "to

[4] Adding to the changes are also cases involving school choice programs. For example, in *Carson v. Makin* (2022) the Court ruled that any public funding made available to secular schools must also be made available to religious schools.

[5] See *Barron v. Baltimore* (1833).

provide protection for the states *against* federal meddling", and thus "cannot logically be applied against the states" (*Elk Grove* 2004. Emphasis added). What would Thomas's position entail for litigation addressing the intersections of religion and government? As he states in *Elk Grove*, it would mean, at the very least, that it's time "to begin the process of rethinking" long-standing establishment clause case law.

In addition, in *Dobbs v. Jackson Women's Health Organization* (2022) Thomas repudiated one mode of constitutional interpretation that is found in a number of Supreme Court cases: the idea of substantive due process defined in relation to the essence of justice. Substantive due process in this form asks if the substantive outcome of a lawmaking process is so violative of principles of liberty and justice that no process that allows such an outcome could be considered a *due* process. An alternative way of interpreting the 14th Amendment's Due Process clause views violations of it occurring only when there is a violation of a long-standing principle in American history; it is only laws that violate such long-held traditions in American law and life that cannot be seen as the products of a due process of lawmaking. In *Dobbs*, Thomas rejects substantive due process defined in relation to the essence of justice, wishing to ground the determination of which laws are ones no due process would produce only on the basis of whether the laws in question offend long-standing principles in American history. This interpretation of how to determine which state laws are undue (and thus violative of the 14th Amendment's Due Process clause) might well entail changes in the scope of application of the Bill of Rights, including the establishment clause, to the states, since the mechanism by which the Bill of Rights applies to the states via incorporation is precisely the 14th Amendment's Due Process clause. If some elements of the Bill of Rights are not seen as deeply rooted in American law, then—if they are viewed apart from existing incorporationist precedent—they might be seen as not applicable to actions of the states. Although Thomas's views on the incorporation of the Bill of Rights have not so far been clearly endorsed by other Supreme Court justices, a number of Court watchers have recently described Thomas as the new "center of gravity" of the Court (Smith 2022).[6] His views may radiate across the Court. The ground beneath the establishment clause is starting to rattle.

Moreover, Thomas's own rethinking of the establishment clause has made extensive use of academic legal scholarship. This fact is potentially quite telling, adding further uncertainty to the Court's understanding of this clause. This is so because a line of legal scholarship advanced by scholars whom Justice Thomas has cited in several opinions (scholars such as Philip Munoz and Philip Hamburger[7]) has argued that the Court's establishment clause decisions in the foundational cases of *Everson* and *McCollum* are very weakly argued, perhaps even being acts of judicial policy-setting, and not conventional exercises of judicial reasoning at all.[8] This line of scholarship could influence Thomas's reconsideration of the court's church-state jurisprudence.

All the while, looming over this entire discussion is the evident willingness of Thomas and his conservative colleagues to overturn long-standing and hot button precedents—a willingness perhaps nowhere more clearly evident than in the Court's recent decision in *Dobbs v. Jackson*. The Court's willingness to overturn in *Dobbs* the nearly 50-year precedent of *Roe* suggests other long-established precedents, such as those surrounding the establishment clause, might equally be vulnerable. With respect to the establishment clause, the law lives in unsettled times.

In such a period of rising uncertainty, it is beneficial I believe to review the legal foundations for the Court's application of the establishment clause to the states and the legal foundations of interpreting it as a strict separation of church and state. In opposition to critics of *Everson* and *McCollum* who see them as largely lawless exercises of preference-seeking by the Supreme Court, in what follows I present an interpretation of the emergence

[6] See also Henderson (2022).

[7] Thomas has cited Munoz in *Espinoza v. Montana* (2020) and Hamburger in *Elk Grove v. Newdow* (2004), both of whom have expressed criticisms of the Supreme Court's reasoning in *Everson* and *McCollum*.

[8] See Section 3.1 below.

of the strict separationism found in *Everson* and *McCollum* that shows the cases to be exercises of a certain kind of substantive due process. Again, substantive due process asks if the substantive outcome of a lawmaking process is so violative of principles of liberty and justice that no process that allows such an outcome could be considered a due process. Substantive due process enters the Court into the business of determining the essences of the topics at bar, and their relationship to the essence of such concepts as justice, fairness and liberty. Moreover, *Everson* is I argue an exercise of a particular kind of substantive due process, one that both seeks the true meaning of the essence of liberty in relation to religion, and also supports these determinations by relating them to a qualitatively prized, or valorized, historical trend—a trend line thought to bear special epistemic weight in reference to the essence of religion and civil liberty.

Recognizing that the establishment clause rests on such a form of substantive due process and also that the Supreme Court's jurisprudence is increasingly fluid gives rise to basic questions about the Court's position on the relationship between church and state. First, in light of Justice Thomas's reading of the establishment clause as a restriction only on the federal government and not on the states, coupled with his repudiation in *Dobbs* of substantive due process as a way of interpreting the 14th Amendment, is it now worth considering whether states could in the future be authorized by the Supreme Court to re-establish religion, just as states like Massachusetts and Connecticut did until the 1830s? These states formally endorsed one Protestant form of religion. In response to this question, I believe that the answer must be no. Although the case law on the establishment clause can be seen as resting on uncertain terrain, there remains at least some solidity beneath our feet: a purely sectarian state-level establishment is highly unlikely to be seen as constitutionally permissible by a majority of the Supreme Court.[9]

Noting both the entrenched nature of some form of state-level non-establishment and the unsettled nature of the Court's case law highlights, I believe, the need for a directly normative assessment of the constitutionality of religious establishment. The first normative question we should ask is what mode of interpretation should the Court employ in interpreting the entrenched principle of non-establishment. Second, we should ask what this preferred method would indicate to be the proper meaning of non-establishment. Although I cannot offer a complete normative account of the establishment clause in this piece, I do wish to limn the outlines of where I think establishment clause case law should move. First, I argue that a rejection of substantive due process is not only highly unlikely in reference to the issue of establishment; it is also indefensible as a normative matter. Secondly, I argue that the way substantive due process was deployed in *Everson* and *McCollum* is a justifiable methodology, one well worth preserving.

However, I end by noting that this mode of substantive due process deployed in *Everson* and *McCollum* opens the strict separationist conception of the establishment clause to a new line of critique, one which I develop but cannot in this piece fully elaborate. Specifically, I argue that the substantive due process methodology the Court deploys in these cases provides additional arguments, beyond that found in *Town of Greece* and *Kennedy*, for a serious reworking of the strict separationist position. Being grounded, as I argue, on the determination of the essence of liberty in regard to religious life, fortified by the valorized history of certain leading times and figures in America, the strict separationist gloss of the establishment clause may, on this methodological basis, need to be significantly rethought. For what if the Court's assessment of religion and civil liberty is faulty? Additionally, what if the historical trend line the Court so prizes is deeply questionable? If so, establishment law jurisprudence might prove true the ancient maxim, "all they that take the sword shall perish with the sword" (Matthew 26:52. KJV).

I develop these arguments in the following way. In Section 2, I survey the foundational cases of *Everson* and *McCollum*. In Section 3, I outline the criticism that these cases are weakly developed and potentially even sheer exercises of political calculation. I argue that

[9] See Section 5.1 below, referencing Smith (2006).

this reading is a rather tempting one because many of the accounts of what the Court was doing in these holdings do indeed leave the cases poorly supported. It is also a rather tempting reading given the political context in which these decisions were rendered. In Section 4, I respond to the critique that *Everson* and *McCollum* are legally unsupported by arguing that the opinions are provided by the Court justification through the special kind of substantive due process which I outline. In Section 5, I then turn to normative considerations. I first defend the type of substantive due process deployed in these two cases. I then argue that the grounds for the Court's strict separationist interpretation in *Everson* and *McCollum* expose strict separation to a critique dealing directly with the essence of religion and civil liberty, and that questions the historical trend line the Court highly valorizes. I end in Section 6 with a summary conclusion.

2. Everson and McCollum: A Brief Overview

It will be helpful first to review the details of *Everson* and *McCullom*. We can begin with *Everson*. The case dealt with publicly subsidized transportation to private schools. By 1919, all states had enacted laws allowing the use of public funds for transporting school children to public schools (Gray 2007). In New Jersey, before 1941, no law authorized the use of public funds to transport students to private schools, which in New Jersey at this time were almost all Catholic. As a result of "growing pressure for support" for Catholic parents who had children in parochial schools, a movement in the 1930s emerged arguing for the provision of public aid to these parents to defray transportation costs (Gordon 2007). The call soon became supported by the popular (and powerful) governor of New Jersey, Frank Hague (himself a Catholic). In 1941 the state passed the so-called Parochial School Bus Bill, which required that "all New Jersey schoolchildren living remote from the schoolhouse" were to be eligible to receive compensation for their transportation costs. According to the law, parents sending their children to private non-profit schools were reimbursed for the cost of bus fare using the ordinary public transportation system (not the busses used for the public schools), with the law specifying that 75% of the costs would be borne by the state and 25% by municipalities. For schoolchildren in Ewing, New Jersey, the closest private high school was in Trenton. From 1941 on the not inconsiderable cost of high school students commuting to a Trenton private high school was paid in part by Ewing's municipal treasury. Further, throughout the 1940s, all of the private high school attendees from Ewing were attending Catholic schools (Gordon 2007, p. 1184).

When the school transportation law was voted upon by the state legislature, supporters anticipated no successful legal challenge—neither under the First Amendment of the U.S. Constitution, which was thought to be inapplicable to the states, nor under the New Jersey Constitution, which barred an establishment of religion and banned public funds from going to non-public schools. Supporters of the law assumed an accommodationist reading of state and federal constitutional law. In 1943, however, Arch R. Everson, a long-standing member of the New Jersey Taxpayers Association, sued the township of Ewing, alleging that the new policy violated the state constitution's non-establishment provision and its provision against public support for private schools. On appeal, the state supreme court upheld the constitutionality under New Jersey law of the Bus law.

Everson then appealed to the U.S. Supreme Court, alleging that the Bus law violated the U.S. Constitution on two counts. First, his legal team levelled a 14th Amendment due process challenge unrelated to the establishment clause of the First Amendment. This assertion claimed that the Bus law constituted the taking of property in a way that could not be seen as "due", since "by taxation the private property of some [are] bestow[ed] . . . upon others, to be used for their own private purposes" (*Everson* 1947). A second challenge was grounded on the federal establishment clause. Tellingly, counsel for Everson brought these two challenges, not simply an establishment clause challenge, a fact owing to the concerns of Everson's counsel over the likelihood of winning on the establishment clause basis. Indeed, Philip Hamburger notes that Everson's team initially "had not expected to

win on such grounds", since a victory on these grounds would have been unprecedented (Hamburger 2002, p. 457). But momentously, it's a challenge Everson decided to make.

In the Supreme Court's decision, Justice Black,[10] writing for the majority, first held that the claim that the Bus law violated the 14th Amendment by being an unfair taking of property without due process of law, is baseless. What he ruled is not baseless, however, is the claim of a violation of the First Amendment's establishment clause through violation of the Due Process clause of the 14th Amendment. He then proceeded to examine the case on this basis.

Black's decision has four premises. First, he maintains that the proper construction of the First Amendment necessitates a strict separation of church and state, holding that the First Amendment requires a "Wall of Separation" between religion and government (*Everson* 1947). The wall is to be "high and impregnable", such that the Court must not "approve the slightest breach" (*Everso*n 1947), for the smallest crack will break the seam. In sonorous terms Black announces for the Court that

> [t]he 'establishment of religion' clause of the First Amendment means at least this: [no] Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State'. (*Everson* 1947)

This premise entails holding that the First Amendment's idea of non-establishment is broader than all earlier Supreme Court cases had held in interpreting the clause against the federal government. As James Hitchcock relates, "in 1947, all federal precedents interpreting the establishment clause were accommodationist" (Hitchcock 2004b, p. 112.).[11]

[10] Justice Hugo Black came to the Court with an interesting background. Black came to the high court from the political world. His judicial experience prior to his confirmation to the Supreme Court consisted only of a year and a half stint as a police court judge in Birmingham Alabama. Elected as Alabama's junior Democratic United States senator in 1926, he was reelected in 1932. While in the senate, Black served as the chairman of the senate's Committee on Education and Labor—an important committee in the years of the Great Depression. He also emerged as a "fierce" defender of Roosevelt's New Deal programs. Further, he fought energetically to pass FDR's so-called Court-Packing Plan, which FDR proposed in the spring of 1937. Only a few months following the defeat of this plan, in August of 1937, FDR nominated Black to the Court. In doing so, FDR nominated a person who, in the words of Justice Robert Jackson, was "completely alien to the judicial tradition", given his inexperience as a judge or a legal scholar, and his lengthy partisan political activities. Moreover, while on the court, Black even harbored serious ambitions to run for the presidency himself. See O'Brien (1991, p. 561), Stein (1995), and Magee (1990, p. 163).

[11] In *Church of the Holy Trinity v. United States* (1892), the Court holds that due to the religious nature of the American republic, congress could not have intended in its immigration laws to bar entry to foreign ministers; in *Bradfield v. Roberts* (1899), the Court rules that federal funding of Catholic hospital is not a violation of the First Amendment; in *Speer v. Colbert* (1906), the Court maintains that appropriating federal funds to Catholic schools in DC is no establishment clause violation; and in *Quick Bear v. Leupp* (1908), the Court upholds against an establishment clause and Fifth Amendment challenge the use of federal Indian Commission funds to support mission schools for Native Americans. Further, we also see a kind of accommodationism in the federal free exercise cases of *Reynolds v. United States* (1878) and *Davis v. Beason* (1890). These cases upheld federal laws banning the practice of polygamy and proscribing membership in groups publicly supporting polygamy. The Court upholds these laws against a challenge based on the First Amendment's free exercise clause. It rejects the claim that the U.S. Constitution's guarantee of free exercise permits polygamy or the dissemination of polygamy-supporting literature. The logic in these cases is based on the acknowledgment of generic Christianity—the accommodation of it–as the benchmark to judge polygamous practice and advocacy of the practice. See also Knicely: In *Everson*, "the Supreme Court abandoned 150 years of jurisprudence" (Knicely 2004, p. 72).

It also entails demanding a broader view of non-establishment than the highest court in New Jersey had affirmed, which was similarly accommodationist, as we saw.

The second premise of the Court's holding is that the First Amendment's establishment clause also applies to actions of the states. Justice Black writes, "The First Amendment, as made applicable to the states by the 14th Amendment . . . commands that a state 'shall make no law respecting an establishment of religion'" (*Everson* 1947).

The third premise is that the First Amendment's establishment clause applies to the states in just the same way it is now interpreted in reference to the federal government: as an imposition of a barrier "high and impregnable" between state law and religious life.

In his fourth premise, Black holds, quite controversially for several of his allies on the Court, that the specific law at issue—the law compensating parents for the cost of transportation to private schools—did not in fact constitute a violation of the high and impregnable wall of church-state—separation. Nevertheless, Black lays down for the Court a new doctrine of strict separationism at the federal and state level, although it remained at the time uncertain how vigorously the new doctrine would be applied.

In *McCollum v. Board of Education* (1948), the Court reaffirmed the key points in *Everson*. It reinforced the strict separationist interpretation of the establishment clause and the application of strict separationism to the states. Moreover, unlike in *Everson*, its decision struck down on this basis a popular state program.

In 1940, Illinois joined a movement, dating to the early 1900s, that had successfully adopted release time programs in public schools. In these programs schoolchildren were permitted to enroll in voluntary in-school classes, no more than 45 minutes in length, conducted in a separate part of the schoolhouse removed from those not in the program, held during the school day, but during time reserved for elective classes, lunch, or sporting activities. During these sessions entering religious leaders, who were paid not by the state but by their congregations, would lead voluntary religious services. These programs allowed any congregation to send its minister into the schools. Indeed, release time programs were from their inception inter-faith, with one of its earliest iterations being the Poughkeepsie Plan, spearheaded by Catholic priests, who offered catechetical instruction in public schools alongside Protestant ministers. Over time these programs had "grown dramatically" in "communities across the nation" (Green 2012, pp. 239, 250), with over two thousand communities by 1948 having such programs (*McCollum* 1948).

In 1945 Vashti McCollum, an atheist[12] with a son enrolled in a Champaign public school, sued in Illinois state court, arguing that Champaign's policy of allowing a release time program in area high schools violated the U.S. Constitution's establishment clause by dint of the way it made public schools available for a religious purpose. She also argued that the 14th Amendment's Equal Protection clause was violated by the programs on the basis that the release time programming was exclusively geared toward religious students, whereas non-religious students were not afforded on any consistent basis the same opportunity to have leaders brought in for non-religious programs or events. She sought standing by alleging harm to her son, whom she said felt pressured to attend these events, even though they were officially strictly voluntary.

The state trial court of Illinois along with its highest appeals court rejected McCollum's contentions. She then bought appeal to the U.S. Supreme Court. In reply to McCollum's establishment clause challenge, Illinois maintained that "historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions" (*McCollum* 1948)—an expression of accommodationism. In the Supreme Court's decision in *McCollum*, however, it reaffirmed that the First Amendment means a strict separation—tolerating therefore no accommodation—and that strict separation applies equally to the states. Furthermore, and unlike in *Everson*, the Court held that the issue at bar—the release time program—did in fact violate the

[12] According to Hitchcock, McCollum was a "passionate atheist who charged that religion was truly "the 'opiate of the masses' . . . and a 'virus' injected into the minds of innocent children" (Hitchcock 2004b, p.130). See also McCollum (1961).

U.S. Constitution, striking down programs across the country that for over half a century had enrolled more than 2 million students, programs whose supporters and participating rabbis, ministers, and priests never thought were illicit. After *McCollum*, however, clergy were to close their Bibles and Tanakhs upon entering a public schoolhouse. Despite the fact documented by legal historian Sarah Barringer Gordon that "during and after World War II, Americans rededicated themselves to education and religion as keys to a strong and vibrant democracy" (Gordon 2007, p. 1177)—with one expression of this being precisely the popularity of release time programs—strict separationism now had teeth.

3. Political Calculations or Unjustified Assertions?

There exists a relatively robust line of assessments of *Everson* and *McCollum* that argues that the decisions are effectively lawless. The former dean of the University of Virginia Law School John Jeffries and his colleague James Ryan have argued that the *Everson* and *McCollum* decisions are best seen as political pronouncements by the Court and not legal arguments at all:

> in terms of the conventional sources of 'legitimacy' in constitutional interpretation, the Supreme Court's establishment clause decisions are at least very venturesome, if not completely rootless [and so] it makes sense to look at the establishment cases as the products of a subconstitutional—which is to say political—contest among religious and secular interests with (often self-serving) ideological commitments . . . [This is so because] looking at the establishment clause from a political perspective yields a more coherent and complete account of modern constitutional doctrine than can be derived from the [legal] sources of text, history, and structure. (Jeffries and Ryan 2001, p. 279)

Philip Munoz asserts that Justice Black "quietly and efficiently managed" to impose a specific outcome "*without* making a substantive legal argument". Instead, he secured his desired outcome "with the wave of his pen" (Munoz 2015, p. 3. Emphasis added). These critiques paint the image of a presidential signing ceremony and not of dispassionate legal adjudication. Donald Drakeman echoes these conclusions by arguing that in *Everson*, "Justice Black set off on a *premeditated*" task, one "letting him express his strong *feelings* about the case" (Drakeman 2007, p. 121. Emphasis added). In the same spirit Carl Esbeck calls *Everson* a "novation" (Esbeck 2008, p. 25), in the technical legal sense of that term: a wholly new set of terms that extinguish one contract and replace it with another, an interpretive act that created a bold new start, one emerging "unsuspected" by judges and lawyers reading the Constitution according to traditional methods of legal interpretation (Esbeck 2008, p. 14).

3.1. The Temptation to Politicize the Opinions: The Insufficient Foundations of Conventional Interpretations and the Politics of Public Education at Mid-Century

When assessing these cases, three questions emerge as to their legal foundations. First, on what basis does the Court rule that the First Amendment means strict separation? Second, on what basis is the establishment clause applicable to the states? And third, on what basis is a provision of the Bill of Rights applicable in the same way to the states as to the federal government? These questions are important ones which the opinions in *Everson* and *McCollum* do not do as thorough a job in answering as they could. The at-times elliptical quality of the holdings in turn generates a real temptation to read the cases as political or preference-seeking assertions by the Supreme Court. Moreover, this temptation can be fed by reflection on the context in which these cases were decided—a context defined by a contested political debate about public education. This charged context might have tempted the justices to take a political stand on the issues in this debate.

The first question—on what basis does the Court rule that the First Amendment means strict separation—is answered by the Court on the basis of a conjunction of precedent and originalism. In *Everson* the majority states, "This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and

Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute," passed in 1785, which barred in Virgnia state tax support for religious entities (1947). Black references primarily Justice Waite's majority opinion in *Reynolds v. United States* (1879). In *Reynolds* the Court held that Jefferson's view essentially was inscribed in the First Amendment: being the "acknowledged leader of the advocates" for religious freedom, Jefferson's thought "may be accepted almost as an authoritative declaration of the scope and effect of the [religion clauses of the First] Amendment" (1879). This position is then reinforced in *Everson* by the Court's own originalism. On its review of the original intent of the framers of the First Amendment, the Court holds, "It was these feelings [Jefferson's and Madison's as found in the Virginia ban on religion-supporting taxes] which found expression in the First Amendment" (*Everson* 1947). As Hitchcock relates, for the Court in *Everson*, "the original meaning of the Establishment Clause was plain . . . and the Court was obligated to follow that intent" (Hitchcock 2004b, p. 109).

Black's arguments may well be questionable. However, given the genuine influence on the First Amendment of Madison and through him Jefferson—the former a key architect of the Bill of Rights—it is not so questionable as to be deemed a pretext covering what is really a personal or political aspiration by the Court for a particular outcome.

However, the second and third questions listed above immediately arise: No matter what one's views on the interpretation of the federal Constitution's First Amendment, how could the Supreme Court render non-establishment applicable to the states, and why would it apply in exactly the same way to the states as to the federal government? A form of doctrinalism has been held to have occurred in *Everson* that can answer these questions. A doctrine is a general legal principle derived from previous cases that is then extended to cases that follow under the principle, but with flexibility in extending or modifying the applied principle.[13] The doctrine thought to be foundational in *Everson* can be called the doctrine of univocal incorporation. This doctrine contains a two-fold interpretive move by the Court: (i) the view that the Due Process of Law clause of the 14th Amendment carries substantive content defined in part by certain provisions in the Bill of Rights, especially those deemed by the Court to have a "preferred position". This preferred position requires their application, or incorporation, against the states. (ii) The view that the elements of the Bill of Rights thus rendered applicable to the states form one indistinguishable unit across the country; that is, the unicity of the Bill of Rights entails that the Bill of Rights carries the exact same meaning when applied to the states as it carries when applied to the federal government (Straughan 2000, p. 71). Critics, however, assert that both these moves are left unjustified in regard to the establishment clause.[14]

Reading the Due Process clause of the 14th Amendment as containing a reservoir of rights is textually warranted and perfectly natural in terms of procedural rights, that is, rights that are 'due' to a person in terms of fair procedures. The Due Process clause holds that no state shall deny any person life, liberty, or property without due process of law. By the 14th Amendment's own textual mandate, it is therefore eminently sensible for the Court to look at what procedures are 'undue,' such that a state taking away life, liberty or property through these procedures would be committing a constitutional violation. However, the Court in *Everson* is seen to have gone beyond this natural reading—a reading often called procedural due process—and ventured into a form of substantive due process. Substantive due process, once again, holds that if a law takes away life, liberty, or property to such a degree and to such an extent that it is deeply egregious, the law cannot be considered the product of a 'due process,' as no 'due process' would ever result is such an egregious

[13] Philip Bobbit defines doctrinalism as the "application of neutral, general principles derived from the caselaw construing the Constitution", applying the *ratio decindi* found in a body of cases in a way that is "neutral as to the parties . . . and general, that is, it applies to all cases" of the relevant sort, yet in a way whereby "its operation is not confined to . . . the strict adherence to previously decided cases" (Bobbitt 1992, p. 100).

[14] Kurland writes that this "transmogrification occurred solely at the whim of the Court" and so "without argument" in cases that made the "Constitution irrelevant" (Kurland 1978, p. 10).

denial of life, liberty, or property. On this reading of the Due Process clause the question immediately emerges as to how the Court is to define outcomes of the lawmaking process which are so egregious as to not be considerable as outcomes of a due process. By the time of *Everson* a set of prominent views had emerged in Supreme Court case law that defined egregious laws as those that offend the essence of justice in the sense that they offend principles essential to a scheme of government based on "ordered liberty" (*Palko v. Connecticut* 1937). Over time, the Court came to specify that select aspects of the Bill of Rights are provisions inherent in a system of government dedicated to upholding ordered liberty, and thus are applicable, via the 14th Amendment, as restraints on the states.[15] Further, it emerged in the Court's case law before *Everson* that the interpretation of the provisions of the Bill of Rights that are incorporated against the states is to be the exact same interpretation—carrying the exact same meaning—as the interpretation applied to actions of the federal government.[16] *Everson* can be seen, therefore, as the unfolding of the univocal incorporation doctrine, extending its core principles to the issue of religious establishment.

However, extending the univocal incorporation doctrine to the establishment clause needed justification. Today, the high Court can well say, as it did in *New York State Rifle and Pistol Association v. Bruen* (2022) that "we have made clear that individual rights enumerated in the Bill of Rights are made applicable against the States through the Fourteenth Amendment and [that they] have the same scope as against the Federal Government. See, e.g., *Ramos v. Louisiana* (2020); *Timbs v. Indiana* (2019); *Malloy v. Hogan* (1964); (Bruen 2022). However, when addressing the 1947 case of *Everson* and its 1948 companion, we are at the point of initiation; here, justification, not reliance on precedent, is necessary. However, it is just here that many critics of the *Everson* and *McCollum* decisions see no reasoned explanation having been given at all.

What is given by Black in *Everson* is often seen as a merely conclusory statement: namely, the claim that "there is every reason" to incorporate the prohibition of the establishment of religion against the states and to give it a "broad interpretation"—that is, a strict separationist interpretation—as there is for the Court to have incorporated the free exercise clause and to have given it a broadened meaning as the Court did in its slightly earlier rulings in *Cantwell v. Connecticut* (1940) and *Murdock v. Pennsylvania* (1943) (*Everson* 1947). To help unpack this, let us look at *Cantwell* and *Murdock* in greater depth.

In *Cantwell*, the issue was the need for religious and other charitable solicitors to secure from the city of New Haven a permit certifying that the solicitors were soliciting for religious or charitable purposes. The Connecticut Constitution had long provided for religious freedom. The city was thus obligated to allow for solicitations for religious reasons. The reason the city's ordinance required it to certify that solicitations were religious appears to relate to other laws governing solicitations, specifically, rules restricting the hours door to door salesmen could come to peoples' homes. The city sought to limit the number of commercial solicitations its citizens were subjected to. To this end the city sought to ensure that those who were salesmen did not conduct their work under false pretense, alleging that they were religious when they were actually only engaged in for-profit sales. To avoid this, the city passed a law allowing it to adjudge if organizations were indeed religious or charitable.

The Jehovah's Witnesses had been active in the city for a few years and were energetic in door-to-door proselytization. In response to the Cantwell city ordinance, members of the Jehovah's Witnesses sued in state court, alleging a violation of Connecticut's constitutional protection of free exercise of religion and arguing also that the regulation "abridges or

[15] The clearest articulation of this position is found in Wiley Rutledge's majority opinion in *Thomas v. Collins* (1945), but its antecedents go back to *Palko v. Connecticut* (1937). In *Thomas*, Rutledge holds that the Bill of Rights's protection of freedom of speech and assembly is a protection that has a "preferred position" relative to other elements of the Bill of Rights, since these rights are deemed essential to democracy, and therefore necessitate incorporation against the states.

[16] The theory of the univocal Bill of Rights was elevated to a core principle during the Warren Court era in *Pointer v. Texas* (1965).

denies freedom of religious profession and worship and liberty of speech and of the press" in violation of the 14th Amendment of the federal Constitution (*State v. Cantwell* 1939). Importantly, the plaintiffs do not assert only a violation of free exercise under the U.S. Constitution, but of other First Amendment rights such as freedom of speech and press, which the Supreme Court had, as early as *Gitlow v. New York* (1925), incorporated against the states—a testament to the recognition that they were plying new ground with a free exercise challenge under the U.S. Constitution. In its ruling, the Connecticut Supreme Court held that the ordinance requiring city certification of an individual's or a group's religious status was a reasonable protection against potential nuisance, and a reasonable effort to ensure consumer protection, holding thus that the rule did not intrude upon the Connecticut constitutional right to religious free exercise, nor upon the 14th Amendment. The plaintiffs then appealed to the United Staes Supreme Court.

In *Cantwell*, the Supreme Court unanimously held, first, that the free exercise clause of the First Amendment is incorporated against the states and, second, that the concept of religious freedom needed to be defined more broadly than it was by the Connecticut Supreme Court because the review of a group's religious status by the city allowed too much possibility of the state using discretion in a way that might turn abusive by limiting the freedom of disfavored religious groups. No evidence, however, was adduced that there had been such abuse of power by the municipal government. Nevertheless, the Court used, seven years before *Everson*, the same kind of solicitude about the mere possibility of problems—a solicitude that led the Court in *Everson* not to tolerate the "*slightest* breech" (*Everson* 1947. Emphasis added) of the high wall of separation. Its solicitude for the possibility of an infringement of religious freedom expressed in *Cantwell* constituted a kind of distant early warning approach as would later be seen in *Everson*: the mere possibility of abuse was deemed constitutionally insufferable.

In the Court's second pre-*Everson* free exercise clause case referenced by Black, *Murdock v. Pennsylvania* (1943), the Court assumed that the free exercise clause is incorporated as in *Cantwell*, and the Court again gave free exercise a broader interpretation than a state's highest court had given it, and even prior federal precedents had. At issue was a city ordinance in Jeannette, Pennsylvania that required all those who solicit funds in return for a product to pay a small licensing fee. Once again, as in *Cantwell*, members of the Jehovah's Witnesses had been going door to door in the community. Missionaries of the Jehovah's Witnesses would deliver religious messages and then seek to have individuals secure, for a price, additional material. As in *Cantwell*, the Jehovah's Witness missionaries had not sought to secure the needed permit. A number of Jehovah's Witnesses were arrested and faced a fine of up to $100 or a jail sentence of up to 30 days (Huba 2018). As part of their response, several Jehovah Witnesses argued to the Pennsylvania Superior Court that their arrest and the associated city regulation constituted a violation both of the Pennsylvania State Constitution's guarantee of religious freedom and the First Amendment of the U.S. Constitution. Notably, as in *Cantwell*, the petitioners did not assert only a free exercise violation—perhaps in light of the relative newness of the incorporation of the free exercise clause to the states—and instead alleged a violation also of the First Amendment's guarantee of freedom of speech and press, which, as noted, had been applied to the states in 1925. The Pennsylvania Superior Court held that Jeannette's law did not involve any violation of a protected right under the Pennsylvania or U.S. Constitutions, since the law did not single out religion as a class or any particular religion, but instead was generally applicable to all who were exchanging products for payment (*Commonwealth v. Murdock* 1942). The Superior Court further ruled that the regulation had been around for over forty years and thus predated the emergence of the religious community in question; and it also emphasized how the law required only a minimal fee, which applied only to door-to-door solicitations and not to solicitations on the public streets (*Commonwealth v. Murdock* 1942). The law, in the Superior Court's judgment, was "nondiscriminatory and not unreasonable", and was therefore "not in violation of the constitutional rights of freedom of worship and freedom of the press secured by our State Constitution and by the Federal Constitution as

enlarged by the 14th Amendment" (*Commonwealth v. Murdock* 1947). In turn, petitioners attempted an appeal to the highest court of Pennsylvania, but their petition was denied by the Pennsylvania Supreme Court. They then petitioned to the United States Supreme Court.

The Supreme Court in *Murdock* held that the fee is an impermissible tax on the enjoyment of a First Amendment right. Deploying again the kind of distant early warning approach expressed in *Cantwell* and later reiterated in *Everson*, the Court held that the mere possibility of the minimal fee being increased to the point of being prohibitory is sufficient to strike down the fee, although no evidence of abuse was shown in the record. This ruling goes well beyond prior federal free exercise case law. For example, *Reynolds* and the later polygamy cases dealing with Mormonism had held that the federal government can judge a practice to be unacceptable and ban it, even if it is religious. Doing so is permissible if there is a basis for doing so in long-standing civilizational values of the Christian West.[17] What the government cannot do is ban the holding of the belief. The distant early warning approach so central in *Cantwell* and *Murdock* is conspicuous in its absence in *Reynolds*, as it is certainly possible that a state could ban religious practices that do not offend long-standing civilizational values, justifying such restrictions under the color of protecting Western civilization. No distant early warning tripwire can be found in the holding in *Reynolds*. Moreover, *Murdock* expands the protections found in the case of *Jones v. City of Opelika* (1942), in which the Court upheld a minimal fee in similar circumstances as in Jeanette. In that case, Justice Reed held for the majority that "nor do we believe it can be fairly said that because such proper charges may be expanded into unjustifiable abridgments, they are therefore invalid on their face." *Jones* is a clear rejection of the distant early warning approach. So *Murdock* is indeed a clear broadening relative to prior state and federal judicial rulings on free exercise; it goes well beyond, in interpreting free exercise, what had gone before in similar cases in state supreme courts and the U.S. Supreme Court.

Returning to *Everson*, the Court, as noted, holds that there is "every reason" to give the establishment clause the same broadened interpretation it had given the free exercise clause in the cases we just surveyed, and "every reason" to apply that broadened interpretation to the states. But, again, why? The claims need explanation. For it is quite possible to argue that free exercise and non-establishment are conceptually distinct. Free exercise relates to restrictions on religious activity, whereas issues of establishment need not entail any such restrictions on religious action. Indeed, as Hitchcock maintains, "the separationists in *Everson* did not show that the alleged establishment of religion violated anyone's freedom" in any tangible sense (Hitchcock 2004b, p. 111). Their alleged injury from an asserted state violation of the establishment clause is quite a different claim than that of the petitioners in *Cantwell* and *Murdock*—claims made by individuals who were interdicted in their religious activities, and, in the case of *Murdock*, were residing in a part of the country where Jehovah's Witnesses were facing the possibility of violent persecution (Peters 2000). The fears drawn by the Court in *Everson*, on the contrary, are much more tenuous. Having the City of Ewing pay money to the families whose children attend private Catholic schools exacted no restraint on the freedom to adhere to a religion opposed to Catholicism (or a religion opposed to state aid to religious schools in general); nor does the township's payment limit in any way the ability to profess and promote in the public square a religious belief opposed to Catholicism (or to state aid to religious schools in general). Nor does the Bus law impact the plaintiffs in any other legally discernible way. As Hitchcock reminds us, at the time of the *Everson* decision (as is still the case now outside establishment clause jurisprudence), "the mere feeling of being excluded or dishonored is conceded no legal or constitutional significance" (Hitchcock 2004b, p. 119).[18] Moreover, in 1947 merely paying through taxes

[17] In *Church of Jesus Christ of Latter-Day Saints v. United States* (1890), the Court held that polygamy can be banned because "it is contrary to the spirit of Christianity and the civilization which Christianity has produced in the Western world".

[18] The point admits of certain highly specific exceptions. Exclusion and demeaning treatment representing animus on the part of government can be a cause for denying that a law has a rational basis. See *Masterpiece*

for policies with which one disagrees was not generally held to be justiciable. Nevertheless, the Court permitted Everson to proceed without a showing of tangible harm other than the alleged harm of having his taxes support a policy he found unconstitutional.[19]

What is more, even if we hold that establishment must be incorporated just as free exercise is, we still have the question of whether the "high and impregnable" wall of separation interpretation of the establishment clause is its proper construction in reference to the actions of state governments. Here, an awkward point emerges for the Court: the thought of Jefferson on federalism. Jefferson, whose intent is so important in the rulings in *Everson* and *McCollum*, disavowed extensions of federal power over the states in most respects. But incorporation does just this by empowering the federal courts to monitor a vast array of activities of the states. For Jefferson, there is an enormous difference between federal and state power; and the latter must not be permitted to spread its tentacles unnecessarily. As he writes in a letter to Adamantios Coray, "The extent of our country was so great, and its former division into distinct States so established, that we thought it better to confederate as to foreign affairs only. Every State retained its self-government in domestic matters, as better qualified to direct them to the good and satisfaction of their citizens, than a general government so distant from its remoter citizens and so little familiar with the local peculiarities of the different parts" (Jefferson 1823). Jefferson gives explicit endorsement of this federalist perspective also in his second inaugural address, in which he states, "religious exercises are under the direction and discipline of *state* or church" (Jefferson 1805. Emphasis added). So for a case that relies so heavily on Jefferson, how can it extend *federal* power in the way it does?

In all, *Everson* supplied what Hitchcock calls a "revolution" in constitutional law (Hitchcock 2004a, p. 159). But, by dint of this very revolutionary impact, the decision demanded substantial justification. So, again, we must ask, what are these "every reason"s to apply the establishment clause to the states and to apply it in the new, expanded form? The Court, critics allege, simply provides no argument. Indeed, it is precisely the act of imposing both the establishment clause and the strict separationist construction of it to the state governments based on what appears to be a merely conclusory statement—that there is "every reason" to do so—that gives rise to such puzzlement among critics, and feeds the policy-by-judicial-ukase critique.[20]

Another source of the suspicion that a political or mere preference-seeking motive informed the *Everson* and *McCollum* decisions relates to the context in which the decisions were made. At mid-century the United States was embroiled in a debate about public schooling and the future of American democracy. At this time, as Jeffries and Ryan have demonstrated, many influential groups in the United States were looking to the public schools as a source of American civic strength, and saw the absence of sectarian influence on the schools as critical for democratic vitality (Jeffries and Ryan 2001, p. 279). This may well have created a certain temptation for the Court to exercise its influence on one side of this debate. Indeed, this is just what Jeffries and Ryan suspect.

In sum, based both on their elliptic character and the political background of their decisions, it seems rather unsurprising that the majority opinions in *Everson* and *McCollum* have been questioned by a significant range of scholars.

Cakeshop v. Colorado Civil Rights Commission (2018); and hateful exclusion can be a sentence enhancer under state and federal hate crimes laws.

[19] The Court would reinforce taxpayer standing in establishment cases in *Flast v. Cohen* (1968). This decision, authored also by Black, created a unique carve-out to the rules of standing by deputizing all taxpayers to serve as sentinels of the high wall of church-state–separationism. *Flast* holds that challenges to congressional authorizations of funding alleging a violation of the establishment clause can be brought by any taxpayer, a rule of standing not available in any other type of challenge to federal appropriations.

[20] See also Kurland (1978).

4. *Everson* and *McCollum* as Forms of Substantive Due Process: Judicial Determination of Essence and a Valorized Historical Trajectory

4.1. The Logic of Everson and McCollum

These criticisms miss the mark. For the legal foundations that answer the question of what Black's "every reason"s are for applying the establishment clause and its strict separationist construction to the states can be detected. They can be found, if rather obliquely, when Black recounts a key section in a federal religious liberty case, *Watson v. Jones* (1871), in which the Court quotes an 1843 South Carolina state case, *Harmon v. Dreher*. *Dreher* is a decision dealing with South Carolina's state constitutional law surrounding the free exercise of religion in relation to religious communities' definition of their own membership. The sentence in the South Carolina state court's decision which the U.S. Supreme Court quotes in *Watson*, and then repeats in *Everson*, provides in part what the Court takes to be its compelling rationale; it provides in large measure its "every reason" for ruling as it did. This sentence reads, in relevant part: "the structure of our government [that is, the government of South Carolina as it had developed by 1843] has, *for the preservation of civil liberty*" led to what Black considers to be a state court ruling favoring strict separation (*Everson* 1947, quoting *Watson v. Jones* 1871, quoting *Harmon v. Dreher* 1843. Emphasis added). In other words, civil liberty, which includes religious liberty, *requires* as a matter of the essential nature of civil liberty as it relates to religion and government, strict separationism. Free exercise and strict separation bear an essential "interrelation" such that they form "complementary clauses" (Everson 1947). Herein lies a core component of Black's opinion.

The logic of Black's decision has three steps. First, the claim, appropriated from *Watson*, that civil liberty necessitates strict separationism is deployed as an expression of the *nature* of civil liberty—a determination of just what the essence of civil liberty in relation to religion actually requires. Second, the Court's claim that the essence of civil liberty indicates the interrelation of free exercise, and other civil liberties, and disestablishment is buttressed by the history of Virginia, whose statesmen were wise enough to see this connection. Detecting this interconnection, the Virginia statesmen not only legislated to protect religious freedom, they disestablished the state religion and proscribed taxes being allocated to religious organizations. Third, the history of Virginia is assigned a special epistemic value due to the sagacity of these Virginia thinkers.

As to the first move—the determination of the essence of religion and its relationship to liberty and state power—the Court appears to think that the South Carolina Appeals Court in the sentence in *Watson* quoted above has discovered the true essence of these matters. Civil liberty, the Supreme Court implies in *Everson*, is imperiled when the state gets entangled in religion: disputes emerge and sectarian strife ultimately enfeebles the state's preservation of civil liberties for all. The Court, although not stating its reasons with precision, appears to be maintaining that strict separation gives protection to the state against sectarian strife. Such strife can cause the civil liberty of religious freedom of those in disfavored sects to be reduced—leading eventually to "cruel persecutions" (*Everson* 1947, quoting Madison 1785)[21]; and it can reduce the overall efficacy of the state as the protector of rights by the way it can make sects that feel disfavored come not to fully support the state, creating in turn a reduced state capacity to protect all rights, not just religious liberty. Hence, the state must be a force that unifies people. To do so, it must not be seen as involved in any measure that might be supportive of religion, understood either as any assistance to one religion or assistance to all.[22]

Further, in both *Everson* and *McCollum* the Court makes clear its claim that the true nature of liberty in relation to religion contains an additional feature: namely, that religion is not hurt by separationism but is only assisted by it. The Court asserts that religion is

[21] For the special status of Jefferson and Madison, see *infra*.

[22] The Court mostly leaves unexplored in *Everson* and *McCollum* the definition of a 'religion' for the purpose of excluding this category from public life.

aided by the freedom it is afforded from meddling by self-interested political partisans, and is vivified by the need to stand on its own two feet, unpropped by public benefactions. As Black asserts in *Everson*, "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere" (1947).

The Court in *Everson* and *McCollum* is thus most plausibly seen as entering the business of defining the very essence of civil liberty in relation to religious life and the nature of religious thriving. Erwin Chemerinsky acknowledges this when he describes the "wall of separation" idea so prevalent in *Everson* as a metaphor the *Everson* Court deploys to express its judicial *philosophy* about the nature of religion and liberty. Chemerinsky writes that the justices in *Everson* were "saying that the *concept* of the Establishment Clause can be understood through the metaphor that Jefferson coined" (in Boston 2007. Emphasis added). Carl Esbeck seems to do the same when he argues that the *Everson* decision advanced a "proposition"—that is, a claim to the truth of the matter—regarding church and state, what he calls the philosophy of "voluntaryism", or the view that religion can thrive, and indeed best thrives, in the absence of state assistance (Esbeck 2008, pp. 20–23). Esbeck argues that the Court in *Everson* was "institut[ing] the effort to bring the practice of voluntaryism", as it had developed in aspects of American history, "more closely in line with its principle" (Esbeck 2008, p. 25). Voluntaryism, Esbeck argues, was seen by the Court as an essential property of religion and liberty in a constitutional framework. The Court in *Everson* and *McCollum*, Esbeck maintains, was now going "to take voluntaryism to its logical ends" (Esbeck 2008, p. 25). In all, church, state and civil liberty are concepts the essential nature of which the Court in *Everson* sees itself as capable of identifying, and, in *McCollum*, is now willing to impose to overturn state law.

Such a foray into essence-seeking is not unprecedented. Indeed, the determination of the essential features of things has been a core aspect of one longstanding judicial activity: the Court's interpretation of the 14th Amendment Due Process clause. The Court in several cases has advanced a construction of the Due Process clause that holds that the clause carries with it a set of robust protections against laws the substantive content of which is deemed egregious, with egregious outcomes being violations of the 14th Amendment. One form this has taken is by defining egregious outcomes in reference to the essential principles of justice.[23] Further, the Court has taken on the task of selecting certain provisions of the Bill of Rights as being so essential to a system of government based on ordered liberty that they require incorporation against the states. All the while, the interpretation of the 14th Amendment on the basis of so-called procedural due process, which requires determining which procedures of a trial are so essential to a fair process as to necessitate incorporation, has long been conducted by the Court.[24] An essence-seeking task, therefore, is inherent in the due process jurisprudence of the high court.

Returning to *Everson* and *McCollum*, we can now address another major point about these cases: namely, the Court's determination of the essential features of religion and its relationship to civil liberty is buttressed by its showing how this view has been expressed in a valued historical trajectory. Here, an important point distinguishes *Everson* and *McCollum* from other 14th Amendment substantive due process cases. To see this we must take note of one feature of most of the cases involving substantive due process defined in reference to the essence of justice, a feature found both in those cases that determine an outcome to be egregiously unjust without necessary reference to the Bill of Rights, and in those cases that incorporate provisions of the Bill of Rights. In much of the case law on substantive due process before *Everson*, the Court sought to fortify its determination of the essential features of the topic being examined by showing that its definition of the relevant essence has deep historical backing in a long and largely unbroken application of the concept throughout legal history, a backing sometimes expressed as being so deeply rooted as to be steeped in the traditions not just of the United States, but of "English speaking peoples" (to use the

[23] See, for example, *Pierce v. Society of Sisters* (1925) and *Meyer v. Nebraska* (1923).

[24] For example, the 6th Amendment's right to a grand jury indictment has not been incorporated against the states. This is in part because it has not been deemed by the Court a protection essential to fairness and liberty.

Court's words in *Rochin v. California* 1952). In many cases incorporating provisions of the Bill of Rights to the states, the provisions of the Bill of Rights themselves have been touted as just such deeply rooted protections. The same reinforcing reference to long-standing history is found in cases of substantive due process where the right is not clearly stated in the Bill of Rights, such as the right to control the education of one's children. The Court, for example, has held that parental control of education in the form of parents having a right to enroll their children in a private school (a right not mentioned in the Bill of Rights) is protected by the 14th Amendment, because the denial of parental control over the education of children is egregiously unjust, since "children are not creatures of the state"(*Pierce v. Society of Sisters* 1925).[25] The Court then reinforces this point by referring to the long historical practice in America of parents directing their children's education.

However, a reference to a long and mostly unbroken tradition in American history is not what the majority opinions give us in *Everson* or *McCollum*. It is here that a central disagreement comes to light between my interpretation of *Everson* and *McCollum* and that of many critics. Many critics see these decisions as replicating the pattern of the Court whereby it anneals its determination of a relevant essence by grounding it in a deep, unbroken tradition of American law. These critics argue in turn that such a grounding for strict separationism is so false—so patently false—that the decisions in *Everson* and *McCollum* must be pretextual, mere fig leaves covering political maneuverings. Such an interpretation of these cases, however, is inaccurate, a point that can be highlighted in two ways. First, we can see the inaccuracy of this reading by summarizing the historical claims the majority opinions give us, and by highlighting that a reading of the Court's usage of history that would see it as providing support for strict separationism by grounding it in a broad and unbroken sweep of American history would be deeply implausible, and thus should be avoided on the basis of interpretive charity. Second, we can see the falsity of this reading by reflecting more carefully on the Court's use of history in these cases, and the way they valorize a certain segment of history.

First, the historical claim in *Everson* and *McCollum* effectively says the following: the essence of religious thriving is not anything the Court alone is discovering, but is an essence that has also been discovered by previous thinkers, thinkers whose insights can be seen as constituting a chain going back to early colonial experience and culminating in Virginia's disestablishment, as well as in the actions of several states in the decades following ratification of the First Amendment. Black writes that "early Americans" sought to remove themselves from the English and European patterns of unifying church and state and the "evils, fears and political problems" that a cooperation between religion and government were thought to create (*Everson* 1947). They soon, Black states, saw these problems reappear across the colonies. The practice of state's aligning with religion became so commonplace, and its problems became so apparent, that it "shocked the freedom-loving colonials into a feeling of abhorrence" (*Everson* 1947). This shock in turn precipitated serious and insightful reflection on the relationship between church and state. The result of this thoughtful reflection was strict separationism. Although strict separationism advanced in some regions besides Virginia, it "reached its dramatic climax" in the Old Dominion in 1785, when the Virginia legislature "refused to renew Virginia's tax levy for the support of the established church, or any religious body" (*Everson* 1947). This decision was the fruit of deep analysis and careful consideration (*Everson* 1947 and Hitchcock 2004b, pp. 6–7).[26] After Virginia's rejection of tax support for religious communities, other states soon enacted similar constitutional changes. Some states, however, "persisted for about half a century" in seeing government aid to religion as permissible and wholesome (*Everson* 1947). Yet,

[25] To be sure, Justice McReynolds's holding in *Pierce* is a bit unclear. The position of Justice Thomas and a number of other conservative jurists, on the contrary, is that state law violates due process only if it violates a long-standing principle found in American history.

[26] Although not mentioned in the majority opinion, Alexis de Tocqueville's arguments in *Democracy in America* could be deployed in defense of Black's historical reading of religion in the United States. Tocqueville in the 1830s argued that the separation of church and state was making both religion and democratic institutions in America stronger. See Tocqueville (2002, vol. 1, chap XVI).

over time the Virginian model radiated to other parts of the country. New York and New Hampshire proposed similar amendments in their state constitutions soon after Virginia (Reiss 2002, pp. 109–10). And the trend continued after the First Amendment's ratification, and came to include the very state whose decision, *Harmon v. Dreher*, Black so warmly quotes—South Carolina.

Although in one sense this history is all true, it constitutes only *one* historical trend. However, Black's use of history acknowledges this. He knows that there were countertrends regarding state support for religion.[27] His opinion tacitly concedes that to the horrors of sectarian tension can be juxtaposed the inter-religious comity that generally prevailed during the War for Independence. In the Revolutionary struggle, diverse religious communities of Protestants came together, among themselves and in common cause with Catholics, such as the eminent Carroll family. Even "antipapists" such as Baptists and Presbyterians served as brothers in arms with Catholics in the Revolutionary fight. They were even joined by many Jews, as seen in the life and work of men such as Hyman Soloman. Even some Anglicans, such as the Reverend William Smith of Maryland, gave support to the Revolutionary cause (even if at times not entirely explicitly).[28] Indeed, William Smith even won in 1782 Washington's agreement to found a college bearing his name along with Washington's service on its Board of Visitors and Governors.[29] In fact, despite decided twists and turns, comity among American religions was made manifest in precisely the release time programs in public schools that swept the nation from the early 1910s onward.[30]

As to the various state forms of support for religion, the countertrends are also numerous. Massachusetts, Connecticut, and other states maintained their religious establishments for decades following the Constitution's ratification. Even after formal disestablishment took hold across the country, this one specific form of state support for religion—an official establishment—was often replaced with other forms of governmental assistance to religion. As David Sehat documents in his important work, *The Myth of American Religious Freedom*, and as is documented by Jonathan Zimmerman and others, aid to religion was commonplace throughout the 19th and early 20th centuries. This even included the state of South Carolina, which disestablished the Protestant Episcopal Church and thus separated church and state to some degree in 1790, but, in 1896, added to its reworked Constitution the requirement for all officeholders to affirm a belief in a "supreme being"—scarcely a strict separationist development (Zimmerman 2012; Butler 2020). Also noteworthy is the rise and persistence of religious-based Blue Laws and blasphemy laws from the 1830s on (Zimmerman 2012).[31]

At this point some critics have argued that the factual basis for *Everson*'s holding as to the meaning of the establishment clause is so faulty as to be pretextual, and thus the decision must be political and perforce not properly legal. But as I've stated, this criticism

[27] It is Justice Frankfurter's concurrence in *McCollum* which maintains the argument that the broad sweep of history supports strict separation, not the majority opinion. It is Frankfurter who alleges emphatically that "long before the Fourteenth Amendment subjected States to new limitations the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people", a view issuing from the "whole experience of our people", one which became "firmly established in the conscience of the nation" (1948). Black's position, on the contrary, is more nuanced.

[28] See Smith (1775).

[29] Washington College in Chestertown, MD.

[30] There is a degree of tension in the Court's rulings when *Everson* is compared to *McCollum*. *Everson* is based in part on the historical view that religions were divisive and at persecuting odds with each other in the period before the First Amendment; but the topic at issue in *McCollum* is a program based on inter-religious comity and solidarity. So when religions do what the Court in *Everson* said they weren't doing in the early history of the country, that is given no evidential weight by the Court in *McCollum*. This I believe is due to the Cout's conviction about the essence of religion in relationship to state power as disclosed in its "distant early warning approach"—a supposition that although interreligious comity may prevail now and again, it will inevitably fracture, and grave bitterness and rivalries that threaten the civil liberties of all are destined to reemerge.

[31] It was only in 1961 in *McGowan v. Maryland* that the Supreme Court clearly shifted the permissible foundation of Blue Laws under the First Amendment from a religious basis to a non-religious one grounded on the licit exercise of state lawmaking to advance the general welfare of state citizens by recognizing a common day of rest.

misunderstands the way the Court deploys history in the majority opinion. A more careful reflection on the Court's use of history suggests that the Court is valorizing one aspect of history—that is, the Court is assigning one element of history special weight. The trend associated with New England dissenters, and expressed in Virginia's disestablishment of religion, and which also radiated to other parts of the country—a trend, to the Court's mind, which "reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions"(*Everson* 1947)—is acknowledged by Black as being only one trend. It is not presented as the outcome of a broad sweeping dispensation of American history. Instead, the Court's use of history discloses only one trend, but a trend bearing special epistemic significance. The trend toward disestablishment in early America is a valorized trend line in large part because of the sagacity of the thinkers who were its leading lights. Indeed, Black accords Virginia's disestablishment special pride of place. To his (Southern) mind,[32] Virginia—the land of luminaries like Jefferson and Madison—contained men of eminent wisdom. It is here where "Thomas Jefferson and James Madison led the fight against any form of state support for religion". Here, Madison wrote his "*great*" work *The Memorial and Remonstrance*", (*Everson* 1947. Emphasis added), and it was here where Madison and Jefferson "provided a *great* stimulus and *able* leadership for the movement" toward disestablishment (*Everson* 1947. Emphasis added). Indeed, in the case that Black cites so approvingly as establishing the special position of Madison and Jefferson in determining the meaning of the First Amendment's religion clauses—*Reynolds v. United States*—Jefferson, in the words of David Reiss, is "reverentially depicted" (Reiss 2002, p. 107). The author of the *Reynolds* opinion, Justice Waite, gives us an account of the origins of the First Amendment in which Jefferson and Madison are presented "as Mosaic lawgivers" (Reiss 2002, p. 108) who "conquer the forces of intolerance" (Reiss 2002, p.112). As such, *Reynolds*—and by extension *Everson*, which relies so heavily on it—both work to establish the "identification of Madison and his compatriots with the *true* meaning of the First Amendment" (Reiss 2002, p. 113. Emphasis in original).[33] As Reiss notes, Black "has identified *a certain* momentum in the historical record that moves from religious persecution to religious liberty. By identifying *this* trend, Black is able to explain away any inconsistent evidence in the historical record. Any 'apparent' inconsistencies are merely laggards" in the fulfilment of the essence of true religious and civil liberty (Reiss 2002, pp. 114–15. Emphasis added.). Critics who focus on the 'inconsistent historical evidence, that is, the countertrends we surveyed which might "cause one to question Black's conclusions", do not appreciate that the trend Black highlights is one that embodies, in the Court's mind, greater epistemic validity in the understanding of the essence of religion and civil liberty, a superiority owing to the superior intellects involved.

4.2. A Clarifying Point about Black's Majority Opinions

For Black, the warrant for the Court to determine and apply the essence of religious establishments in relation to civil liberty is grounded in the 14th Amendment, but in a nuanced way. He does not seek to define the essence of this issue by looking directly and exclusively at the words of the 14th Amendment. That is, he does not attempt a straightaway interpretation of what due process of law requires viewed in isolation. Instead, any violation of the 14th Amendment's Due Process clause in *Everson* or *McCollum* will for Black result only because of a violation of the enumerated constitutional provision of non-establishment expressed in the First Amendment, which then triggers a violation of the Due Process clause.

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[32] The Southernness of Black's mind is not unimportant. Raymond Decker notes how in the Alabama of Black's early years as a lawyer, Thomas Jefferson was admired almost to the point of idolatry (Decker 1971). For Black's lifelong love of Jefferson, see Meador (2003).

[33] As reinforcement for the specialness of Virginia, Frankfurter writes in his concurrence in *McCollum* that the Virginia experience is an "event basic in the history of religious liberty" (1948). Note, it is basic not solely in the history of America, but in the very unfolding of the true essence of religious liberty over time.

Nonetheless, although the warrant to search for the essence of religion and liberty and to corroborate that essence by highlighting an historical trajectory that reinforces the Court's judgment is seen by Black as being given to the Court through the textual provision of the First Amendment's establishment clause (as incorporated against the states via the 14th Amendment), construing the language of the establishment clause requires, as Richard Boldt and Dan Friedman point out, "the very sort of judicial exploration" of the essences of the issues at bar and their place in American history that his brothers on the Court deployed in interpreting directly the 14th Amendment's words of "due process" in various substantive due process cases. Black's decision, therefore, still rests on an "exploration" of the essence of the matter at bar—-civil liberty, religion, and their relationship to state power (Boldt and Friedman 2017, p. 322).[34]

5. Entrenched Non-Establishment and a Turn to Normative Assessments: Defending the Court's Methodology, Questioning the Court's Conclusions

5.1. Sectarian Re-Establishment Is Highly Unlikely

Where might this reading of *Everson* and *McCollum* lead us? One conceptual avenue that opens is Justice Thomas's narrow focus on strict originalism and his repudiation altogether of substantive due process in that form in which the Court determines the essence of justice and the relationship between justice and the essence of the issue at bar. Such claims advanced by Thomas could be used to argue that states are free to re-establish religions, to some degree just as they did in Massachusetts in the early 19th century, that is, by endorsing the articles of one form of Protestant Christianity as the true faith. I say "to some degree" because we must remember that Thomas's position on the establishment clause does not negate other constitutional provisions, such as the right of all to serve in public life without religious oaths, and the rights explicitly mentioned by him in *Elk Grove*, those of being free from "coercion of religious orthodoxy and of financial support [to churches] by force of law" (2004). These measures for Thomas would face serious constitutional obstacles. What is at stake, therefore, is largely the prospect of state endorsements of religion and the expansion of religious free exercise claims. Nevertheless, a resurrected establishment of this limited sort, if sectarian, remains highly unlikely.

Why is this so? First, rejecting substantive due process in the form of seeking the essence of justice—a precondition to rejecting a constitutional requirement for state-level non-establishment altogether on my reading of *Everson* and *McCullom*—would be a radical shift. It would render precarious cases going all the way back to *Pierce*. In fact, it bears noting that the state of Oregon in the *Pierce* case attempted to justify its barring of students from being able to attend private schools by explicitly maintaining that the protections of due process were procedural protections only (Hitchcock 2004a, p. 153). Do we really want to say that children *are* "creatures of the state"? An interpretive method—such as a rejection of substantive due process—that would permit such an outcome seems both normatively indefensible and something it's reasonable to assume the Court's majority would likely never countenance. To be sure, substantive due process can involve difficult determinations concerning such things as the nature of liberty, but there seems no guarantee judges ever

[34] If suspicion were to remain that such an 'essence-seeking' interpretation of the Constitution is inconsistent with Black's reputed advocacy of judicial restraint, we should emphasize that Black was, throughout his jurisprudence, quite open to sweeping exercises of judicial discretion—as long as the exercise was warranted, to his mind, by a textual constitutional provision. His reputation for restraint results in large part from his dissent in *Griswold v. Connecticut* (1965); but it also results, as Tinsley Yarbrough remarks, from his Equal Protection jurisprudence (Yarbrough 1973, p. 479). Here however we should refer to Decker's legal biography of Black. Decker begins his account of Black's life in the law by referencing the eulogy given him by Chief Justice Earl Warren. "Black arose", Warren remarks, "to become one of the authentic legal philosophers of our time", since for him, Warren continues, "the Bill of Rights enunciates the fundamental philosophy that serves as the underpinning of the entire government structure, and because of this philosophic priority, it must likewise have legal priority" (in Decker 1971, p. 1341). Hence, Decker concludes that "in accordance with his deep concern . . . [for] personal liberties expressed in the Bill of Rights, Justice Black *was* a judicial activist" (Decker 1971, p. 1350. Emphasis added). As an activist legal philosopher, we should not be surprised if he plumbs the depths of the essential features of the topics he adjudicates.

can remove themselves so cleanly from the hard work of defining the core meaning of contested concepts.[35]

Second, as to the specific issue of state religious establishments, in light of rising religious diversity as well as the decades-long legacy of strict separationism, I see no reason not to defer to the conclusions of Steven Smith and others on this matter. As Smith relates, the fear of a sectarian state establishment "seems misplaced" (Smith 2006, pp. 1891–92). A complete "return to the federalist jurisdictional arrangement for religion . . . [which would permit a state to create a sectarian establishment if it chose] is not only undesirable . . . it simply is not going to happen"(Smith 2006, pp. 1891–92).[36]

5.2. A Normative Turn: Defending the Court's Methodology in Everson and McCollum

Given the normative desirability of substantive due process and the highly likely solidity to at least some form of non-establishment, we can I believe now profitably turn to the expressly normative question, just what kind of non-establishment should we have?

In answering this question we must first ask the question of what method judges should use to determine the form which non-establishment should take. Specifically, should judges, as a supplement to their determination of the essential features of the topics at bar, be engaged in the work of determining an appropriate historical trend line, one that is especially salient and conferred elevated epistemic status? Such an interpretive methodology, I believe, is not easy to reject. I shall suggest three reasons why this is so: the prevalence of its use among both "liberal" and "conservative" thinkers and jurists; the difficulty of a historical method that relies only on what can be called historical quantity; and the risks of relativism from adopting a quantitative historical method.

First, the qualitative historical methodology seems to be one engaged both by liberal- and conservative-leaning jurists and legal theorists. With respect to "liberal" case law, not only do we see it in the decisions in *Everson* and *McCollum*—decisions which have come to be been seen as "liberal"—but we also see it in other liberal opinions, including the dissenting opinion in *Dobbs*. There Justices Breyer, Sotomayor, and Kagan, in a jointly authored dissent, maintain that abortion rights as defined in *Roe* and *Planned Parenthood v. Casey* (1992) merit being upheld in large measure due to their status as the crystallization of an historical development driven by thinkers and advocates whose insights deserve special epistemic status in reference to the issue of abortion. Rejecting the claim made in the majority opinion in *Dobbs* to the effect that, since abortion rights are not deeply rooted in the long swathe of American legal history they should be accorded no constitutional guarantee, the dissent argues that a right to abortion *is* rooted in history, but in the sense of being rooted in one especially important trend line in American law: the trends emerging from movements informed by women's perspectives and the thoughts of women's rights and minority rights advocates. This trend line has special weight and thus buttresses the assertion of a right to terminate a pregnancy.

To see this we should note that the dissent, when addressing whether an asserted right not expressly stated in the Constitution exists under the Due Process clause, looks to history in a particular way. Lawful access to abortion, the dissent concedes, is not deeply rooted in a long train of unbroken affirmation in American legal history. However, the

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[35] The Warren Court, for example, in *Benton v. Maryland* (1969), used the interpretive method of judging according to the essence of ordered liberty and the essence of a right to defend to overturn *Palko v. Connecticut*. See Murphy et al. (1995, p. 134). Also, a core component of the Court's decision in *Obergefell v. Hodges* (2015) banning state laws excluding the LGB community from the institution of civil marriage, was the Court's determination of the nature of the marital unit. As Kennedy, writing for the majority, maintains, changes in marriage as a civil institution over time have "worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. These new insights have strengthened, not weakened, the institution of marriage" (*Obergefell* 2015). The determination that the marital unit has been strengthened by changes presupposes an understanding of marriage's essential features, lest there be no meaningful criterion by which to assert that marriage has in fact been "strengthened", rather than harmed. The majority does indeed limn what it calls "the nature of marriage" in its opinion. *Obergefell* is thus, in substantial part, an exercise in essence-seeking on the part of the Supreme Court.

[36] See also *Golden Gate Law Review* (2018).

dissent rejects that this should be the way that history is looked upon. Judges need to discern the *relevant* history. The task of doing so, however, does not entail that "anything goes" (*Dobbs* 2022)—i.e., that judges can determine any rights they might fancy citizens to possess by looking at any slice of history. No, for "history and tradition guide and discipline [the] inquiry", the dissent holds (*Dobbs* 2022). But the relevant history to be looked at is the history of legal thinking and judicial rulings on the matter of abortion made at times when women's perspectives and women's and minority rights advocacy played a leading role. Going back to the founding of the 14th Amendment is unhelpful history, since most Americans then did not "understand women as full members of the community embraced by the phrase 'We the People'"; indeed, the thinking of the time was defined by "American feminists [being] explicitly told—of course by men" how to think and to act, since "the men who ratified the Fourteenth Amendment and wrote the state laws of the time did not view women as full and equal citizens" (*Dobbs* 2022). Only with the success of the women's and minority rights movements in the 1960s and 1970s do we have a history that the dissent deems relevant, because only then do we have historical developments that express thinking with elevated epistemic weight, thinking that includes the voices and viewpoints of women, and thus thinking holding increased epistemic status. Legal developments truly informed by feminist and minority rights advocacy are found, the dissent maintains, in such cases as *Griswold v. Connecticut* (1965), *Roe*, and *Obergefell v. Hodges* (2015),[37] all of which came to the conclusion that personal privacy is central and should not be trumped by competing considerations and support the conclusion that "every one, including women, owns their own bodies" (*Dobbs* 2022). These developments form an interlocking line, manifested, in important part, in "the step-by-step evolution of the Court's precedents" that has occurred for "decades upon decades" (*Dobbs* 2022). It is *this* trend line that deserves to be given elevated status.

However, just as in *Everson*, so too in *Dobbs*, the trend line that these justices maintain should be given elevated status is not the only trend line in American law and life; countervailing trends from the 1960s on very much exist. Only 22 years following *Griswold*, for example, the Court reaffirmed the constitutionality of state bans on same sex intercourse in *Bowers v. Hardwick* (1986). And in 1972, just one year before *Roe*, the Supreme Court in *Baker v. Nelson* (1972) effectively affirmed a Minnesota Supreme Court's unanimous decision in which it held that it was "not persuaded" that "restricting marriage to only couples of the opposite sex" is at all "irrational", and that the "historic institution [of heterosexual marriage] is manifestly more deeply founded than the asserted contemporary concept of marriage and social interests for which petitioners [for gay marriage] contend" (*Baker v. Nelson* 1971). The United States Supreme Court on appeal ruled that the Minnesota decision did not involve a substantial federal question, implying that for the Supreme Court no substantial 14th Amendment issue was raised, entailing in turn that there was for the Supreme Court no plausible claim for the petitioning gay couples under the 14th Amendment (*Baker v. Nelson* 1972). Moreover, and arguably in contradistinction to a right of 'owning owns own body,' the Supreme Court in *Gonzalez v. Carhart* (2007) rejected an asserted right under the 14th Amendment to partial birth abortion, staying true to an approach requiring unenumerated rights to be deeply rooted in American history. And just ten years prior to *Carhart*, the Court unanimously rejected on the same basis a right of ownership over one's body in *Washington v. Glucksberg* (1997), holding that no right to bodily autonomy exists to lawfully be assisted to kill oneself. Yet, nothing could arguably be more intimate and personal than one's relationship to one's own existence.

[37] Evidence of this alignment can for example be seen in *Obergefell*, not only in the *amici* briefs filed on behalf of Obergefell—which included a veritable Who's Who of LGBTQ advocacy and minority rights' groups nationwide—but also in the research and conclusions drawn from numerous of these organizations that are included in the opinion. The majority in *Obergefell* refers generously to the "more than 100 *amici* submitted by supporters of expanding legal rights for members of the LGBT community". Their work and those of others "has led to an enhanced understanding of the issue, an understanding reflected in the arguments now presented for resolution as a matter of constitutional law". For a list of the *amici* briefs on behalf of petitioners see Scotusblog.com (n.d.).

These countertrends appear not to discomfit the dissenting justices in *Dobbs*. For the dissent is prizing one trend line, and conferring it epistemic advantage as to the nature of the right in question. As Kennedy asserts in *Obergefell*: "rights come not from ancient sources alone. They rise, too, from a better-informed understanding of how constitutional imperatives define a liberty" (2015). It is just this "better-informed understanding" that modern feminist, minority and gay rights advocacy has allowed the dissenting justices in *Dobbs* to see. Therefore, they argue we should prize this trend over other trends bereft of the epistemic advantage which is supplied by the inclusion of previously marginalized views.

Moreover, not only do we see the method of qualitatively culling historical examples in left-leaning jurisprudence; we also see it in what is often described as conservative-leaning legal thought. One area where we can detect this is in cases involving school choice, state Blaine Amendments (or "Baby Blaine Amendments"), and their relationship to the federal Constitution's free exercise clause. In these cases what the Court recently asserted in *Bruen* (2022) seems to ring true: "not all history is created equal".[38]

School choice litigation has been at the forefront of the Supreme Court's docket for nearly twenty years. These cases have often involved so-called state "Baby Blane Amendments". Named after Maine Republican Congressman James G. Blaine, who in 1875 called for a national constitutional amendment to prohibit states from financially supporting religious entities (a call which failed), Baby Blaine Amendments are state-level constitutional requirements that prohibit public funding from being used to aid or advance religious organizations. The history of these amendments is for many conservatives not seen as evidence of a long tradition of state-level separationism in the educational sector; instead, the value of the historical trend line trend of states adopting Baby Blaine amendments is diminished because of its reported connection with anti-Catholicism, a connection which renders the history of state "no-funding" laws uninstructive for the high Court. As one leading conservative legal theorist, Philip Hamburger, remarks, "nativist anti-Catholicism gave respectability and popular strength to the Blaine amendments" (Hamburger 2002, p. 481). For this reason, many conservatives see the historical trend of state no-aid amendments as an unserviceable past.

To be sure, historical trends defined by animus and rank discrimination have no weight, not least for reasons of equal protection. But the argument that state Blaine Amendments are products of a less enlightened reflection on religion in public life is advanced even when the evidence of anti-Catholic bias is slight. And, indeed, the evidence for such bias often is slight. In those states adopting a Blaine amendment for which there exists a relatively complete legislative record surrounding its adoption, Jill Iris Goldenziel has found that the record "does not reveal them to be legislatively enacted bigotry" (Goldenziel 2005, p.97). Despite these considerations, it appears that for many conservatives, the Blaine amendments are still de-valorized—seen as less epistemically enlightening—because the trends are tinctured by the air of anti-Catholic prejudice. The trend therefore does not hold special epistemic weight. For many conservatives, "not all history is created equal", indeed.

For our purposes it is not important whether one agrees with this or that instance of valorizing or discrediting various trend lines in American law. The point, rather, is one of judicial methodology. And the use of this very method by both liberals and conservatives is itself suggestive evidence of the value of the methodology itself.

Additional support for a qualitative historical method is that to replace such a method while still crediting history would require relying on what we can call a quantitative assessment of the length and breadth of various trends. One such example of a quantitative historical standard is found in *Glucksberg*. *Glucksberg*'s standard for rights under the Due Process clause imposes a presumption against new rights unless there is substantial and weighty evidence attesting to their deeply historically embedded character. Another

[38] In *Bruen* the phrase appears to have been uttered only as a poetic way to reinforce originalism by prioritizing the history at and around the time of a constitutional provision's ratification.

example of a quantitative historical assessment can be seen in *Bruen*. There the Court holds that it will permit only those restrictions on the possession of handguns for personal defense that are "consistent with this nation's historical tradition of firearm regulation" (*Bruen* 2022). In *Bruen*, the Court acknowledges that a variety of restrictions on lawful handgun possession existed across American history. But the Court assesses their weight to be insufficient. Countertrends to the position the Court affirms are seen as "outliers" that do not out-measure the "overwhelming weight" of other historical evidence the Court cites. A serious critique of this quantitative historical approach is that there are likely many cases where the sheer weight of the historical embeddedness of rival trends will be hard to calculate. In these cases, the risk of bias entering—even if unintendedly—can be high. A qualitative approach would avoid this problem. At the same time, it would also promote greater judicial transparency.

Third, to deny the very possibility that changing insights into the essential nature of things can occur, and can be so significant as to require judicial cognizance, is to toy with epistemic relativism. But doing so might prove to be an unwelcome jurisprudential straitjacket in certain circumstances.

In all, it seems quite hard to judge the interpretive method of qualitatively assessing competing historical trend lines to be indefensible.

5.3. Rethinking Strict Separationism: Sketching a New Critique

If the kind of legal argumentation found in *Everson* and *McCollum*—substantive due process fortified by a qualitative historical method—is hard to reject, a new critique of *Everson* and *McCollum* can emerge that centers on this very same kind of legal argumentation: a critique that asks whether the *bien pensants* of Virginia's Founding gentry class really were so auspicious as to be given elevated status, or were perhaps just a bit too racist to stand as steady guides on the nature of all that freedom requires (Greene 2011).[39] One that asks whether men like Jefferson were just a bit too unsober in their dismissal of traditional Christianity to be described as clear-minded thinkers on religious topics.[40] One that asks, full-throatedly, just what the essences of religion and liberty truly are and so asks whether religion really requires state secularism; whether religion thrives in the strictly secular state[41]; and whether liberty in relation to religion requires not only non-coercion of religious belief and practice, but a complete church-state–separationism.[42]

Such questions must be reserved for another day. But their resolution is no abstract angel-counting remote from the 'real word' of legal analysis, since, as we've noted, at least one leading member of the Supreme Court—Clarence Thomas—as well as leading members of the legal academy—such as Steven Smith—have argued that the whole edifice of church-state–separation now needs to be re-thought (Smith 2006). If, therefore, the answers to these questions about historically valued sources of insight and the essences of things are contrary to those provided by the high court in its originating strict separationist cases, that old adage might well ring true: if you live by the sword, you can die by the sword.

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[39] See also Prud'homme (2021, p. 34), noting how separationism aided the growth of slavery in many parts of the antebellum South.

[40] Hitchcock records that Jefferson took a "low road" against traditional Christianity, an approach that "involved strong personal intolerance in religious matters, [and] a tendency to invoke separationist principles to promote the kind of religion Jefferson himself favored and to inhibit that which he opposed" (Hitchcock 2004b, p. 24). For Jefferson's immoderate condemnations of orthodox Christianity, see also Strehle (2011).

[41] Justice Jackson in his concurrence in *Everson* argues that one religious tradition, Catholicism, "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", and in turn has sought, wisely from its own perspective, aid from whatever quarter it can get in conducting its schooling (1947). Since schooling is, according to Justice Jackson, such "a vital", if not the most vital, part of the Roman Catholic Church–one on which "its growth and cohesion, discipline and loyalty, spring"—the Catholic Church has sought state support to make attendance in Catholic schools easier. It is not at all clear that policies that make it *harder* for students to attend so critical an institution to Catholicism as Catholic schools could, by Jackson's logic, really be said to help this religion. The same point would, of course, also apply to other religions.

[42] For recent arguments to these effects, see Prud'homme (2019) and Smith (2014).

6. Conclusions

In this work I first canvassed the rising uncertainty coming from the United States Supreme Court concerning the meaning of the First Amendment's prohibition on laws "respecting an establishment of religion". Since 1947 and 1948, the controlling interpretation of this provision has largely been that of a strict separation of church and state. Over the last decade or so, however, the ground beneath us has begun to shift, as the Court has signaled its willingness to revise establishment clause jurisprudence. I have argued that the underlying logic buttressing the Court's strict separationist jurisprudence in *Everson* and *McCollum* was a form of substantive due process. On this basis, the Court in these two originating cases sought to define the essence of liberty as it relates to religion and its intersection with state power. It also fortified this determination by drawing support from a prized trajectory in the development of American law. I then argued that this substantive due process methodology is a defensible one which the Court should not be willing to jettison. However, I concluded that although the method the Court has used to develop strict separationism is justifiable, that very method may well lead us to question whether strict separation does indeed best capture the essence of liberty in relation to religion and its intersection with the state, and whether the history the Court draws on to support its determination of this essence is an appropriate history on which to rely. If the answer to these two questions is no, further substantial change in church-state jurisprudence might appear to be appropriate.

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