No. 03-1693

IN THE
Supreme Court of the United States

MCCREARY COUNTY, KENTUCKY, *ET AL.*,
Petitioners,
v.
AMERICAN CIVIL LIBERTIES UNION OF KENTUCKY, *ET AL.*,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF AMICUS CURIAE OF CONSERVATIVE LEGAL DEFENSE AND EDUCATION FUND, JOYCE MEYER MINISTRIES, COMMITTEE TO PROTECT THE FAMILY FOUNDATION, LINCOLN INSTITUTE FOR RESEARCH AND EDUCATION, AMERICAN HERITAGE PARTY, PUBLIC ADVOCATE OF THE UNITED STATES, RADIO LIBERTY, AND SPIRITUAL COUNTERFEITS PROJECT, INC. IN SUPPORT OF PETITIONERS

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December 8, 2004

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INTEREST OF AMICI CURIAE

The *amici curiae*, Conservative Legal Defense and Education Fund, Joyce Meyer Ministries, Committee to Protect the Family Foundation, Lincoln Institute for Research and Education, American Heritage Party, Public Advocate of the United States, Radio Liberty, and Spiritual Counterfeits Project, Inc., are a coalition of nonprofit organizations, and a media organization, sharing a common interest in the proper construction of the Constitution and laws of the United States.[1] Each of the *amici* is tax-exempt under section 501(c)(3), section 501(c)(4), or section 527 of the Internal Revenue Code, except for Radio Liberty, an independent media organization.

Each of the *amici* is involved in informing and educating the public on important issues of national concern, including questions related to the original intent of the Founders and the correct interpretation of the United States Constitution, and/or supporting organizations or causes with such educational goals. The First and Fourteenth Amendment issues presented in this case have a direct impact the right of organizations to express their views on religious, educational, social, and political issues, and are of great interest to these *amici*. In the past, most of the *amici* have filed *amicus curiae* briefs in other federal litigation, including matters before this Court. These *amici* seek to provide this Court with a perspective that would not otherwise be presented.[2]

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[1] Pursuant to Supreme Court Rule 37.6, it is hereby certified that no counsel for a party authored this brief in whole or in part, and that no person or entity other than these *amici curiae* made a monetary contribution to its preparation or submission.

[2] These *amici curiae* requested and received the written consents of the parties to the filing of this *amicus curiae* brief, in the form of a letter from counsel of record for petitioners and a notice of "global consent" from counsel for respondents, and these have been submitted to the Clerk of Court for filing. *See* Sup. Ct. R. 37.3(a).

SUMMARY OF ARGUMENT

The central question presented in this case is whether this Court's test laid down in Lemon v. Kurtzman, 403 U.S. 602 (1971), and any variant thereof, applying the Establishment Clause of the First Amendment to the several states should be overruled. For years, the Lemon test has been roundly criticized as unworkable[3], but that is only a secondary reason to reject it. Rather, this Court should overrule Lemon because it rests upon the wholly illegitimate premise that the Establishment Clause applies to the States through incorporation into the Fourteenth Amendment's Due Process Clause.

This Court has not entertained any serious challenge to that doctrine since Duncan v. Louisiana, 391 U.S. 145 (1968), but, if a constitutional doctrine proves to be erroneous, its longevity is no reason to keep it. *See* C. Rice, "The Bill of Rights and the Doctrine of Incorporation," The Bill of Rights 11 (E. Hickok, Jr., ed., Univ. Press of Va.: 1991). Each justice of this Court has a continuing, sworn obligation to ensure that the Court's doctrines are consistent with the text of the Constitution. A line of judicial precedents, no matter how long unbroken, must never "close" the Constitution to reinspection, to ensure conformity to its text. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803).

Moreover, *stare decisis* is no bar to repudiation of this Court's Establishment separationist doctrine, even though embedded in a line of precedents stretching back for 59 years. Indeed, this Court's decisions, which have transmuted the original historical purpose of the Establishment Clause as a

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[3] *See, e.g.,* Freethought Society v. Chester County, 334 F.3d 247, 256 n.4 (3d Cir. 2003).

shield of protection of the states from the exercise of federal power[4] into a sword of supremacy of federal power over the states — contrary to the powers reserved to the States and the people by the Tenth Amendment — should be stricken as an illegitimate exercise of political will by this Court. *See* W. Lietzau, "Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation," 39 *DePaul L. Rev.* 1191 (1990); Note, "Rethinking the Incorporation of the Establishment Clause: A Federalist View," 105 *Harv. L. Rev.* 1700 (1992).

To correct this error, this Court should return to the original meaning of the Fourteenth Amendment's Due Process and Privileges and Immunities Clauses, as set forth in this Court's opinions in the Slaughter-House Cases, 83 U.S. 36 (1873), and Davidson v. Board of Administrators of the City of New Orleans, 96 U.S. 97 (1878), neither of which has ever been expressly overruled. Both preserve the Constitution's federalist structure, recognizing that the state and local citizenry retain the constitutional authority to make their own decisions concerning matters such as displays of the Law of God.

Finally, to continue to usurp power over the States and their political subdivisions by misapplying the Establishment Clause — as this Court has done since Everson v. Board of Education, 330 U.S. 1 (1947) — while requiring all other branches of the federal and state governments to support this Court's decisions as the supreme law of the land — as this Court has done since Cooper v. Aaron, 358 U.S. 1, 18-19 (1958) — would thrust a dagger into the very heart of the rule of law. *See* R. Berger,

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[4] "The wall of separation between church and state, then, if it existed at all, was not between government and the public, but between the federal government and the states." P. Johnson, A History of the American People, 211 (HarperCollins: 1997).

Government by Judiciary 289 (Harvard Press: 1977). In truth, any elevation of this Court above the Constitution undermines the oaths of all federal judges before God to "support this Constitution" as the "Supreme Law of the Land," as prescribed by 28 U.S.C. Section 453, and as further reflected in this Court's practice to open its public sessions with the prayer, "God save this honorable court." A court which disregards its oath and its prayer risks judgment of the "rectitude of [its] intentions" by the "Supreme Judge of the world" and deprivation of the "Protection of Divine Providence" on the nation, as invoked by America's founders in the Declaration of Independence (para. 31). Sources of Our Liberties at 321.

ARGUMENT

I. "THIS CONSTITUTION ... SHALL BE THE SUPREME LAW OF THE LAND."

A. Judicial Review Requires Textual Fidelity.

Fully 201 years ago, this Court embarked upon a visionary journey to ensure that the newly-established government of the United States would be a "government of laws, and not of men." *See* Marbury v. Madison, 5 U.S. at 163. To that end, the Marbury Court believed that, through the power of judicial review, it could apply the Constitution to the acts of the other branches of government, while remaining itself **under** the law of that instrument. Thus, Chief Justice John Marshall twice pronounced that the **written** Constitution is a "rule for the government of courts," just as it is a rule governing the "other departments" of the federal government (*id.*, 5 U.S. at 179-80), exhibiting prescient understanding that the rule of law "goes out the window" if "words and phrases" of the Constitution mean whatever the judges "may wish." *See* M. S. Evans, The Theme is Freedom 268 (Regnery: 1994).

Under Marbury, the judicial oath of office required the courts to examine the language of the Constitution, to discover the rule of law stated therein, and then to apply that rule to the facts of the case. *See* E. White, "Reflections on the Role of the Supreme Court: the Contemporary Debate and the 'Lessons' of History," 83 *Judicature* 162, 163 (1979). To that end, the Court developed a rule of construction designed to ensure that the Court would not stray from the written text:

> In expounding the Constitution ... **every word** must have its due force, and appropriate meaning; for it is evident ... that **no word** was unnecessarily used, or needlessly added.... **Every word** appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. **No word** ..., therefore, can be rejected as superfluous or unmeaning.... [Holmes v. Jennison, 39 U.S. (14 Peters) 540, 570-71 (1840) (emphasis added).]

Under strict textual constraint, the Court sought to realize Chief Justice Marshall's vision that: "Courts are the mere instruments of the law.... Judicial power is **never** exercised for the purpose of giving effect to **the will of the judge; always** for the purpose of giving effect ... to **the will of the law**." Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 866 (1824) (emphasis added).

B. Judicial Review Requires Fidelity to the Original Meaning of the Text.

Because **all** government officials, including federal judges, derive their just powers from the consent of the governed, the Marbury Court understood that the courts, then and in the future, were obligated to apply the **original** meaning of the

text:

> That the people have an **original right** to establish, for their **future** government, such **principles** as, in **their opinion**, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected.... The **principles** ... **so established**, are ... **fundamental**. And **as the authority from which they proceed is supreme**, ... **they are designed to be permanent**. [Marbury, 5 U.S. at 176 (emphasis added).]

Thus, "the province and duty of the judicial department to say what the law is" (*id.*, 5 U.S. at 177) obligates the courts to examine the actual words of the Constitution in deference to the "form and ... substance" of the "government of the Union" as having "emanate[d]" from the people, not from this Court. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 404-05 (1819). Because the courts "must never forget[] that it is *a constitution* [they] are expounding," the "objects" and the "limitations" prescribed therein must be applied as the people originally ordained. *Id.*, 17 U.S. at 407 (emphasis original).

This "originalist" restraint upon the power of judicial review applied not only to judicial ascertainment of the powers of the federal government (*see id.,* 17 U.S. at 407-08, 411-25), but also to the limits on the powers of government, both federal and state. Thus, the Marshall Court refused to apply the federal Bill of Rights to limit the powers of the several States, because the original language of the Constitution did not allow it:

> **The constitution was ordained and established** by the people of the United States ... for their own government, and **not for the**

> **government of the individual states.** [Thus] the limitations on power, if expressed in general terms, are ... necessarily applicable to the government created by the instrument. [Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 247 (1833) (emphasis added).]

C. *Stare Decisis* Requires Conformity to the Meaning of the Original Constitutional Text.

This Court has largely forgotten this fundamental principle of textual restraint and has misused the power of judicial review to replace the federal system of government established by the express words of the Constitution with a unitary system expressly contrary to the Constitutional text. As demonstrated in Part II below, this Court has imposed its own political vision upon the individual States by misappropriating the Fourteenth Amendment's Due Process Clause, and then misapplying the doctrine of *stare decisis* to justify its unconstitutional interpretation of "due process of law."

For example, in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), a plurality of this Court invoked "the rule of *stare decisis*" to retain and reaffirm "the essential holding of Roe v. Wade." *Id.*, 505 U.S. at 846. In order to accomplish this goal, the Court "reformulat[ed] the doctrine of *stare decisis"* as "a prop to preserve the power of the Court," equating its ruling in Roe v. Wade to "the rule of law." *See* C. Stern, "The Common Law and the Religious Foundations of the Rule of Law Before Casey," 38 *U.S.F.L. Rev.* 499, 520-22 (2004). According to Casey, the rule of law depends wholly upon "the people's acceptance of the Judiciary as fit to **determine** what the Nation's law **means** and to **declare** what it **demands**." *Id.*, 505 U.S. 865 (emphasis added).

It is not this Court's job, however, "to determine" the meaning of the "Nation's law," as if it were a body of Platonic guardians of the people. As enunciated in Marbury, **only** the people have the authority to determine the law, and they have previously made that determination by producing a **written** Constitution which is, itself, "the Supreme Law of the Land," binding on this Court. *See* Marbury, 5 U.S. at 179-180. To read Marbury otherwise — as this Court has done in Cooper v. Aaron, 358 U.S. 1 (1958) — is to elevate judicial interpretation of the Fourteenth Amendment, even if "misguided," to be "the supreme law of the land," over the actual written Constitution. *See* E. Meese, "Perspective on the Authoritativeness of Supreme Court Decisions: The Law of the Constitution," 61 *Tul. L. Rev.* 979, 982-83 (1987). To invoke *stare decisis* to insulate this Court's prior interpretations of the Constitution — right or wrong — from examination in light of the constitutional text undermines the rule of law, threatening a regime of judicial despotism whereby the validity of the Court's constitutional interpretations is measured by its own opinions.

Just short of two decades ago, this Court rebuked United States District Court Judge Brevard Hand for daring to reexamine — in the light of the constitutional text and history — this Court's Establishment Clause jurisprudence as applied to the State of Alabama. Wallace v. Jaffree, 472 U.S. 38, 48 (1985). Remarkably, this Court dismissed Judge Hand's careful analysis of the original text and of the testimony of constitutional historians, James McClellan and Robert Cord,[5] with a perfunctory parade of its own precedents. *See id.*, 472 U.S. at 48-55.

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[5] *See* Jaffree v. Board of School Comm'rs of Mobile County, 554 F. Supp. 1104 (S.D. Ala. 1983).

At the time of America's founding, the prevailing legal authorities believed that a court was duty-bound to measure the correctness of a judicial decision by a standard outside of its own precedents. *See* W. Blackstone, I *Commentaries on the Laws of England* 69-71 (U. Chi. Facsimile edition: 1765). While "the decisions ... of courts [were] held in the highest regard," Blackstone warned that they were not "law" themselves, but only "evidence" of law, "[s]o that *the law,* and *the opinion of the judge* are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law." *Id.* at 69-70, 71 (emphasis original). New York's Chancellor James Kent agreed, asserting that "[e]ven a series of decisions are [*sic*] not always conclusive evidence of what is law," and where such decisions are shown to be "**hasty** and **crude**," they "ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by **the perpetuity of error.**" J. Kent, I *Commentaries on American Law* 444 (O. Halsted, New York: 1826) (emphasis added).

According to these venerable authorities — and further in light of the utter failure of the Lemon test to provide a comprehensible rule of law[6] — this Court must not shrink from its task to reexamine, in light of the constitutional text, its incorporationist decisions applying the Establishment Clause to the States. As Justice Felix Frankfurter once observed, "the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it." *See* Graves v. O'Keefe, 306 U.S. 466, 491-92 (1939) (Frankfurter, J., dissenting). *See generally* R. Berger, Government by Judiciary at 296-99.

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[6] *See* Freethought Society v. Chester County, 334 F.3d at 256 n.4.

II. THE ESTABLISHMENT CLAUSE DOES NOT APPLY TO THE STATES.

By its express language, the First Amendment's Establishment Clause applies only to Congress. Yet, this Court has applied that Clause to local school boards, cities, counties, state legislatures, and executive officials. *See, e.g.,* Everson v. Board of Education, 330 U.S. 1, 15-16 (1947); Lynch v. Donnelly, 465 U.S. 668 (1984); County of Allegheny v. ACLU, 492 U.S. 573 (1989); Marsh v. Chambers, 463 U.S. 783 (1983); Edwards v. Aguillard, 482 U.S. 578 (1987). The Court has justified this extension on the ground that the Due Process Clause of the Fourteenth Amendment incorporates all the rights in the First Amendment, as well as all but one of the rights specified in the Fourth, Fifth, Sixth, and Eighth Amendments. *See* Duncan v. Louisiana, 391 U.S. 145, 147-48 (1968); Robinson v. California, 370 U.S. 660 (1962); Benton v. Maryland, 395 U.S. 784 (1969); and Schlib v. Kuebel, 404 U.S. 357 (1971). Through its incorporation doctrine, this Court has justified imposing its much-maligned, albeit modified, three-part test of Lemon v. Kurtzman, 403 U.S. 602 (1971), to resolve Establishment Clause complaints against the States. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308, 316 (2000). If this Court's incorporation doctrine is erroneous, then so are both the original and modified Lemon tests.

A. The Fourteenth Amendment's Due Process Clause Does Not Incorporate Any of the Bill of Rights.

As noted above, this Court unanimously declared in 1833 that, of the ten articles of the federal Bill of Rights, only the Tenth applied to the States. *See* Barron v. Baltimore, 32 U.S. at 243, 247, 248-49. With the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments came new constitutional provisions addressed expressly to the several

States. After careful examination of the language of the three amendments in their historical context, however, this Court found that none had changed the fundamental federal structure of the United States Constitution. *See* Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 66-82 (1873). Emphasizing that the Fourteenth Amendment had reaffirmed America's unique dual citizenship (*id.* at 72)[7], the Court ruled that the protection afforded by the Fourteenth Amendment from state abridgments of "the privileges and immunities of citizens of the United States" did **not** include those privileges and immunities arising out of one's state citizenship. Rather, except for the protection afforded out-of-state citizens by Article IV, Section 2 of the Constitution, those privileges and immunities arising out of an American citizen's state citizenship were secured to a state's own citizens by the constitutions of the several States, **not** by the newly-enacted Privileges and Immunities Clause of the Fourteenth Amendment. *Id.*, 83 U.S. at 73-81.

Notwithstanding the Slaughter-House ruling, litigants continued to press federal constitutional claims against the States and their political subdivisions, invoking the Fourteenth Amendment's Due Process Clause. In 1878, in response to an overcrowded docket of such cases, the Court observed "that there exists some **strange misconception of the scope of this provision as found in the XIVth Amendment**." Davidson v. New Orleans, 96 U.S. 97, 104 (1878) (emphasis added). Thus, the Davidson Court dismissed a Fourteenth Amendment Due Process claim against New Orleans, ruling that the insertion of that clause into the Constitution had not changed the holding in Barron v. Baltimore that the "takings clause" of the Fifth Amendment did not apply to the States. *Id.*, 96 U.S. at 104-05.

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[7] *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

In support of its holding, the Court explained that the phrase, "due process of law," had not acquired a new meaning when it was placed in the Fourteenth Amendment:

> The prohibition against depriving the citizen or subject of his life, liberty, or property, without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the fourteenth amendment, in the year 1866.
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> The equivalent of the phrase "due process of law"... is found in the words "law of the land," in the Great Charter.... In the series of amendments to the Constitution of the United States ... as further limitations upon the power of the Federal Government, it is found in the fifth, in connection with **other guaranties** of personal rights of the same character. [*Id.*, 96 U.S. at 101 (emphasis added).]

Without reciting the rule of constitutional construction in Holmes v. Jennison, the Davidson Court nevertheless applied it, refusing to construe the two Due Process Clauses differently, lest it render the other express guarantees in the federal Bill of Rights "superfluous or unmeaning." *See* Holmes, 39 U.S. at 571.

Nine years later, however, the Court inexplicably departed from this rule of construction, attributing to the Fourteenth Amendment's Due Process Clause the same protection that was secured by the Fifth Amendment's Takings Clause. *See* Chicago, Burlington and Quincy Railroad Co. v. Chicago, 166 U.S. 226, 236 (1897). The Court did not explain how the

Fourteenth Amendment's Due Process Clause could possibly contain a just compensation requirement limiting a city's taking for public use, when the previously-ratified Fifth Amendment's Due Process Clause appeared alongside a separate and independent Takings Clause in the very same amendment. Instead, it simply jettisoned its rule of constitutional construction that "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." *See* Holmes v. Jennison, 39 U.S. at 570-571. Moreover, the Court departed from the original meaning of "due process of law" which did not embrace the just compensation rule of the Takings Clause. *See* T. Cooley, A Treatise on Constitutional Limitations 430-511, 653-54 (5th ed. Little, Brown: 1883).

After the Chicago B. & Q. Railroad case, the Court appeared to halt efforts to further expand the protection of the Fourteenth Amendment's Due Process Clause. *See, e.g.,* Brown v. New Jersey, 175 U.S. 172 (1899). Indeed, 11 years after the Chicago case, the Court apparently believed that it had never departed from its position that the term "due process" in the two Due Process Clauses meant the same thing. Twining v. New Jersey, 211 U.S. 78, 101 (1908). Thus, in Twining, the Court refused to find the Fifth Amendment's privilege against self-incrimination in the Fourteenth Amendment's Due Process Clause (*id.*, 211 U.S. at 99-114). Further, in 1922, the Court concluded that "neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about the 'freedom of speech' ...." Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).

Nevertheless, just three years after Prudential, the Court ruled that "we **may and do assume** that **freedom of speech and of the press** — which are protected by the First

Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' **protected by the due process clause of the Fourteenth Amendment from impairment by the states**," perfunctorily dismissing its statement to the contrary in Prudential as completely "incidental." Gitlow v. New York, 268 U.S. 652, 666 (1925) (emphasis added). Like the Chicago B. & Q. Railroad Court, the Gitlow Court utterly disregarded the fact that its reading of the Fourteenth Amendment's Due Process Clause was unprecedented. Never before had the phrase "due process of law" been understood to include the freedoms of speech and of the press. *See* T. Cooley, A Treatise on Constitutional Limitations at 430-541 and 512-575. Moreover, if the Gitlow Court's construction of the Fourteenth Amendment's Due Process Clause were applied to the same clause in the Fifth Amendment, it would render the First Amendment's explicit protection of the freedoms of speech and of the press "superfluous and unmeaning," in violation of the rule of construction in Holmes v. Jennison. But neither textual restraint hindered the Court after Gitlow from routinely imposing the First Amendment's speech, press, and assembly restrictions upon the States. *See, e.g.,* Near v. Minnesota, 283 U.S. 697 (1931) and DeJonge v. Oregon, 299 U.S. 353 (1937).

In none of these cases did the Court attempt a textual analysis to show how these First Amendment rights came to be incorporated into the Fourteenth Amendment's Due Process Clause. Instead, the Court simply stated its incorporationist doctrine as a judicial *fait accompli*: That such First Amendment "immunities ... **have been found to be implicit in the concept of ordered liberty**, and thus, through the Fourteenth Amendment, become valid as against the states." Palko v. Connecticut, 302 U.S. 319, 324-25 (1937) (emphasis added). The Court made no effort to reconcile its view that the Fourteenth Amendment's Due Process Clause embraced a

substantive "concept of ordered liberty," whereas it had previously ruled that the Fifth Amendment's Due Process Clause contained only the **procedural** principle embodied in the "law of the land" phrase found in the Magna Charta. *See* Murray v. Hoboken Land Improvement Co., 59 U.S. (18 How.) 272 (1856). Nor did the Court explain then — nor has it ever explained — how the Fourteenth Amendment's Due Process Clause **evolved** in such a way as to have embraced the freedoms of speech, assembly and the press, when **all** of these guarantees were the product of legal and political developments **after** the 1215 Magna Charta, and were recognized separately and independently from the "law of the land" clauses in several of the original thirteen state constitutions. *See, e.g.,* Articles IX, XII, and XVI, *Constitution of Pennsylvania* (Aug. 16, 1776), reprinted in Sources of Our Liberties 330-31 (Perry, ed., ABA Found: 1972). *See generally* Sources of Our Liberties 5-6, 233-35, 242-44, 312, 339-40, 348-350, 355-56, 366, 376-77, 384-85, and 422-46.

In a case in which a criminal defendant in a state trial was seeking the benefit of the federally-guaranteed privilege against self-incrimination, however, the Court finally addressed the impact of its revolutionary interpretation of "due process of law" on the federal Bill of Rights. In a biting concurring opinion, Justice Frankfurter ridiculed the argument that "'due process of law' [was] merely a shorthand statement of other specific clauses" that appeared in the Fifth Amendment alongside its Due Process Clause. Such a claim, he argued, would attribute to the "authors and proponents" of the federal Bill of Rights either (a) "ignorance of, or indifference to," the historic meaning of "due process of law," or (b) foolishness in placing the privilege against self-incrimination as a "meaningless clause" in the Bill of Rights. Adamson v. California, 332 U.S. 46, 66 (1947).

Justice Black countered that his study of the "**historical events** that culminated in the Fourteenth Amendment, and the **expressions** of those who sponsored and favored ... its submission and passage" had persuaded him that "one of the chief objects [of] the provisions of the Amendment's first section, separately, and as a whole ... was to make the Bill of Rights[] applicable to the states." *Id.*, 332 U.S. at 71-72 (emphasis added). Significantly, however, Justice Black made no attempt to demonstrate how the **language** of the first section of the Fourteenth Amendment embraced the **expressions** the Fourteenth Amendment's supporters and opponents made during a congressional debate. Instead, Justice Black amorphously argued: "**In my judgment that history** conclusively demonstrates that the language ..., taken as a whole, was thought by those responsible for its submission to the people, and by those who opposed its submission, sufficiently explicit to guarantee that thereafter no state could deprive its citizens of the privileges and protections of the Bill of Rights." *See id.,* 332 U.S. at 74-75 (emphasis added).[8]

Twenty-one years after Adamson, Justice Black's nontextual approach to the Fourteenth Amendment prevailed. In Duncan v. Louisiana, 391 U.S. 145 (1968), the Court simply stated that the "spacious language" of the Fourteenth Amendment's Due Process Clause had led the Court to "look increasingly to the Bill of Rights for guidance," and hence, "many of the rights guaranteed by the first eight Amendments to the Constitution have been **held** to be protected against state action." *Id.*, 391 U.S. 147-48 (emphasis added). To be sure, the Court recited three of the "tests" that it had applied in this selective

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[8] In his monumental study of the historical record, Professor Charles Fairman found "Justice Black's position fatally weak." "Does the Fourteenth Amendment Incorporate the Bill of Rights?," 2 *Stan. L. Rev.* 5, 171 (1949).

incorporationist venture, but all three were self-devised and totally disconnected from any meaning of "due process of law" ever contemplated by the People who ratified the original Constitution. In short, having discarded the Holmes v. Jennison rule of constitutional construction that no word in the Constitution was "superfluous or unmeaning,"[9] the Duncan Court simply announced a judicial *coup d'etat*, utilizing "due process of law" not as a legal term **of meaning fixed in time**, but a kind of judicial chameleon, changing in meaning with the changing political preferences of a majority of the justices sitting on this Court.[10] *See generally* G. Carey, In Defense of the Constitution 141-42 (Liberty Fund: 1995).

By adopting and applying an ever-changing definition of "due process of law," this Court's incorporationist approach to the Fourteenth Amendment's Due Process Clause has enabled a shifting majority of five justices of this Court to impose its political will upon the States in direct contradiction of the fundamental principle undergirding the rule of law that the Marshall Court described in Marbury v. Madison: Only "the people have an original right to establish, for their **future** government, such [permanent] principles as, **in their opinion**, shall most conduce to their own happiness." *Id.,* 5 U.S. at 176 (emphasis added). Additionally, this incorporationist approach has trumped the amendment process prescribed in Article V of the Constitution, heedless of the warning of President George Washington in his 1799 Farewell Address:

> If in the opinion of the People, the distribution

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[9] The Court did so, even though it had acknowledged as late as 1946 that it was governed by this rule of construction. *See* Richfield Oil Corp. v. State Board of Equalization, 329 U.S. 69, 77-78 (1946).

[10] *See, e.g.,* Lawrence v. Texas, 539 U.S. 558, 588 (2003).

> or modification of the Constitutional powers be in any particular wrong, let it be corrected by an amendment in the way in which the Constitution designates. But **let there be no change by usurpation**; for though this, in one instance, may be the instrument of good, it is the **customary weapon by which free governments are destroyed**. [G. Washington, *Farewell Address*, excerpted in R. Berger, Government by Judiciary at 299 (emphasis added).]

In sum, incorporationism has evolved into a pernicious doctrine that "subvert[s] the very foundation of all written constitutions," enabling this court in ordinary litigation to by-pass at its "pleasure" the written limits laid down in the document. *See* Marbury, 5 U.S. at 178. *See generally* R. Berger, Government by Judiciary (Harvard Press: 1977). Nowhere has this judicial usurpation of the rule of constitutional law been more clearly revealed than in this Court's decisions applying the First Amendment's Establishment Clause to state and local governments.

B. The Fourteenth Amendment's Due Process Clause Does Not Incorporate the Establishment Clause.

In an "unreflective" opinion, and "without offering reasons and justification"[11], this Court first applied the Establishment Clause to the States in 1947, in Everson v. Board of Education, 330 U.S. 1 (1947). Acknowledging that historically the relationship between religion and the States had not been

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[11] M. Glendon and R. Yanes, "Structural Free Exercise," 90 *Mich. L. Rev.* 477, 481, 482 (1991)

governed by a uniform constitutional principle, Justice Black asserted that, as the Court had applied the "free exercise" guarantee of the First Amendment and "the broad meaning given" to it to the States, the same was true of the Establishment Clause. *Id.*, 330 U.S. at 13-15. Placing primary reliance upon Cantwell v. Connecticut, 310 U.S. 296 (1940), all nine justices on the Everson Court agreed. *See* Everson, 330 U.S. at 15, n.22; 22; and 29, n.2. But, relying solely on Schneider v. Irvington, 308 U.S. 147 (1939), the Cantwell Court had concluded that the First Amendment religion clauses had been incorporated by the Fourteenth Amendment's Due Process Clause solely because the other First Amendment freedoms had been found by the Court to be "fundamental," "reflect[ing] the belief of the framers of the Constitution" that the two religious freedom rights in the First Amendment, like the freedoms of speech and press, "lie[] at the foundation of free government by free men." *See* Schneider, 308 U.S. at 161.

Given Justice Black's view that the Fourteenth Amendment, taken as a whole, had incorporated every guarantee of the first eight amendments and applied them to the States, the citation to Schneider to him. It also would have satisfied three of his colleagues — Justices Douglas, Rutledge, and Murphy — all of whom would go on record, within one year, as having subscribed to the total incorporationist view.[12] But, within that same year, all of the other five Everson justices rejected Black's view. In Adamson v. California, 332 U.S. 46 (1947), Chief Justice Vinson and Associate Justices Frankfurter, Jackson, and Burton joined Justice Reed's opinion ruling that the Fourteenth Amendment's Due Process Clause did not incorporate the Fifth Amendment privilege against self-incrimination. Indeed, in his concurring opinion in Adamson,

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[12] *See, e.g.,* Adamson v. California, 322 U.S. at 59-92 (Justices Black and Douglas), and at 123-24 (Justices Murphy and Rutledge).

Justice Frankfurter dismissed the claim that the Fourteenth Amendment's Due Process Clause "comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government," in part, on the ground that "[i]t would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way." *Id.*, 332 U.S. at 66, 63 (ante). Thus, Justice Frankfurter rejected not only the total incorporationist views of Justice Black, but even a "selective incorporation of the first eight Amendments" on the further ground that the only "basis of [such a] selection is merely that those provisions of the first eight Amendments are incorporated **which commend themselves to individual justices as indispensable to the dignity and happiness of a free man**," which is a "merely **subjective test**." *Id.,* 332 U.S. at 65 (emphasis added).

Yet Justice Frankfurter had voiced none of these concerns in Everson. Instead, he had joined Justice Jackson's and Justice Rutledge's opinions that applied Justice Black's strict separationist view of the Establishment Clause to the States. *Compare* Everson, 330 U.S. 15-16 *with* 330 U.S. 22 and 29. Thus, in the very first case in which this Court applied the Establishment Clause to the States, **not one justice** questioned whether the Establishment Clause should be applied to the States. Indeed, **not one justice** made any effort to demonstrate that the no establishment guarantee met the Court's test that freedom from the establishment of religion, like the freedoms of speech and the press, "reflects the belief of the framers of the Constitution that [it] lies at the foundation of free government by free men." Schneider, 308 U.S. at 161. Nor could anyone have sustained such a claim, in view of the history of state religious establishments, and other religious preferences, which existed side-by-side with the free speech and free press provisions in the state constitutions existing at the time of the adoption of the federal Bill of Rights. *See, e.g.,* Articles II and

XII, *Constitution of Pennsylvania* (Aug. 16, 1776), reprinted in Sources of Our Liberties at 329 and Articles VIII, XXXIII, and XXXVIII, *Constitution of Maryland* (Nov. 3, 1776), reprinted in Sources of Our Liberties at 349-50. *See generally* Sources of Our Liberties at 309-310, 338-40, 353-56, 365-66, and 374-377; M. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," 44 *Wm. and Mary L. Rev.* 2105 (2003).

To accomplish its revolutionary goal of imposing a uniform national rule separating church and state, the Everson Court misappropriated its own precedents, citing two cases — Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815) and Watson v. Jones, 80 U.S. 679 (1872) — which did not even mention the First Amendment and two others — Reynolds v. United States, 98 U.S. 145 (1879) and Davis v. Beason, 133 U.S. 333 (1890) — which gave no indication of the scope and extent of the Establishment Clause. *See* Everson, 330 U.S. at 14-15 n.21. Although the fifth case, Reuben Quick Bear v. Leupp, 210 U.S. 50 (1908), did refer to the Establishment Clause, it gave no support to the Everson Court's claim that the Court previously had given the Establishment Clause a "broad interpretation," calling for a wall of separation of church and state. *See id.*, 330 at 14-15, 43 n.35. Instead, Quick Bear supported the moderate view of Justice Story, as subsequently articulated by then-Associate Justice Rehnquist in his concurring opinion in Wallace v. Jaffree, 472 U.S. 38 (1985), that the Establishment Clause "was ... designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others." *Id.*, 472 U.S. at 113.

Because the Everson Court's misappropriations of its prior precedents are so obvious, and because their misapplication went unchallenged, one can only conclude that all nine justices simply ignored Justice Frankfurter's warning, issued just three

years previously in the West Virginia flag salute case, to exercise "judicial self-restraint ... lest we unwarrantably enter social and political domains wholly outside our concern." West Virginia v. Barnette, 319 U.S. 624, 666 (1943) (Frankfurter, J., dissenting). Yet, in Everson, even Justice Frankfurter did not heed his own words. Only recently has careful scholarship uncovered the apparent hidden political agendas that motivated the two leading Everson justices — Justices Black and Frankfurter — to manufacture a strict separationist view of the Establishment Clause and impose it upon the States. In his book, Separation of Church and State, University of Chicago law professor Philip Hamburger has documented that Justice Black, a former Klansman, brought to the Everson case an "anti-Catholic" prejudice that was the moving force behind the effort to defund New Jersey's school busing program, which benefited Catholic parochial schools, the subject matter of the Everson case. *See* P. Hamburger, Separation, at 422-34, 454-63. Whatever other differences Justice Frankfurter may have had with Justice Black, they reportedly melted away in the heat of Justice Frankfurter's "distinct distaste for Catholicism."[13] *Id.* at 474. Indeed, Justice Frankfurter's "'insistent' attitude about a secular separation" of church and state was so strong that it reportedly led him to adopt Justice Black's approach to the Fourteenth Amendment in religion cases, notwithstanding his almost concurrent warning in Adamson that (a) the total incorporationist view was contradicted by the constitutional text, and (b) the selective incorporationist view wrongfully opened the door to "subjective selection" of those guarantees that might "have primacy for one [justice]" while another guarantee "might appear to another [justice] as an ultimate need

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[13] Such anti-Catholic character did not end with Everson, but reportedly seeped into the Court which fashioned the Lemon test in 1971. *See* W. B. Ball, Mere Creatures of the State? Education, Religion and the Courts 31-32, 35-39 (Crisis Books: 1994).

in a free society." *See* Adamson, 332 U.S. at 65.

As Justice Thomas has recently pointed out, both the particular history of the Establishment Clause and the text of the Fourteenth Amendment's Due Process Clause cry out for careful, principled analysis, not a subjective test. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 680, 697 (2002). For too long this Court has unreservedly followed Everson and its progeny on the assumption that its Establishment Clause and Due Process premises had been carefully assessed and objectively adopted. But, as shown above, there are strong reasons to believe that the Everson Court rushed headlong into the no-establishment arena, seeking to achieve a strict-separationist political objective.

C. No Fourteenth Amendment Privilege or Immunity Has Been Abridged in this Case.

At the heart of the Lemon test is the claim that violations of the Establishment Clause by state and local governments injure plaintiffs' "standing in the political community." *See* County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989) (majority opinion) and 625 (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984); Wallace v. Jaffree, 472 U.S. at 69 (O'Connor, J., concurring). Thus, if the action at issue has been taken by the State, then the Lemon endorsement test is tailored to assess the impact on a statewide "political community." *See, e.g.,* Capitol Sq. Review Bd. v. Pinette, 515 U.S. 753, 780 (1995) (O'Connor, J., concurring). If the action is taken by a city or county, then the impact is evaluated accordingly. *See, e.g.,* County of Allegheny, 492 U.S. at 587, 599-600, 620.

The Lemon test, then, is designed to redress a political grievance, **not** a Due Process life, liberty, or property right.

Accordingly, in order to establish "standing" in Establishment Clause cases, plaintiffs must show that the action complained of interferes with their full political participation as citizens of the government entity engaged in the allegedly unconstitutional activity. *See, e.g.,* Books v. City of Elkhart, 235 F.3d 292, 297, 300-01 (7th Cir. 2000), *cert. denied*, 532 U.S. 1058 (2001); Suhre v. Haygood County, 131 F.3d 1083, 1090 (4th Cir. 1997); Doe v. County of Montgomery, Ill., 41 F.3d 1156, 1158, 1159 (7th Cir. 1994); Saladin v. City of Milledgeville, Ga., 812 F.2d 687, 692-93 (11th Cir. 1987); Freethought Society v. Chester County, 191 F. Supp. 2d 589, 593-94 (E.D. Pa. 2002); Arizona Civil Liberties Union v. Dunham, 112 F. Supp. 2d 927, 929, 932-933 (D. Az. 2000). As the U.S. Court of Appeals for the Seventh Circuit observed in Books v. Elkhart:

> The Supreme Court has cautioned that government "sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and the accompanying message to adherents that they are insiders, favored members of the political community.'" [235 F.3d at 306-07].

As in Elkhart, the district court below found that the plaintiffs had standing because "they must enter the courthouse to conduct civic business." *See* ACLU of Ky. v. McCreary County, Ky., 96 F. Supp. 2d 679, 682-83 (E.D. Ky. 2000); ACLU of Ky. v. Pulaski County, Ky., 96 F. Supp. 2d 691 (E.D. Ky. 2000). Further, the court of appeals below found, in its application of the Lemon test, that:

> The citizenry exhibits a similar impressionability [of endorsement] in the setting of a county courthouse, where the

> government carries out one of its quintessential functions — the enforcement of the civil and criminal laws. Typically, citizens are at the courthouse out of necessity — whether they are on trial for a crime, have been subpoenaed as witnesses, are seeking to vindicate their civil rights, have been called to jury duty or are simply contesting parking tickets, registering to vote, or renewing their driver's licenses. [ACLU of Ky. v. McCreary County, Ky., 354 F. 3d 438, 461 (6th Cir. 2003).]

By design and in effect, then, this Court's Lemon test — which the lower courts rightfully understood was designed to vindicate the plaintiffs' claims that the display of the Ten Commandments at issue adversely impacts on their "standing in the political communit[ies]" of three Kentucky counties (*id.*, 354 F.3d at 445) — impermissibly collapses the constitutionally guaranteed dual citizenship into one unitary national citizenship, the privileges and immunities of which are defined by this Court's interpretation of the Establishment Clause. Such a homogenization of citizenship rights was never authorized, nor even contemplated, by the Fourteenth Amendment.

From the beginning, the people of the United States have enjoyed dual citizenship. As citizens of "Free and Independent States,"[14] the people of the original thirteen colonies — acting before the people of the United States formed a government for the nation — formed their respective state governments by ratification of distinct and different state constitutions. Subsequently, as citizens of the United States, the people

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[14] *See* THE DECLARATION OF INDEPENDENCE, para. 24 (1776).

ratified the United States Constitution, creating a new government for the nation, while preserving the independence and sovereignty of the several states. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 801 (1995). Thus, the original Constitution recognized in the people both a citizenship of the United States and a citizenship of an individual State. *Compare* Article I, Section 2, Paragraph 2; Article I, Section 3, Paragraph 3; and Article II, Section 1, Paragraph 5 *with* Article IV, Section 2, Paragraph 1. *See also* U.S. Term Limits, 514 U.S. at 840 (Kennedy, J., concurring).

One of the purposes of the Fourteenth Amendment was to harmonize these two citizenships. By its first sentence, the Amendment proclaimed that a person's national citizenship was acquired either by birth or naturalization, and one's state citizenship was acquired by residence. *See* Slaughter-House Cases, 83 U.S. at 74. Having initially established United States citizenship independent from State citizenship, the Fourteenth Amendment's very next provision was designed to protect that national citizenship from any state law which would "abridge the privileges and immunities" arising out of that citizenship status. In limiting the scope of its protection to such privileges and immunities, the Fourteenth Amendment preserved the preexisting structure of the Constitution, leaving the States as the exclusive protectors of those privileges and immunities that arise out of state citizenship status. As Justice Kennedy has put it most recently, American "citizens ... have two political capacities, one state and one federal, **each protected from incursion by the other**." U.S. Term Limits, 514 U.S. at 921 (emphasis added). Thus, as Justice Kennedy has also observed, this Court, since it decided the Slaughter-House Cases in 1873, has limited the reach of the Fourteenth Amendment's protection of the Privileges and Immunities Clause to only those rights enjoyed by the American people **in their relation to the national government**, not to those rights enjoyed by

them as citizens of the states, counties and cities **in relation to of the communities wherein they reside**. *See* U.S. Term Limits, 514 U.S. at 842-44. Indeed, as the Slaughter-House Court stated, any other construction of the Fourteenth Amendment's Privileges and Immunities Clause would destroy the dual citizenship of the American political system, because it would subject the "entire domain" of privileges and immunities of citizenship to national enforcement and control. *See* Slaughter-House, 83 U.S. at 77-78. *See also* R. Berger, Government by Judiciary at 20-68, 193-220, 249-82.

This distinction between the privileges and immunities of two American citizenships, so carefully drawn by the Fourteenth Amendment, and affirmed by this Court in Slaughter-House, has never been overruled. Instead, it has been "eclipsed"[15] by this Court's unconstitutional incorporationist approach to the Due Process Clause. And nowhere has this "eclipse" been more pronounced than in this Court's misuse of the Establishment Clause to homogenize those two citizenships, thereby depriving the nation of diverse state accommodations of religion which are so vital in the cultivation of civic virtue. Note, "Rethinking Incorporation of the Establishment Clause: A Federalist View," 105 *Harv. L. Rev.* at 1714-17.

III. BY OATH BEFORE GOD, THIS COURT IS OBLIGED TO CONFORM ITS WILL TO THE CONSTITUTIONAL TEXT.

The principal question before this Court is whether it will honor its oath before God to decide this case according to the written law of the Constitution, as promised in Marbury v.

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[15] *See* I L. Tribe, American Constitutional Law 1315-18 (3d ed. 2000).

Madison, or ignore that duty by grounding its decision on its own Establishment Clause "jurisprudence," as it did in Wallace v. Jaffree. *See id.* at 48.

By law, each justice of this Court is required to take an oath to "administer justice without respect to persons, and do equal right to the poor and to the rich, and ... faithfully and impartially discharge and perform all the duties incumbent upon me ... under the Constitution and laws of the United States. **So help me God.**" 28 U.S.C. section 453 (emphasis added). This judicial oath of impartiality with regard to persons and faithfulness concerning the rule of law originated in the Bible. *See Leviticus* 19:15 ("You shall do no injustice in court. You shall not be partial to the poor or defer to the great, but in righteousness shall you judge your neighbor.") and *Deuteronomy* 1:16-17. It, therefore, carries with it the rewards of obedience (*Deuteronomy* 16:20; *Psalms* 106:3) and the punishments of disobedience (*see* 2 *Chronicles* 19:8-10). Indeed, from the beginning, America's founders understood the civil oath of office to have "impose[d] a sacred obligation," the "practical force and value [being] derived from faith in God and the sanctions of Divine law." D. Dreisbach, "In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution," 48 *Baylor L. Rev.* 927, 979-80 (1996). The judicial oath of office, then, is not recited as a mere formality, but as a solemn acknowledgment that the authority of the judicial office comes from God, to whom all judges are ultimately accountable for their stewardship of that office. *See Romans* 13:1-4.

Furthermore, this Court opens each of its sessions with the prayer, "God save this honorable court." This, too, is not a mere formal ceremony, but an appropriate recognition of this Court's trust to God's merciful protection. *See*, *e.g.*, 1 *Samuel*

10:24-25; *Isaiah* 33:22.

This prayer to God, and the oath before Him, are especially important for Article III judges, including members of this Court, because, once appointed, they are not periodically accountable to the people, or even to the President who appointed them, or to the Senate that confirmed them. Rather, they enjoy the perquisites of office so long as they measure up to the standard of "good behavior." Article III, Section 1, United States Constitution. Surely, good behavior obligates each justice to submit to "this Constitution [as] the Supreme Law of the Land," and not to demand that others submit to this Court's opinions as if they were the law of the land. *Cf.* R. Berger, Impeachment 160-65 (Harvard Press: 1973). In recent years, however, this Court has insisted that the lower federal courts follow its precedents "no matter how misguided the judges of those courts may think it to be." *See* Hutto v. Davis, 454 U.S. 370, 375 (1982). Indeed, when United States District Court Judge Brevard Hand honored his oath, refusing to subscribe to what he considered to be an erroneous opinion that the Due Process Clause of the Fourteenth Amendment incorporated the First Amendment's Establishment Clause, this Court considered it "unnecessary" to justify its decisions, but only "to recall" its previous opinions. *See* Wallace v. Jaffree, 472 U.S. at 48-55. Such treatment of lower federal court judges would transform their oath before God, to be faithful to "this Constitution," into an oath of abject fealty to this Court. *See* R. Berger, Government by Judiciary at 288-299.

While it may appear uncommonly difficult for this Court to relinquish the power that it has exercised over the several States and their peoples, by its incorporationist doctrine it could do the nation, and itself, no greater service than candidly to abandon the power that it has incrementally usurped over the States and to return to the "'narrow ... function which the

constitution[] ha[s] conferred on'" it, lest it continue "'to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.'" *See* West Virginia v. Barnette, 319 U.S. at 669 (Frankfurter, J., dissenting). *See also* P. Carrington, "Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court," 50 *Ala. L. Rev.* 397, 399, 400-01, 404, 413 (1999).

CONCLUSION

For the reasons stated, the Lemon test should be overruled, and this case reversed and remanded with instructions to dismiss for lack of jurisdiction, thereby restoring the people of Kentucky to their constitutionally guaranteed choice of state citizenship, unfettered by this Court's previously asserted uniformitarian views of the relation between religion and state and local governments.

Respectfully Submitted,

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