Establishment, Expressivism, and Federalism

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INTRODUCTION

The Supreme Court has held that the Fourteenth Amendment makes the Establishment Clause applicable "with full force to the States." Call this a "one-size-fits-all" approach. This Article suggests that it may be desirable in the Establishment Clause context to "size" constitutional limitations to the level of government—federal, state, or local—that is acting. That is to say, it may be the case that states or localities should be permitted to regulate in ways that the federal government cannot, and vice versa. "Sizing" draws on underutilized flexibility that is inherent in our government's federal structure. The struggle concerning religion and the state that is reflected in Establishment Clause disputes is a profoundly cultural conflict—at stake, in the view of advocates on both sides, is the very character of citizens and of society—and the cultural dimension of this struggle is an integral part of the normative justification for sizing the Establishment Clause.

This Article proceeds in four parts. Part I clarifies what is at stake in struggles concerning the proper relation between government and religion in the Establishment Clause context. It argues that there are bound to be large-scale cultural winners and losers under contemporary Establishment Clause doctrine.

Part II draws on a so-called "expressivist" approach to law to argue that Part I's conclusion has doctrinal implications. Expressivism refers to the view that laws frequently reflect, and are generally

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understood to endorse, particular values. In so doing, law often "shapes or reinforces social norms, social forms, or social practices more generally." Expressivists accordingly believe it necessary to identify the likely "social meaning" of legal doctrine. After explaining what expressivism is, Part II shows that contemporary Establishment Clause doctrine creates harms from an expressivist perspective. Understanding these harms requires an appreciation of the way that social meaning varies depending upon what level of government—federal, state, or local—is barred from doing the "establishing." A constitutional rule prohibiting a national church precludes the federal government from proclaiming that this is a Christian country. A rule that also disallows the establishment of state or local churches, as our current doctrine does, expresses wholesale disapproval of the intermixing of secular and religious authority. By contrast, a rule prohibiting a national church but countenancing established local churches—as was the case from the founding up to the incorporation of the Establishment Clause against the states—could be said to express neutrality on the issue of intermixing insofar as such a rule disallows a single, nationwide orthodoxy but permits divergent approaches to flourish at the subfederal level.

Because the social meaning of a prohibition on established churches varies depending on which level of government is constrained, it follows, from an expressivist perspective, that Establishment Clause concerns are implicated differently depending on what level of government is acting. But is this a purely theoretical observation? After all, one might ask: is it not inevitable that constitu-

5. Depending on one’s view, this occurred either upon the Fourteenth Amendment’s adoption or in Everson v. Board of Education, 330 U.S. 1 (1947). Some scholars have suggested that the founders did not intend the Establishment Clause to proscribe the establishment of a national church, but believed that it disabled the federal government from interfering with established state churches. See, e.g., STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 22-26 (1995); Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 ARIZ. ST. L.J. 1085 (1995). Philip Hamburger appears to have definitively put this view to rest. See PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 106 n.40 (2002).
6. As will be made clear in the Essay, this observation is important, but does not by itself mean that Establishment Clause doctrine need be reworked.
tional limitations must apply in identical ways to all levels of government to which they are applicable? The first section of Part III shows that this is not the case: sizing constitutional constraints to the level of government that is acting is plausible. Several justices have embraced sizing (though not in so many words) in the past. Indeed, as a matter of blackletter law, it sometimes is the case that one level of government is constitutionally proscribed from acting in a manner that is permissible for another. For instance, Congress can enact protectionist legislation whereas states may not, and so-called “special governments” may disenfranchise those individuals who do not own property whereas local and state governments cannot. More generally, differential treatment of different levels of government in our federal system is not uncommon, and is justified on such grounds as functionalism and democratic theory. This Essay argues that a commitment to expressivism, along with an awareness of what is at stake in struggles concerning the relationship between government and religion, together suggest that the Establishment Clause might be another arena where sizing is appropriate.

If sizing is an option, what determines whether it should be exercised? A companion piece argues that the one-size-fits-all doctrinal status quo is justifiable only on pragmatic grounds that support a defeasible one-size-fits-all principle, not a categorical one-size-fits-all requirement. Building on this understanding, the second section of

7. See infra Part III.A.
8. A work-in-progress provides a comprehensive study of contemporary constitutional doctrines that are “sized” as among the different levels of government to which they apply. See Mark D. Rosen, The Surprisingly Strong Case for Sizing Constitutional Guarantees: A Pragmatic Analysis 31–47 (manuscript on file with the Chicago-Kent Law Review) [hereinafter Rosen, Sizing Constitutional Guarantees].
11. Id.
12. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 77–88 (1980) (explaining, on the basis of the theory of “representation reinforcement,” why Congress can enact protectionist legislation but states cannot). For a complete discussion of doctrines that are best understood as instances of sizing, see Rosen, Sizing Constitutional Guarantees, supra note 8, at 31–89.
13. See Rosen, Sizing Constitutional Guarantees, supra note 8, at 31–47. The companion piece also explores several potential generic costs of sizing that properly are taken account of in determining whether, as a pragmatic matter, a constitutional provision should be sized. See id. at 89–94. Two merit discussion here. The first is that sizing may risk undermining the national political community. Id. at 89–91. The Rawlsian argument below provides a response with regard to sizing the Establishment Clause: sizing Establishment Clause protections advances rather than impedes the foundational liberal commitments that ought to shape our national political community. See infra Part III.B. Second, sizing can create significant administrative costs. See Rosen, Sizing Constitutional Guarantees, supra note 8, at 91–94. Such costs would be
Part III argues that determining whether a constitutional doctrine should be sized invariably turns on the political theory that is brought to the task of constitutional interpretation. Part III then argues that John Rawls's social contractarian approach, which is reflected in the original position, is a fair way to identify a democratic constitutional political order, and that the original position gives support to sizing the Establishment Clause in narrowly circumscribed conditions. Rawls's approach is suited to identifying a constitutional order that itself is democratic insofar as it asks what type of political order we as individuals would think it fair to establish. A person in the original position, understanding the law's expressive dimension and what is at stake in struggles concerning the relation between government and religion, would choose a political regime in which the federal government did not have the power to choose sides, but in which subfederal polities could in certain situations.

Part IV identifies some of the implications of this Essay's analysis. It explains why sizing holds out the prospect of a more neutral Establishment Clause doctrine than does one-size-fits-all. It also shows some practical applications of this Essay's Rawlsian analysis with regard to several concrete Establishment Clause scenarios.

I. CULTURAL CONFLICT AND THE ESTABLISHMENT CLAUSE: WHAT IS AT STAKE

It is necessary to have a basic understanding of contemporary Establishment Clause doctrine before considering the different philosophical commitments held by various advocates in the debate concerning the appropriate relations between religion and government. Appreciating the stakeholders' different philosophical com-

only minimal under the approach outlined in this Essay, however, because only a small number of subfederal polities, if any, would be candidates for sizing under the strict Rawlsian criteria discussed below. See infra Part III.B.


15. As noted above, Rawlsian political theory justifies sizing the Establishment Clause only under a narrow range of circumstances. Elsewhere I examine other theories that could ground a broader justification for sizing. See generally Rosen, Sizing Constitutional Guarantees, supra note 8 (analyzing sizing from the perspectives of law and economics, multicultural liberal theorists Will Kymlicka and Charles Taylor, majoritarian devotee John Hart Ely, and political philosopher Robert Nozick, among others). Some of these approaches might have application to Establishment Clause guarantees and potentially could justify a broader range of sizing this constitutional guarantee. The point of this short Essay is not to provide a definitive account of what Establishment Clause doctrine should look like, but to identify a novel approach to construing Establishment Clause guarantees and to start exploring what the consequences might be.
mitments, in turn, helps explain why contemporary Establishment Clause doctrine deviates so appreciably from the commitment to neutrality that the doctrine identifies as its ideal. Rather, there always are large-scale cultural winners and losers under today's law. This is why Establishment Clause law is an arena in which opponents' legal struggles frequently reflect, and are a part of, a deep cultural conflict.

A. Case Law

By its terms, the Establishment Clause limits only the federal government.\(^6\) Prior to the enactment of the Fourteenth Amendment, the Establishment Clause and the other Bill of Rights protections were not applicable to the states.\(^7\) This is why it was not unconstitutional during our country's first century for states to have established churches.\(^8\) The Supreme Court incorporated the Establishment Clause against the states in the 1947 case of *Everson v. Board of Education*.\(^9\) Since *Everson*, the Supreme Court has decided approximately sixty cases under the Establishment Clause. The vast majority have been challenges to state, not federal, activities.\(^20\) Identifying the Establishment Clause's legal rules is notoriously difficult, for the Court has utilized many different formulations.\(^21\) Nonetheless, it is fair to say that Establishment Clause doctrine does not appear to vary depending upon which level of government—federal, state, or local—has acted.\(^22\)

16. See U.S. Const. amend I ("Congress shall make no law respecting an establishment of religion. . . .").
21. For instance, the Ninth Circuit identified, and applied, three different doctrinal tests in the recent case of *Newdow v. U.S. Congress*, 292 F.3d 597, 605–07 (9th Cir. 2002).
22. See Lee v. Weisman, 505 U.S. 577, 580 (1992) (noting that the Establishment Clause is a provision that "the Fourteenth Amendment makes applicable with full force to the States and their school districts"); Epperson v. Arkansas, 393 U.S. 97, 103–04 (1968) ("Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice.") (emphasis added).
What is concretely at stake in today's Establishment Clause cases? Everson's statement that "[n]either a state nor the Federal Government can set up a church"\textsuperscript{23} is virtually uncontested.\textsuperscript{24} Short of establishing a national or state church, however, what constitutes a prohibited "establishment" is sharply disputed. One set of cases involves the display of creches and menorahs in public spaces; such displays frequently are permissible.\textsuperscript{25} Another series of cases concerns the acceptability of teacher-led and student-led prayer in public schools; such invocations or benedictions are largely unacceptable under contemporary doctrine.\textsuperscript{26} A large number of decisions deal with funding-related issues, such as public funding of religious schools and government services provided for religious institutions.\textsuperscript{27} The case law in this context is by no means settled, but the rule appears to be that the government can aid religious schools only insofar as it aids nonreligious institutions and only if the aid provided is not inspired by an intent to support religion in particular.\textsuperscript{28} Finally, a few cases have involved delegations of government authority to religious institutions and religious groups.\textsuperscript{29} Such delegations have been uniformly struck down.

\textbf{B. The Cultural Divide}

Although many cases concerning the Establishment Clause could be said to involve merely money—for example, can there be a special

\textsuperscript{23} 330 U.S. at 15.
\textsuperscript{24} I take issue with it, however, later in this Essay. See infra Part IV.A.
\textsuperscript{26} See, e.g., Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (striking down school district policy permitting student-led, student-initiated prayer before football games); Lee, 505 U.S. at 599 (striking down benediction during graduation ceremony).
school district to which developmentally disabled children of only one religious denomination can attend so the children can receive publicly financed assistance without having to interact with children from different religious backgrounds?—these cases also can be usefully understood as loci for the contemporary debate with regard to the appropriate relationship between government and religion in this country. After all, the funding cases are decided on the basis of constitutional principles that reflect this debate. Furthermore, most recent cases do not involve money at all, but are best understood primarily, if not exclusively, as concerning the debate about the relationship between government and religion. In short, the Establishment Clause cases are debated and decided in terms that reflect the debate about the proper relationship between government and religion—what Professor Lupu helpfully has labeled "the political and cultural wars over the place of traditional Judeo-Christian values, themes, prayers, and holidays in public life." 

Arguments in support of a strong separation between religion and the public sphere—what often is called "separationism"—typically focus both on society-at-large and the individual. A commonly voiced society-wide concern advanced by separationists is that a failure to keep the religious and political spheres apart will lead to social strife along religious lines and a consequent fragmentation of the American political community. Individual-focused concerns animating separationism include not coercing people and not making a person's standing in the political community turn on her religion.

Many separationists view their position as neutral. Indeed, Establishment Clause doctrine long has identified neutrality as its

32. See id. The Court said "no."
33. This is true, for example, of the cases concerning the public display of creches and student-led prayer in schools. Professor Lupu recently argued that the bulk of Establishment Clause litigation today is not over funding questions, but concerns "questions of state sponsorship of religious messages and themes." Ira C. Lupu, Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause, 42 WM. & MARY L. REV. 771, 774 (2001).
34. Id.
36. See, e.g., Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."). For a critical analysis of this aspect of Barnette, see Steven D. Smith, Barnette's Big Blunder, 78 CHI.-KENT L. REV. 625 (2003).
ideal. If government does not involve itself in religion, they say, all people will be free to practice their religion (or not to) as they please. However, as I will suggest below—and as others have argued—separationism is neutral only within a set of assumptions in respect to human nature and religion that many people do not share. As such, the claim that separationism is neutral is quite misleading. Under contemporary doctrine, how the relationship between church and state is resolved invariably generates big-time winners and losers in a cultural contest concerning the appropriate relationship between government and religion. (I believe that the approach I suggest in this Essay, by contrast, is a more neutral doctrine that diminishes the extent to which there are cultural winners and losers.)

Separationism can be said to be neutral for those who believe that full religious practice can occur in the “private” realm. For such people, the government’s lack of involvement truly allows them to fully practice their religion (in their view). However, those who believe that a full religious life is realizable only if one’s religious activities encompass all aspects of one’s life—what I will be calling an “integrationist” approach—understandably view separationism as nonneutral. Justice Scalia’s observation in his dissent in *Lee v. Weisman* reflects an integrationist perspective. He argued against the notion that religion is some purely personal avocation that can be indulged entirely in secret... in the privacy of one’s room. For most believers it is not that, and has never been. Religious men and women of almost all denominations have felt it necessary to acknowledge and beseech the blessing of God as a people, and not just as individuals, because they believe in the “protection of divine Providence,” as the Declaration of Independence put it, not just for individuals but for societies.

Interestingly, under Scalia’s account, public worship not only is an aspect of the individual’s practice of religion, but may be necessary

38. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968) (“Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice... The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.”); Andrew Koppelmann, *Secular Purpose*, 88 VA. L. REV. 87, 120 (2002) (noting that “[t]he idea of neutrality was introduced into Establishment Clause jurisprudence at the same time that the clause was held applicable to the states.”); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the ‘No Endorsement’ Test*, 86 MICH. L. REV. 266, 313-14 (1987).


40. *Id.*


42. *Id.* at 645.
for the country’s welfare as well. In short, at least as regards religion, Scalia is arguing that there is no ready divide between public and private.

Notwithstanding Justice Scalia’s claim that there is a public dimension to the religious practice of “most believers,” his words in Lee were penned in a dissent. It surely can be difficult for those steeped in mainstream American society to understand why some people maintain that the religious life cannot be confined to the “private” domain. A recent analysis by Professor Noah Feldman of the intellectual history of the Establishment Clause facilitates an understanding of some of the contestable assumptions that underlie separationsim.\footnote{See Noah Feldman, The Intellectual Origins of the Establishment Clause, 77 N.Y.U. L. REV. 346 (2002). Although I am no historian, Feldman’s account seems persuasive. For present purposes, I will take it as largely correct. One question that arises under his thesis is why states were permitted to have established churches; after all, a Lockean liberty of conscience would appear to be equally threatened whether establishment occurred at the federal or subfederal level. Possible responses include that the founders would not have conceived that it was possible for the government to put such limitations on states, or that a ban on state establishments simply could not have garnered sufficient support at the time of the founding. Cf. Conkle, supra note 18, at 1133. In any event, I do not rely solely on Feldman’s conclusions to support my argument that contemporary Establishment Clause doctrine is not neutral but instead creates large-scale winners and losers in the cultural struggle concerning the relationship between government and religion. See infra note 96 and accompanying text.}

Professor Feldman argues that the founders intended the Establishment Clause to protect “liberty of conscience,” as that term was developed and understood by John Locke.\footnote{Feldman, supra note 43, at 350–51, 369–71.} In the course of his article, Feldman shows the conceptual link between Locke’s notion of liberty of conscience and Protestant theology.\footnote{Id.} Locke based his argument for liberty of conscience in Scripture,\footnote{Id. at 372.} and Locke’s argument, if Professor Feldman is correct, rested on the Protestant beliefs that faith stands at the core of religiosity, that faith cannot be dictated, and that acting against conscience itself is a sin.\footnote{Id. at 369–71.}

Lockean premises readily give rise to separationsim.\footnote{For a contrary reading of Locke, see Thomas G. West, Vindicating John Locke: How a Seventeenth-Century ‘Liberal’ Was Really a ‘Social Conservative,’ available at http://www.frc.org/get/wt01f1.cfm (arguing that Locke believed that government properly played a role in assuring that its citizens have proper morals).} They lead to the conclusion that government should not concern itself with religious matters, for coercion (such as legal requirements) is incom-
compatible with true religion under Locke's account. Indeed, legal obligations even can lead to sin insofar as a person might be legally required to act against her conscience.

Religions and belief structures that view faith differently, however, may not have a Lockean conception of liberty of conscience. Consider Judaism, for example. It is action-based rather than faith-based insofar as actions matter more than beliefs; it frequently is said of so-called Orthodox Judaism, for instance, that it prescribes an ortho-praxis rather than an orthodoxy. Not unrelated to this, Judaism has a religious concept under which it is permissible for a person to engage in religiously prescribed activities even if she does not believe in them at the time. It is thought that the person may, through practice, acquire the mental state necessary to perform religious duties to their fullest extent. In a related vein, consider Aristotle’s belief that people become habituated to act virtuously by acting virtuously, and that they are not capable of distinguishing right from wrong without an antecedent, behavior-generated moral structure. Clearly, these Jewish and Aristotelian notions are at variance with the Protestant notion that acting against conscience is a sin. Furthermore, both Jewish and Aristotelian thought are consistent with—and in fact have given rise to—political theories under which government has an important role in supervising its citizens’s moral development. The logic is straightforward: if action matters most (Judaism),


50. The principle described above in text is known as mi’toch she’lo li’isha ba li’isha. See Babylonian Talmud Tractate Pesachim 50(b) (Tel-Man Press, Vilna d. 1989) (author’s translation). For elaboration, see Tosephot d’h “vi’kahn bi’osem,” as well as the Rabeiny Asher and the Karban Natanel on the sugya.

51. ARISTOTLE, NICOMACHEAN ETHICS, 1103b1–1103b5 (Terence Irwin trans., Hackett Publishing Co. 1985) (“We become just by doing just actions, temperate by doing temperate actions, brave by doing brave actions”); see also id. at 1180a6 (“[S]omeone who is to be good must be finely brought up and habituated, and then must live in decent practices, doing nothing base either willingly or unwillingly”). Aristotle mentions two other ways virtue is obtained, natural endowment and intellect. Id. at 1179b9–10, 1179b19–21. However, natural endowment is both rare and out of an individual’s control, and only a few people can be moved by intellect. By and large, therefore, society can become virtuous only by means of government-led habituation. See A.C. Bradley, Aristotle’s Conception of the State, in A COMPANION TO ARISTOTLE’S POLITICS 28 (David Keyt & Fred D. Miller, Jr. eds., 1991).

52. See Bradley, supra note 51, at 28–29 (describing Aristotle’s political theory, under which the state is to play a role in habituating its citizens to virtue); see, e.g., HOWARD KREISEL, MAIMONIDES’ POLITICAL THOUGHT: STUDIES IN ETHICS, LAW, AND THE HUMAN IDEAL 3–4 (1999):

Maimonides maintains . . . that politics ideally consists of the following components: knowledge of what is true happiness and what is not, the way of attaining it, training in
or if good action is a prerequisite to informed and meaningful choice (Aristotle), then there is no reason to conclude that the government is disqualified from mandating good actions. Indeed, it may be a necessary component of a person's full ethical and spiritual development.

Anecdotal evidence on its own demonstrates that contemporary doctrine rests on philosophical commitments not shared by everyone and creates cultural winners and losers. Consider the modern (twentieth century) religious community known as the Rajneesh. Members of the community apparently believed that the full practice of their religion required that they have a city of their own—what can be thought of as a modern day Jerusalem or Mecca—that would be run by them in accordance with Rajneesh principles. The Rajneesh thought that all aspects of work in their city, including its governance, constituted a form of religious worship, and that living there afforded its members a richer, more integrated spiritual life than was otherwise possible. They also believed that they had to live separately from general society to avoid being influenced by the outside world. To pursue its goals, the Rajneesh community purchased a nearly 65,000 acre parcel of undeveloped land in Oregon and incorporated about 2,000 acres of it under Oregon law. Soon thereafter, however, a federal district court ruled that the existence of the city of Rajneesh-

the moral qualities, and finally, rules of justice for the ordering of society. ... Politics thus is ultimately concerned with the attainment of the human beings' final end ... Its goal is the creation of a social environment most conducive to the individual's pursue of perfection. ... 

To be clear, I do not mean to suggest that Aristotle himself was religious, but that his understanding of personhood leads to the conclusion that the polity must be actively involved in morally educating its citizens. The conception of personhood so clearly explicated by Aristotle is held by many religious persons and groups, and it is easy to understand how such an understanding gives rise to integrationist commitments. For an example of a contemporary religious neo-Aristotelian philosopher who advances the view that a "unified" life requires that government actively seek to inculcate virtues in its citizens, see Alasdair MacIntyre, The Virtues, the Unity of a Human Life and the Concept of a Tradition, in LIBERALISM AND ITS CRITICS 125, 141-44 (Michael Sandel ed., 1984). Aristotelian views concerning human nature and politics also were absorbed by classical Jewish and Islamic thinkers. See KREISEL, supra, at 3-5 (noting that both Maimonides and Alfarabi developed political theories that are properly characterized as part of the "Aristotelian tradition").

53. The argument developed here accordingly does not turn on the soundness of Professor Feldman's analysis.


55. Id. at 1082-84.

56. Id. at 1083.
puram violated the Establishment Clause. The principle of strict separation that led to the city's demise, far from being neutral, interfered with the Rajneeshee's ability to live their lives in the manner they believed their religion dictated. It interfered with their chance to live out what they deemed to be the most fulfilling religious life. I will come back to the Rajneeshpuram case later in the Essay.

To quickly conclude, there is no neutrality with respect to the relationship between government and religion under contemporary Establishment Clause doctrine. Scalia, Judaism, neo-Aristotelians, and the Rajneesh are examples of cultural losers under a regime of strict separation. Indeed, the Establishment Clause's antiestablishment principle, if Feldman is correct, paradoxically rests on Christian theological premises that are not shared by all. In that sense, the First Amendment's ban on establishment itself may even be said to constitute an establishment of certain Protestant principles. Not surprisingly, some people of different backgrounds do not agree with these principles or their separationist implications. In the view of these groups, strict separation interferes with their adherents' religious worship and with society's well-being. In short, the appropriate relationship between religion and government is hotly contested because advocates on both sides of the issue believe so much is at stake. The cases are battles in a classic cultural war for the identity and welfare of individuals and society at large.

II. EXPRESSIVISM

The conflict between the various camps in Establishment Clause struggles can be usefully understood in expressivist terms. To see this first requires an understanding of what is meant by an "expressive" theory of law. Understanding the cultural conflict in expressivist terms suggests that such conflict may have doctrinal consequences.

57. See Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208, 1216–17 (D. Or. 1984); Rosen, Outer Limits, supra note 54, at 1084 (discussing at greater length the legal proceedings and ultimate disposition).  
58. See infra at pp. 706, 709.  
59. For another critique of the notion of neutrality in the Establishment Clause context, see Smith, supra note 38, at 320–31. For a discussion of how this Essay's suggestion would square with Professor Smith's critique of the possibility of neutrality, see infra Part IV.B.  
60. See supra note 52.
A. What It Is

It is important from the outset to note that although expressivism has been embraced by many commentators and some judges, it is a controversial approach to law that has been sharply criticized by others. I cannot hope to defend expressivism’s merits in the course of this short Essay. This piece instead works within an expressivist framework without explicitly defending it. Even so, this Essay may help to illuminate expressivism’s desirability insofar as understanding a theory’s concrete implications is necessary to inductively evaluate the theory.

Expressivism refers to a family of legal theories that are attentive to the fact that laws frequently express messages that are generally understood by citizens. This is not to suggest that a law only has expressive significance, but that understanding a law’s social meaning is necessary to fully understand the law. Indeed, expressivists argue that awareness of law’s social meaning frequently helps to make sense of doctrinal distinctions that otherwise can be difficult to understand. To be sure, expressivists do not claim that their approach is fully applicable to all parts of the law, but think that the significance of the expressive dimension varies from one body of doctrine to another. It follows that attaining a full awareness of the law’s social meaning, and hence its expressive outcomes, may have prescriptive consequences for a body of law that has significant expressive effects. This brings us to the Establishment Clause, for several members of the Supreme Court and numerous commentators have argued that the Establishment Clause is best understood as being importantly, and perhaps primarily, concerned with expressivism.


62. The most notable proponent of this approach has been Justice O’Connor. See supra Part I.B.

63. See, e.g., Adler, supra note 3 (providing a rigorous critique of one variant of expressivism).


65. See, e.g., id. at 1551–52, 1558.

66. See infra Part II.B.

Expressivism is a relative newcomer to American jurisprudence, and several variants of expressivism can be found in the legal literature. Most are not rigorously formulated, but instead are grounded largely on intuition and are regrettably silent in respect of salient matters. One notable exception is a recent work by Elizabeth Anderson and Richard Pildes entitled *Expressive Theories of Law: A General Restatement*. It is a full-blown, sophisticated exposition of many of the fundamentals of any expressivist account of law. Its carefully worded title—*Expressive Theories of Law*—suggests its authors’ recognition that there are numerous variants of expressivism. Anderson and Pildes’s rich account, however, can easily be misunderstood as a comprehensive discussion of all these many variants. It is important to bear in mind that it is not. Rather, after answering philosophical challenges that are applicable to a broad range (if not the entire range) of expressivist theories, Anderson and Pildes articulate and defend their particular expressivist theory. What follows accordingly draws heavily on Anderson and Pildes’s theoretical defense of expressivism generally, but is not limited to the variant of expressivism that they embrace.

As mentioned above, what all expressivist theories share is the observation that laws frequently express certain attitudes, values, or beliefs. Anderson and Pildes persuasively argue that it is sensible to speak of expression as such, despite the fact that law is created by a collective agency (such as a legislature) rather than an individual. Anderson and Pildes also convincingly contend that a law can express a particular meaning irrespective of whatever may have been the actual intent of those who enacted it. The justification for both of these arguably counterintuitive claims is that the relevant social meaning for expressivist purposes is the meaning that citizens attribute to the law. Social meaning accordingly is an empirical phenomenon. Furthermore, it is a function of contemporary

68. To be sure, some earlier scholarship anticipated themes that today’s expressivists have developed. See Adler, supra note 3, at 1369. This is not surprising, for there is little that is wholly new under the sun.
69. See Anderson & Pildes, supra note 64.
70. See id. at 1506–27.
71. See id. at 1527–75.
72. See id. at 1514–27.
73. See id. at 1525.
74. See id. at 1520–27. Anderson and Pildes offer an additional reason as to why the first challenge to expressivism fails when they argue that it is sensible to ascribe mental states to collectives. See id. at 1514–20.
understandings and sensibilities. In other words, social meanings are "socially constructed. These meanings are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community." Because expressivist theories focus on law's meaning for citizens, it does not matter that law is created by a multimember body. It similarly does not matter what indeed was in the mind of those who enacted a particular law.

The variants of expressivism focus on different possible consequences of the fact that law expresses attitudes, values, and beliefs. Anderson and Pildes are concerned with what they call "expressive harms." Expressive harms refer to the expression of "impermissible attitudes toward persons, such as hostility or contempt for racial or ethnic groups." Robert Cooter and Cass Sunstein, by contrast, are concerned with the ways in which law socializes citizens as it expresses particular attitudes, values, or beliefs. Cooter, for example, speaks of two expressive uses of law, one of which is "[c]hanging individual values." Similarly, Cass Sunstein argues that law inevitably and properly is involved in "norm management," and in "express-

75. Id. at 1525.

76. Interestingly, Anderson and Pildes go even further and argue that group expression does not depend on there being a meaning of which the group is conscious:

The expressive meaning of a particular act or practice, then, need not be in the agent's head, the recipient's head, or even in the heads of the general public. Expressive meanings are socially constructed. These meanings are a result of the ways in which actions fit with (or fail to fit with) other meaningful norms and practices in the community. Although these meanings do not actually have to be recognized by the community, they have to be recognizable by it, if people were to exercise enough interpretive self-scrutiny.

Id. The expressive analysis I undertake later in the Essay is of this sort; I seek to identify a social meaning of Establishment Clause doctrine that is undeniable, though not widely recognized.

77. Id. at 1527.

78. Id. at 1521.

79. Anderson and Pildes attempt to disassociate expressivism from such "direct cultural effects." Id. at 1560 (arguing that "expressive interpretations are concerned with the expressive character of laws, not with the direct cultural effects of decisions, with how some segment of the public reacts to a decision, or with extremely speculative parades of horribles."). The effort to distinguish cultural effects from a law's expressive character appears to be driven by concerns that courts are not competent to make such "speculative" judgments. Id.

80. Robert Cooter, Expressive Law and Economics, 27 J. LEGAL STUD. 585, 586 (1998). The other expressive function Cooter mentions is "[c]reating focal points" that lead to a new equilibrium for a given system of social norms. Id. By this, Cooter means law's ability to switch behavior without altering the individual's tastes. Id. at 595. Examples include prohibiting smoking in airports and requiring dog owners to clean up after their pets. Id. It is likely that altering behavior in this way ultimately leads to a change in societal values, as well.
ing social values” and “social norms” that shape and constitute the political community.81

B. Expressivism’s Relevance to the Establishment Clause

1. The Endorsement Test

As several scholars have noted,82 Justice O’Connor introduced an approach to the Establishment Clause, known as the endorsement test, which is accurately described as being expressivist in character. In a concurring opinion in the case of Lynch v. Donnelly,83 Justice O’Connor wrote that the Establishment Clause prevents
government endorsement or disapproval of religion. Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.84 Justice O’Connor’s focus on the “message” that is sent by government endorsement of religion is what makes her concurrence expressivist.85 Her concern that nonadherents not be made to feel as “outsiders”—an obvious harm—puts O’Connor’s approach into the Anderson and Pildes variant of expressivism. The linkage between the Establishment Clause and expressivism is not limited to Lynch or to Justice O’Connor. Professor Matthew Adler correctly notes that “[s]ince Lynch, the Court has repeatedly incorporated an endorsement analysis into its Establishment Clause decisions; and all nine sitting justices are now on record as favoring some such analysis.”86 Widespread adoption of aspects of the endorsement test can be understood as doctrinal recognition of expressivism’s relevance to the Establishment Clause.

Although the endorsement test generally has been well received in the academic community,87 it also has been the subject of some

82. See, e.g., Adler, supra note 3, at 1372; Anderson & Pildes, supra note 64, at 1547.
84. Id. at 687–88 (O’Connor, J., concurring).
85. For a fuller discussion as to why O’Connor’s concurrence properly qualifies as expressivist, see Anderson & Pildes, supra note 64, at 1546–51.
86. Adler, supra note 3, at 1372 (citations omitted).
87. For an extensive list of academic commentary supportive of the no endorsement test, see Smith, supra note 38, at 274 n.45.
heavy criticism. The two most sustained critiques have been penned by Professor Michael McConnell and Professor Steven Smith. McConnell's arguments are a critique of the endorsement test, but not of expressivism generally; as I will show later, his arguments have no application to the expressivist approach that this Essay advocates. Because this Essay takes no position on the wisdom of the particular approach to expressivism that is found in the endorsement test, it accordingly will not address Professor McConnell's substantive points. One of Professor Smith's arguments, by contrast, poses a challenge to the logic that undergirds any expressivist theory of law. For this reason, it is necessary to fully consider Professor Smith's position.

In the course of his article, Professor Smith critiques the endorsement test by asking whether laws excluding clergy from office express a disrespect for clergy (by implying, for instance, that they are not sufficiently capable), express respect for clergy (by implying, for example, that they are too special to be sullied by politics), or do neither (by simply reflecting the view that separation between church and state is best). The crux of Professor Smith's argument is that a given governmental act may have multiple, mutually exclusive meanings. Although Smith's point was directed to the endorsement test, it applies to all expressivist theories insofar as they presume that a government action has a particular social meaning. After all, if a governmental action can be understood to mean both "x" and "not-x," then it might be difficult to understand what type of expressive consequence possibly can flow from it.

While Smith's argument suggests that the endorsement test might be unworkable in certain contexts, it is not devastating to the endorsement test in particular or to expressivism more generally. To begin, it is possible that legal doctrine sometimes (at least) expresses a clear message. For instance, as I will soon suggest, it is plausible to conclude that today's Establishment Clause doctrine communicates at least one thing very clearly: that the intermingling of political and religious authority is categorically bad. This is not to suggest that the

89. See infra note 104.
90. See Smith, supra note 38, at 306–07; see also id. at 322–23. It should be noted that the bulk of Smith's argument, like McConnell's, is applicable to the endorsement test in particular and has no general relevance to expressive theories of law. See, e.g., id. at 276–309, 313–31.
91. See infra pp. 687–89.
doctrine has any particular meaning as an a priori matter. Indeed, whether legal doctrine does or does not communicate a singular, clear message would appear to be an empirical fact that turns on a whole network of contingent contemporary social understandings; in the words of Anderson & Pildes, it is “socially constructed.” The point is that sometimes doctrine may express a readily cognizable message. Smith does not argue against this possibility, and his point accordingly is not an across-the-board critique of the endorsement test or expressivism more generally.

Moreover, even where a governmental action is capable of generating multiple meanings, it is not self-evident that this renders expressivism irrelevant. Imagine a circumstance where a governmental action had a pernicious meaning of “x” to members of Group A, but had a benign meaning of “y” to all other members of society. Is it inappropriate as a per se matter to say that the governmental action creates an expressive harm to members of Group A just because the action has more than one possible social meaning? I do not see why this should be so. After all, outside the context of expressivism, it is not generally the case that the law is calibrated to the least sensitive members of society. In short, more is necessary to undermine the logic of expressivism than Professor Smith’s observation that a governmental action may have multiple meanings.

2. Expressivism and Cultural Conflict

The costs endured by contemporary losers in Establishment Clause litigation discussed above can usefully be described in expressivist terms. I wish to make clear from the outset that what follows does not purport to be an argument based on current doctrine. Neither the Court nor commentators have analyzed the effects of Establishment Clause doctrine in the particular expressivist terms soon to be discussed. What follows accordingly is a self-conscious call for doctrinal change. On the other hand, this doctrinal change may be partly grounded in contemporary doctrine. It could be argued that insofar as the Court has adopted an expressivist approach to the Establishment Clause through the endorsement test, it has opened

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92. Anderson & Pildes, supra note 64, at 1525.
93. It is worth noting that the phenomenon posited above is not counterfactual. One of the characteristics of social groups is that their members tend to see things similarly.
94. See supra Part I.B.
95. See supra note 68.
the door for the adoption of other expressivist approaches in the Establishment Clause context. If so, the analysis that follows merely ventures through that door.

The injured stakeholders under contemporary Establishment Clause doctrine for the most part have been\(^\text{96}\) "integrationists"—those like Justice Scalia, the Rajneesh, and neo-Aristotelians who believe that contemporary doctrine literally interferes with their ability to live life fully in accordance with their views of what religion requires. Preventing such persons from freely living out their lives is the most blunt method of altering social norms in a Cooterian and Sunsteinian sense, for the law puts such groups at risk and, accordingly, actually works towards the creation of a society where there simply are not any persons who hold such views. This is one possible consequence of contemporary Establishment Clause doctrine that can be understood in expressivist terms.

To more fully understand the expressivist effects of today's Establishment Clause doctrine, consider the law's "social meaning." Even if it is true that doctrine frequently (or even usually) can be said to express many different things,\(^\text{97}\) today's Establishment Clause doctrine communicates at least one thing very clearly: the intermingling of political and religious authority is categorically bad. To understand the social meaning of contemporary doctrine clearly, consider the following. For the first one hundred-plus years of this country's existence—before the incorporation of the Establishment Clause against the states—the Clause barred the establishment of a national church, but did not proscribe state and local governments from intermixing politics and religion. And the subfederal American polities did intermix politics and religion: there were established churches in six states,\(^\text{98}\) state and local governments paid salaries for clergy, and so forth.\(^\text{99}\) Today, by contrast, all levels of government\(^\text{100}\)

96. To be sure, integrationists have not lost all recent struggles, and it might even be said that of late they have been winning more frequently than they have lost. See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639 (2002) (upholding school voucher program); Rosenberger v. Rector and Visitors of the Univ. of Va., 515 U.S. 819 (1995) (upholding state university's funding of school newspaper with Christian perspective). Even if this is the case, this only would mean that there is a different set of cultural winners under contemporary doctrine. This would not undermine this Essay's project, which is to develop a doctrine that reduces the extent of absolute winners and losers under the Establishment Clause, and that accordingly is more neutral in effect.

97. See supra Part II.B.1.

98. See Conkle, supra note 18, at 1132.

99. For more on church-state relations at the subfederal levels prior to incorporation, see HAMBURGER, supra note 5.
are disallowed from establishing religion, and the same constraints to
which the federal government is subject apply in equal force to
subfederal polities.100

Now consider the changing social meaning of Establishment
Clause doctrine through history. Before incorporation, the Constitu-
tion could well have been understood to express the view that it
would be problematic to establish a national church. It is far harder
to say that the Establishment Clause’s generally understood meaning
was that the intermingling of religion and politics was categorically
bad, given the twin facts that (1) absent from the list of limitations
that the Constitution imposed on states was any establishment
constraint and that (2) there indeed were established churches in
many states at the time. By contrast, today’s doctrine, under which
the Clause applies equally to all levels of American government,
could readily be understood to express the view that the intermingling
of religious and political authority is unqualifiedly bad—that it is
categorically un-American, categorically counter to American
constitutionalism. In short, the social meaning of Establishment
Clause doctrine is a function of what level of government the doctrine
applies to.

Although it is conceivable that contemporary Establishment
Clause doctrine could have been differently understood by the
American public, I suggest that, in fact, it is not. Though I cannot
definitively establish this empirical fact here, I imagine that most
would agree that American citizens generally understand the Estab-
lishment Clause as communicating categorical opposition to the
intermixing of governmental and religious authority. Indeed, judging
by the reflexively critical approach most Americans take to such
intermixings in other countries, Americans seem to believe that
categorical opposition to the intermingling of the realms of religion
and politics is a mandate of modern political theory more generally—

100. The sole exception is tribal governments, which are not bound by the United States
Constitution. See Talton v. Mayes, 163 U.S. 376 (1896). So, for example, in the Hopi tribe
“religion and village organization . . . is virtually inseparable [and m]embership in a village is in
part religious as well as civil.” Mark D. Rosen, Multiple Authoritative Interpreters of Quasi-
Constitutional Federal Law: Of Tribal Courts and the Indian Civil Rights Act, 69 FORDHAM L.
REV. 479, 551–52 (2000) (quoting Kavena v. Hopi Indian Tribal Court, 16 Indian L. Rep. 6063,
6065 (Hopi Tribal App. Ct. 1989)).
101. See supra Part I.A.
typically liberal political theory—and is not merely a parochial
American constitutional requirement.102

Assuming this description of the contemporary social meaning of
Establishment Clause doctrine (and liberal political theory) to be
correct, it follows that such a monolithically uniform message from
the government itself is likely to have Cooterian and Sunsteinian
socializing effects on the integrationists, apart from the aforemen-
tioned fact that the law keeps integrationists from doing as they wish.
Moreover, if the social meaning of the Establishment Clause pointed
out above is correct, then Establishment Clause doctrine also creates
expressive harms of the Anderson and Pildes variety for stalwart
integrationists. The law's categorical rejection of the intermixing of
governmental and religious authority constitutes an expressive harm
insofar as it expresses utter contempt for the way of life integration-
ists feel so dear, suggesting (and indeed sometimes explicitly stating)
that the form of life they seek is wholly incompatible with American
and liberal values.

III. SIZING: ITS POSSIBILITY AND DESIRABILITY

Assume as correct the social meaning of contemporary Estab-
lishment Clause doctrine described above. Is such a social meaning
problematic? This Part refutes two plausible claims that it is not, and
suggests that such a social meaning indeed is problematic under
widely held liberal premises.

First, it might be argued that contemporary Establishment
Clause jurisprudence, and its consequent social meaning, are un-
avoidable consequences in a post-Fourteenth Amendment world in
which the Establishment Clause has real teeth in respect of the
federal government. If the Establishment Clause is to place signifi-
cant limitations on the federal government, the argument goes, then it
inevitably must do the same in respect of subfederal polities. Al-
though this view typically is not explicitly made today,103 it is a fre-

102. Part III.B infra critiques the view that liberalism is categorically opposed to the
intermingling of religious and political authority.

103. Some thoughtful commentators have put forward this view. See, e.g., Amy Gutmann,
Religion and State in the United States, in OBLIGATIONS OF CITIZENSHIP AND DEMANDS OF
FAITH: RELIGIOUS ACCOMMODATION IN PLURALIST DEMOCRACIES 127 (Nancy L. Rosen-
blum ed., 2000) ("Dissenting citizens at the local level might look to public authorities at
another level to regulate and restrain their local religious-political officials. But why would a
weak Establishment Clause jurisprudence that permitted church-state entanglement at one level
not also permit it at another?"); cf. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES
quently unstated article of faith for many, if not most, scholars and practitioners of constitutional law. In response, subpart A introduces the doctrinal option that I dub sizing. That is to say, what the Constitution proscribes, permits, or mandates could vary across different levels of government. It simply is not inconceivable that the Constitution could permit a local government to do something that the federal government is constitutionally disabled from doing.

The second plausible claim as to why the above-discussed social meaning of the Establishment Clause is not problematic is that the intermixing of religious and political authority in fact is normatively undesirable as a categorical matter. Communicating such a message, on this view, accordingly is not problematic. Quite the opposite: it is beneficial! Stated differently, this second claim is that even if it is true that sizing is possible, it is undesirable. Subpart B answers this challenge. It explains why intermixing religious and political authority is not per se unacceptable under standard liberal premises. To the contrary, it is intermixing's categorical preclusion that is problematic. A government structure that permits the intermixing of religious and political authority in select subfederal polities, subject to some important caveats, is the best way to realize foundational liberal commitments. And that provides a predicate for concluding that sizing may be normatively desirable.

A. Sizing Identified

Individual justices on the Supreme Court (though never a majority) long have advocated the position that the Constitution's constraints sometimes might apply to the states differently than they apply to the federal government. This is the concept that I denominate “sizing.” I hope to suggest here that sizing is a doctrinal technique that takes advantage of a potential for political diversity that is inherent in America's federal system, and that this potential can be called upon to neutralize some of the expressive consequences of contemporary doctrine.104

AND POLICIES 486 (2d ed. 2002) (arguing that “rights such as freedom of speech are fundamental liberties, and there is no reason why their content should vary depending on the level of government”).

104. Sizing accordingly is not vulnerable to McConnell's critiques. McConnell argues that the endorsement test is unworkable because there can be no neutral baseline from which to judge whether a governmental act endorses or disapproves of religion, see McConnell, supra note 88, at 148–49; that the endorsement test is biased against religion because virtually no governmental action “disapproves” of religion, but instead can be said to be driven by a secular
Let our brief tour of sizing start with the 1925 case of Gitlow v. New York, which concerned a First Amendment challenge to a New York statute that criminalized the advocacy of anarchy. In dissent, Justice Holmes wrote as follows:

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

In classic, epigrammatic Holmesian fashion, this was all the great Justice had to say about the matter. These words suggest that Justice Holmes was advancing a text-based argument that the constitutional constraints differ as between the federal and state governments because each is governed by different constitutional language.

The next important discussion of sizing appears in yet another dissent, that of Justice Jackson in Beauharnais v. Illinois, which purpose, id. at 152; and that the test is biased among religions insofar as messages affirming mainstream religions “are likely to be familiar and to seem inconsequential.” Id. at 154. None of these critiques has application to a sizing that was prompted by sensitivity to expressivist concerns. This definitively shows that McConnell’s arguments do not undermine expressivism generally, but instead are a critique of one particular expressivist doctrine, the endorsement test.

105. I currently am at work on a more comprehensive analysis of sizing that, among other things, explores aspects of contemporary constitutional doctrine—not merely the thoughts of a handful of Supreme Court Justices—that can be understood as reflecting sizing. See Rosen, Sizing Constitutional Guarantees, supra note 8, at 31–47. None of these other doctrines concern the Establishment Clause, however, and I accordingly will not discuss them here.

106. 268 U.S. 652 (1925).

107. Id. at 672 (Holmes, J., dissenting) (emphasis added).

108. Justice Holmes and the other justices surveyed below all rejected incorporation of the Bill of Rights, concluding that the limitations to which states are subject are provided by the Fourteenth Amendment’s due process clause. This position, of course, has been flatly rejected by the Court. See, e.g., Zelman v. Simmons-Harris, 536 U.S. 639, 648 (2002) (“[t]he Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment . . .”) (emphasis added). As I will show in a future piece, however, sizing is not dependent on rejecting incorporation, but is fully consistent with selective incorporation. See Rosen, Sizing Constitutional Guarantees, supra note 8, at 11–21. Indeed, several justices who have embraced selective incorporation also have advocated what this Essay dubs sizing. See, e.g., Crist v. Bretz, 437 U.S. 28, 52–53 (1978) (Powell, J., dissenting). This Essay examines Justices Holmes’s, Harlan’s, and Jackson’s understanding of sizing because theirs are the most articulate discussions of sizing that are found in the judicial corpus. As such, they clearly illustrate the doctrinal option of sizing. Moreover, most of their analysis seamlessly transfers to the selective incorporation context. See Rosen, Sizing Constitutional Guarantees, supra note 8.

On another note, it is interesting to observe that although Justice Holmes’s analysis stated that (what I call) sizing should result in greater “latitude” for the States, the majority of justices in Gitlow, who did not engage in sizing, upheld a state statute that Holmes’s dissent would have struck down. There is no logical inconsistency here, of course: the majority’s free speech test was less strict than either the federal or state free speech test that Holmes advocated.

famously upheld a state's group libel statute. Among other arguments, Justice Jackson articulated what might be called a functionalist explanation in support of sizing:

The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms. Criminality of defamation is predicated upon power either to protect the private right to enjoy integrity of reputation or the public right to tranquility. Neither of these are objects of federal cognizance except when necessary to the accomplishment of some delegated power. ... When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquility to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.

For these reasons I should not, unless clearly required, confirm to the Federal Government such latitude as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power.111

Justice Harlan was the next member of the Court to embrace sizing. In a series of dissenting opinions, Justice Harlan developed the most sophisticated arguments to date in support of sizing. In his dissent in Roth v. United States, Justice Harlan adopted Justice Jackson's functional analysis from Beauharnais.112 Justice Harlan's approach was not markedly different from Justice Jackson's, though his explanation is even more straightforwardly of the sizing variety:

The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems important that we should keep in the forefront the question of whether those interests are state or federal. Since under our constitutional scheme the two are not necessarily equivalent, the balancing process must needs often produce different results. Whether a particular limitation on speech or press is to be upheld because it subserves a paramount governmental interest must, to a large extent, I think, depend on whether that government has, under the Constitution, a direct substantive interest, that is, the power to act, in the particular area involved.113

110. See id. at 291–94 (Jackson, J., dissenting).
111. Id. at 294–95 (Jackson, J., dissenting) (emphasis added).
113. Id. at 503–04 (emphasis added).
Throughout many opinions in which he advocated the sizing of constitutional limitations, Justice Harlan articulated two additional justifications. First, in the spirit of Justice Brandeis's *New State Ice dissent*, Justice Harlan praised the fact that each state is an independent "experimental social laborator[y]" that can experiment with "novel techniques of social control." Harlan thought that there was an "immense advantage" to having "separate centers for such experimentation," and argued that there was "no overwhelming danger to our freedom to experiment" so long as there was "no uniform nation-wide suppression of," (for instance) a particular book. Justice Harlan argued that the possibility of experimentation, in the absence of severe risk due to the fact that other states can be expected to legislate differently, was a reason to treat state legislation differently than federal legislation for purposes of constitutional analysis.

Second, and conversely, Justice Harlan argued that there are far greater "dangers to free thought and expression . . . if the Federal Government imposes a blanket ban over the Nation on such a book" than if a state does insofar as a federal ban forecloses the possibility that some people in the United States will be allowed to read a particular book. Similarly, a federal ban destroys "[t]he prerogative of the States to differ on their ideas of morality." The greater dangers inherent in federal regulation accordingly justify a constitutional regime under which the federal government would be subject to more stringent constitutional limitations than states such that states may be permitted to ban materials that the federal government could not.

These justifications for sizing carry over fully to the Establishment Clause. Indeed, in a concurring opinion in *Walz v. Tax Commission*, Justice Harlan explicitly suggested that Establishment

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117. *Id.* at 505–06 (Harlan, J., dissenting).

118. *Id.* (Harlan, J., dissenting).

119. *Id.* at 506 (Harlan, J., dissenting).

120. *Id.* (Harlan, J., dissenting).

Clause protections may be scaled on the basis of which level of government was operating, writing that "[i]t may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government." In the recent case of Zelman v. Simmons-Harris, Justice Thomas made the same point in a concurring opinion, writing that "in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government."

Justice Thomas's concurrence in Zelman is the last locus of discussion concerning sizing that this Essay will examine. Justice Thomas did not elaborate any additional justifications for sizing—he focused, as did Justice Harlan, on the benefit of allowing states to experiment. Justice Thomas did, however, provide a novel suggestion as to what limitations should apply to states:

Thus, while the Federal Government may "make no law respecting an establishment of religion," the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.

Of course, the requirement that state law not impede free exercise rights does not amount to much of a limitation under the contemporary free exercise doctrine that has been created by Employment Division, Department of Human Resources of Oregon v. Smith and its progeny. Justice Thomas's words that state law cannot impede "any other individual religious liberty interest" presumably are intended to afford additional protections beyond those of Smith, though he has not explained what they might be. Below I suggest different constraints to which states properly are subject under the Fourteenth Amendment. They go beyond what likely would be

122. Id. at 699 (Harlan, J., concurring).
123. 536 U.S. 639 (2002).
124. Id. at 678 (Thomas, J., concurring).
125. A full explanation of sizing must await another day. See Rosen, Sizing Constitutional Guarantees, supra note 8.
127. Id. at 679 (Thomas, J., concurring).
129. Under this line of case law, government action interfering with a person's ability to freely exercise her religion generally is permissible—it is subject to only a rational basis test—as long as the governmental action is neutral and generally applicable. Strict scrutiny applies only if the government has acted in a nonneutral, nongeneral manner. Id. at 878–84.
included in even a generous interpretation of Justice Thomas's formulation.

B. Sizing's Desirability

The discussion above definitively shows that it is not inevitable, as an a priori matter, that the constitutional limitations that apply to one level of government must apply to other levels of government in the same way. Though sizing has never commanded a majority of the Supreme Court, it is not inconceivable. Indeed, over the past seventy-five years or so, assorted justices have advocated what I have called sizing.

The question remains, of course, as to whether sizing is normatively desirable; just because something is possible does not preclude its being repugnant. Answering this question requires recourse to some normative framework. For present purposes I will assume, without proving, that constitutional interpretation inevitably involves reliance on some contestable political theory. Frequently the theory is unstated. I take it to be self-evident that it is better to explicitly identify the theory one utilizes, particularly where the theory is outcome-determinative. What follows is a normative argument, based on liberal political theory, that suggests the desirability of sizing in certain very narrow circumstances. The types of expressive consequences identified earlier in this Essay are a crucial part of this political analysis. Although it is possible that the circumstances justifying sizing do not today pertain within the United States, the analysis importantly shows that liberal political theory does not categorically require strict separation between religious and political authorities. Awareness of the doctrinal option of sizing is significant insofar as sizing can operationalize this conclusion of liberal political theory.

In addition to providing a theoretical justification for sizing, the discussion below also identifies the type of constraints to which states and other subfederal polities should be subject. The framework that follows accordingly provides the building blocks for understanding what types of Establishment Clause limitations properly apply to subfederal governments under the Fourteenth Amendment. These limitations go beyond what Justice Thomas alluded to in his Zelman concurrence.

In two earlier articles, I relied on the liberal political theories developed by John Rawls and Will Kymlicka to argue that foundational
liberal commitments require that liberal polities permit certain "illiberal groups" and "political perfectionists" to flourish, subject to some important but relatively modest constraints. I Iliberal groups and political perfectionists, as I understand and have formally defined them, both require the ability to exercise political power over their members that current constitutional doctrine is widely believed to proscribe. Though not a null set, this is a very small category, for many groups can flourish without exercising political power. Some integrationists, but most likely not all, would qualify as political perfectionists or illiberal groups. My analysis suggests that standard liberal premises give rise to the conclusion that many (though not all) illiberal groups and political perfectionists should be allowed to exercise the type of political power that they believe is necessary for their survival, subject to certain limitations. To date, however, I have not elaborated precisely what governmental powers these groups should be permitted to exercise. This Essay examines the governmental powers in relation to religion that political perfectionists should be permitted to exercise, focusing only on the thought of John Rawls (due to considerations of length). After sketching the

130. I have developed these arguments in Outer Limits, supra note 54, and Mark D. Rosen, "Illiberal" Societal Cultures, Liberalism, and American Constitutionalism, 12 J. CONTEMP. LEGAL ISSUES 803 (2002) [hereinafter Rosen, Illiberal Societal Cultures]. Outer Limits was primarily an argument based on a reworking of JOHN RAWLS, POLITICAL LIBERALISM (1993). Illiberal Societal Cultures provided a syncretic reading of POLITICAL LIBERALISM and WILL KYMUCKA, MULTICULTURAL CITIZENSHIP (1995).

131. See Rosen, Outer Limits, supra note 54, at 1064–71 (defining "political perfectionists"); Rosen, Illiberal Societal Cultures, supra note 130, at 804, 810–11 (defining "illiberal societal cultures").

132. See Rosen, Outer Limits, supra note 54, at 1064–71 (defining "political perfectionists"); Rosen, Illiberal Societal Cultures, supra note 130, at 804, 810–11 (defining "illiberal societal cultures").

133. See Rosen, Outer Limits, supra note 54, at 1071–87.

134. For a discussion of the practical differences as regards self-governance between "public" ordering and "private" ordering through contract and voluntary associations, and an explanation as to why private ordering is inadequate for some groups, see Mark D. Rosen, The Radical Possibility of Limited Community-Based Interpretation of the Constitution, 43 WM. & MARY L. REV. 927, 930–32 (2002) [hereinafter Rosen, Community-Based Interpretation].

135. Only those integrationist groups that believed that the exercise of political power was necessary for their members' complete self-actualization as human beings would qualify as political perfectionists for purposes of this Rawlsian analysis. See Rosen, Outer Limits, supra note 54, at 1064–71. Determining whether a particular integrationist group qualifies as a political perfectionist thus is highly context specific, and this Essay accordingly will not seek to identify which if any of today's integrationist groups would so qualify.

136. For an explanation as to why political theory, and John Rawls's thought in particular, is highly relevant to constitutional interpretation, see Rosen, Outer Limits, supra note 54, at 1061–62; see also infra at p. 697. I explore other plausible justifications for sizing constitutional guarantees in a companion piece. See Rosen, Sizing Constitutional Guarantees, supra note 8.
framework developed in my earlier pieces, I will show that political perfectionists should be allowed to exercise powers that would be foreclosed under contemporary Establishment Clause doctrine but that could be accommodated under sizing.\textsuperscript{137}

1. Rawls's Original Position

John Rawls's project in \textit{Political Liberalism} is to describe the basic structure of a stable and enduring democratic constitutional regime that can win the wholehearted support of a citizenry having a plurality of irreconcilable "comprehensive doctrines."\textsuperscript{138} Rawls is a social contractarian,\textsuperscript{139} aiming to identify the powers that persons willingly would cede to a government of their creation. Such an approach seems well suited to identifying the institutional (constitutional) characteristics of a \textit{democratic} constitutional regime insofar as democratic authority requires, at least, that the government structure be one to which citizens hypothetically could be said to have consented.\textsuperscript{140}

Rawls's foundational premise is that the fairest way to define governmental powers is to ask what powers would be selected by persons who did not already know their identities and interests. A government that exercised the powers so identified would be "fair" or "just" in Rawls's terminology.\textsuperscript{141} This assumption—what I would call an insight—is the predicate for Rawls's heuristic device known as the

\textsuperscript{137} Elsewhere I have explored two alternative doctrinal methods whereby these groups could be allowed to exercise powers that the federal government and states are constitutionally foreclosed from exercising. See Rosen, \textit{Community-Based Interpretations}, supra note 134; Mark D. Rosen, \textit{Our Nonuniform Constitution: Geographical Variations of Constitutional Requirements in the Aid of Community}, 77 \textit{TEX L. REV.} 1129, 1138-90 (1999) [hereinafter Rosen, \textit{Our Nonuniform Constitution}]. These two alternatives are succinctly described and contrasted in Rosen, \textit{Illiberal Societal Cultures}, supra note 130, at 831-40.


\textsuperscript{139} See \textit{JOHN RAWLS, THE LAW OF PEOPLES} (1999) (noting the social contractarian nature of his analysis).

\textsuperscript{140} For a similar view, see Robert C. Post, \textit{Democratic Constitutionalism and Cultural Heterogeneity}, 25 \textit{AUSTL. J. LEGAL PHIL.} 185, 185 (2000) ("The enterprise of democratic constitutionalism rests upon the premise of collective agency. If we ask who makes a democratic constitution, the answer must be given in the first person plural . . . . The collective agency of the people constitutes a 'demos' capable of 'bestowing . . . democratic authority on a polity'" (quoting J.H.H. Weiler, \textit{Does Europe Need Constitution? Demos, Telos and the German Maastricht Decision}, 1 EUR. L.J. 219, 238 (1995)). But see Randy E. Barnett, \textit{Constitutional Legitimacy}, 103 \textit{COLUM. L. REV.} 111, 113, 115–32 (2003) (contending that the legitimacy of the American Constitution cannot be grounded on consent, and proposing an alternative basis for grounding the Constitution's legitimacy).

\textsuperscript{141} \textit{RAWLS, supra} note 130, at 291.
"original position." Under the original position, people are to identify the fair political structure by conceiving themselves as being under a "veil of ignorance" under which they "do not know the social position, or the conception of the good (its particular aims and attachments), or the realized abilities and psychological propensities, and much else, of the persons they represent."\textsuperscript{142} Because the parties do not know whether the beliefs espoused by the persons they represent is a majority or a minority view... [t]hey cannot take chances by permitting a lesser liberty of conscience to minority religions, say, on the possibility that those they represent espouse a majority or dominant religion and will therefore have an even greater liberty. For it may also happen that these persons belong to a minority faith and may suffer accordingly. If the parties were to gamble in this way, they would show that they did not take the religious, philosophical or moral convictions of persons seriously, and, in effect, did not know what a religious, philosophical, or moral conviction was.\textsuperscript{143}

The veil of ignorance thus is crucial to enabling people to transcend their self-interests so as to identify a just and fair political structure. Stated differently, the veil of ignorance transforms personal self-interest into society-wide self-interest: people in the original position will choose to accommodate everybody in a fair way because they do not know whom they actually represent and accordingly would not want to create a political structure that did not accommodate whomever it is they happened to be.

2. The Need to Accommodate

Rawls argues that the original position generates two principles of justice that should structure constitutional democracies. In my earlier works I provided a lengthy textual analysis of this part of Rawls's theory.\textsuperscript{144} I reworked Rawls's application of the principles of justice because his analysis unnecessarily takes a position on contested questions concerning human nature. I argued that foundational Rawlsian premises are more fully achieved by taking account of flexibility built into the federal political structure that Rawls ignores.\textsuperscript{145} For these reasons, some of my conclusions are explicitly at variance with Rawls's. For instance, his analysis suggests that politi-

\textsuperscript{142} Id. at 305.
\textsuperscript{143} Id. at 311.
\textsuperscript{145} See Rosen, \textit{Outer Limits}, \textit{supra} note 54, at 1106–25.
cal perfectionists cannot be accommodated under liberalism. Because I tinker so extensively with Rawls's approach, I refer to my analysis as being "Rawlsian"; it is inspired by Rawls's principles, but it is not a straightforward application of his theory.

Stripped of the formal derivation provided elsewhere, my analysis is as follows. A person in the original position, who by definition does not know the religious or philosophical convictions of the person she in fact is, must realize that she might be one of several types of persons. She might be a separationist who wanted the government to largely leave her alone in respect of contested religious, philosophical, and moral matters, and who thought that government involvement in such matters would interfere with her ability to self-determine. On the other hand, she might be a political perfectionist, that is, a person who believes that she could fully develop herself only if the government actively involves itself in religious, philosophical, or moral matters. As mentioned above, only those "integrationist" groups that believed that government’s involvement in religion is necessary for them to fully self-actualize would qualify as political perfectionists.

What type of government structure would the person in the original position opt for? She would not select a regime under which the federal government could take a position on contested religious, philosophical, or moral matters, because such a regime would threaten to impose Cooterian or Sunsteinian expressive harms that could preclude her from living her life as she saw fit. She would, however, choose a regime under which subfederal governments could take a position on such contested matters. Flatly disabling both the

146. He writes: "Suppose that a particular religion, and the conception of the good belonging to it, can survive only if it controls the machinery of the state,... This religion will cease to exist in the well-ordered society of political liberalism." RAWLS, supra note 130, at 196–97; see also id. at 62 (concluding that citizens or associations of citizens cannot “use the state’s police power to decide... basic questions of justice as that person’s, or that association’s, comprehensive doctrine directs”). I cite to both these statements in Rosen, Outer Limits, supra note 54, at 1106–07.

147. Id. at 1063.

148. See Rosen, Outer Limits, supra note 54, at 1089–1125; Rosen, Illiberal Societal Cultures, supra note 130, at 808–31.

149. Accordingly, government would not be disabled from regulating in respect of matters that impacted relatively uncontested religious, philosophical, and moral matters, such as prohibiting murder.

150. Under Rawls’s account, such persons are excluded from the original position. See Rosen, Outer Limits, supra note 54, at 1120–23. In my earlier papers I explained why excluding these persons is problematic under Rawls’s own premises. See id. at 1121–23; Rosen, Illiberal Societal Cultures, supra note 130, at 812–15.
federal and subfederal polities from doing so—as our current Establishment Clause doctrine does—would disable her from living a full life if she in fact represented an integrationist political perfectionist. It would impose Cooterian and Sunsteinian expressive consequences that a person in the original position would not willingly accept. Such a political structure also would impose expressive harms of the sort identified by Anderson and Pildes by communicating categorical disrespect for the personal commitments of someone she might represent. On the other hand, the subfederal polities would not be free to do whatever they might wish, but would be subject to some important soon-to-be-discussed limitations.\textsuperscript{151} It is this type of political structure—a structure that maximizes the possibilities for political diversity—that would be chosen by a person in the original position.

This Rawlsian analysis confirms a long recognized benefit of the federal political structure. As Justice Harlan argued in \textit{Roth}, the federal system allows different states to pursue different moral agendas.\textsuperscript{152} In my view, this benefit is most usefully conceptualized from the vantage point of living beings rather than the inanimate state. Thusly reconceptualized, the advantage of federalism is that it contains the potential of allowing a wider range of citizens' needs and interests to be satisfied than does a single, nation-wide polity. This potential benefit is squandered, however, if the federal and subfederal polities enjoy identical limitations and powers.

It might be said, of course, that the very point of constitutional law is to impose uniform requirements that, among other things, have the effect of creating a single, national political culture. This observation is true, but it begs the question of what matters demand uniformity—or, stated differently, what is the \textit{nature} of our nation's political culture?\textsuperscript{153} That question, it seems to me, is answerable only by means of a theory concerning human needs and the appropriate role of the government—in short, by political theory.\textsuperscript{154} Which political

\textsuperscript{151} As I shall soon explain, these limitations would address many of the concerns articulated by separationists. With regard to those concerns not allayed by Rawlsian limitations, the Rawlsian analysis provided here suggests that separationist concerns should predominate over integrationist concerns at the federal level, but that integrationist concerns should have priority over the separationist concerns at the subfederal level.


\textsuperscript{153} For a fuller development of this point, see Rosen, \textit{Community-Based Interpretations}, supra note 134, at 1006-09.

\textsuperscript{154} Though it typically seeks to portray itself as being above the political fray, originalism—an approach I do not share—is one political theory; it is a theory of what powers are enjoyed by government and its constituent branches.
theory should be relied upon, of course, is a matter of deep controversy. For the reasons mentioned above, I believe that a Rawlsian analysis is instructive. And such an analysis suggests that because of the diversity of comprehensive doctrines that are held by our country's citizens, our national political culture is best understood as not demanding uniform requirements that unnecessarily prevent political perfectionists from maintaining themselves over time, and even flourishing. Insofar as sizing is one possible doctrinal mechanism for accommodating integrationist political perfectionists, Rawlsian political theory provides a prima facie justification for sizing.

3. Limits on Accommodation

The analysis above showing the need to accommodate integrationist political perfectionists does not mean that the Establishment Clause properly imposes no limitations on subfederal sovereigns. But the constraints imposed by the Establishment Clause ought to vary depending upon which level of government is being restricted.

The appropriate limits on subfederal polities are best understood by considering the limitations on the accommodation of political perfectionists that Rawlsian theory imposes. Rawlsian theory gives rise to several types of limitations. As a threshold matter, certain political perfectionists—including, possibly, some integrationists—cannot be accommodated. More specifically, because persons in the original position would want to create a "well-ordered" political society—conditions that permit and promote an "enduring and secure" political regime—they would not accommodate those groups that were unwilling to live peacefully with others or to allow other persons to govern themselves as they wish. In short, liberal theory suggests that the fair state can (and should) accommodate only those groups that are tolerant in the sense that they are willing to let nonmembers live as they wish.

In addition to limiting which groups can be accommodated, Rawlsian political theory also suggests that there should be certain restrictions on the activities that even qualifying groups can undertake. These restrictions flow from two requirements: well-

155. See supra note 91.
156. RAWLS, supra note 130, at 38.
158. This is a weaker form of toleration than Rawls embraces. For a description and critique of Rawls's conception of toleration, see id. at 1110–14.
orderedness and exit. Well-orderedness would prevent a group from stockpiling weapons in anticipation of an Armageddon, for example, or from seeking to establish relations with foreign countries in contravention of United States policy. Furthermore, the requirement of well-orderedness justifies the restriction of activities that might impose significant externalities on those outside the group. For example, it is conceivable that the anguish on the part of general society on account of the activities undertaken in an enclave could push general society to the breaking point and threaten well-orderedness. It is doubtful that American society could tolerate human sacrifice anywhere on American soil, for instance. Substantive limitations of this sort on the activities that integrationist political perfectionists can pursue within their enclaves are wholly appropriate.

The original position suggests, however, that any such substantive limitations should be few and far between; people in the original position, not knowing whom they represented, would not select a well-orderedness limitation that granted autonomy only to those groups whose values mirrored those of general society.159 Instead, people in the original position who are creating the basic structure of a large, diverse society would be aware of the "burdens of judgment"—those factors that account for enduring disagreement among people despite conscientious attempts to reason with others160—and adopt an attitude of toleration in respect of activities undertaken in enclaves in which they elect not to live.161 For these reasons, those seeking to substantively limit activities on the grounds that such activities threaten to undermine well-orderedness should bear a very high burden of proof.

Ultimately, what is required by well-orderedness is context-dependent. It is a function of contemporary sensibilities and circumstances. It accordingly is subject to change as citizens's sensibilities change. If citizens were to come to hold the Rawlsian view proposed here—that their foundational commitments required that they accommodate certain political perfectionists—then it would follow that the scope of self-government consistent with well-orderedness would increase. Relatedly, even if certain governmental action by

159. For a more extensive discussion of what well-orderedness may require, see Rosen, *Illiberal Societal Cultures*, supra note 130, at 819–22.
political perfectionists would not satisfy the requirement of well-orderedness today due to contemporary sensibilities, this does not mean that such governmental actions are per se incompatible with Rawlsian political liberalism for all times. Quite clearly, distinguishing between what liberalism categorically precludes from what only is contingently precluded is crucial to understanding the scope of self-governance at subfederal levels that liberalism can tolerate.

The limitations imposed by the requirement of well-orderedness go far toward dispelling separationist concerns regarding sectarianism and social strife along religious lines, for accommodation is required only insofar as it would not lead to such social fissures. Not all separationist concerns, however, would be allayed by the well-orderedness requirement. Permitting some subfederal polities to establish religion (more on what that means shortly) may well fragment the national political community in ways that are contrary to separationism's commitments. A Rawlsian analysis suggests, however, that the separationist's ideal for the national political community collides with what liberalism requires. The separationist notion of national unity wrongly comes at the expense of political perfectionists. The original position's thought experiment demonstrates that fairness requires a looser, less categorical conception of the United States's national character than separationism champions. A Rawlsian analysis suggests that these separationist concerns properly should be subordinated to the interests of qualifying political perfectionists at the level of some subfederal polities. In short, a national political culture characterized by an across-the-board commitment to separationism is normatively problematic from a Rawlsian perspective. A national political culture consistent with Rawlsian liberalism would be willing to accommodate the integrationist policies desired by qualifying political perfectionists at some subfederal levels of government, subject to the caveats of well-orderedness and exit.

"Exit," the second limitation on subfederal sovereigns that a Rawlsian analysis generates, refers to the requirement that persons must have the right to move. Exit derives from Rawls's requirement that the principles of justice require that the basic political structure

162. The requirement of well-orderedness also preserves one of liberalism's foremost accomplishments of bringing about peace and avoiding sectarian conflicts of the sort found in the centuries-long European religious wars. See RAWLS, supra note 130, at xxviii; KYMLICKA, supra note 130, at 155.

163. See infra Part IV.

164. See supra p. 675.
be “compatible with a similar scheme of liberties for all.”165 Without the right to exit, persons born into a group they wished to leave, but were prohibited from leaving, would not enjoy the same right to fully live out their lives that was enjoyed by a nonperfectionist (for example) that lived in a nonperfectionist community. Persons in the original position, not knowing whom they represented, accordingly would choose a political structure in which people had a right to leave whichever group with which they lived.166 The exit requirement accordingly allays yet another concern underwriting the separationist position. People’s standing in their political community will turn on their religion only if they consent to it, for the exit requirement demands that people have the power to leave and accordingly to not be subject to a subfederal polity that intermixes religion and government. For this reason, Rawlsian liberalism cannot accommodate a pure Aristotelian political community that sought the power to paternalistically compel its citizens to stay and act morally so that they become habituated to virtue. The exit requirement makes room only for a paternalistic polity whose citizens commit to being bound by a polity empowered to pursue nonsecular matters.

The exit right thus demands that no polity have the power to preclude its inhabitants from exiting (with the exception of lawful incarceration, which has this effect). Beyond that, polities cannot make exiting so onerous (for example, by requiring the exiter to leave behind all her real and personal property167) that it would be unreasonable to expect a person to incur such costs to exercise an opt-out right. But at what point is the cost of exiting too onerous? One can begin to fill in the details of exit by asking how a person in the original position would choose to construct the conditions that satisfy the requirement of an opt-out. The original position, however, on its own cannot definitively identify exit’s contours because the original position does not provide a mechanism for determining how risk-averse its players are.168 Such indeterminacy might be regretful, but it is commonplace: political theory virtually always underdetermines

165. For a discussion of this, see Rosen, Outer Limits, supra note 54, at 1097–98.
166. For far greater elaboration of “exit,” see id. at 1097–1106; Rosen, IlIiberal Societal Cultures, supra note 130, at 824–30. For an explanation as to why there likely is no parallel requirement of “opt-in,” see id. at 825–26.
167. For an example of a community that had such a rule, see Hofer v. Hofer, [1970] 13 D.L.R.3d 1 (Can.) (upholding Hutterites’ power to condition exit on forfeiture of all private property). Under the framework discussed above, the Canada Supreme Court’s decision in Hofer was incorrect.
168. For some implications of this, see, Rosen, Outer Limits, supra note 54, at 1099–1101.
institutional details.\textsuperscript{169} Such underdetermination is something we live with all the time—consider the open-endedness of our country’s constitutive commitments to “equal protection” and “due process,” for instance—and is not an indication that the underlying theory is flawed. Indeed, the process of working out the details of society’s commitments itself can be usefully conceptualized as being a part of a healthy political community’s process of constantly refining and redefining itself.

Elsewhere I have begun to discuss factors that bear on exit.\textsuperscript{170} One of the most difficult set of considerations concerns education, in particular: how much knowledge about life outside the community in which an individual finds herself, and how much training to support oneself and otherwise survive in the outside world, is necessary for an exit right to be real?\textsuperscript{171} Exit poses extremely difficult questions, and I will not repeat here the preliminary attempts I have made at answering them.\textsuperscript{172} The point for present purposes is that under a Rawlsian analysis, the requirements of well-orderedness and exit should guide the doctrinal development of what limitations should apply to subfederal polities populated by political perfectionists. Although these principles do not provide determinate answers in respect of many if not most questions, they point in the right direction in a far more specific way than does Justice Thomas’s formulation in \textit{Zelman}.\textsuperscript{173}

\section*{IV. PRACTICAL IMPLICATIONS}

Particularly because this Essay’s suggested approach varies in some respects so much from contemporary Establishment Clause doctrine, I hope in this final section to concretely clarify some of its implications. Additionally, while I will be unable to provide determinate answers to the vast majority of Establishment Clause issues that

\textsuperscript{169} See, e.g., Rawls, supra note 138, at 784 (noting that “details about how to satisfy this proviso must be worked out in practice and cannot feasibly be governed by a clear family of rules given in advance”).

\textsuperscript{170} See Rosen, \textit{Outer Limits}, supra note 54, at 1097–1106. I believe the analysis there to be sound, except insofar as it is modified by what follows above in text.


If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today. . . . If he is harnessed to the Amish way of life by those in authority over him and if his education is truncated, his entire life may be stunted and deformed.

\textsuperscript{172} For preliminary approaches, see Rosen, \textit{Illicit Societal Cultures}, supra note 130, at 827–28; Rosen, \textit{Outer Limits}, supra note 54, at 1097–1106.

\textsuperscript{173} See discussion supra p. 694.
could arise under sizing, I hope to illustrate by means of some specifics the approach that Rawlsian analysis suggests should be taken to resolving them.

A. "Multiple" Sizings

Even without delving into specifics, it should be clear that the content of both the well-orderedness and exit constraints is likely to vary depending on which level of government is acting. To begin, the threat to the country's well-orderedness posed by a particular practice undoubtedly is a function of the number of people who are participating in it; what happened in the two thousand acre town of Rajneeshpuram surely would be less disruptive of our country's sense of itself than if the entire State of California were owned and operated by the Rajneesh, for example.174 Similarly, with regard to exit, the extent to which a polity can block its inhabitants' access to information about life outside its borders is a function of size. A New York state-wide ban on the sale of certain reading materials would mean that inhabitants of certain counties would have to drive for hours to cross the border to enter another state. A municipal ordinance has less reach and accordingly is less likely to undermine the exit requirement.

The foregoing leads to the conclusion that Rawlsian analysis provides support for a form of sizing that is more context-sensitive than what has been discussed by even those justices who have contemplated sizing. It suggests that constitutional limitations should be scaled not only between the federal and state governments, but also vis-à-vis states and substate polities. Stated differently, in addition to the conclusion that subfederal polities should be permitted to take positions on contestable issues that the federal government cannot—the standard form of sizing discussed by Justices Holmes, Jackson, Harlan and Thomas (among others)—a Rawlsian analysis suggests that the limitations on the subfederal polities also may vary depending on what level of government (state or local) is acting. Generally speaking, at least with regard to Establishment Clause protections, it is to be expected that substate polities would be subject to less restrictive constitutional constraints than states under sizing insofar as

174. For more on the Rajneesh, see supra pp. 679–80.
smaller polities are less threatening than larger polities with regard to well-orderedness and exit.\textsuperscript{175}

### B. Sizing and Neutrality

Earlier in the Essay I suggested that sizing provides an approach to Establishment Clause conundrums that is more neutral than contemporary doctrine.\textsuperscript{176} The concept of neutrality is particularly important to the Establishment Clause, for Establishment Clause doctrine long has sought to ensure government neutrality.\textsuperscript{177} However, the prospect for neutrality under the Establishment Clause, and indeed the concept of neutrality more generally, has been subject to trenchant criticism. Professor McConnell, among others, has argued that any conception of neutrality must presuppose some baseline, and that any such baseline inevitably is nonaxiomatic and contestable.\textsuperscript{178} In a similar vein, Professor Smith has argued that the concept of neutrality is "barren" and "useless"\textsuperscript{179} for two dominant reasons: because there are multiple conceptions of neutrality\textsuperscript{180} and because "in a pluralistic culture, there is often no shared consensus" of its meaning.\textsuperscript{181} These are strong arguments against the possibility of developing a doctrine that might be termed "absolutely" neutral, and I will not attempt to defend any such concept of absolute neutrality against such challenges. Nonetheless, even if there is no objective view "from nowhere"\textsuperscript{182} from which absolute neutrality can be identified, it seems to me to be quite possible to conclude that comparisons among alternative doctrines can be made so that doctrinal options can be ordinally ranked in terms of neutrality.

With this understanding, I make the following claim: the Rawlsian-based approach to sizing developed here is \emph{more neutral} than the approach found in contemporary Establishment Clause doctrine. To the extent that courts and scholars long have sought to

\textsuperscript{175} The conclusion that smaller polities should enjoy greater regulatory leeway does not apply to all (or even necessarily most) constitutional provisions. See Rosen, \textit{Sizing Constitutional Guarantees}, supra note 8.

\textsuperscript{176} \textit{See supra} p. 676.

\textsuperscript{177} \textit{See supra} note 38.

\textsuperscript{178} \textit{See McConnell}, supra note 88, at 148–49.

\textsuperscript{179} \textit{See Smith}, supra note 38, at 325, 329; \textit{see generally id.} at 320–31.

\textsuperscript{180} \textit{Id.} at 322.

\textsuperscript{181} \textit{Id.} (internal quotation omitted).

\textsuperscript{182} Cf. \textsc{Thomas Nagel}, \textit{The View from Nowhere} 6 (1986) (arguing that objectivity "cannot by itself provide a complete picture of the world, or a complete stance toward it").
understand the Clause's mandate as a requirement of government neutrality, this Essay's suggestion accordingly can be understood as a doctrinal improvement.

A fundamental question that necessarily arises when seeking to assess neutrality concerns the relevant scope of inquiry: should one look at the government whose actions are being challenged in a given litigation or instead look more globally to all levels of government within a country when analyzing a doctrine from the perspective of neutrality? Once the question is asked, it seems clear to me that any neutrality analysis of a federal constitutional doctrine ought to take the second, global perspective. That is to say, the relevant question of whether a particular United States constitutional doctrine results in a more neutral outcome takes account of how the doctrine operates throughout the entirety of the country. Focusing exclusively on the particular level of government that happens to be challenged in a single litigation—as contemporary Establishment Clause doctrine does—is myopic.

Viewed from the perspective of all governments, sizing is more neutral than contemporary doctrine insofar as it accommodates more types of people. It is not wholly neutral—after all, the Rawlsian-based approach to sizing discussed in this Essay would not accommodate all political perfectionists, it does not permit those groups it can accommodate to do whatever they want without limitation, and it does not satisfy all the concerns advanced by separationists. Whether or not these lines demarcating what can be accomplished and what is impossible are justifiable turns on some thick political theory, not the concept of neutrality itself. Nonetheless, sizing would appear to be more neutral than contemporary Establishment Clause doctrine from virtually any perspective. Whereas contemporary law categorically precludes the intermixing of religion and politics everywhere in the United States, a Rawlsian-based sizing approach would prohibit the federal government from imposing one approach across the country but would allow a variety of approaches to be accommodated at the subfederal level. For this reason, sizing is, at the very least, incremen-

183. See Smith, supra note 38, at 313–14.
184. Consider how the Court applies the endorsement test. The message communicated always is adjudged solely in relation to what the challenged government's action is hypothesized to mean. See, e.g., Lynch v. Donnelly, 465 U.S. 668, 687–88 (1984) (O'Connor, J., concurring). Never have expressivist analysts sought to identify the aggregate message that is communicated by taking into consideration not only the challenged government's activity but also the activities of (let us say) other state governments and the federal government.
tally better than contemporary Establishment Clause doctrine from the perspective of neutrality.

C. Established Churches?

One might ask: would sizing open the door to permitting the full-scale establishment of some governmental churches? Yes.\(^{185}\) The constraint of well-orderedness, in particular, makes it unlikely that there could be established state churches as there were in the nineteenth century, primarily due to the religious and cultural diversity found in all states today. In my view, it is very possible, however, that both the requirements of well-orderedness and exit could be satisfied by an established municipal church in limited circumstances. A relatively easy case, it seems to me, is presented by the city of Rajneeshpuram.\(^ {186}\) Well-orderedness was not violated because the city was of limited size and it was religiously homogeneous; the city was not exercising political authority over non-Rajneesh or others who did not want to be regulated by the polity. The requirements of exit also appear to have been satisfied. The city’s educational system included science, math, social studies, and comparative cultures, and the city planned to set a formal curriculum that was in accordance with state guidelines. Moreover, inhabitants of the city were free to leave, as many in fact did.\(^ {187}\) Due to the powerful normative reasons for permitting the Rajneesh to govern themselves as they deemed appropriate,\(^ {188}\) and the negligible costs of allowing them to do so, it seems to me that the city of Rajneeshpuram was an ideal candidate to have an established religion. Fleeing Taliban members would not be permitted to set up their own municipality in Arizona, however, for such a community would be unable to satisfy the well-orderedness requirement (they presumably would not be willing to coexist peace-

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185. To anticipate a possible objection, even full establishment of religion in the form of a municipal church would not run afoul of constitutional requirements as a purely formal doctrinal matter because the textual constitutional limitation on states is the Fourteenth Amendment’s requirement that they not violate liberty without due process, not that they not establish religion. See supra note 108.

186. For more on the Rajneesh, see supra at pp. 679–80. In fact, even the city of Rajneeshpuram did not technically have an established church. The city was owned and operated by a corporation, not the church. See Oregon v. City of Rajneeshpuram, 598 F. Supp. 1208, 1214–15 (D. Or. 1984); Rosen, Our Nonuniform Constitution, supra note 137, at 1183. The corporation, however, was wholly owned by the church. Id.

187. See Rosen, Outer Limits, supra note 54, at 1132.

188. See id. at 1131–32.
fully with their neighbors) and accordingly would not be a candidate for accommodation under the Rawlsian approach sketched above.

It is quite possible that the requirement of well-orderedness would prohibit cities with mixed religious populations from adopting full-fledged established churches. That is to say, established local churches likely would be permissible only in the rare instance where municipal boundaries coincided with a homogeneous population of political perfectionists that was desirous of establishment. Such polities are rare, to be sure, but they may exist.

Many complex issues would arise under such an approach. Here are a few. Consider first the relevant time period for determining whether the population is homogeneous: is it the time of establishment or is it an ongoing obligation? This Essay’s analysis suggests that the answer is the time of establishment. Otherwise, a pernicious incentive would be created that would encourage any individual who was philosophically opposed to establishment anywhere to surreptitiously purchase or rent property in the integrationist community to thereby disrupt its homogeneity. The rule I suggest appears to do no violence to well-orderedness or exit, and it better advances a just liberal state by not permitting a single mobile dissenter (who is willing to relocate to an integrationist community) to interfere with an integrationist community’s ability to govern their lives as they deem necessary.

Next, one might wonder whether the proposed homogeneity requirement could be circumvented, and well-orderedness thereby undermined, were groups to simply create new subfederal polities in states that have laws permitting easy incorporation of local governments such as towns and villages. Even a proliferation of such local governments, however, would not constitute a circumvention of the homogeneity requirement or a threat to well-orderedness as a per se matter. So long as the resulting polity ruled over a homogeneous population, what would be the problem? Indeed, a proliferation of small local governments may well be beneficial. The primary benefit


190. Under New York state law, for example, a territory with at least 500 residents and not more than five square miles may be incorporated upon petition by at least twenty percent of the voting residents of that territory or by the owners of more than fifty percent of the territory’s real property. See N.Y. Village Law §§ 2-200, 2-202 (McKinney 1973 and Supp. 1994).

191. See supra pp. 702-03 (discussing the fact that what is required under the requirement of well-orderedness depends on citizens’ values and sensibilities, which may change over time).
is that each government can cater to the idiosyncratic needs of its constituents. Although there are certain efficiency risks entailed by large numbers of small local governments—notably the possibility of wasteful duplication and lost scales of economy—many of these potential costs can be avoided by means of interlocal agreements and other forms of joint action among substate polities.

Though the creation of many new local governments does not undermine well-orderedness as a per se matter, there are certain risks due to sizing's interaction with other state laws. In developing the contours of the constitutional constraint of well-orderedness—which could be textually grounded either in the Fourteenth Amendment's liberty guarantee or in the language of the Establishment Clause itself—courts would have to be attentive to the fact that the doctrine would have to be highly context sensitive. For example, well-orderedness could be threatened if state law provided that substate polities could annex other substate polities by means of a majority vote of the citizens of a combination of the annexing and to-be-annexed polities. Such an annexation rule, in combination with the time of incorporation rule discussed above, would effectively allow a single polity with an established church to successively annex smaller unconsenting polities that did not have established churches. The constitutional requirement of well-orderedness accordingly would have to disallow application of such an annexation law in these circumstances.

D. Funding, Symbolism, and Coercion

To date, of course, virtually all subfederal polities that have faced Establishment Clause challenges have not sought to adopt full-fledged churches or even to delegate political power to churches. Instead, contemporary Establishment Clause battles largely have

194. This type of annexation statute is very common. It was upheld by the United States Supreme Court in an early decision. See Hunter v. City of Pittsburgh, 207 U.S. 161 (1907). A federal district court has upheld a state annexing statute under which only citizens of the annexing city could vote. See Moorman v. Wood, 504 F. Supp. 467, 473–74 (E.D. Ky. 1980). Such an annexation statute also would be problematic, of course, and would have to be subject to the constitutional restrictions discussed below in text.
195. It could be expected, however, that more such attempts would be made if this Essay's suggestions were adopted.
concerned the permissibility of government involvement in ceremonies with religious overtones (such as allowing creches to be erected at city hall and benedictions at graduation ceremonies) and government funding of religious institutions. Under sizing, some subfederal polities could be granted considerably more regulatory leeway than they currently enjoy in respect of many of these matters. Consider the funding issue that the Supreme Court recently resolved in the *Zelman* case. The Court upheld Ohio's voucher program because the cities directed voucher money to parents, not to parochial schools. Under the Court's reasoning, although such indirect financing of religious schools did not violate the Establishment Clause, direct financing would.

From a Rawlsian perspective, however, even if direct federal financing of religious schools constituted a prohibited establishment of religion, it is not at all clear that a local government's direct financing should. The relevant question is whether the subfederal polity's policy threatened well-orderedness or exit. It is not readily apparent how direct funding would implicate these concerns.

This does not mean, however, that local governments populated by a majority of political perfectionists would have a free hand to do as they please in respect of schools under sizing. The requirement of exit, as well as the independent constitutional right of free exercise, would place limitations on local governments' abilities to coerce student participation in such things as prayer. The exit requirement also would impose educational constraints that would be operative in both public and parochial schools. For example, students would have to receive enough information about life outside their community so that they could make informed decisions to remain or leave. Under this approach, although a school curriculum that only taught creation-

197. *Id.* at 648–51.
198. *See id.* at 649 ("our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools... and program of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals" (citations omitted)).
199. This is consistent with current doctrine. *See* Engel v. Vitale, 370 U.S. 421, 424 (1962).
200. For more on this, see Rosen, *Outer Limits*, *supra* note 54, at 1102–04. For the suggestion that this requirement is unrealistic and problematic under some understandings of human nature, see Rosen, *Illiberal Societal Cultures*, *supra* note 130, at 827–28.
ism would be problematic, a curriculum that taught both evolution and creationism might not be.\textsuperscript{201}

On the other hand, it might be the case that the introduction of sectarian materials into a school curriculum would be barred under the requirement of well-orderedness. Those who are not members of the religious majority can be expected to take great umbrage at the introduction of such materials into the classroom,\textsuperscript{202} and the degree of upset may well disrupt the well-orderedness that people in the original position would wish their society to enjoy.\textsuperscript{203} What should drive the legal analysis is not the question of whether a statute does or does not bear a secular purpose—what is asked under today’s blackletter law—\textsuperscript{204} but the statute’s likely impact as regards well-orderedness. In short, sizing would permit some governments (local governments to be sure, and perhaps state governments) to actively advance some nonsecular purposes, but not all. Stated differently, Rawlsian analysis suggests, and sizing can operationalize, the principle that nonestablishmentarianism at each and every level of government is not a requirement of liberal constitutionalism as an \textit{a priori} matter.

One possible consequence of subjecting some local governments to fewer constitutional constraints than state governments would be to set in motion a “procedural” battle over what level of government has legislative jurisdiction over sharply contested political issues. For example, opponents of direct funding may try to centralize education to the state level, hoping that the state government will be subject to stricter constitutional limitations than local governments. This is true, but is not dispositive, for this dynamic is not confined to sizing, but rather is a natural byproduct of a federal system in which the different levels of government have divergent powers. Indeed, the determination of what level of nonfederal government has the power to regulate almost always is a matter of state law,\textsuperscript{205} and battles over which

\textsuperscript{201} This is contrary to contemporary doctrine. \textit{See} Edwards v. Aguillard, 482 U.S. 578 (1987).

\textsuperscript{202} For an example of a state statute that did this very thing, see \textit{School District of Abington Township v. Schempp}, 374 U.S. 203 (1963) (Pennsylvania statute required reading from the New Testament).

\textsuperscript{203} \textit{See supra} pp. 702–03 (discussing the fact that what is required by well-orderedness is a function of citizens’ sensibilities and may change over time).

\textsuperscript{204} \textit{See generally} Koppelmann, \textit{supra} note 38, at 88.

\textsuperscript{205} There are only minimal federal constitutional limitations with regard to how political power is allocated as between the state and substate polities.
governmental level has regulatory power already are common.\textsuperscript{206} Such battles sometimes are explicitly driven by the understanding that one level of government is constitutionally permitted to act in a manner that another level of government cannot.\textsuperscript{207} More generally, insofar as federal systems by definition are political arrangements in which different levels of government have different powers, struggles concerning which level of government has power in regard to a given task would appear to be endemic to the federal political structure. Understanding this reduces, if not eliminates, the concern that sizing may lead to struggles over which level of government ought to exercise regulatory power over contested matters. Such battles, after all, are a natural concomitant of a federal system.

Moreover, it is possible that sizing would not lead to sharpened battles concerning the distribution of power among subfederal polities. Although democratic theory does not offer a way of answering the question of at what level of government a particular issue ought to be resolved,\textsuperscript{208} Rawlsian liberal theory does. As discussed above, it suggests that many issues about which there is sharp dispute in society should be decided differently by different subfederal polities. This is what the person in the original position would select, for she would not wish to create a political structure that would not accommodate her if she happened to be a political perfectionist who was willing to peacefully coexist with other groups (and that accordingly satisfied the requirement of well-orderedness). This is the type of tolerance that Rawlsian liberalism calls for.\textsuperscript{209} Well-orderedness requires that citizens be educated to be tolerant in these ways.\textsuperscript{210} To

\textsuperscript{206} See, e.g., Marshal House, Inc. v. Rent Review and Grievance Bd. of Brookline, 260 N.E. 2d 200 (Mass. 1970) (determining that rent control is to be decided at state-wide rather than municipal-wide level).

\textsuperscript{207} See, e.g., Mun. Bldg. Auth. v. Lowder, 711 P.2d 273 (Utah 1985) (holding that building authority is constitutionally permitted to issue bonds for financing jail without voter approval whereas county may not).

\textsuperscript{208} Resolving the question implicates the following question: of what group must there be a majority to justify a political decision? Stated differently, if "x" represents the number of people in a polity, democratic theory says that political action is justified if the following number of people vote for it: $\frac{1}{2}x + 1$ divided by x. The question that democratic theory cannot answer, however, is the size of the denominator, that is, of x: is it a town, city, or state? The smaller the group of which there must be a majority, the more likely it is that a given group that constitutes a minority of the entire population nonetheless will be able to politically express its will within its local government. See generally ROBERT DAHL, DILEMMAS OF PLURALIST DEMOCRACY 96–100 (1982) (noting the "dilemma" of "a more exclusive versus a more inclusive demos" and concluding that there is no determinate theoretical solution as to how large a democratic polity should be).

\textsuperscript{209} See Rosen, Outer Limits, supra note 54, at 1110–14.

\textsuperscript{210} See id. at 1097.
the extent this education is successful, even citizens who disagree with the policies (such as establishment) that sizing would tolerate at the substate level may restrain themselves from seeking to centralize policymaking at the state level so as to impose their preferred policies on everybody else.

**CONCLUSION**

Law's expressive dimensions may have implications with regard to the sizing of constitutional protections. It is not inevitable that a given constitutional protection must apply in identical ways to the different levels of government in our country's federal system. Expressive analysis shows that the Constitution's social meaning, in respect of the Establishment Clause, varies considerably depending upon which level of government is being constrained. Awareness of what is at stake for adversaries in Establishment Clause conflicts makes it clear that contemporary Establishment Clause doctrine, which makes no distinction between the federal and subfederal governments, generates significant expressive consequences and thereby creates cultural winners and cultural losers. Sizing can reduce these cultural costs and generate more neutral outcomes than is possible under the current doctrine.

Whether sizing is desirable ultimately turns on considerations of political theory. Rawlsian political theory, a promising approach to identifying democratically constitutional governmental institutions, provides a justification for sizing in some instances. Although sizing would allow certain subfederal polities greater leeway than current law permits, it is not the equivalent of wholly freeing states or municipalities from constitutional limitations in respect of Establishment Clause protections. Rawlsian analysis suggests that as regards political perfectionists, the appropriate constitutional limitations are those constraints that are generated by the requirements of well-orderedness and exit. These limitations are more modest than the constraints that typically apply to the federal and subfederal governments under current doctrine.

Finally, it bears mention that although the reader might disagree with either my choice of Rawls, or my interpretation of Rawls for purposes of determining how sizing the Establishment Clause ought to proceed, this Essay's Rawlsian argument in Parts III.B and IV is independent of the analysis that comes before. That is to say, rejection of this Essay's Rawlsian analysis says nothing of the Article's first
four arguments: (1) that there are large-scale cultural winners and losers under contemporary Establishment Clause doctrine; (2) that these cultural consequences have expressivist consequences that *prima facie* may have doctrinal consequences under an expressivist account; (3) that sizing is a plausible option that may alleviate some of current Establishment Clause doctrine's expressivist harms; and (4) that determining whether and how to size ultimately turns on a thick political theory. Much will have been accomplished if this Essay encourages debate on the fifth issue of what thick political theory ought to inform the scope of sizing.