University of Nevada, Reno

Clarifying Establishment Clause Jurisprudence Through Modern Dialectical Plasticity

A dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Judicial Studies

By

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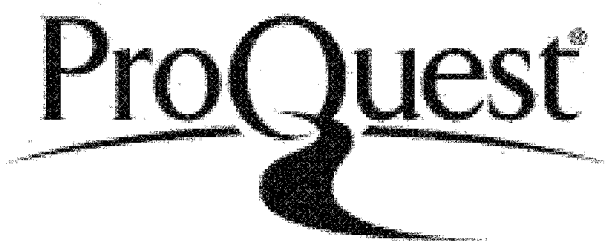

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Dissertation Abstract

This study offers a clarifying explanation of U.S. Establishment Clause jurisprudence from the First Amendment's ratification through the Supreme Court's decision in Pleasant Grove City, Utah v. Summum, 555 U.S.____, 129 S.Ct. 1125 (2009). From inception through present day, the Establishment Clause developed erratically and without a dominating structure, at least when viewed through the common historical and legal lenses. This study, however, takes the unconventional view that the totality of Establishment Clause history is understandable, and actually has an ordered structure, when viewed through the lens of Catherine Malabou's dialectical "plasticity."

This study breaks down Establishment Clause legal history into five periods. The periods are ratification of First Amendment, post-ratification to 1947, the Supreme Court decision in Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947), post-Everson to 2009, and finally the 2009 Supreme Court case of Pleasant Grove City. The leading Establishment Clause interpretative theories for each period are also set out to demonstrate the lack of consistency throughout Establishment Clause history and jurisprudence.

The study then turns to Hegel and the dialectic to interpret Establishment Clause law and history in order to demonstrate an actual underlying structure and process therein. The modern day concept of "dialectical plasticity" as advanced by Catherine Malabou is used. Such plasticity contains three essential capabilities: It has the ability to *receive* form, *give* (differentiate and trans-differentiate) form and *explode* form. These three properties within dialectical plasticity are applied to the above time periods to reveal the underlying structure and process within Establishment Clause law. In the end,

the various and common Establishment Clause interpretive periods are shown to be inconsistent and irreconcilable with each other. The resolution to the internal Establishment Clause conflict and opposition is found in Malabou's understanding of dialectical plasticity's explosive nature.

The dialectical plasticity's explosive ability to resolve conflict and opposition is evidenced in the Pleasant Grove City case. In Pleasant Grove City, the Supreme Court ruptured the barriers of traditional (and conflicting) Establishment Clause reasoning by using the recently minted governmental free speech doctrine to resolve Pleasant Grove City's church and state dilemma created when it accepted and displayed a Ten Commandments monument in the city park.

In the end, the inconsistencies and traditionally erratic Establishment Clause jurisprudence is explained through Malabou's dialectical plasticity. Dialectical plasticity has the ability to resolve opposition and conflict by the process of receiving form, giving form, and, as act of ultimate resolution, exploding form.

Dedicated to
Samuel

Acknowledgments

No project is complete without the acknowledgments. I have read plenty of them over the years and they frequently seemed somewhat formulaic. Many so often reflected the cliché sentiment that "no man is an island." I would read through the acknowledgement sections with a certain degree of eye rolling, to be honest. It was not until I found myself deep into the judicial studies program, and this dissertation in particular, that what was cliché was also true. The graduate school process makes you realize that even with the years of personal effort you could not have done it alone. And, you realize that the acknowledgment page is only place where you can memorialize gratitude for all those that helped and supported you even when you thought yourself an island.

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Judicial Studies, and Director of the Grant Sawyer Center for Justice Studies, University of Nevada, Reno. The other members were Judge Andrea Davis, 4th Circuit Court of Appeals, Dr. Malcom Feeley, Claire Sanders Clements Dean's Chair Professor of Law, University of California, Berkley School of Law, Dr. Piotr Hoffman, Professor, Department of Philosophy, University of Nevada, Reno, and Dr. Clayton Crockett, Associate Professor and Director of the Religious Studies Program, University of Central Arkansas.

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Chapter I: Introduction

While interaction between law and religion spans the course of world history, this study focuses on the American experience with the U.S. Constitution's First Amendment's Establishment Clause. The First Amendment was ratified in 1791. The First Amendment begins with the Establishment Clause that reads: "Congress shall make no law respecting an establishment of religion..." The Establishment Clause generates impassioned debate and fervid litigation over the appropriate, acceptable, and tolerable level to which law and religion combine and diverge. Law and religion, in general, have at times repelled each other and at time attracted each other, and the American experience is no different. To date, political and historical theories, Constitutional analysis, and litigation surrounding the Establishment Clause have not produced a single, coherent approach to resolving the debate over how, and to what extent, law and religion commingle. As a result, the relationship and interaction between law and religion within the Establishment Clause context is erratic, disjointed, and disconnected.

This study offers a clarifying explanation of U.S. Establishment Clause jurisprudence by applying the thoughts and philosophy of George W.F. Hegel, and the present day observations of philosopher Catherine Malabou, to the First Amendment Establishment Clause's jurisprudence and history. The explanation given herein, however, does not clarify or explain Establishment Clause jurisprudence, or church and state relations, in a conventional way. Rather, this study defines and identifies the Hegelian (as advanced by Malabou) dialectic that is working within and throughout the Establishment Clause legal history, and uses the

dialectic's presence, and its "plasticity," to provide a more cohesive understanding of Establishment Clause jurisprudence. In the end, this study utilizes the dialectic's "explosive" plastic nature to show the rupture in Establishment Clause jurisprudence following the 2009 Pleasant Grove City v. Summum Supreme Court decision.

This study is significant, it is argued, because there is not a consistent theme or identity of Establishment Clause jurisprudence. The legal and historical record, even the accurate one, demonstrates that there is little consistency in the application of the Establishment Clause to church and state relations in the United States. From the First Amendment's ratification through 2009, the Establishment Clause's application has produced a rather disjointed and erratic body of law.

The historical and recent developments in Establishment Clause jurisprudence could be perhaps chalked up to the personal policy preferences of the Supreme Court Justices who happen to be sitting at the time any particular case arrives at the Court. Or, Establishment Clause historical developments may be the result of the political tides, prevailing public opinion, or even the generally expected common sense response at the time any such case was decided. Such explanations may account for a particular legal opinion or some limited collection of Establishment Clause decisions. Such non-dialectical explanations, however, do not provide any systematic understanding of Establishment Clause's legal and historical developments. Nor are church and state relations clarified by consigning the Establishment Clause's function and effect to personal policy preferences, political tides, prevailing public opinion, or any historical period's particular appreciation of or requirements for common sense response to immediately pressing matters.

This study seeks to identify a definitive process within Establishment Clause jurisprudence. The definitive process is revealed through the form and function of the dialectic and the dialectic's "plastic" nature as defined by Catherine Malabou. The dialectic's plastic nature is broken down into three essential properties: The capacity to *receive* form; the capacity to *give* (differentiate and trans-differentiate) form, and finally the capacity to be *explosive*. By identifying the dialectic's plastic properties within Establishment Clause history and jurisprudence, this study demonstrates that there is a defined structure to and process within Establishment Clause law.

Furthermore, by identifying the dialectic's plastic properties and their functions, Establishment Clause jurisprudence can be comprehensively understood as something more than just an out growth of ad hoc personal policy preferences, random reflections of public opinion, or a period's sentiments about what is an expected response. Understanding dialectical plasticity within Establishment Clause law and history will provide clarity in this fundamental constitutional area which traditionally lacks clearness.

Additionally, this study is significant, it is argued, because it identifies a step towards harmonizing the legal tension and separation between church and state. Church and state are perceived as opposites that are unable to commingle without becoming oppressive. Hegel, however, believed that such separation caused incompleteness in the body politic as a whole. For Hegel, it was not whether a synthesis between church and state could occur. Rather, his concern was how to unify church and state into a complete polis without causing oppression and tyranny too frequently seen when church and state merge. By identifying the dialectic's

plastic nature operating within Establishment Clause law, a rupture in the "high wall of separation" between church and state becomes apparent. Moreover, it can be seen that this rupture in the barrier between church and state did not result simply from an irregularity in the application of the repeatedly inconsistent Establishment Clause theories. It is argued herein that such rupture in that "high wall" between church and state resulted from the dialectic's explosive plastic nature that was revealed through the Pleasant Grove City v. Summum[1] Supreme Court decision. As a result of the rupture, church and state were able to unite in Pleasant Grove under the new rubric of (governmental) free speech.

Chapter IV begins the main discussion of this dissertation. The main discussion begins, and ends, with the 2009 Pleasant Grove City v. Summum Supreme Court decision. Section 1 of Chapter IV provides the facts of the Pleasant Grove City case. Pleasant Grove City is a recent and significant Supreme Court decision that upheld and approved the city's acceptance and public display of a Ten Commandments monument. The Supreme Court's decision, unlike other similar religiously infused cases, was ostensibly *not* decided on Establishment Clause grounds. It also was not a free exercise case. Rather, the Supreme Court's Pleasant Grove City decision upholding the city's acceptance, endorsement, and display of a Ten Commandments monument was based upon the recently minted governmental free speech doctrine. Section 1 sets out the Pleasant Grove City, Utah v. Summum pertinent facts, but the decision's significance is revealed later through the discussion of the dialectic's plastic nature, and its explosive capacity.

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[1] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1139 (2009)

Under Section 2 of Chapter IV the traditional, transitional, and contemporary definitions of the dialectic are set out. The discussion starts with Plato, moves to Hegel and his twentieth-century expounders, and finally ends with current day philosopher Catherine Malabou. Plato generally understood the dialectic to be a "type of argumentation that proceeds by question and answer, and seek[s] to refute an opponent's viewpoint by revealing logical flaws" in the argument.[2] For Plato, the dialectic represented a greater "philosophical pathway to the highest truth."[3] Hegel, however, changed the way the dialectic is defined.

Section 2 continues the discussion of the dialectic from Hegel through present day philosopher Catherine Malabou. Traditionally, Hegel's dialectical process is defined as a transition in which a lower stage is both annulled and preserved in a higher one (sublimation or dialectical supersedure)[4]. In the mid-twentieth century the dialectic's definition went through a transition where the dialectic came to be seen as a recognition of a negative attribute which causes or produces the opposite, positive attribute.[5] By the end of the twentieth century the dialectic, according to Catherine Malabou, was seen as being plastic in nature and function. This dialectical "plasticity" is ultimately adopted herein to explain and clarify Establishment Clause jurisprudence.[6]

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[2] Michael Allen Fox, *The Accessible Hegel*, 37 (Humanity Books/Prometheus Books 2005).
[3] Michael Allen Fox, *The Accessible Hegel*, 37 (Humanity Books/Prometheus Books 2005).
[4] Charles Taylor, *Hegel* 119 (Cambridge: Cambridge University Press 1975).
[5] Sean Sheehan, *Žižek: A guide for the Perplexed* 58-61 (London: Continuum International Publishing Group 2012).
[6] This study seeks to utilize a contemporary understanding of the Dialectic in order to provide insight into U.S. Establishment Clause jurisprudence. This study does not seek to establish, justify or otherwise prove the dialectic. Additionally, this study does not seek to politicize, either "left" or "right," Hegel as a philosopher or the dialectic as a process.

The end of section 2 discusses Malabou's concept of dialectical plasticity and its three essential properties. First, plasticity designates the capacity of certain materials, such as clay, plaster, and marble, to *receive* form.[7] In mechanics, a material is called *plastic* if it cannot return to its initial form after undergoing a deformation. Plastic material retains an imprint and thereby resists endless polymorphism.[8]

Plasticity's second property, according to Malabou, designates the power to *give* form such as done by the work of a sculptor or a plastic surgeon.[9] This plasticity infers the susceptibility to being imprinted upon,[10] as well as having a quality of resilience.[11] This second property of plasticity also demonstrates a "transformative ability," but again not an infinite modifiability.[12] Moreover, such transformative ability is seen in two ways. The transformation can be a *differentiation* within the same form type. Or, the transformation can be a *trans-differentiation* across similar forms.

Finally, plasticity's third property refers to the "possibility of the deflagration or explosion of every form – as when one speaks of 'plastique,' 'plastic explosive,'... The notion of plasticity is thus situated at both extreme of the creation and destruction

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[7] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[8] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[9] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[10] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[11] Clayton Crockett and Catherine Malabou, *Plasticity and the Future of Philosophy and Theology, Political Theology*, Vol 11.1, 29 (2010).
[12] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008).

of form."[13] Dialectical plasticity defined as explosive is in the end how the Pleasant Grove City v. Summum case is ultimately understood.

Section 3 moves from the philosophical realm to the history of church and state relations and the Establishment Clause. The church and state relations are broken down into several periods. The first period covers the First Amendment and the Establishment Clause's meaning at ratification. Next, the study focuses on Establishment Clause jurisprudence from ratification to the 1947 U.S. Supreme Court decision in Everson v. Board of Education of Ewing.[14] The Everson decision is reviewed and followed by a discussion of Establishment Clause jurisprudence from 1947 up to the 2009 Pleasant Grove City case. That discussion includes the three major Establishment Clause interpretive theories advanced in the case law since the Everson decision. Finally, the Pleasant Grove City case and the advancement of the governmental free speech doctrine are discussed. These historical periods are ultimately tied to together through the dialectic and its "plasticity." It is the "plasticity" that ultimately clarifies, Establishment clause legal developments, and provides structure to the erratically appearing Establishment Clause jurisprudence.

Chapter IV, section 4 is where Establishment Clause law and history meet Malabou's dialectical plasticity. In this section the individual Establishment Clause periods discussed from ratification through the Pleasant Grove City case are analyzed through the lens of dialectical plasticity. Section 4a discusses the First Amendment's ratification and explains ratification in terms of the dialectic's plastic capacity to

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[13] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[14] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).

receive form. That is, the Establishment Clause was created (received its form) from church and state history and the ultimate ratification of the First Amendment.

Section 4b discusses the Establishment Clause's time period from ratification up to the 1947 Supreme Court decision in Everson v. Board of Education of Ewing.[15] In this time period, Establishment Clause law is analyzed through the dialectic's plastic nature in *giving* or *differentiating* form. Also during this time, federal Establishment Clause law was nearly non-existent and the law that was made freed the states from any federal constraints on church and state relations. Dialectical plasticity in this period was characterized by the repeated *giving* of form. The form given, however, was a form that limited federal involvement in local church and state relations.

Section 4c discusses the significance of the Supreme Court's 1947 decision in Everson v. Board of Education of Ewing. The Everson decision changed the dialectic's plastic nature with the *giving* of form. Prior to 1947, the plasticity's *giving* of form was to *differentiate* within the Establishment Clause rubric that state (local) interest was unimpeded by the federal Establishment Clause. Everson changed that rubric. The differentiation that occurred in Everson was the dialectic's plastic ability to *trans-differentiate* form. Everson, while remaining inside the confines of the Establishment Clause, changed the dialectic's giving-of-form's nature from the Establishment Clause having little effect beyond federal government action to having a controlling effect at all levels of church and state relations from the national to the local.

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[15] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).

Section 4d discusses the return of the dialectic's plastic nature to the *giving* of form th the post-Everson through 2009 time period. This section shows that the dialectic's plasticity returned to its ability to give/differentiate form, but in a post-Everson, federally centered direction. The dialectic's post-Everson direction was to give or differentiate form within the Establishment Clause context that deeply involved the federal Establishment Clause in local church and state relations. Post-Everson saw the differentiation of form to enable the federal Establishment Clause to control all aspects of church and state relations regardless of the political level in which they arose.

Section for 4d further discusses the post-Everson rise of three competing federal Establishment Clause theories. The three competing theories are defined as strict separation, accommodation, and neutrality. This section shows how the irreconcilability of these three competing theories resulted in the dialectic's plastic nature turning to its final characteristic - "plastique" as explosive - to resolve the conflict within church and state relations presented in the Pleasant Grove City v. Summum case.

Section 4e of Chapter IV analyzes the Supreme Court's Pleasant Grove City v. Summum decision. This section argues that Pleasant Grove City represents the dialectic's plastic ability and capacity to resolve opposition and conflict through its *explosive* attribute. Recall that the dialectic is a means of providing unity and a pattern of understanding to contradictory world.[16] Plasticity is able to resolve opposites and conflicts because it is able to receive and create form, give (differentiate and trans-differentiate) form, and ultimately explode form. It is this

[16] Michael Allen Fox, *The Accessible Hegel*, 38 (Humanity Books/Prometheus Books 2005).

final attribute, the capacity to explode form, which enables the dialectic through the Pleasant Grove City decision to provide unity and clarity to the otherwise erratic and inconsistent Establishment Clause case law developments and history.

The jurisprudence that developed from the 1947 Everson decision forward through 2009 offered no singular identity for the Establishment Clause and its application to church and state relations. To the contrary, three major competing and irreconcilable Establishment Clause theories arose. Those three competing theories created an environment in which there was no unity and no cohesive pattern of Establishment Clause application and function. The dialectic's plastic nature and capacity to either *receive* form or *give* form (either as differentiation or trans-differentiation) were unable to reconcile the contradictory Establishment Clause jurisprudence produced following the 1947 Everson case. The dialectic's capacity to be explosive, however, reconciled church and state relations in the 2009 Pleasant Grove City decision.

Pleasant Grove City was not plasticity as *receiving* form because it did not create a new Establishment Clause. The Pleasant Grove City decision was not plasticity as *giving* form (either via differentiation or transdifferentiation) because the decision was not based on the known confines of Establishment Clause jurisprudence. Rather, the Pleasant Grove City decision shows the dialectic's plastic capacity to be explosive. Pleasant Grove City was explosive dialectical plasticity because the Court's decision ruptured the traditional Establishment Clause wall of separation between church and state. The rupture occurred when the Court approved the city's official display of the Ten Commandments monument in a city park not on existing

(and irreconcilable) Establishment Clause formulas, but through the newly minted governmental free speech doctrine. It is the resolution of an Establishment Clause dilemma through application of the governmental free speech doctrine that reveals the dialectic's ability to resolve opposition and conflicts through the dialectical plasticity and its *explosive* capacity.

The final section in Chapter IV briefly turns the discussion back to Hegel's concern over the separation of church and state. Section 4f revisits Hegel's comments on the separation of church and state being a fracture in the polis, but accepting that fracture as necessary to avoid political fear and oppression. While the Pleasant Grove City decision united church and state in the city park, was it able to do so without fear or political tyranny? The answer is left to the future, but the future will no doubt be a product of dialectical plasticity coming to bear on the people's and government's right to free speech.

The conclusion of this study looks to the future of church and state relations and the Establishment Clause. The dialectic's plastic nature can be seen throughout Establishment Clause history. In 2009, however, the dialectic's plastic nature to either give or receive form was not able to thoroughly resolve the church and state dilemma presented in Pleasant Grove City's official acceptance and display of the Ten Commandments monument. While the competing, modern establishment Clause formulas were certainly available, none would truly resolve the issue over the Ten Commandments. Using the existing formula would only serve to perpetuate the conflict and opposition within Establishment clause jurisprudence. Faced with continued conflict, the dialectic's plastic nature revealed the remaining characteristic

for resolving the irresolvable. At this point the dialectic's plastic nature and capacity to be "explosive" occurred and the traditional notions of Establishment Clause based church and state relations, and the barriers erected therein, were ruptured.

The Supreme Court turned to the recently developed governmental free speech doctrine to resolve the Pleasant Grove Ten Commandments monument Establishment Clause issue. In light of the Establishment Clause's legal history from 1791 to 2009, the Pleasant Grove City decision cannot just be chalked up to momentary political preferences or as just a random individual response to an immediately pressing issue. The irreconcilable issues in church and state relations left the modern Establishment Clause in conflict. That conflict found resolution through the dialectic's plastic nature to be ultimately explosive. The dialectic's explosive capacity to resolve the conflict between church and state in Pleasant Grove City (or at least breach the purportedly high wall of separation between them) outside the known confines of the Establishment Clause opens up new vistas in church and state relations. Now that "governmental free speech" offers an avenue for resolving the traditional dilemma of church and state separation, perhaps the dialectic's plastic capacity to give and receive form will provide new and expanded direction in church and state relations.

Chapter II: Literature Review

No published material is presently known that combines a contemporary, "plastic" Hegelian dialectic with U.S. Constitutional Law in order to explain and provide structure to U.S. Establishment Clause jurisprudence. This study, however, combines several areas that independently are well covered in the literature. The areas reviewed are the traditional, transitional, and contemporary understanding of the dialectic, Hegel's comments on the relationship between church and State, U.S. church and State relations, and case law that cover three historical epochs, the recently minted government free speech theory.

The following literature review will cover the major works and case law in the independent areas listed above. The "Major Dissertation Sections/Structure" section that follows after the "Literature Review" demonstrates how these areas are combined to explain and provide a harmonizing structure to the erratically appearing Establishment Clause jurisprudence.

1. Hegel's Dialectic: Traditional and Contemporary

The first area in this literature review looks at Hegel's dialectic, both the traditional and contemporary understanding. The traditional dialectic of assimilation and transformation is discussed to set the stage for the contemporary understanding of the dialectic. In the end, a contemporary "plastic" dialectic is adopted. The "plastic" described herein, however, is not meant as something cheap or flimsy. Rather, constitutional plasticity describes a legal medium wherein matters are created,

shaped, and sculpted in a manner similar to that in which an artists, sculptors, or composers work with their moldable, "plastic," environment.

Hegel and the dialectic have nearly two centuries of comments. For the purposes of this study, the dialectic's history is brief. Defining the dialectic and the dialectical process will be the primary focus. Hegel's writings, as primary sources, along with the traditional and contemporary commentators are utilized to explain and define the dialectic. The traditional dialectic is discussed in terms of opposites combining and negating to form a new substance. Traditional authors including Charles Taylor, Stephen Houlgate, and Michael Allen Fox will be used to set out the traditional understanding and function of Hegel's dialectic.

For example, Fox states Hegel's dialectic and dialectical process is more than mere contrariness. Hegel's dialectic is defined as a process beyond confrontation and contention.[17] Rather, Hegel's dialectic is founded upon the "dependency and complementarity" of equally important, yet conflicting and opposite appearing, factors.[18] For Hegel's dialectic, the key is what happens to those original yet opposing factors.[19] Rather than being overcome by one or disappearing altogether, the oppositely occurring factors are "transformed by, and assimilated into, the solution, where they remain present as an active ingredient."[20] In other terms, when something becomes dialectically transformed it is said to be "dialectically superseded," and thus surpasses toward a new result in which the old state is implicit

[17] Michael Allen Fox, *The Accessible Hegel*, 41 (Humanity Books/Prometheus Books 2005).
[18] Michael Allen Fox, *The Accessible Hegel*, 41 (Humanity Books/Prometheus Books 2005).
[19] Michael Allen Fox, *The Accessible Hegel*, 43 (Humanity Books/Prometheus Books 2005).
[20] Michael Allen Fox, *The Accessible Hegel*, 43 (Humanity Books/Prometheus Books 2005).

and preserved in the transformation and transfiguration.[21] Similarly, Charles Taylor states "that 'Aufhebung' is the term for the dialectical transition in which the lower stage is both annulled and preserved in a higher one."[22]

But, the dialectic is not to be confused with bad infinite progression.[23] Contemporary philosopher Catherine Malabou equates the dialectic process with plasticity. "Plastic," according to Malabou, "means the quality of a matter, which is at the same time fluid but also resisting. Once formed, it cannot go back to its previous state. For example, when the sculptor is working on the marble, the marble, once sculpted, cannot be brought back to its original state."[24] The dialectic, as plastic, however, stretches and folds not in the "stereotypical supercessionism that is criticized by postmodern theorists wary of its totalizing operation."[25] Dialectic as "plastic" is not an outcome resulting from a "bad infinite."[26] Rather, Malabou asserts that "plasticity" means at once both openness to all kinds of influences as well as resistance.[27] "Things that are plastic preserve their shape, as does the marble in a statue: once given a configuration, it is unable to recover its initial form. 'Plastic', thus, designates those things that lend themselves to being formed while resisting

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[21] Michael Allen Fox, *The Accessible Hegel*, 45, 46 (Humanity Books/Prometheus Books 2005).
[22] Charles Taylor, *Hegel* 119 (Cambridge: Cambridge University Press 1975).
[23] Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction*, 144 (New York: Columbia University Press 2010).
[24] Noelle Vahanian, *A Conversation with Catherine Malabou*, 6 (JCRT 9.1, 2008).
[25] Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction* (Carolyn Shread, trans., Clayton Crockett, foreword, New York: Columbia University Press 2010).
[26] Catherine Malabou, *The Future of Hegel: Plasticity, Temporality and Dialectic* 144 (New York: Routledge 2005).
[27] Noelle Vahanian, *A Conversation with Catherine Malabou*, 6 (JCRT 9.1, 2008).

deformation."[28] "Plasticity's range of meanings," according to Malabou, "is not yet exhausted, and it continues to evolve with and in the language."[29]

Plasticity's range of meaning is stretched herein to Constitutional law and an analysis of the 1st Amendment's Establishment Clause. To date, no literature has been uncovered where Catherine Malabou's "plasticity" is revealed in the Establishment Clause history and jurisprudence.

For this study, the Constitution is neither a living, breathing document nor a political result forever frozen upon being written. Rather, taking cues from Catherine Malabou and Hegel, the Constitution and the Establishment Clause are plastic in nature. The Constitution is open to influences while it resists change; the Constitution preserves its meaning and shape, but, once interpreted, it cannot recover its initial form. This "plastic" reading of the Constitution, and specifically the Establishment Clause, reveals the (contemporary) Hegelian dialectic working in Establishment Clause jurisprudence.

2. Hegel and Church/State Relations

The second area reviewed is Hegel's comments on the relationship between church and the State. This section sets up Hegel's comments on church state relations and shows how that relationship may be understood through the plasticity of the dialectic. While brief, this section looks to Hegel's earlier writings and subsequent commentary on church/state relations at the level of the ideal. According to Shlomo

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[28] Catherine Malabou, *The Future of Hegel: Plasticity, Temporality and Dialectic* 8, 9 (New York: Routledge 2005).
[29] Catherine Malabou, *The Future of Hegel: Plasticity, Temporality and Dialectic* 9 (New York: Routledge 2005).

Avineri, Hegel saw a problem with vesting the Church with political power.[30] Hegel, however, did not necessarily see the political establishment of the Church as a contradiction.[31] In fact, Hegel, because he saw separation of church and state as a fracture in the polis as a whole, was not philosophically satisfied with separation as a solution to preventing religious oppression via the State.[32] Hegel perceived the ancient polis as having mastered the integration of the religious and the political into one totality.[33] Hegel, in his early theological writings, stated that:

> But if the principle of the state is a complete whole, then church and state cannot be separate...The whole of the church is a mere fragment only when man in his wholeness is broken up into political man and church man.[34]

Moreover, Hegel stated in the Philosophy of Right:

> But if religion be religion of a genuine kind, it does not run counter to the state in a negative or polemical way like the kind just described. It rather recognizes the state and upholds it, and furthermore it has a position and an external organization of its own. The practice of its worship consists in ritual and doctrinal instruction, and for this purpose possessions and property are required, as well as individuals dedicated to the service of the flock. There thus arises a relation between the state and the church. To determine this relation is a simple matter. In the nature of the case, the state discharges a duty by affording every assistance and protection to the church in the furtherance

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[30] Shlomo Avineri, *Hegel's Theory of the Modern State* 30 (Cambridge University Press 1972, 1994).
[31] Shlomo Avineri, *Hegel's Theory of the Modern State* 31 (Cambridge University Press 1972, 1994).
[32] Shlomo Avineri, *Hegel's Theory of the Modern State* 30, 32 (Cambridge University Press 1972, 1994).
[33] Shlomo Avineri, *Hegel's Theory of the Modern State* 30 (Cambridge University Press 1972, 1994).
[34] Shlomo Avineri, *Hegel's Theory of the Modern State* 32 (Cambridge University Press 1972, 1994). See also G.W.F. Hegel, *Early Theological Writings* (T.M. Knox, ed., Philadelphia: University Press 1975).

> of its religious ends; and, in addition, since religion is an integrating factor in the state, implanting a sense of unity in the depths of men's minds, the state should even require all its citizens to belong to a church – a church is all that can be said, because since the content of a man's faith depends on his private ideas, the state cannot interfere with it.[35]

While Hegel settled on the separation of church and state as an available political remedy for avoiding oppression and maintaining the private affairs of religious belief, he did not demand separation of church and state as a philosophical necessity. In fact, he did not separate the two. Avineri concluded that Hegel's "dream of a kind of political structure that would cater not only to man as an individual but also to man as a social being. The problem for him [Hegel] was how to reach such a synthesis within the conditions of modern world."[36]

This study offers a synthesis between church and state by presenting the Establishment Clause jurisprudence and the rupture therein, as a product of modern dialectical plasticity as expressed by Catherine Malabou. The synthesis between church and state, or at least the beach in the high barrier between them, came in the 2009 Pleasant Grove City v. Summum Supreme Court. As a result of that decision, church and state were commingled in the city public display of a Ten Commandments monument. The city was allowed to accept and publicly display the monument, according to the Supreme Court, because the city had, as a governmental entity, the right of free speech. This breach in the high wall of separation normally seen in Establishment Clause history resulted form the dialectic's plastic capacity to be

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[35] G.W.F. Hegel, *Philosophy of Right* para. 270 (Alan White, ed., Newburyport, MA: Focus Publishing 2002).

[36] Shlomo Avineri, *Hegel's Theory of the Modern State* 33 (Cambridge University Press 1972, 1994).

explosive. Such explosive capacity, it is argued enables the traditional Establishment Clause formulation of the separation of church and state to be ruptured and a new church and state synthesis created through the government free doctrine.

3. U.S. Church/ State History.

The next area reviewed is the history of church and state relations in the United States. That history is broken down into several epochs. The beginning epoch covers the First Amendment and the Establishment Clause's meaning at ratification. Next, the study focuses on Establishment Clause jurisprudence from ratification to the 1947 U.S. Supreme Court decision in Everson v. Board of Education of Ewing.[37] The Everson decision is reviewed and followed by a discussion of Establishment Clause jurisprudence from 1947 up to the 2009 Pleasant Grove City case. That discussion includes the three major Establishment Clause interpretive theories advanced in the case law since the Everson decision. Finally, the Pleasant Grove City case and the advancement of the governmental free speech doctrine are discussed. These three historical periods are ultimately tied to together through the dialectic and its "plasticity." It is the "plasticity" that ultimately harmonizes and provides structure to the erratically appearing Establishment Clause jurisprudence.

3a. Establishment Clause: As Understood at Ratification

Earnest debates continue over what the First Amendment Establishment Clause meant at ratification and what it has meant since. The First Amendment was

[37] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).

ratified in 1791 and addresses religion two ways: It allows for the free exercise of religion and provides a limitation on and a boundary around the government and religion. The Amendment specifically states in pertinent part "Congress shall make no law respecting an establishment of religion..."[38] What the limitations and boundaries are between church and state, and how such limitations and boundaries are determined, is the subject of this study. Some literature surrounding the Establishes Clause expresses absolute certainty in knowing what the drafters of the First Amendment, and those who ultimate ratified it, meant by "establishment" as well as the Establishment Clause's constitutional purpose. Other literature, however, holds there is no single, indubitable Establishment Clause meaning.

What the Establishment Clause originally meant when drafted and ratified, according to Barry Adamson, is clear and unequivocal. Adamson, in his recent book *Freedom of Religion, the First Amendment, and the Supreme Court: How The Court Flunked History*, states that what the Establishment Clause, and "establishment," meant at drafting was a "well understood term of art among the states in the 1700's, yielding a historically and contextually plain purpose, function, and meaning."[39] That "well understood term of art," according to Adamson, led Congress in 1789 to write the Establishment Clause to "thwart a single government-*preferred*, government-*sanctioned*, government-*financed* ecclesiastical institution (or religion, church, denomination, faith, sect, creed, or religious society) from usurping or assuming

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[38] U.S. Constitution, First Amendment, ratified December 15, 1791.
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[39] Barry Adamson, *Freedom of Religion, the First Amendment, and the Supreme Court* 15 (Gretna, La: Pelican Publishing Company 2008)

governmental functions, but nothing more."[40] (Italics original). The history, however, may not be as crystal clear as portrayed by Adamson.

The Establishment Clause very well may have meant different things to the various American Founding Fathers. While the separation between government and religion was thought to be advantageous to both, the drafters of the Bill of Rights may not have worked from a consistent and harmonious Establishment Clause definition (or even assumption) and function.[41] Justice Brennan once stated that "The historical record [about the Establishment Clause] is at best ambiguous, and statements can readily be found to support either side of the proposition."[42] History shows at least three main views were held by the American Founding Fathers at the time the First Amendment was written. Professor Laurence Tribe summarized them as follows:

> At least three distinct schools of thought...influenced the drafters of the Bill of Rights: first, the evangelical view (associated with Roger Williams) that "worldly corruptions...might consume the churches if sturdy fences against the wilderness were not maintain"; second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interest (public and private) "against ecclesiastical depredations and incursions"; and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing the decentralizing power so as to assure competition among sects rather than dominance by any one.[43]

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[40] Barry Adamson, *Freedom of Religion, the First Amendment, and the Supreme Court* 15,17, 19-28 (Gretna, La: Pelican Publishing Company 2008)
[41] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1184 (3rd ed. 2006).
[42] Abington School District v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring); See also, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1184 (3rd ed. 2006).
[43] Laurence H. Tribe, American Constitutional Law 1158-1160 (2nd ed. 1988); See also, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1184 (3rd ed. 2006).

Without a clear, unified history as to what the Establishment Clause meant at drafting and subsequent ratification, the courts were left to fashion judicial decisions and provide a constitutional analysis as cases arose. The courts, however, have not been consistent over time with defining the Establishment Clause's meaning and function.

3b. Establishment Clause: Ratification to 1947

The case law from ratification of the 1st Amendment up to the early 20th Century shows the Supreme Court mostly defined the Establishment Clause to limit the national government in religious activity, but did not impose such limitations on the States. For example, William George Torpey wrote in 1948 that "The Federal Constitution and the Bill of Rights did not nullify the union of church and state which existed in a few instances in 1789. Neither did they forbid any state to establish a religion or to assist a specific sect. The First Amendment forbids only Congressional action."[44] The Supreme Court held as much in 1845 in Permoli v. Municipality No. 1 of the City of New Orleans.[45]

In Permoli, The City of New Orleans passed an ordinance prohibiting anybody from carrying a corpse to a Catholic church, and not to the city obituary chapel, for funeral services. All corpses were to be brought to the city obituary chapel for funerals. Persons who carried a corpse to any place other than the city mortuary, and any priest who exposed any corpse during any Catholic funeral proceedings, faced a $50 fine.[46] The city justified the ordinance on public health

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[44] William George Torpey, *Judicial Doctrines of Religious Rights in America* (Chapel Hill: The University of North Carolina Press 1948).
[45] Permoli v. Municipality No. 1 of the City of New Orleans, 44. U.S. 589 (1845).
[46] The text of the City ordinance is as follows:

concerns. Using the central obituary chapel prevented a corpse from being generally exposed to the public and also allowed city officials to monitor contagious diseases such as yellow fever. It also shut down Catholic funeral services.

On November 9, 1842, the Reverend Bernard Permoli brought the body of the late Louis LeRoy to the Roman Catholic Church of St. Augustin. There Reverend Permoli exposed the body, blessed it, and performed customary Catholic funeral ceremonies.[47] Reverend Permoli was fined $50 for violating the city's ordinance. He appealed the assessment asserting the local city ordinance unlawfully impaired his *nationally* protected religious liberties. The Supreme Court had the final say holding that "The Constitution makes no provisions for protecting the citizens of the respective states in the religious liberties; this is left to the state constitutions and law; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states..."[48] The Court concluded that "In our judgment, the question presented by the record is exclusively of state cognizance, and equally so in the old states and the new ones; and the writ of error must be dismissed."[49] The Permoli decision fell squarely within Constitutional doctrine of the time.

The position that the national Bill of Rights and the national Constitution only concerned national governmental action was the standard judicial doctrine since Chief

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Resolved, that from and after the promulgation of the present ordinance, it shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine of fifty dollars, to be recovered for the use of this municipality, against any person who may have carried into or exposed in any of the aforesaid churches any corpse, and under penalty of a similar fine of fifty dollars against any priest who may celebrate any funeral at any of the aforesaid churches; and that all the corpses shall be brought to the obituary chapel, situated in Rampart street, wherein all funeral rites shall be performed as heretofore. Permoli v. Municipality No. 1 of the City of New Orleans, 44. U.S. 589 (1845

[47] Permoli v. Municipality No. 1 of the City of New Orleans, at 590.

[48] Permoli v. Municipality No. 1 of the City of New Orleans, at 609.

[49] Permoli v. Municipality No. 1 of the City of New Orleans, at 609.

Justice John Marshall rendered the Barron v. Baltimore decision in 1833.[50] There Chief Justice Marshall, in deciding whether local action that deprives a person of property without just compensation could violate the national Constitution's taking clause, held that The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.[51] "If the framers had intended the national Constitution's Bill of rights," the Chief Justice maintained, "they would have declared this purpose in plain and intelligible language."[52]

In addition to Permoli, Michael McConnell cites two additional cases in which establishment clause like issues were present, but which did not have direct or lasting impact on Establishment Clause jurisprudence.[53] McConnell cites Terrett v. Taylor[54] and Vidal v. Girard's Executors.[55] The issue in Terrett was whether the Episcopal Church in Virginia could keep land it acquired prior to the Revolution. The dispute arose after Virginia confiscated the church's rental lands, sold them, and distributed the proceeds to charity. Prior to independence, the Episcopal Church was the established church in Virginia. The church acquired the rental lands as a result of protections afforded through royal charter and incorporation. But, Virginia's post Revolution disestablishment law sought to undue the benefits afforded the previously established church. As result, the lands were confiscated and sold.

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[50] Barron v. Baltimore, 32 U.S. 243 (1833).
[51] Barron v. Baltimore,, at 247. See also Chemerinsky, at 491.
[52] Barron v. Baltimore, at 247. See also Chemerinsky, at 492.
[53] Michael W. McConnell, "The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic," 37 Tulsa L. Rev. 7 (2001).
[54] Terrett v. Taylor, 13 U.S. 43 (1815)
[55] Vidal v. Girard's Executors, 43 U.S. 127 (1844)

The church sued and the Supreme Court, with Justice Story writing for the majority, held that church property had become private property which was vested with the church. Moreover, the State could not come back (after a change in administration) and undo what had been vested previously as a result of a 1784 act that recognized private ownership rights of churches in their properties.

In Vidal, Stephen Girard, the richest man in America upon his death in 1831, left the City of Philadelphia a multi-million trust to help educate poor, white orphan boys. A detailed will set out how the school was to be built and operate. The will further stated that no religious training could take place and visitors for religious reasons were to be excluded.

Girard's surviving brother and nieces, concerned perhaps with missing out on a multi-million dollar inheritance or perhaps bereaved by the exclusion of religious training from the school, sough to break the will. The Supreme Court got the case in 1844 and upheld the will. Particularly, Justice Story reasoned that the testator's desires should be upheld whenever possible and that the will was not necessarily contrary to religious (Christian) principles. Apparently, in a bit of convoluted reasoning, Girard's desire to exclude ministers from the school did not prevent lay persons from providing religious instruction.

Neither Terret nor Vidal was resolved on First Amendment Establishment Clause reasoning. Not that the issues were not present. The Constitutional doctrine of the time perhaps did not allow the issue of the national protections against religious establishment to be raised. Nevertheless, it is clear that the Supreme Court was not

shy about addressing matters involving church and state relations. It just did so without benefit of the First Amendment's Establishment Clause.

The Supreme Court's holdings that confined the national Constitution's effect to national governmental action did not mean, however, that church and the state were destined to be either totally combined or wholly cleaved apart. In fact, how the state and local governments managed church/state relations, as well as how the national government also managed, demonstrates the dialectic's plasticity within the developing Establishment Clause jurisprudence.

While pre-revolutionary America found the church and state combined in the British monarch, immediate post-revolution America began an early trend of separating church and state. That trend developed in state constitutions prior to the adoption of the National Constitution and the subsequent Bill of Rights, and it continued to varying degrees thereafter. According to Torpey, "The early state constitutions displayed a tendency to separate church and state in order that there might be a qualified enjoyment of individual religious freedom..." This separation was, however, unevenly cleaved in the early state constitutions. Torpey notes "The separation of church and state, however, was not complete in the first state constitutions. Legal favoritism for particular types of Christianity persisted in some form in the early documents."[56] In the 1777 Georgia constitution, for example, only Protestants could hold important government office. Similarly, the Massachusetts constitution of 1780 required the governor and high office holders to be Christians.

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[56] William George Torpey, *Judicial Doctrines of Religious Rights in America* 15 (Chapel Hill: The University of North Carolina Press 1948).

Only Virginia and Rhode Island provided full freedom at that time.[57] Many states, including Nevada, limited state funding of religious schools, institutions and causes.[58] Most states, however, viewed separation of church and state as a matter of separating government from some specific religious sects (and some Christians), but not limiting Christianity from government.[59]

Despite the First Amendment's Establishment Clause, there was an early (and continued) degree of commingling of religion with the national level. For example, all presidents, except Jefferson, proclaimed days of prayer and thanksgiving. Congress began (and still begins) sessions with prayer or invocations to God, and furthermore Congress has paid chaplains since 1789. Government paid chaplains also serve in the armed forces and in the prisons.[60] Of course, the U.S. Supreme Court begins its sessions with the cry "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. *God save the United States and this Honorable Court!*" (Emphasis added). The greater amount of commingling of church and state, however, took place on the state and local level. Much of the early state and local litigation was over benefits (stipends)

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[57] William George Torpey, *Judicial Doctrines of Religious Rights in America* 16(Chapel Hill: The University of North Carolina Press 1948).
[58] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 114 (Boulder, CO: Westview Press 3rd ed., 2011).
[59] William George Torpey, *Judicial Doctrines of Religious Rights in America* 17(Chapel Hill: The University of North Carolina Press 1948).
[60] William M. Wiecek, The *Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 257 (New York: Cambridge University Press 2006).

bestowed on government sponsored clergy,[61] and later litigation involving tax exemptions for church properties.[62]

3c. Establishment Clause: Everson v. Board of Education (1947)

The Supreme Court's decision in Everson v. Board of Education was a watershed event both for legal history and constitutional law. From ratification to Everson there was a dearth of Establishment Clause litigation. William Wiecek frankly begins his Establishment Clause analysis in The Oliver Wendell Holmes Devise with "There was no Establishment Clause law to speak of in 1945."[63] Wiecek states further that "The foundational case, Everson v. Board of Education (1947), has, in the opinion of a distinguished constitutional scholar, 'become the most influential single announcement of the American law of church and state.'"[64] The historical back drop set forth in the Everson decision, according to Wiecek, is also an "etiological myth."[65]

The facts in Everson are rather straightforward: New Jersey enacted a law that allowed local school districts to reimburse parents for public transportation (busing) costs incurred with sending (transporting) their children to school. The Ewing Township's Board of Education authorized the local reimbursements to parents of children attending both public and private schools. The private schools included (and

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[61] Philip Hamburger, *Separation of Church and State*, 89-107; 111-129 (Cambridge, MA: Harvard University Press 2002).
[62] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* (Boulder, CO: Westview Press 3rd ed., 2011).
[63] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 250 (New York: Cambridge University Press 2006).
[64] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 250 (New York: Cambridge University Press 2006), citing Arthur E. Sutherland, Establishment According to Engle, 76 Harvard Law Review, 25, 31 (1962).
[65] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution 261* (New York: Cambridge University Press 2006).

were primary made up of) Catholic parochial schools. Everson, in his status as a local taxpayer, objected to the payment being made for busing to and from the Catholic schools. Everson asserted that payments for transportation to and from religious schools violated the national Constitution and specifically the First Amendment's Establishment Clause. The Court traversed a long history of the "high wall of separation of church and state. After a lengthy opinion, however, the Supreme Court held in a 5-4 decision that payment of general transportation cost for students generally, even if such students attended parochial schools, did not violate the Establishment Clause.[66]

Justice Black, in writing for the majority, relied upon history and historical interpretation to ultimately conclude that "the clause against the establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[67] The problem with Justice Black's reliance on history was that it was a "mangled history," and history remade.[68] The Everson critics also contend that Justice Black's historical review was the "falsification of history to reach a result compelled not by historical reality but by their [Justice's] own policy preferences."[69] The Supreme Court, although confident in its Establishment Clause interpretation, decided Everson without the aid of true historical guidance. Without authentic

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[66] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).
[67] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 266 (New York: Cambridge University Press 2006).
[68] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 271 (New York: Cambridge University Press 2006).
[69] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 271 (New York: Cambridge University Press 2006).

historical guidance on the Establishment Clause's meaning, "the Justices concocted a synthetic past."[70]

3d. Establishment Clause: Competing Theories 1947 - 2009

Lacking a clear historical definition of the Establishment Clause's role, and finding that the 14th amendment perhaps changed the Constitutional landscape, the post-Everson Supreme Court decisions suggest three competing approaches in analyzing Establishment Clause issues. The approaches are a strict separation analysis, an accommodation approach, and a neutrality theory. Adherents to a strict separation approach assert government and religion should disassociate from each other to the greatest extent possible. That is, government should be exclusively secular and that religion should be relegated and confined to private society.[71] The strict separation approach adopts the Jeffersonian view that there should be a "wall of separation between Church & State."[72] However, that has not completely happened.

The accommodation approach to church/state relations maintains that "Government should accommodate religion by treating it the same as nonreligious beliefs... the government violates the establishment clause only if it establishes a church, coerces religious participation, or favors some religions over others." [73] The accommodation approach essentially advocates that religion should not suffer any disability in the public realm. Rather, religion should play a role equal to any other

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[70] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 256 (New York: Cambridge University Press 2006).
[71] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1192 (3rd ed. 2006).
[72] Thomas Jefferson, Letter to Messrs. Nehemiah Dodge (January 1, 1802); Chemerinsky, at 1192.
[73] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1197 (3rd ed. 2006).

belief. Anything short of the government formally declaring a state religion, according to those advocating the accommodation approach, is acceptable.[74]

The last approach within the Establishment Clause rubric is a neutrality approach. The neutrality approach essentially requires governmental action be neutral toward religion. Government cannot favor religion over the secular and cannot favor one religion over another.[75] In analyzing whether government action is religiously "neutral," the Court adopts a two step analysis. First, the Court looks to whether the law on its face differentiates among religions. If there is a facially apparent differentiation or discrimination, then an Establishment Clause violation is found and the Court does not need to move to the second test.[76] If there is no facially apparent differentiation, then the Court, when useful, turns to a traditional balancing test.[77]

The balancing test looks to whether the law at issue has a secular purpose, whether religion is advanced or inhibited, and whether the government and religion will become excessively entangled.[78] This balancing test, however, is not the exclusive means by which the U.S. Supreme Court analyzes Establishment Clause issues. There have been a number of instances where Establishment Clause claims have been decided without utilizing this balancing test.[79] Perhaps most notable was Everson wherein the Supreme Court set out a strict separationist position only to

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[74] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1198 (3rd ed. 2006); See also, Michael W. McConnell, Accommodation of Religion, 1995 Sup Ct. Rev. 1, 14.
[75] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1193 (3rd ed. 2006).
[76] Hernandez v. Commissioner, 490 U.S. 680 (1989).
[77] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[78] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[79] Chemerinsky, at 1202. Chemerinsky cites Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994); Lynch v. Donnelly, 465 U.S. 668 (1984), and Marsh v. Chambers, 463 U.S. 783 (1983).

uphold the payments for all private busing costs whether to public or parochial school.[80]

In 1971, The Supreme Court set out a key balancing test in Lemon v. Kurtzman.[81] That decision ushered in a balancing test and neutrality standard for deciding establishment clause issues. (Some Lemon test proponents use the Lemon test to justify strict separation in church/state relations. As we will see, however, the unstable nature of the balancing test provides an explanation for the Court's leap from establishment clause to the free speech.) The Lemon case set out a three pronged test: First, the law must have a secular legislative purpose. Second, the statute's primary principal or primary effect must be one that neither advances nor inhibits religion. Finally, the stature must not foster an excessive government entanglement with religion.[82]

Each prong of the Lemon balancing test has seen substantial litigation. In Wallace v. Jaffree, for example, the Court invalidated a law that authorized public school teachers to invoke a one minute period of silence for meditation or prayer. The Court held that such moment of silence had no secular purpose and was essentially designed to re-introduce prayer in school.[83]

In Estate of Thornton v. Caldor, Court invalidated a Connecticut law prohibiting employers from making persons work on his or her Sabbath. The Court

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[80] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).
[81] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[82] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[83] Wallace v. Jaffree, 472 U. S. 38 (1985). For similar ruling on the secular purpose prong see also Edwards v. Aguillard, 482 U.S. 578 (1987), and McCreary County, Kentucky v. ACLU of Kentucky, 545 U.S. 844 (2005).

held that such law violated the second prong of Lemon in that the law's primary effect was to advance religion.[84]

The Lemon excessive entanglement prong has seen several interpretations come from the Supreme Court. Excessive entanglement is generally thought to mean that generally a State's involvement in religious activities or assistance programs will violate the third prong of Lemon because such involvement "carries the grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[85] The Lemon test's third prong, however, is not easily applied nor ready apparent when applied to particular situations. For example, the Court held in Aguilar v. Felton[86] that government could not pay teachers salaries in parochial school. The fear was that the government would then be required to become more fully entangled as it monitored whether the teachers were teaching religious or secular subjects. A little more than a decade later the court backed away from that position and held that public school teachers may provide remedial education in parochial schools (but still not pay teachers salaries in those schools).[87]

The Lemon balancing test has come under attack in recent years, and is even avoided in Establishment Clause cases.[88] Justice Scalia has called for the Lemon test's demise, but finds the test just will not die. Justice Scalia opined:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late night horror movie that repeatedly sit ups in its grave and shuffles abroad,

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[84] Estate of Thornton v. Caldor, 472 U.S. 703 (1985). *Cf* Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987). For a general discussion of litigation on the three prongs of Lemon see: Chemerinsky, 1202-1206.
[85] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973),
[86] Aguilar v. Fenton, 473 U.S. 373 (1985).
[87] Agostini v. Fenton, 521 U.S. 203 (1997).
[88] See Lamb's Chapel v. Center Moriches Union Free School District (Justice Scalia concurring), 508 U. S. 384, 398 (1993). See also Chemerinsky, 1202, fn 56.

> after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys... Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's reported opinion repeatedly), and a sixth has joined an opinion doing so...The secret of the Lemon test's survival, I think, is that it is easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will...When we wish to strike down a practice it forbids, we invoke it...when we wish to uphold a practice it forbids, we ignore it entirely...Sometimes, we take a middle course, calling its three prongs 'no more than helpful sign-posts...Such a docile and useful monster is worth keeping around, at least in a somnolent state; no one ever knows when one might need him.[89] (Citations omitted).

The competing Establishment Clause theories from Everson through 2009 has resulted in three competing approaches and one significant, although ghoulish, balancing test. It is the confusion caused by these approaches and the undead Lemon test that is what plasticity in the dialectic may clarify and harmonize.

3e. Pleasant Grove City, Utah v. Summum

The facts in Pleasant Grove City are as follows.[90] In 1971 the local Fraternal Order of Eagles in Pleasant Grove City, Utah, donated a Ten Commandments

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[89] Lamb's Chapel v. Center Moriches Union Free School District (Justice Scalia concurring), 508 U. S. 384, 398-399 (1993).

[90] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125 (2009).

monument to the city. The Monument was placed in Pleasant Grove City's Pioneer Park and remained there until it was rediscovered, cleaned up, and rededicated in 2003. At that time, the Summum religious group from Salt Lake City petitioned Pleasant Grove City and requested permission to erect a Summum stone monument.. The Summum wanted to erect a monument that contained its Seven Aphorisms.[91] The city declined the request. The Summum again petitioned the city in 2005 and were again declined. The Summum sued the city claiming a violation of free speech. The Summum contended that their Constitutional right of free speech was violated by accepting the Fraternal Order of Eagles' monument but rejecting the Seven Aphorisms monument.

The Court sided with the city. The Court held that the city could rightfully accept and display the Ten Commandments monument and reject the Seven Aphorisms monument because the city had its own protected right of free speech. The Court stated:

> A government entity "is entitled to say what it wishes," and to select the views that it wants to express. It may exercise this same freedom when it receives private assistance for the purpose of delivering a government-controlled message. This does not mean that there are no restraints on government

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[91] In footnote 1 of the Pleasant Grove City opinion, the Court described the Seven Aphorisms as taken from briefs to the Court: Respondent's brief describes the church and the Seven Aphorisms as follows: "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.' See The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/gnosticism.shtml (visited Aug. 15, 2008). "Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. See The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (visited Aug. 15, 2008)."

> speech. For example, government speech must comport with the Establishment Clause.[92]

And, Justice Scalia added in his concurring opinion that the city did not violate the Establishment Clause in accepting the Eagles' monument and rejecting the Summum's monument. Scalia stated:

> The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate *any* part of the First Amendment.[93]

Pleasant Grove City was not expressly resolved on a First Amendment Establishment Clause analysis. Rather, Pleasant Grove City was ostensibly resolved by applying the Governmental Free Speech Doctrine to the City's acceptance and display of the Ten Commandments monument.

4. Government Free Speech Doctrine

The Pleasant Grove City case was decided on governmental free speech grounds but was litigated in the shadow of the Establishment Clause.[94] The Court held "that the City's decision to accept certain privately donated monuments while rejecting respondent's is best viewed as a form of government speech. As a result, the City's decision is not subject to the Free Speech Clause..."[95] However, Justice Souter noted that "the interaction between the 'government speech doctrine' and

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[92] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1133 (2009)
[93] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1139 (2009)
[94] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125 (2009) (Souter, J. concurring), and 1136 (Scalia, J., and Thomas, J. concurring).
[95] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1138 (2009).

Establishment Clause principles has not, however, begun to be worked out."[96] While the Establishment Clause lurked in the margins of the Pleasant Grove decision, the Justices resolved the case by application of the governmental free speech doctrine.

The governmental speech doctrine essentially holds that the government, as an entity, has the right of free speech. The government, in functioning as such, can say what it wishes to promote its policies. The Supreme Court has held that "We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[97] However, the governmental free speech doctrine is still a recent and under-developed doctrine. In fact, Justice Souter, sitting by designation on the First Circuit Court of Appeals in 2010 noted in Griswold v. Driscoll, 616 F.3d 53 (1st Cir. 2010) that "We need not decide that the Guide is government speech to resolve this case, but we think that while the doctrine is still at an adolescent stage of imprecision, see Summum, 129 S.Ct. 1139 (Stevens, J., concurring)(describing it as "recently minted") it would run counter to the thrust of Supreme Court authority and our own recent decision... to extend Pico's even less precise rule to the drafting and revision of school curriculum."[98] That is to say, the government free speech doctrine is relatively new, un-refined, and imprecise, but that it is a doctrine sufficient enough to mold Establishment Clause decisions – at least in Pleasant Grove City at this point.

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[96] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, (2009) (Souter, J. concurring).
[97] Rosenberger v. Rector and Visitors of Univ. of Va., 515 US 819, 834 (1995). See also Rust v. Sullivan, 500 US 173,194 (1991), and Johanns v. Livestock Marketing Assn., 544 US 550 (2005).
[98] Griswold v. Driscoll, 616 F. 3d 53, 60 fn 6 (1st Cir. 2010).

Chapter III: Methodology

The methodology employed herein will be part legal case study, part historical analysis, and part application of philosophy.

The case study and historical analysis portion groups U.S. Supreme Court cases into historical periods that reflect major themes and turning points in U.S. Establishment Clause history and jurisprudence. The historical Establishment Clause case material is broken down into four main groups. The first legal and historical period includes the history of church and state relations from early colonial times through ratification of the First Amendment and the Establishment Clause therein. The second historical is set out from the 1791 ratification of the First Amendment up to the Supreme Court's decision in Everson v. Board of Education of Ewing.[99] The third legal period includes the time from the 1947 Everson case up to the 2009 Supreme Court decision in Pleasant Grove City v. Summum.[100] The fourth and final period covers the Pleasant Grove City v. Summum decision itself. This historical review shows the erratic journey of Establishment Clause jurisprudence from ratification to Pleasant Grove City.

The application of philosophy portion of this study looks to Hegel's dialectic, as expounded by Catherine Malabou, to resolve the conflicts with Establishment Clause jurisprudence. The study takes Catherine Malabou's position that the dialectic is plastic in nature. Dialectical "plasticity" is then explained and its three essential characteristics are set out. Those characteristics are the dialectic's plastic nature to

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[99] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).
[100] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125 (2009).

receive form, to give form (both in differentiating and trans-differentiating), and to be explosive.

The legal and historical periods set out earlier are then analyzed, explained, and illuminated through Malabou's concepts of dialectical plasticity. Each historical period is analyzed within one of the three characteristics of dialectical plasticity. The ratification period is shown to be a time frame in which dialectical plasticity operated to have church and state relations receive form by way of the Establishment Clause's creation through ratification.

Post-ratification until 1947 shows that the dialectic's plastic nature operated to give (differentiate) form to church and state relations by preventing the Establishment Clause from effecting local church and state interactions. The 1947 Everson case demonstrates dialectical plasticity's ability to give form in a trans-differentiating manner, and redirect the force of the Establishment Clause downward into local church and state relations.

The study ends where it began with the Supreme Court's Pleasant Grove City, Utah v. Summum decision. The dialectic's plastic nature is revealed here in its explosive form. In Pleasant Grove City, the issue over the acceptance of a Ten Commandments monument and its display in a city park was resolved by using the recently minted governmental free speech doctrine and not on Establishment Clause grounds. The use of the governmental free speech doctrine reveals the dialectic's need to resolve conflict between church and state relations even if the old forms are jettisoned and replaced with non-Establishment Clause solutions.

Chapter IV: Dissertation Chapters

1. Case Summary: Pleasant Grove City, Utah v. Summum

The salient facts in Pleasant Grove City are as follows.[101] In 1971 the local Fraternal Order of Eagles in Pleasant Grove City, Utah, donated a Ten Commandments monument to the city. The Monument was placed in the city's municipal park, Pioneer Park. The Ten Commandments monument remained undisturbed in the city's Pioneer Park until it was rediscovered, cleaned up, and rededicated in 2003. At that time, the Summum religious group from Salt Lake City, Utah, petitioned Pleasant Grove City requesting permission to erect a Summum stone monument. The Summum wanted to erect a monument displaying the Summum Seven Aphorisms.[102] Pleasant Grove declined the Summum's request. The Summum again petitioned the city in 2005 and were again denied. Thereafter, the Summum sued Pleasant Grove contending the city violated the Summum's Constitutional right of free speech. The Summum claimed the city violated the Constitution's Free Speech Clause by displaying the Fraternal Order of Eagles' Ten Commandments monument but rejecting the Summum's Seven Aphorisms monument.[103]

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[101] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125 (2009).

[102] In footnote 1 of the Pleasant Grove City opinion, the Court described the Seven Aphorisms as taken from briefs to the Court: Respondent's brief describes the church and the Seven Aphorisms as follows: "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.' See The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/gnosticism.shtml (visited Aug. 15, 2008). "Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. See The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (visited Aug. 15, 2008)."

[103] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)

The Summum filed suit in the U.S. District Court, Utah, seeking to compel Pleasant Grove to accept its Seven Aphorisms monument and display it in the city's municipal park. The Summum also sought a preliminary injunction directing the city to immediately place the Summum stone monument in the park pending the final out come of the litigation.[104] The District Court denied the injunctive relief sought. The Summum appealed to the 10th Circuit Court of Appeals, but limited the appeal to a First Amendment free speech claim.[105]

The 10th Circuit Court panel reversed the District Court's decision. The 10th Circuit held that Pleasant Grove could not reject the Summum monument because both the Ten Commandments monument and the Summum monument were categorized as private, not governmental, speech. The court held that the city's actions unconstitutionally impaired the Summum's private right of free speech. The Circuit Court further held that the city needed a compelling justification, one sufficient to pass a strict scrutiny test, in order for the city to display the Fraternal Order Eagles' Ten Commandment monument and reject the Summum's Seven Aphorisms monument.[106] The 10th Circuit panel concluded the city could not likely overcome a strict scrutiny test and ordered that the city immediately place the Summum Seven Aphorisms monument in the park.[107] The city requested an en banc review, but was denied. The city then sought Supreme Court review and certiorari was granted.[108]

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[104] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[105] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[106] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[107] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[108] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)

The case was argued before the U.S. Supreme Court on November 12th, 2008, and the Court handed down its decision on February 25th, 2009. The Supreme Court sided with Pleasant Grove and reversed the 10th Circuit's ruling. The Supreme Court held that the city could rightfully accept and display the Ten Commandments monument and reject the Summum Seven Aphorisms monument without violating any Summum Constitutional Free Speech rights. The Court held that at issue was not Summum's private speech. Rather, the Court held that the issue was the city's First Amendment protected right of governmental free speech. The Court stated:

> A government entity "is entitled to say what it wishes," and to select the views that it wants to express. It may exercise this same freedom when it receives private assistance for the purpose of delivering a government-controlled message. This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.[109]

Moreover, Justice Scalia added in his concurring opinion that the city did not violate the Establishment Clause in accepting the Eagles' monument and rejecting the Summum's monument. Justice Scalia stated:

> The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate any part of the First Amendment.[110]

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[109] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1133 (2009)
[110] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1139 (2009)

Interestingly, Pleasant Grove City was not expressly resolved on a First Amendment Establishment Clause analysis. Rather, as will be discussed in detail later, Pleasant Grove City was ostensibly resolved by applying the Governmental Free Speech Doctrine to the City's acceptance and display of the Ten Commandments monument.

The Court's rationale in Pleasant Grove City appears to side step the critical, and elephant size, Establishment Clause issue. Place this case in line with the other major Establishment Clause cases and it just reinforces the notion that Establishment Clause jurisprudence has no consistency, no predictability, and is perhaps irreconcilable in its presently understood form. It is argued herein, however, that the Pleasant Grove City case actually provides an opportunity to better understand Establishment Clause jurisprudence and perhaps explain it by revealing the plastic presence of the dialectic therein.

Before demonstrating the "plasticity" within the Pleasant Grove City decision, however, the dialectic requires elaboration and Establishment Clause history needs to be set out. The following sections start with a discussion of the dialectic from the traditional to the most contemporary understanding of the dialectic's plasticity. The study then discusses the Establishment Clause's history and associated major case law that has developed and each major period is placed within the dialectic's "plasticity." A discussion of the Government free speech doctrine follows, and the study concludes with identifying the "plastic" dialectic's explosive quality in Establishment Clause jurisprudence as seen in the Pleasant Grove City decision. The end result will demonstrate, it will be argued, a means by which the Establishment

Clause's discordant jurisprudence can be clarified and harmonized through the dialectic's plastic, explosive nature.

2. The Dialectic: Traditional Aufhebung, a Transition, now Plasticity.

2a. The Dialectic: Traditional Aufhebung.

The dialectic's known use goes as far back as ancient Greece and Plato.[111] In Plato's time the dialectic was generally understood to be a "type of argumentation that proceeds by question and answer, and seek[s] to refute an opponent's viewpoint by revealing logical flaws" in the argument.[112] For Plato, the dialectic represented a greater "philosophical pathway to the highest truth."[113]

Plato, in Book 7 of *The Republic*, briefly explains the dialectic and its purpose:

> And so, Glaucon, I said, we have at last arrived at the hymn of the dialectic. This is that strain which is of the intellect only, but which the faculty of sight will nevertheless be found to imitate; for sight, as you may remember, was imagined by us after a while to behold the real animals and stars, and last of all the sun himself. As so with dialectic; when a person starts on the discovery of the absolute by the light of reason only, and without any assistance of sense, and perseveres until by pure intelligence he arrives at the perception of the absolute good, he at last finds himself at the end of the intellectual world, as in the case of sight at the end of the visible....And do you also agree, I said, in describing the dialecitian as one who attains a

[111] Michael Allen Fox, *The Accessible Hegel*, 37 (Humanity Books/Prometheus Books 2005).
[112] Michael Allen Fox, *The Accessible Hegel*, 37 (Humanity Books/Prometheus Books 2005).
[113] Michael Allen Fox, *The Accessible Hegel*, 37 (Humanity Books/Prometheus Books 2005).

> conception of the essence of each thing?... Dialectic, then, as you will agree, is the coping stone of the sciences[114], and is set over them; no other science can be placed higher – the nature of knowledge can go no further.[115]

By the early 19th century, however, the concept of the dialectic significantly moved away from such an ancient understanding. Perhaps the greatest movement away from the dialectic's ancient definition occurred with G.W. F. Hegel. Hegel moved the dialectic from Plato's pathway to higher truth to a new means of understanding the world. Seeking to harmonize a discordant world, Hegel re-invented and re-defined the dialectic in order to provide unity and a pattern of understanding to a contradictory world.[116]

Traditionally, Hegel's dialectic was viewed as a system wherein conceptions turn through themselves into their opposites.[117] Hegel stated that "The dialectical moment is the self-sublation of these finite determinations on their own part, and their passing into their opposites."[118] Hegel referred to the result of the dialectical process as the "Aufhebung."[119] The Aufhebung has been defined numerous ways, but it has come to mean essentially sublimation or sublation.[120] Some define the dialectic as a transition in which the lower stage is both annulled and preserved in a higher one.[121] For Hegel, the dialectic "is not a relation *between* different things (for example, between an individual and society), but is the process whereby one category or

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[114] For purposes herein, Plato's concept of "the sciences" includes law and jurisprudence.
[115] Plato, *Republic*, 532a, b; 534b (Benjamin Jowett, trans., New York: Barnes & Noble Classics 2004)
[116] Michael Allen Fox, *The Accessible Hegel*, 38 (Humanity Books/Prometheus Books 2005).
[117] Stephen Houlgate, The Hegel Reader 14 (Blackwell Publishing 1998).
[118] Stephen Houlgate, The Hegel Reader 170 (Blackwell Publishing 1998).
[119] Michael Allen Fox, *The Accessible Hegel*, 45 (Humanity Books/Prometheus Books 2005).
[120] Michael Allen Fox, *The Accessible Hegel*, 45 (Humanity Books/Prometheus Books 2005).
[121] Charles Taylor, *Hegel* 119 (Cambridge: Cambridge University Press 1975).

phenomenon *turns into* its own opposite: 'the *dialectical* moment is the self-sublation [Sichaufheben] of these finite determinations on their own part, and their passing into their opposites.'" (Emphasis original).[122] Evidence of the dialectic defined as a passage into a thing's opposite is found throughout language and history. For example:

> ...This dialectic is therefore recognized in many proverbs. The legal proverb, for instance, says, 'Summum ius summa iniuria', which means that if abstract justice is driven to the extreme, it overturns into injustice. Similarly, in politics, it is well known how prone the extremes of anarchy and despotism are to lead to one another. In the domain of individual ethics, we find the consciousness of dialectic in those universally familiar proverbs: 'Pride goes before a fall', 'Too much wit outwits itself', etc. – Feeling, too, both bodily and spiritual, has its dialectic. It is well known how the extremes of pain and joy pass into one another; the heart filled with joy relieves itself in tears, and the deepest melancholy tend in certain circumstances to make itself known by a smile.[123]

Hegel's dialectic has been frequently (and perhaps inaccurately) explained as a three-step process. In the first step a thing (a thesis) is identified as existing in a positive form. Second, the negative of the thing is identified (the antithesis). This antithesis negates and contradicts the original positive thesis. Finally, there is a synthesis where an overcoming of the negative occurs and the positive thesis and the

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[122] *The Cambridge Companion to Hegel and Nineteenth-Century Philosophy* 129-130 (Frederick C. Beiser, ed., Cambridge: Cambridge University Press 2008).
[123] Stephen Houlgate, *The Hegel Reader* 172 (Blackwell Publishing 1998)

negative antithesis "sublate" into a new form wherein the thesis and the antithesis are both individually abolished yet preserved in a new identity.[124]

Hegel's dialectic, however, came to be seen as a process beyond simply confrontation and contention.[125] The post-19th Century dialectic was understood as the "dependency and complementarity" of equally important, yet conflicting and opposite appearing, factors.[126] The dialectic's key was found in what happened to those original yet opposing factors.[127] Rather than being overcome by one or disappearing altogether, the oppositely occurring factors are "transformed by, and assimilated into the solution where they remain present as an active ingredient."[128] In other terms, when something becomes dialectically transformed it was said to be "dialectically superseded," and thus surpasses toward a new result in which the old state was implicit and preserved in the transformation and transfiguration.[129]

The resulting dialectical process, however, is not simply a bad infinite progression.[130] As Hegel's dialectic continued to influence thought into the 20th Century, the Aufhebung evolved to mean something more than to simply suppress and preserve.[131] Since Hegel, the dialectical process has progressed beyond the ancient pathway to higher truth, and beyond the traditionally understood dialectical process by which all differences are overcome and swallowed up into a totalizing new

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[124] Sean Sheehan, *Zizek: A guide for the Perplexed* 59-60 (London: Continuum International Publishing Group 2012).
[125] Michael Allen Fox, *The Accessible Hegel*, 41 (Humanity Books/Prometheus Books 2005).
[126] Michael Allen Fox, *The Accessible Hegel*, 41 (Humanity Books/Prometheus Books 2005).
[127] Michael Allen Fox, *The Accessible Hegel*, 43 (Humanity Books/Prometheus Books 2005).
[128] Michael Allen Fox, *The Accessible Hegel*, 43 (Humanity Books/Prometheus Books 2005).
[129] Michael Allen Fox, *The Accessible Hegel*, 45, 46 (Humanity Books/Prometheus Books 2005).
[130] Catherine Malabou, *The Future of Hegel: Plasticity, Temporality and Dialectic* 144 (New York: Routledge 2005).
[131] Catherine Malabou, *The Future of Hegel: Plasticity, Temporality and Dialectic* 144 (New York: Routledge 2005).

whole.[132] Leading into the 21st Century, Hegel's dialectic continued to influence thought and continued to be re-defined.

2b. The Dialectic: A Transition

The traditional understanding of Hegel's dialectic passed through another transition in the twentieth-century. Leading the way through this transition were philosophers such as Martin Heidegger, Alain Badiou, Alexandre Kojeve, Jacques Derrida, and Slavoj Žižek, to name a few. Alexandre Kojeve stands out among the prominent twentieth-century figures with his lectures on Hegel from 1933 to 1939 in Paris at Ecole Pratique des Hautes Etudes. His major influence was to read Hegel's dialectic as totalizing system. Hegel's view of history, according to Kojeve, was a "...dialectical process in which irrational aspects of experience gradually are rationalized."[133] Moreover, Kojeve read Hegel to mean that history (and history's subject – man) will end when, through the totalizing dialectical process, negation itself is finally negated, and opposition is over come and opposites are reconciled.[134]

Following World War I and War World War II, the perception was that Hegel's positions were a totalizing (and totalitarian) system that simply attempted to rationalize everything. This interpretation continued well in to the late twentieth-century. Philosophers like Emmanuel Levinas, see Hegel as a "totalizing thinker who creates the world in which all things, all forms of otherness are absorbed within the horizon of a single-History without an iota of deviation," and Jacques Derrida, who

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[132] Postmodern Philosophy – A Seminar, http://crestondavis.wordpress.com/2010.
[133] Pierre Macherey, *Hegel or Spinoza* 2, 119(Minneapolis: University Press Minnesota 2011).
[134] Pierre Macherey, *Hegel or Spinoza* 3 (Minneapolis: University Press Minnesota 2011).

thought Hegel was little more than a complete totalizer devoid of the possibility of exteriority and difference.[135]

The perceived problem with the traditional understanding of Hegel's dialectic and its ever onward and upward progression is that such dialectical progression should eventually lead to a point of "Absolute [unconditioned] knowledge."[136] That is, an end point should be reached where the dialectic's onward and upward progression overcomes all contradictions and one arrives at a complete, unconditional understanding of the matter (entity) at hand – A final point of absolute knowledge. Absolute knowledge is defined as the state or time in which an entity's thesis and antithesis (its opposing attributes) unify into an unconditional understanding of the entity's self.[137] Such traditionally understood and described Hegelian dialectical progression, however, leads to a totalizing system wherein all differences are swallowed up, digested, subsumed, and turned into a singular, non-distinct chyme.[138]

The dialectic, at least for the post modern, is not some grand devouring enzyme that breaks down and merges all particulars into an indistinctive, monochromatic mass. Rather, the dialectic came to be seen as something other than this onward and upward movement that ever progressed toward some "absolute knowledge" or some "absolute idea."[139] Hegel's final absolute at the dialectic's end "is not some conclusive meeting of knowledge with truth because," as Slavoj Žižek

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[135] Clayton Crockett, et al, *Hegel & The Infinite, Religion, Politics, and Dialectic* 3,4 (New York: Columbia University Press 2011).
[136] Sean Sheehan, *Žižek: A Guide for the Perplexed* 58 (London: Continuum International Publishing Group 2012).
[137] Postmodern Philosophy – A Seminar, http://crestondavis.wordpress.com/2010.
[138] See Generally: Clayton Crockett, et al, *Hegel & The Infinite, Religion, Politics, and Dialectic* 221-232 (New York: Columbia University Press 2011).
[139] Sean Sheehan *Žižek: A guide for the Perplexed* 58 (London: Continuum International Publishing Group 2012).

postulates, "there is no substantial in-self called Truth and the dialectical process does not lead to a final totality."[140] The dialectic is not just a mere moment of a positive and negative coming together to be subsumed into a new whole. A further reading of Hegel reveals that perhaps the traditionally accepted negative positive collision and subsequent synthesis inaccurately describes the dialectic.

A more contemporary interpretation of the dialectic asserts that such traditionally used positive/negative/over-coming synthesis explanation is misleading.[141] "What is misleading about a thesis/antithesis encounter leading to a synthesis is that it tends to set up the idea of two opposing forces as opposed to the idea of a split being reflected back into something's identity."[142] That places the dialectic as acting between the independently standing, yet opposing, positive and negative (thesis and antithesis) forces. A contemporary view, however, has the dialectic's action resulting from the opposition that resides within the entity and not some opposition that stands in independent and stark contrast to the entity (thesis).[143]

An example of this is viewing the law and a criminal act as not being opposites. What some came to contend is that the crime is a "necessary founding gesture" of the law which makes an act a crime.[144] That is to say, but for an undesirable or unwanted act occurring, there would be no need to pass a Law prohibiting such act's occurrence. The dialectical process is not seen as the

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[140] Sean Sheehan *Žižek,: A guide for the Perplexed* 58 (London: Continuum International Publishing Group 2012).
[141] Sean Sheehan, *Žižek: A guide for the Perplexed* 60 (London: Continuum International Publishing Group 2012).
[142] Sean Sheehan, *Žižek: A guide for the Perplexed* 60 (London: Continuum International Publishing Group 2012).
[143] Sean Sheehan, *Žižek: A guide for the Perplexed* 60 (London: Continuum International Publishing Group 2012).
[144] Sean Sheehan, *Žižek: A guide for the Perplexed* 60 (London: Continuum International Publishing Group 2012).

traditional synthesis of independently standing opposites. The Aufhebung, for Žižek and his adherents, is "a process whereby what is overcome is a one-sidedness which is preserved when the negative assumes a positive identity."[145] Rather than a digestion and sublimation there is "an acknowledgment of a complicity of opposites in one identity."[146] Zizek contends that:

> It is true that one finds in Hegel a systematic drive to cover everything, to propose an account of all phenomena in the universe in their essential structure; but this drive does not mean that Hegel strives to locate every phenomenon within a harmonious global edifice; on the contrary, the point of dialectical analysis is to demonstrate how every phenomenon, everything that happens, fails in its own way, implies a crack, antagonism, imbalance, in its very heart. Hegel's gaze upon reality is that of a Roentgen apparatus which sees in everything that is alive the traces of future death.[147]

Yet perhaps the contemporary assertions by writers such as Žižek provide still an incomplete understanding and description of the dialectic's movement and functioning.

The dialectic's characterization has changed from Plato's truth seeking mechanism, to a totalizing system ending with a point of absolute knowledge, to an understanding that the dialectic is a complicity of opposites in one identity. But the dialectic (its definition and function) has yet again been transformed. The contemporary, leading edge at which the dialectic's modern formulation stands is

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[145] Sean Sheehan, *Žižek: A guide for the Perplexed* 61 (London: Continuum International Publishing Group 2012).
[146] Sean Sheehan, *Žižek: A guide for the Perplexed* 61 (London: Continuum International Publishing Group 2012).
[147] Slavoj Žižek, *Less Than Nothing: Hegel and the Shadow of Dialectical Materialism* 8 (London & New York: Verso 2012).

found in Catherine Malabou's concept of the "plastic" dialectic. It is the dialectical "plasticity" which is ultimately adopted and utilized herein to provide some harmonizing explanation to Establishment Clause jurisprudence.

2c. The Dialectic: A Newfangled "Plasticity."

Throughout history the dialectic's definition and function informed and refined the way the world is understood. For Plato, the dialectic was a pathway to truth. For Hegel, however, the dialectic was, as a general concept, the means by which one accounted for the appearance of and subsequent reconciliation between opposites encountered. For a modern Hegelian like Žižek, the dialectic, at its more controversial boundary, is a means through which a thing's inherent negativity is recognized, and without such recognition, the entity's positive attributes could not be placed or exuded. There remains, however, a further leading edge formulation of the dialectic that is useful (if not exegetic) to ultimately finding some accordance within the fragmented Establishment Clause jurisprudence.

The present-day work of Catherine Malabou moves Hegel and the dialectic into a new (and perhaps 3-dimensional) definition and understanding. Malabou contends that the Hegelian dialectic is best understood as something that is "plastic" as opposed to something that is a "bad infinite progress" towards some absolute ideal.[148] According to Malabou, the dialectic is "plastic" in nature:

> Plasticity is a name for the originary unity of acting and being acted upon, of spontaneity and receptivity. A medium for the

[148] Catherine Malabou, *The Future of Hegel: Plasticity, Temporality and Dialectic* 145 (New York: Routledge 2005).

> differentiation of opposites, plasticity holds the extremes together in their reciprocal action, enabling the function of a structure of anticipation where the three terms of the temporal process are articulated: the originary synthesis, the hypothesis or embodiment of the spiritual, the relation of the moment in time. The meaning of the notion of plasticity is the same as its way of being. Plasticity is what it is, plastic. Indeed, the originary operation of receiving and giving form is not a rigid and fixed structure but an instance which can evolve, which means that it can give itself new forms. The temporal differentiation of plasticity makes possible the historical deployment of the substance-subject.[149]

Malabou envisions "plasticity" essentially three ways: First, plasticity designates the capacity of certain materials, such as clay, plaster, and marble, to *receive* form.[150] According to Malabou:

> In mechanics, a material is called *plastic* if it cannot return to its initial form after undergoing a deformation. Plastic material retains an imprint and thereby resists endless polymorphism. This is the case, for instance, with sculpted marble. Once the statue is finished, there is no possible return to the indeterminacy of the starting point. So plasticity designates solidity as

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[149] Catherine Malabou, *The Future of Hegel: Plasticity, Temporality and Dialectic* 186 (New York: Routledge 2005).
[150] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).

much as suppleness designates the definitive character of the imprint, of configuration, or of modification.[151]

Second, plasticity, according to Malabou, designates the power to *give* form such as done by the work of a sculptor or a plastic surgeon.[152] This plasticity infers the susceptibility to being imprinted upon,[153] as well as having a quality of resilience.[154] But, just as in Constitutional law,".....plasticity is as much a resistance to change as it is an openness to it."[155]

This second element of plasticity demonstrates its "transformative ability," but again not an infinite modifiability.[156] It is a more "open" and "unrestrained definition" of plasticity.[157] Malabou offers the adult stem cell as an example of such power to *give* form, such transformative ability without polymorphism:

> Stem cells exhibit plasticity in a striking and powerful way. Stems cells possess the capacity to differentiate themselves into additional cells of the same kind of tissue, as well as the ability to develop into cells of other types of tissue. Plasticity here refers to the ability of stem cells to shift or modulate between one and the other, between self-differentiation and trans-

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[151] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[152] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[153] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[154] Clayton Crockett and Catherine Malabou, *Plasticity and the Future of Philosophy and Theology, Political Theology*, Vol 11.1, 29 (2010).
[155] Catherine Malabou, Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction xiv (New York: Columbia University Press 2005).
[156] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[157] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008)

> differentiation...This capacity to differentiate and transdifferentiate themselves is called, precisely, stem cell plasticity. [158]

Malabou further states that "According to this meaning, plasticity designates generally the ability to change one's destiny, to inflect one's trajectory, to navigate differently, to reform one's form and not solely to constitute that form as in the 'closed' meaning."[159] Plasticity in this second definition is essentially the ability to *give* form much in the way of a sculptor or plastic surgeon.

Finally, plasticity refers to the "possibility of the deflagration or explosion of every form – as when one speaks of 'plastique,' 'plastic explosive,'... The notion of plasticity is thus situated at both extreme of the creation and destruction of form."[160] Dialectical "plasticity" allows for the creative giving, taking, destruction, and reconstruction of forms rather than the traditionally conceived dialectic that is simply responsive or passive in its operation.[161]

Unlike the pathway to higher truth, or the ever onward and upward progression towards an ideal, or using a negativity (or negative attribute) to positively produce positivity, Malabou contends that "Plasticity or a plastic reading of the Hegelian dialectic involves the stretching and folding of forms of temporality and subjectivity rather than the stereotypical supercessionism that is criticized by

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[158] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008)
[159] Catherine Malabou, *What Should We Do With Our Brains*, 17 (Sebastian Rand, trans. New York: Fordham University Press 2008)
[160] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[161] Clayton Crockett and Catherine Malabou, *Plasticity and the Future of Philosophy and Theology, Political Theology*, Vol 11.1, 29 (2010).

postmodern theorists wary of its totalizing operation."[162] "Above all, plasticity concerns form, a mutability of and in form rather than a limit of form or alternative to form."[163]

"Plasticity" provides a more thorough description and explanation of the dialectic's operation and workmanship in creating a new identity out of the opposites that struggle for singular identity. The dialectic as "plastic" provides insight into and greater understanding of the dialectic's resiliency in managing the collision between positives and negatives, between opposites, and the synthesis that occurs as a result thereof.[164] As Malabou concludes:

> I have now come to see that the concept of plasticity is well suited to describing a certain arrangement of being that I accepted from the start without, however, understanding it. Plasticity refers to *the spontaneous organization of fragments*.....As a concept, plasticity is also endowed with the 'dithyrambic gift for synthesis' enabling me to perceive the form of fragmentation and find my spot in the movement.[165]

Malabou's plastic understanding of the dialectic is also wildly well suited for describing, organizing, and synthesizing the fragments of Constitutional, Establishment Clause law.

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[162] Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction* (New York: Columbia University Press 2005).
[163] Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction* xiv (New York: Columbia University Press 2005).
[164] Clayton Crockett and Catherine Malabou, *Plasticity and the Future of Philosophy and Theology, Political Theology*, Vol 11.1, 29 (2010).
[165] Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction* 7 (New York: Columbia University Press 2005).

3. Examining Church State Relations Through the Dialectic

At this point, following the above discussion on the dialectic's plasticity, the question should be asked as to whether the dialectic is a proper means of exploring, explaining, and expounding upon Establish Clause jurisprudence. The unsurprising answer to that question is "yes," and two reasons stand out. First, the concepts of the church and state, the sacred and the secular, are set up as competing, and often opposing, societal (political) theories. While not always in conflict in all societies, the competition and opposition between church and state is notably present in western civilization. Particularly, such competition and opposition is starkly evident in American Constitutional, Establishment Clause jurisprudence. It is precisely because of the competitive and oppositional nature between church and the state (religion and law) that the dialectical process is a valid, proper means of exploring, explaining and expounding on U.S. Establishment Clause jurisprudence.

Second, Hegel saw a significant issue in the perceived opposition (if not repulsion) between church and the state. Hegel thought such opposition could (should) be reconciled. Hegel remained uncertain, however, as to how that reconciliation could occur. Hegel saw that political theory (and actual government), in order to become truly a complete, unified system, should not separate church from state, religion from government. Hegel, however, understood the impasse caused by the antagonism and opposition found within western civilization's concepts of law and religion. Hegel lamented over whether, and how much, unification could ever be accomplished in the modern world. While not able to articulate just how such church/state impasse could ever be bridged into perhaps a peaceful unification, Hegel

contemplated the possibility of sealing the fissures between law and religion, and church and state. In the end, Hegel's own interest in the potential reconciliation of church and state makes it an idea worth exploring through the dialectic.

The following two subsections explore the two major reasons why the dialectic is a proper area of inquiry when considering the relationship between church and state (law and religion). Overall, this paper argues that the dialectic's ultimate plasticity is an indispensible means of examining and understanding the antagonism found within law and religion and the apparent irreconcilability found in the U.S. Constitution's Establishment Clause law .[166]

3a. Church and State: History, Political Theory, and Challenges

Throughout the world, governmental systems and religious beliefs have separated and merged. The degree to which such separation and merger occurs depends on how political theory either obstructs or facilitates the interaction between law and religion, and church and state. Briefly examining that interaction sheds light on and helps uncover the plastic dialectical process contained within the dynamics of the church and state relationship.

Political theory does not automatically self-identify as religion. A religious doctrine, however, can form a basis on which a political theory is built. Political theory (and the political systems that flow there from) can be directly influenced by theological premises. Political theory can be expressed in terms of, and justified by,

[166] Note: Much of the following two subsections comes from the author's forthcoming publication on Political Theory in *The Encyclopedia of Sciences and Religions*, Springer Publishing. The original research citations were maintained herein however.

the same sources as theological positions. That is, religion and political goals can both be based upon Holy Scripture and divine revelation.

There are many ways in which the major religions of Judaism, Christianity, and Islam (and perhaps minority religions as well), inform political theory. [167] Political theory is informed and impacted by religion through divine revelations, and scriptures or other authoritative writings. Political theory and religion wrestle with the relationship between natural, positive, and divine law, church and state relations, and the duties and obligations of citizens, subjects and rulers, just to name a few areas.[168] Ultimately, it is the interaction within and between these areas that the dialectic's plasticity can be discerned. Each major religion impacts and influences political theory and thus how church and state combine and separate.

For Judaism, political philosophy is derived from the interpretation of the Torah and the Talmudic writings. The political out-growth of Judaic Biblical interpretation assumed a legalistic form. Interpretation of divine revelation provided direction, order, and regulation for government and society. Historically, religion and law, "church" and state, for Judaism, were significantly commingled.

Judaic thought is not the only place where religion directly informs political theories and systems. A venerated Islamic political and religious philosopher, Alfarabi (870-950), worked to harmonize the political thought with Islam. The Quran contains divine law as revealed through the prophet Muhammad. The Quran, in combination with other religious writings, provides the bases for Islamic law or

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[167] Leo Strauss and Joseph Cropsey, *History of Political Philosophy* 318-319 (3rd ed. 1987).
[168] Leo Strauss and Joseph Cropsey, *History of Political Philosophy* 319 (3rd ed. 1987).

Shari'a. The Shari'a serves as a means of applying divine law to followers in many areas of daily life including politics.

Judaism and Islam incorporated divine revelation into nearly all inclusive laws and political order that dominate and regulate all aspects of life, public and private.[169] Christianity, on the other hand, did not. While Judaism and Islam applied and adapted divinely revealed laws into social and political order, Christianity sought to separate and distinguish the earthly from the divine. Christianity did not come as a divine source of comprehensive set of laws and societal regulations. Rather, Christianity came about as a fundamental belief system that left believers largely at liberty to organize their political and social lives around principles that are not necessarily religious.[170] Christianity, however, has been used through history to justify various political ends. Christianity has been used to establish political authority, question authority, engage in war, protest war, justify slavery, and advance freedom and civil rights, to name a few. The Church's canonical laws also provided a fundamental framework for western law.[171]

Political theory can be informed by religion, but political theory usually is not identical to religion. In some instances, political theory and religion are inextricably linked. While political theory typically does not self identify as religion, political theory can be directly and indirectly influenced, informed, and even justified by religion.

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[169] Leo Strauss and Joseph Cropsey, *History of Political Philosophy* 251 (3rd ed. 1987).
[170] Leo Strauss and Joseph Cropsey, *History of Political Philosophy* 251 (3rd ed. 1987).
[171] See generally: Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983), and Harold Berman, *Law and Revolution, II. The Impact of the Protestant Reformations on the Western Legal Tradition* (2006).

There are essentially three models by which political theory and the law address religion's role in society. First, religion and political theory can be one and the same. Second, the political theory can allow religious participation, and governments can make a variety of accommodations for religion in the public sphere. Finally, the political theory can be used to exclude religion entirely from the public and political sphere.

The first example of the political theory and religion combining to be essentially the same is found in countries such as Iran and Afghanistan (before 2001). In Iran, following the 1979 Islamic Revolution, the Ayatollah Khomeini ushered in an Islamic state that replaced the ruling monarch with a theocracy. This Iranian theocracy based its laws, and in particular its criminal codes, on Islamic religious law. In Afghanistan prior to 2001 the Taliban did much the same. The Taliban established an Islamic state based upon a strict use and interpretation of Islamic religious laws. These countries (and 10 others) demonstrate the merger of and fusion between political theory and religion.

The second example of political theory and religion interacting are countries that enforce purely secular laws, but nonetheless establish a state religion. Here there is an incomplete fusion of religion and political theory. England is one such example. In 1689, the Church of England was firmly established and granted a variety of legal and political privileges. The head of this state established religion is the ruling monarch (currently Queen Elizabeth II) who holds the title of Supreme Governor of the Church of England. There are 60 such states in the world where a church is

officially sanctioned by the government.[172] While England and other numerous other countries maintain a governmentally sanctioned church, there is an incomplete fusion between church doctrine and political theory.

A further example of political theory and religion interacting is in the United States. The United States, like England, enforces purely secular law. Unlike England, however, the U.S. does not maintain a state sanctioned or official church. In the U.S., however, political theory and constitutional interpretation allow various amounts of religion in the public realm.

Additionally, religious fundamentalism and the emergence of new minority religions (in the world and in the U.S.) provide yet another layer of church/state relationships for the plastic dialectic to explore and illuminate. Religious fundamentalism is defined as an effort by some religious believers to return to and preserve their distinct religious identity, which identity is threatened by a contemporary and more secularized era.[173] The attempt to return to a philosophical time before modernity may significantly impact political theory when fundamentalists become social and political activists. Such fundamentalists reject the typical models of political participation and discussion. Fundamentalists, having already decided what ought to be, reject out of hand different points of view. In rejecting such dialogue, fundamentalists champion their cause in a more aggressive, dogmatic, and all too frequent violent manner.[174] In avoiding accepted models of political participation, rejecting debate and dialogue, and often resorting to violence, fundamentalists challenge contemporary notions of church/state jurisprudence.

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[172] Ahmet T. Kuru, *Secularism and state Policies Toward Religion*, Appendix A (2009)
[173] John Hoffman and Paul Graham, *Introduction to Political Theory* 389 (2nd ed. 2009).
[174] John Hoffman and Paul Graham, *Introduction to Political Theory* 390, 392 (2nd ed. 2009).

A final, and more contemporary, challenge for understanding and define church/state relations, and particular the American experience therein, is the rise of new minority religions. New minority religions (NMRs) challenge traditional order, norms, and political relationships within a society. NMRs challenge traditional values and separate themselves from dominant religions in society. In doing so, NRMs also challenge the historical hegemony of the dominate church(s) and strain relations with secular governmental entities. While NMRs find it difficult to develop followings in culturally homogenous countries, they do exist. For example, China has been challenged by the presence of the Falun Gong and Japan endured the deadly attacks by Aum Shinrikyo. Some former Communist block countries such as Uzbekistan and Turkmenistan are challenged by various Muslim groups. In China, and other places, the NMRs are not tolerated and are even declared terrorist organizations. Whether any particular NMR is or is not a terrorist organization is beyond the scope here. However, connecting NMRs with terrorism allows for greater control over emerging and minority religious groups. Such characterization of the minority religion also places greater traditional political order over religious freedom generally.[175] While not all NMRs are labeled terrorist organization, NMRs are routinely referred to as "cults" or "sects," which carry a rather negative, if not scary, connotation. New minority religions, whether violent or just different, stand in opposition to the traditional political order. In doing so, new minority religions find themselves often struggling for political freedoms and asking for social tolerance.

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[175] See generally: James T. Richardson, *Religion, Law, and Human Rights,* Religion, 407 Globalization and Culture (2007); James T. Richardson, *Social Justice and Minority Religions: A Sociological Introduction,* 12 Social Justice Research 241 (1999).

Whether NMRs obtain political freedoms or are accepted within a society depends on how each particular society realizes its underlying political theory.[176]

The extent to which law and religion combine, and how one informs the other, provides a compelling reason for seeking out the dialectic's process within church and state relations. Many avenues of exploration exist as there are many religious doctrines and numerous political systems. For purposes herein, however, the ultimate focus will be on how such interaction and participation between law and religion can be explained within the American constitutional experience. The amount of influence and participation religion has in the political sphere in the United States is often in flux – sometimes combing, sometimes separating and sometimes on a collision course. The erratic relationship between church and state (law and religion) can be better understood through the dialectic's plastic nature.

The dialectic, and its "plasticity," is a proper means of exploring, explaining, and expounding upon church and state issues. Historically, as well as today, law and religion inform political theory. The extent to which they combine, separate, or collide, is an area well suited to dialectical inquiry. But, perhaps it is not the only reason for seeking out the dialectical process with the church and state relationship.

In addition to seeing the need for reconciliation in competing and often opposing natures of religious doctrine and political systems, Hegel also reasoned that church and state should not necessarily be or remain separated. Hegel's concern was not in ensuring separation between church and state, but rather Hegel's thought was whether the two could be harmoniously combined into a total system – a true polis.

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[176] See generally: James T. Richardson, *The Sociology of Religious Freedom: A Structural and Socio-Legal Analysis*, 67 Sociology of Religion 271 (Fall 2006).

3b. Separation of Church and State: Hegel's Concern

A second reason for using the dialectic to understand the interaction of church and state, and specifically the law surrounding the U.S. Constitution's Establishment Clause, comes from Hegel himself. According to Hegel expert Shlomo Avineri, Hegel saw a problem with vesting the church with political power.[177] Hegel, however, did not necessarily see the political establishment of the Church as a contradiction.[178] In fact, Hegel, because he saw separation of church and state as a fracture in the polis as a whole, was not philosophically satisfied with separation as a solution to preventing religious oppression via the State.[179] Hegel perceived the ancient polis as having mastered the integration of the religious and the political into one totality.[180] Hegel, in his early theological writings, stated that: "But if the principle of the state is a complete whole, then church and state cannot be separate...The whole of the church is a mere fragment only when man in his wholeness is broken up into political man and church man."[181] Moreover, Hegel stated in the Philosophy of Right:

> But if religion be religion of a genuine kind, it does not run counter to the state in a negative or polemical way like the kind just described. It rather recognizes the state and upholds it, and furthermore it has a position and an external organization of its own. The practice of its worship consists in ritual and doctrinal instruction, and for this purpose possessions and property are

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[177] Shlomo Avineri, *Hegel's Theory of the Modern State* 30 (Cambridge University Press 1972, 1994).
[178] Shlomo Avineri, *Hegel's Theory of the Modern State* 31 (Cambridge University Press 1972, 1994).
[179] Shlomo Avineri, *Hegel's Theory of the Modern State* 32 (Cambridge University Press 1972, 1994).
[180] Shlomo Avineri, *Hegel's Theory of the Modern State* 30 (Cambridge University Press 1972, 1994).
[181] Shlomo Avineri, *Hegel's Theory of the Modern State* 32 (Cambridge University Press 1972, 1994). See also G.W.F. Hegel, *Early Theological Writings* (T.M. Knox, ed., Philadelphia: University Press 1975).

> required, as well as individuals dedicated to the service of the flock. There thus arises a relation between the state and the church. To determine this relation is a simple matter. In the nature of the case, the state discharges a duty by affording every assistance and protection to the church in the furtherance of its religious ends; and, in addition, since religion is an integrating factor in the state, implanting a sense of unity in the depths of men's minds, the state should even require all its citizens to belong to a church – a church is all that can be said, because since the content of a man's faith depends on his private ideas, the state cannot interfere with it.[182]

While Hegel settled on the separation of church and state as an available political remedy for avoiding oppression and maintaining the private affairs of religious belief, he did not demand separation of church and state as a philosophical necessity. Avineri concluded that the "dream of a kind of political structure that would cater not only to man as an individual but also to man as a social being always remained with Hegel. The problem for him [Hegel] was how to reach such a synthesis within the conditions of modern world."[183]

Church and state are perceived as opposites that are unable to commingle without becoming oppressive. Hegel identified the fracture that existed in such perception and further believed that such fracture caused incompleteness in the body politic as a whole. It was not whether a synthesis between church and state could (or should) occur. For Hegel, rather, the concern was how to unify church and state into

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[182] G.W.F. Hegel, *Philosophy of Right* para. 270 (Alan White, ed., Newburyport, MA: Focus Publishing 2002).
[183] Shlomo Avineri, *Hegel's Theory of the Modern State* 33 (Cambridge University Press 1972, 1994).

a complete polis without causing the oppression and tyranny that was seen too frequently when church and state merge. Hegel's own inquiry into how the barrier between church and state could be opened is further reason to explore the dialectic's plasticity within Establishment Clause jurisprudence.

Before proceeding, a brief summary of this study so far is in order. The study began with a summary of the Pleasant Grove City v. Summum case. That case sets the recent U.S. Constitutional boundary in church and state relations. Next, the study examined the definition of the Dialectic from the ancient beliefs to contemporary understandings. Catherine Malabou's leading edge view of the dialectic as "plastic" was ultimately adopted as the standard through which U.S. Establishment Clause jurisprudence might be better understood. The immediately preceding chapter set out two major reasons for examining, exploring and expounding on Establishment Clause law through the dialectic's plasticity. The two reasons justifying seeking the dialectic within church and state relations is that religion frequently conflicts with and sometimes informs political theory, and Hegel himself saw the separation as church and state as a fracture in the philosophical completeness of the body politic. This study now turns to the core discussion.

The following chapter analyzes U.S. Establishment Clause history and law. There are five historical and legal periods discussed: Ratification of the First Amendment's Establishment Clause; from ratification to 1947; the Everson v. Board of Education case; competing theories from 1947 to 2009, and finally a return to the Pleasant Grove City v. Summum decision. Each historical and legal period is set forth and then analyzed through the plasticity of the dialectic. Specifically, each

period is viewed through the dialectic's plastic nature and capacity to create or receive form, give form, and finally to be explosive. The final chapter before the study summary revisits the Pleasant Grove City v. Summum case and looks to bring some harmony and cohesive understanding to Establishment Clause jurisprudence through Malabou's plastic dialectic.

4. U.S. Church/State Relations

4a. Establishment Clause: As Understood at Ratification

There are two time periods prior to the First Amendment's ratification that shed light on the Establishment Clause's meaning and purpose. First, the European experience in the church and state struggles and alliances spilled into early America as exploration and colonization began. That European history is beyond this study's scope, but it is clear that the church and state relations in Europe impacted the exploration, settlement, and ultimate colonization of America.[184] The early 16th century saw the Spanish and Portuguese Catholic rulers expand their influence throughout Latin America and even into what became Florida.[185] Jesuits and other missionaries in the later 16th century went throughout the American frontier.[186] French Canadian Catholics, Dutch Protestants, Scandinavian Lutherans, and German and Dutch Calvinists all extended European power and religious regimes to the New

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[184] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 14 (Boulder, CO: Westview Press 3rd ed., 2011). See also William George Torpey, *Judicial Doctrines of Religious Rights in America* 3-36, generally, (Chapel Hill: The University of North Carolina Press 1948),

[185] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 14-15 (Boulder, CO: Westview Press 3rd ed., 2011).

[186] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 14-15 (Boulder, CO: Westview Press 3rd ed., 2011).

World. Some, however, came as dissenters. For example, the Plymouth Colony (1620) and the Massachusetts Bay Colony (1629) were founded by Puritan dissenters.[187] Early New World history and experiences shows that "At the time when American exploration and colonization began there was practically uniform agreement that the prosperity of both church and state depended upon an intimate relationship between the two. It is not surprising, therefore, to find that the early colonizers on American shores were sympathetic toward the union of church and state."[188] That early close relationship and alliance between church and state was not unwavering.

By the end of the colonization period, Britain was "the most prominent colonizer of all."[189] "By the time of the American Revolution in 1776, there were Anglican churches in every American colony, and every American colony was formally under the jurisdiction (albeit not active rule) of the Bishop of London and the Archbishop of Canterbury."[190] This arrangement, however, did not sit well in the colonies. The colonists grew resentful of the Church of England's refusal to allow other forms of "legal worship, especially in sparsely populated areas, and the Church lost considerable favor within the colonies with its indifference to corruption within the clergy.[191] The British Church also demanded taxes to pay for a church and clergy

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[187] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 15 (Boulder, CO: Westview Press 3rd ed., 2011).
[188] William George Torpey, *Judicial Doctrines of Religious Rights in America* 4 (Chapel Hill: The University of North Carolina Press 1948).
[189] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 15 (Boulder, CO: Westview Press 3rd ed., 2011).
[190] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 15 (Boulder, CO: Westview Press 3rd ed., 2011).
[191] William George Torpey, *Judicial Doctrines of Religious Rights in America* 13 (Chapel Hill: The University of North Carolina Press 1948).

the many colonists did not favor.[192] By the time of the Revolution, the colonists had reached a stage where the separation of church and state was desirable and possible. The colonists' separation from the state sanctioned church could allow for greater and better protected religious liberties.[193] It is from this historical backdrop that post-Revolution America begins to define the roles of church and state, as well as law and religion, in the newly minted United States.

Immediately following the Revolution, but before the ratification of the Constitution, the United States, as a national entity, was governed under the Articles of Confederation. Under the Articles, the states were strongly governed by their individual state constitutions. During this time, church and state relationships were mostly a matter of state constitutional and statutory consideration. The Continental Congress had little involvement with religion. Prior to the Revolution, the Continental Congress opened its sessions with daily prayer, appointed (and paid for) Congressional chaplains, created the Continental Chaplain Corps, and issued the first Thanksgiving Day proclamation.[194] During the Revolution, Congress allowed a conscientious objector status for those with religious objections (pacifist views) toward war, but encouraged such objectors to assume non-combat duties where possible.[195] The Congress also included religious liberty clauses in four international treaties and included religion in the famous 1787 Northwest Ordinance, and of course

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[192] William George Torpey, *Judicial Doctrines of Religious Rights in America* 13 (Chapel Hill: The University of North Carolina Press 1948).
[193] William George Torpey, *Judicial Doctrines of Religious Rights in America* 13 (Chapel Hill: The University of North Carolina Press 1948).

[194] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 72-73 (Boulder, CO: Westview Press 3rd ed., 2011).
[195] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 73 (Boulder, CO: Westview Press 3rd ed., 2011).

religion is invoked in the Declaration of Independence.[196] While the Continental Congress mentioned religion in variety of settings, the states used religion and religious tests in significant ways.

In the early state constitutions, legal favoritism existed toward particular types of Christianity.[197] For example, the following list (originally complied by Sanford H. Cobb) demonstrates how the individual states addressed religious qualifications for public office holders: Virginia and Rhode island allowed full freedom of religion; New Hampshire, Connecticut, New Jersey, Georgia, North Carolina and South Carolina specified Protestantism; Delaware and Maryland insisted on Christianity; Pennsylvania, Delaware, North Carolina, and South Carolina required an acknowledgment that the Bible was produced by divine inspiration; Pennsylvania and Delaware also required a belief in Heaven and Hell; Delaware further required a declaration of faith in the doctrine of the trinity; New York, Maryland, and South Carolina excluded ministers from civil service, and Pennsylvania and South Carolina required belief in one Supreme being.[198] In the time frame from pre-Revolution through governance under the Articles of Confederation, separation of church and state as more separation from various sects of Christianity, but not separation from

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[196] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 75-76 (Boulder, CO: Westview Press 3rd ed., 2011). The Northwest Ordinance included language "No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments," and "Religion, morality and knowledge, being necessary to good government and happiness of mankind, schools and the means of education shall forever be encouraged." (Id at 76).

[197] William George Torpey, *Judicial Doctrines of Religious Rights in America* 15 (Chapel Hill: The University of North Carolina Press 1948).

[198] William George Torpey, *Judicial Doctrines of Religious Rights in America* 16 (Chapel Hill: The University of North Carolina Press 1948), quoting S.H. Cobb, *The Rise of Religious Liberty in America*, 501 (New York: Macmillan Co, 1902).

Christianity.[199] The trend toward complete separation of church and state, however, was under way.[200]

Earnest debate continues over what the First Amendment Establishment Clause meant at ratification and what it has meant since. The First Amendment was ratified in 1791 and addresses religion two ways: It allows for the free exercise of religion and provides a limitation on and a boundary around the government and religion. The First Amendment's Establishment Clause specifically states in pertinent part "Congress shall make no law respecting an establishment of religion..."[201] What limitations and boundaries the Amendment placed on church/state relations upon ratification is still debated. Some literature surrounding the Establishment Clause expresses absolute certainty in knowing what the drafters of the First Amendment, and those who ultimate ratified it, meant by "establishment" as well as the Establishment Clause's constitutional purpose. Other literature, however, holds there is no single, indubitable Establishment Clause meaning.

For example, what the Establishment Clause originally meant when drafted and ratified, according to Barry Adamson, is clear and unequivocal. Adamson believes that the Establishment Clause, and what "establishment," meant at drafting, was a "well understood term of art among the states in the 1700's, yielding a

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[199] William George Torpey, *Judicial Doctrines of Religious Rights in America* 16 (Chapel Hill: The University of North Carolina Press 1948).
[200] William George Torpey, *Judicial Doctrines of Religious Rights in America* 17 (Chapel Hill: The University of North Carolina Press 1948).
[201] U.S. Constitution, First Amendment, ratified December 15, 1791.
"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

historically and contextually plain purpose, function, and meaning."[202] That "well understood term of art," according to Adamson, led Congress in 1789 to write the Establishment Clause to "thwart a single government-*preferred*, government-*sanctioned*, government-*financed* ecclesiastical institution (or religion, church, denomination, faith, sect, creed, or religious society) from usurping or assuming governmental functions, but nothing more."[203] (Italics original). The history, however, may not be that crystal clear.

The Establishment Clause very well may have meant different things to the various American Founding Fathers and drafters of the Bill of Rights. While the separation between government and religion was thought to be advantageous to both, the drafters of the Bill of Rights may not have worked from a consistent and harmonious Establishment Clause definition (or even assumption) and function.[204] U.S. Supreme Court Justice William Brennan once stated that "The historical record [about the Establishment Clause] is at best ambiguous, and statements can readily be found to support either side of the proposition."[205] History shows at least three main views were held by the American Founding Fathers at the time the First Amendment was written. Professor Laurence Tribe summarized them as follows:

> At least three distinct schools of thought...influenced the drafters of the Bill of Rights: first, the evangelical view (associated with Roger Williams) that 'worldly corruptions...might consume the churches if sturdy fences against

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[202] Barry Adamson, *Freedom of Religion, the First Amendment, and the Supreme Court* 15 (Gretna, La: Pelican Publishing Company 2008)
[203] Barry Adamson, *Freedom of Religion, the First Amendment, and the Supreme Court* 15,17, 19-28 (Gretna, La: Pelican Publishing Company 2008)
[204] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1184 (3rd ed. 2006).
[205] Abington School District v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring); See also, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1184 (3rd ed. 2006).

> the wilderness were not maintain;' second, the Jeffersonian view that the church should be walled off from the state in order to safeguard secular interest (public and private) 'against ecclesiastical depredations and incursions;' and, third, the Madisonian view that religious and secular interests alike would be advanced best by diffusing the decentralizing power so as to assure competition among sects rather than dominance by any one.[206]

Without a clear, unified (or perhaps contemporaneously documented) history as to what the Establishment Clause meant at drafting and subsequent ratification, the courts were left to fashion judicial decisions and provide a constitutional analysis as cases arose. The courts, however, have not been consistent over time with defining the Establishment Clause's meaning and function.

What did the Establishment Clause's ratification really demonstrate? Ratification did something more than set up future debate or provide the judiciary with a ready made, never ending dispute. The First Amendment's enactment, including the Establishment Clause language, essentially summed up in a simple, brief clause the sum total of America's experience in church/state relations from exploration, through colonial rule, through revolution, and up to the adoption of the national Constitution. More importantly, however, the First Amendment's ratification, including the Establishment Clause contained therein, was a critical and foundational jurisprudential event that is explainable through the plasticity of the dialectic.

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[206] Laurance H. Tribe, American Constitutional Law 1158-1160 (2nd ed. 1988); See also, Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1184 (3rd ed. 2006).

4a1. Plasticity at Ratification – *Receiving* Form

Recall that the First Amendment and the Establishment Clause did not arise out of a vacuum. Exploration and settlement in the new world saw church and state interests closely aligned. Colonial America experienced an early drifting apart of church and state partnerships only to be re-joined under later, stronger British rule. Post-Revolution, pre-Constitution America trended away from state sanctioned churches, but still folded general Christianity, and based privileges thereon, into state activity. This history culminated into the ratification of the Establishment clause language in 1791. The Establishment Clause's enactment, however, represented something more than just another turn in the church/state relationship continuum. The Establishment's Clause ratification, rather, was a foundational jurisprudential event best explained by the dialectic's plasticity and its capacity to *receive* form.

According to Catherine Malabou, the dialectic is a medium for differentiating opposites and holding extremes together in a reciprocal action. The dialectic accomplishes this action because it is plastic in nature.[207] Something is "plastic" if it cannot return to its initial form. As Malabou states, "Once a statue is finished, there is no possible return to the indeterminacy of the starting point."[208] One element of plasticity is a thing's ability to receive form such as in the way clay or marble have the capacity to be sculpted.[209] Plasticity includes the attribute of being able to receive form, and the capacity to be imprinted upon. Among plasticity's powers is the power

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[207] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[208] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[209] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).

to create form.[210] The dialectic then is able to differentiate opposites and hold extremes together in reciprocal action because of its plastic nature. This dialectical plasticity – the *receiving* of form – is found in the Establishment Clause's ratification.

The Establishment Clause's form as written in the First Amendment is like the starting, squared block of marble on a sculptor's pedestal or a centered ball of potter's clay set on throwing wheel. Although the first form or imprint may be only a squared marble block or a rounded clay ball, the first form has been received. There is form from what was once just mass. The ratification of the First Amendment and the Establishment Clause therein imprinted new form onto and created new structure for church and state relations. The dialectic's plastic nature enabled the totality of the American church and state history to receive new form, to become a new creation, through ratification of the Establishment Clause

At ratification, the Establishment Clause set new form to history and there was no returning to what had been. The Establishment Clause provided a new starting point, a new form, a new block of marble, a proper ball of clay, which would govern the future interactions between church and state (law and religion). What the Establishment Clause meant at ratification was not a clear and unequivocal statement designed to simply prevent a government-preferred ecclesiastical institution from usurping or assuming governmental functions, nor was the Establishment Clause's enactment just another step in a bad infinite progression among the three competing political theories of the times. The Establishment Clause's enactment represented something far greater.

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[210] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).

What the Establishment clause meant at ratification was that the dialectic's plasticity worked to create and provide new, un-retractable shape and form to U.S. church and state relations from which all past relationships were mooted, yet retained, and all future relationships would be governed. Once formed, however, church and state relations did not remain static even though their original form was not recoverable. The state and church continued their interactions and continued to impact each other. Such interactions arose within and from the newly formed Establishment Clause starting point. Although the Establishment Clause's ratification is a moment of dialectical plasticity in *receiving* (creating) form, the church and state interactions following ratification into the 20th century are moments defined by the dialectic's plastic nature for the *giving* (differentiation) of form.

4b. Establishment Clause: Ratification to Everson (1947)

The case law from ratification of the First Amendment up to the early 20th Century shows that the Supreme Court mostly defined the Establishment Clause to limit the national government in religious activity, but did not impose such limitations onto the States. For example, William George Torpey wrote in 1948 that "The Federal Constitution and the Bill of Rights did not nullify the union of church and state which existed in a few instances in 1789. Neither did they forbid any state to establish a religion or to assist a specific sect. The First Amendment forbids only

Congressional action."[211] The Supreme Court held as much in 1845 in Permoli v. Municipality No. 1 of the City of New Orleans.[212]

In Permoli, The City of New Orleans passed an ordinance prohibiting anybody from carrying a corpse to a Catholic church, and not to the city obituary chapel, for funeral services. All corpses were to be brought to the city obituary chapel for funerals. Persons who carried a corpse to any place other than the city mortuary, and any priest who exposed any corpse during any Catholic funeral proceedings, faced a $50 fine.[213] The city justified the ordinance on public health concerns. Using the central obituary chapel prevented a corpse from being generally exposed to the public and also allowed city officials to monitor contagious diseases such as yellow fever. It also shut down Catholic funeral services.

On November 9, 1842, the Reverend Bernard Permoli brought the body of the late Louis LeRoy to the Roman Catholic Church of St. Augustin. There Reverend Permoli exposed the body, blessed it, and performed customary Catholic funeral ceremonies.[214] Reverend Permoli was fined $50 for violating the city's ordinance. He appealed the assessment asserting the local city ordinance unlawfully impaired his *nationally* protected religious liberties. The Supreme Court had the final say, holding that "The Constitution makes no provisions for protecting the citizens of the

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[211] William George Torpey, *Judicial Doctrines of Religious Rights in America* (Chapel Hill: The University of North Carolina Press 1948).
[212] Permoli v. Municipality No. 1 of the City of New Orleans, 44. U.S. 589 (1845).
[213] The text of the City ordinance is as follows:
Resolved, that from and after the promulgation of the present ordinance, it shall be unlawful to carry to, and expose in, any of the Catholic churches of this municipality, any corpse, under the penalty of a fine of fifty dollars, to be recovered for the use of this municipality, against any person who may have carried into or exposed in any of the aforesaid churches any corpse, and under penalty of a similar fine of fifty dollars against any priest who may celebrate any funeral at any of the aforesaid churches; and that all the corpses shall be brought to the obituary chapel, situated in Rampart street, wherein all funeral rites shall be performed as heretofore. Permoli v. Municipality No. 1 of the City of New Orleans, 44. U.S. 589 (1845
[214] Permoli v. Municipality No. 1 of the City of New Orleans, at 590.

respective states in the religious liberties; this is left to the state constitutions and law; nor is there any inhibition imposed by the Constitution of the United States in this respect on the states..."[215] The Court concluded that "In our judgment, the question presented by the record is exclusively of state cognizance, and equally so in the old states and the new ones; and the writ of error must be dismissed."[216] The Permoli decision fell squarely within Constitutional doctrine of the time.

The position that the national Bill of Rights and the national Constitution only concerned national governmental action was the standard judicial doctrine since Chief Justice John Marshall rendered the Barron v. Baltimore decision in 1833.[217] There Chief Justice Marshall, in deciding whether local action that deprives a person of property without just compensation could violate the national Constitution's taking clause, held that The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual states.[218] "If the framers had intended the national Constitution's Bill of rights," the Chief Justice maintained, "they would have declared this purpose in plain and intelligible language."[219]

In addition to Permoli, two additional cases in which establishment clause like issues were present, but which did not have direct or lasting impact on Establishment Clause jurisprudence.[220] The two cases are Terrett v. Taylor[221] and Vidal v. Girard's

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[215] Permoli v. Municipality No. 1 of the City of New Orleans, at 609.
[216] Permoli v. Municipality No. 1 of the City of New Orleans, at 609.
[217] Barron v. Baltimore, 32 U.S. 243 (1833).
[218] Barron v. Baltimore,, at 247. See also Chemerinsky, at 491.
[219] Barron v. Baltimore, at 247. See also Chemerinsky, at 492.
[220] Michael W. McConnell, "The Supreme Court's Earliest Church-State Cases: Windows on Religious-Cultural-Political Conflict in the Early Republic," 37 Tulsa L. Rev. 7 (2001).
[221] Terrett v. Taylor, 13 U.S. 43 (1815)

Executors.[222] The issue in Terrett was whether the Episcopal Church in Virginia could keep land it acquired prior to the Revolution. The dispute arose after Virginia confiscated the church's rental lands, sold them, and distributed the proceeds to charity. Prior to independence, the Episcopal Church was the established church in Virginia. The church acquired the rental lands as a result of protections afforded through royal charter and incorporation. But, Virginia's post-Revolution disestablishment law sought to undue the benefits afford the previously established church. As result, the lands were confiscated and sold.

The church sued and the Supreme Court, with Justice Story writing for the majority, held that church property had become private property which was vested with the church. Moreover, the State could not come back (after a change in administration) and undo what had been vested previously as a result of 1784 act that recognized private ownership rights of churches in their properties.

In Vidal, Stephen Girard, the richest man in America upon his death in 1831, left the City of Philadelphia multi-million trust to help educate poor, white orphan boys. A detailed will set out how the school was to be built and operate. The will further stated that no religious training could take place and that visitors for religious reasons were to be excluded.

Girard's surviving brother and nieces, concerned perhaps with missing out on a multi-million dollar inheritance or perhaps bereaved by the exclusion of religious training from the school, sough to break the will. The Supreme Court got the case 1844 and upheld the will. Particularly, Justice Story reasoned that the testator's

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[222] Vidal v. Girard's Executors, 43 U.S. 127 (1844)

desires should be upheld whenever possible and that the will was not necessarily contrary to religious (Christian) principles. Apparently, in a bit of convoluted reasoning, Girard's desire to exclude ministers from the school did not prevent lay persons from providing religious instruction.

Neither Terret nor Vidal was resolved expressly on First Amendment Establishment Clause reasoning. Not that the issues were not present. The Constitutional doctrine of the time perhaps did not allow the issue of the national protections against religious establishment to be raised. Nevertheless, it is clear that the Supreme Court was not shy about addressing matters involving church and state relations. It just did so without benefit of the First Amendment's Establishment Clause.

The Supreme Court's holdings that confined the national Constitution's effect solely to national governmental action did not mean, however, that church and the state were destined to be either totally combined or wholly cleaved apart. In fact, how the state and local government managed church/state relations, as well as how the national government also managed, demonstrates the dialectic's plasticity within the developing Establishment Clause jurisprudence.

While pre-revolutionary America found the church and state combined in the British monarch, immediate post-revolution America began an early trend of separating church and state. That trend developed in state constitutions prior to the adoption of the National Constitution and the subsequent Bill of Rights, and it continued to varying degrees thereafter. According to Torpey, "The early state constitutions displayed a tendency to separate church and state in order that there

might be a qualified enjoyment of individual religious freedom..." This separation was, however, unevenly cleaved in the early state constitutions. Torpey notes "The separation of church and state, however, was not complete in the first state constitutions. Legal favoritism for particular types of Christianity persisted in some form in the early documents."[223] In the 1777 Georgia constitution, for example, only Protestants could hold important government office. Similarly, the Massachusetts constitution of 1780 required the governor and high office holders to be Christians. Only Virginia and Rhode Island provided full freedom at that time.[224] Many states, including Nevada, limited state funding of religious schools, institutions and causes.[225] Most states, however, viewed separation of church and state as a matter of separating government from some specific religious sects (and some Christians), but not eliminating Christianity from government.[226]

Despite the First Amendment's Establishment Clause, there was an early (and continued) degree of commingling of religion and government at the national level. For example, all presidents, except Jefferson, proclaimed days of prayer and thanksgiving. Congress began (and still begins) sessions with prayer or invocations to God, and further Congress has paid chaplains since 1789. Government-paid chaplains also serve in the armed forces and in the prisons.[227] Of course, the U.S.

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[223] William George Torpey, *Judicial Doctrines of Religious Rights in America* 15 (Chapel Hill: The University of North Carolina Press 1948).
[224] William George Torpey, *Judicial Doctrines of Religious Rights in America* 16(Chapel Hill: The University of North Carolina Press 1948).
[225] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* 114 (Boulder, CO: Westview Press 3rd ed., 2011).
[226] William George Torpey, *Judicial Doctrines of Religious Rights in America* 17(Chapel Hill: The University of North Carolina Press 1948).
[227] William M. Wiecek, The *Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 257 (New York: Cambridge University Press 2006).

Supreme Court begins its sessions with the cry "The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. *God save the United States and this Honorable Court!*" (Emphasis added). The greater amount of commingling of church and state, however, took place on the state and local level. Much of the early state and local litigation was over benefits (stipends) bestowed on government sponsored clergy,[228] and later litigation involved tax exemptions for church properties.[229]

The Establishment Clause set new form to church and state relations. That new form was a product of the dialectic's plasticity in the nature of *receiving* and creating form. The receiving of form defined as the capacity to be imprinted upon, or configured, or modified. Once created, however, the new form evidences dialectical plasticity in the manner of *giving* form. Such dialectical plasticity is seen in a form's transformability (but not infinite modifiability) and its ability to displace, transform, or differentiate from the original casting. The plasticity as *giving* of form characterizes post-ratification Establishment Clause jurisprudence to the mid 20th century.

4b1. Plasticity: Ratification to 1947– *Giving/Differentiation* of Form

Just as the dialectic's plasticity revealed the Establishment Clause's meaning at ratification, the subsequent legal and historical developments in church and state

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[228] Philip Hamburger, *Separation of Church and State*, 89-107; 111-129 (Cambridge, MA: Harvard University Press 2002).
[229] John Witte, Jr., and Joel A. Nichols, *Religion and the American Constitutional Experiment* (Boulder, CO: Westview Press 3rd ed., 2011).

relations from the First Amendment's ratification up to 1947 are also explainable through the dialectic's plastic nature. Plasticity's nature during this period, however, differs from plasticity's power to create form through ratification. Specifically, Establishment Clause law and history from ratification to 1947 reflects the dialectic's plasticity as defined as the capacity to differentiate or be given form.[230]

The concept of differentiation or giving form, according to Malabou, is like the sculptor's or plastic surgeon's work.[231] This is not to be confused with the plasticity's formational (Creational) power and effect at ratification. At ratification, as discussed above, plasticity was a means for church and states relations to receive form (receiving defined as the capacity to retain imprints and not remain a formless, shapeless mass) and that form was the Establishment Clause itself.

From ratification forward, plasticity's nature turned from the capacity to create and receive form to the capacity and susceptibility of being imprinted upon or the giving of form. Plasticity in this sense is about a metamorphosis from an already existing identity.[232] This plasticity is a transformative ability, but not endless polymorphism. It is the ability to inflect a trajectory or navigate differently. It is the power and ability to differentiate within the same things. Recall Malabou's stem cell example. Stem cell plasticity is just this type of plasticity. Stem cells have the ability and capacity to differentiate themselves into additional cells of the same kind of

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[230] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008.
[231] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[232] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).

originating tissue. This differentiation aptly describes Establishment Clause law and history from ratification through the mid-20th century.

Judges (the law's equivalent to sculptors and surgeons) imparted imprints, configurations, and modifications on the initial Establishment Clause form through the judicial decision making process. However, the post-ratification to 1947 time frame saw the Establishment Clause receive little imprinting, configuring, or modifying by the federal courts for federal purposes. The block of marble that was the Establishment Clause remained relatively un-sculpted on the federal side of the block. The federal Establishment Clause stem cell, if you will, continued to replicate itself into the same originary cellular tissue that maximized state involvement and minimized federal concern in church and state relations. Minor federal modifications, however, did occur. These minor modifications included the federal government hiring chaplains, invoking a national day of prayer and thanksgiving, as well as having the Supreme Court open its sessions with a plea for God to save "this honorable Court."

From a federal perspective, the national Constitution's Establishment Clause case law and legal history following ratification through the mid 20th century was essentially a matter of deferring to the various state constitutions. Cases such as Permoli, Vidal, Terrett, and Barron confirm that federal position. This deferment to the state constitutions, however, is not a by-product of the Court's inability (or lack of desire) to deal with church and state relations. Rather, the deferment to the states is in essence the dialectic's plastic transformative ability to displace or transform the mark or the imprint made at the time the Establishment Clause was ratified.

Malabou contends that plasticity's second major attribute is the ability to turn one's destiny, to inflect one's trajectory, to navigate differently, and to reform one's form.[233] Malabou's stem cell example makes the point. For Malabou, the stem cell has the capacity to differentiate into cells of the same tissue. (The stem cell can also change into types of cells specific to although tissue, but such capacity to "trans-differentiate" is discussed below). Church and state relations from the Establishment Clause's ratification until the 1947 Everson decision were governed by the dialectic's plastic ability to differentiate itself – to inflect the trajectory and to navigate differently. Once set, the Establishment Clause form could neither return to its pre-ratification form, but still remained resistant to dramatic change. In this posture, the dialectic's response to events requiring application or consideration of the Establishment Clause was to differentiate the church and state relations from federal concerns to state concerns. Still within the realm of church and state relations, but inflecting a trajectory or navigating the path that maintained a continued and relatively minor federal presence in Establishment Clause considerations. The dialectic's plasticity, defined as the ability to differentiate within the same form, allowed the federal Establishment Clause to remain an under-whelming federal force in church and state relations for nearly a century and a half. This lack of federal presence enabled church and state relation to inflect a trajectory away from federal dominance to local and state control. The dialectic's plasticity characterized as the ability to give (differentiate) form allowed the federal courts to limit the

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[233] Catherine Malabou, *What Should We Do With Our Brains*, 17 (Sebastian Rand, trans. New York: Fordham University Press 2008).

Establishment Clause's national scope and thereby enable the form of church and state relationship to be governed on a state (local) level.

The Establishment Clause's trajectory was dramatically changed in 1947 by the Supreme Court's decision in Everson v. Board of Education of Ewing.[234] At ratification, plasticity displayed its ability and capacity to *receive* form. Post-ratification to 1947 demonstrated the dialectic's plastic nature in *giving* and *differentiating* form by narrowing the Establishment Clause's federal scope and thus allowing church and state relations to be conducted on the state and local level. In 1947, dialectical plasticity revealed another characteristic. The Supreme Court's decision in Everson demonstrated the dialectic's plasticity not only in the ability to differentiate form but also in its capacity to *trans-differentiate* such form.

4c. Establishment Clause: Everson v. Bd. Education

The Supreme Court's decision in Everson v. Board of Education was a watershed event both for legal history and constitutional law. From ratification to Everson there was a dearth of Establishment Clause litigation. William Wiecek frankly begins his Establishment Clause analysis in The Oliver Wendell Holmes Devise with "There was no [federal] Establishment Clause law to speak of in 1945."[235] Wiecek states further that "The foundational case, Everson v. Board of Education (1947), has "become the most influential single announcement of the

[234] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).
[235] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 250 (New York: Cambridge University Press 2006).

American law of church and state."[236] Unfortunately the historical back drop set out by the Justices in the Everson decision was an "etiological myth."[237]

The facts in Everson are rather straightforward: New Jersey enacted a law allowing reimbursements by local school districts parents for public transportation (busing) costs incurred with sending their children to school. The Ewing Township's Board of Education authorized the local reimbursements to parents of children attending both public and private schools. The private schools included (and were primary made up of) Catholic parochial schools. Everson, in his status as a local taxpayer, objected to the busing cost reimbursements being given for busing children to and from the Catholic schools. Everson asserted that payments for transportation to and from religious schools violated the national Constitution and specifically the First Amendment's Establishment Clause. The Court traversed a long and inaccurate history of the "high wall of separation between church and state. After a lengthy opinion, however, the Supreme Court held in a 5-4 decision that payment of general transportation cost for students generally, even if such students attended parochial schools, did not violate the Establishment Clause.[238]

Justice Black, in writing for the majority, relied upon history and historical interpretation to ultimately conclude that "the clause against the establishment of

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[236] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 250 (New York: Cambridge University Press 2006), citing Arthur E. Sutherland, Establishment According to Engle, 76 Harvard Law Review, 25, 31 (1962).
[237] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution 261* (New York: Cambridge University Press 2006).
[238] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).

religion by law was intended to erect 'a wall of separation between Church and State.'"[239] Justice Black stated:

> The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between Church and State.[240]

Despite this purported high "wall of separation between Church and State", the majority opinion held that the local option to pay for transportation costs for all students, whether attending public or religious schools, was constitutional.

Perhaps the more important result from Everson decision was that for the first time the First Amendment's Establishment Clause was applied to and controlled state actions. The problem with the opinion, however, was that it "mangled history" and

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[239] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 266 (New York: Cambridge University Press 2006).
[240] Everson v. Board of Ed. of Ewing, 330 U. S. 15-16 (1947).

remade a century and a half of history to bring the Establishment Clause to bear on the states.[241] The Everson critics further contend that Justice Black's historical review was the "falsification of history to reach a result compelled not by historical reality but by their [Justice's] own policy preferences."[242] Although confident in its Establishment Clause interpretation, the Supreme Court decided Everson without the aid of true historical guidance. In rendering the decision, "the Justices concocted a synthetic past."[243] Through that synthetic past, the Justices altered, revamped, and remolded how the Establishment Clause functioned.

The Everson decision was a watershed case in terms of federal versus state (local) control over church and state relationships. While generally understood as further advancement in the expanding incorporation doctrine (based on a synthetic history), the Everson decision cannot be fully appreciated without understanding how the dialectic's plasticity informed the decision.

Dialectical plasticity appears in Everson decision not as the power of creation as seen at ratification. Nor was it plasticity defined as having the ability to simply differentiate itself as it had done for nearly a century and a half preceding Everson. Dialectical plasticity in the Everson case was about significantly *giving* form to Establishment Clause jurisprudence through dialectical plasticity functioning as *trans-differentiation.*

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[241] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 271 (New York: Cambridge University Press 2006).
[242] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 271 (New York: Cambridge University Press 2006).
[243] William M. Wiecek, *The Oliver Wendell Holmes Devise, Volume XII The Birth of the Modern Constitution* 256 (New York: Cambridge University Press 2006).

4c1. Plasticity with Everson – *Giving/Trans-Differentiation* of Form

From ratification of the Bill of Rights in 1791 to the Everson decision in 1947, the dialectic's plastic nature defined and shaped church and state relations. The Establishment Clause's adoption revealed dialectical plasticity's creational power and formational ability in church and state relations. This creational and formational ability demonstrates the church and state relationship's capacity to receive form as the Establishment Clause. Following the Establishment Clause's creation, dialectical plasticity moved from functioning as a creational power to working as a means to give or differentiate form to the newly existing Establishment Clause. In this after-creation role, plasticity gave or differentiated Establishment Clause jurisprudence by effectively limiting federal involvement so as not to reach the local church and state relationships. During this time, plasticity gave form to Establishment Clause jurisprudence much in the same manner that a stem cell differentiates into the same tissue. From 1791 to 1947, church and state relations were born from tissue that offered little federal involvement and the subsequent developments (differentiations) followed that same pattern for nearly a century and a half. That dramatically changed, however, with the Everson decision.

Catherine Malabou set out essentially three types of dialectical plasticity. Plasticity can first be defined as a things ability to be formed (receiving form). Second, plasticity is also a things capacity or susceptibility to formation (given form). Finally, although not yet discussed, is plasticity's explosive characteristic. The Everson decision exemplifies plasticity as an existing thing's ability to be formed.

For Malabou, there are two possibilities to the plasticity's capacity or susceptibility to be given form.

From ratification to Everson, plasticity embodied the Establishment Clause's capacity to give or *differentiate* form whereby church and state relations were replicated with little federal authority exerted into local church and state relations. The Everson decision, however, took on the second plastic characteristic found in a things capacity and susceptibility to be *given* form. This second characteristic is plasticity's ability to *trans-differentiate* among forms. While still within the realm of plasticity as receiving form, *trans-differentiation* describes a things capacity to develop into other forms, but not become randomly polymorphic or a new creation.

According to Malabou, effective transformative ability is the possibility of displacing or transforming the mark or the imprint, of changing determination in some way.[244] Malabou again uses the adult stem cell as an example of this transformative ability and trans-differentiation capability:

> Adult stem cells are non-specialized cells found in specialized tissue (the brain, bone marrow, blood, blood vessels, the retina, the liver, etc.) They renew themselves, and most of them specialize, in order to produce all the types of cells in their tissue origin that normally die. This is how, for example, immature blood cells are made out of bone marrow stem cells. But while the majority of adult stem cells generate cells similar to those of the tissue they come from, it has been discovered that some of them (notably skin stem cells) can transform themselves into different types of cells (for example,

[244] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008).

> nerve or muscle cells). One then says that they 'transdifferentiate' themselves, that is, literally, that they change their difference.[245]

The dialectic's plastic ability to trans-differentiate or change difference presents itself in Establishment Clause jurisprudence in the 1947 Everson v. Board of Education of Ewing[246] Supreme Court decision.

From 1791 to 1947, the Establishment Clause differentiated itself into the same jurisprudence that constricted the Clause's reach no farther than federal action. Similar to the stem cell that turns into its originating tissue, the jurisprudence that restricted the federal government's scope (and enabled local) in church and state relations was replicated time and time again for nearly a century and a half. The Everson case, however, saw the stem cell that is the Establishment Clause changed its difference similar to the dramatic way a stem cell changes transforms from its originating tissue.

The Everson case, by incorporating the Establishment Clause into state action, appears on the surface to be a decision arising out of the political preferences of the Supreme Court justices. The Everson case, however, is better understood through the dialectic's plastic nature and its ability to *trans-differentiate* its form. Sometimes stem cells, because of their plastic nature, develop into cells of the same originating tissue and sometimes they develop into different tissue. When the stem cell transforms into a cell different from the originating tissue, the stem cell is said to have trans-differentiated itself. That is what the Everson case represents in Establishment Clause jurisprudence.

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[245] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[246] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).

Everson did not create a new Establishment Clause. Rather, the Everson decision took the then-existing Establishment Clause and transformed the scope in which it applied to church and state relations. The Establishment Clause was not re-created, and it was not simply a differentiation into the same jurisprudence that dominated church and state for a century and a half. The Everson decision was in essence dialectical plasticity functioning as *trans-differentiation.* Similar to the adult stem cell that has the capacity to develop into cells of tissue total different than the originating tissue, the Everson decision move the Establishment Clause's interpretation from a restricted federal only scope to an all-encompassing national standard for all types of church and state interactions.

Everson was dialectical plasticity in a moment of *trans-differentiation.* The national Establishment Clause jurisprudence provided little direction to and oversight of church and state relations on a local level from ratification to 1947. The case law through out that time frame essentially differentiated itself into the same jurisprudence that restricted and held the Establishment Clause's scope to the federal arena. As a result of Everson, however, nearly all aspects of church and state relations were to be governed from a national standard. This is akin to the adult stem cell being generated from one type of tissue but developing into a cell of another tissue type. The plastic nature of the stem cell, its inherent plasticity, enables a particular cell to change from an originating cell type into different tissue altogether. This is the process of *trans-differentiation.* Such capacity to trans-differentiate is also found in Establishment Clause jurisprudence, and specifically describes the ultimate decision on Everson.

While Everson was a watershed case, the decision did not exemplify plasticity defined as simply receiving form nor as explosion of form. Everson did not change the Establishment Clause. The Establishment Clause, the block of marble created at ratification, remained relatively untouched and un-imprinted on by the federal judiciary until 1947. The Establishment Clause was already formed. The issue is to what degree and in what manner was it imprinted, configured, or modified. What Everson accomplished was not a re-creation of the Establishment Clause, but rather a change in who defined, molded, or sculpted church and state relations.

The Everson decision, while a dramatic example of political federalism weighing in favor of the national government, was, in the context of the dialectic's plasticity, a change in sculptors or surgeons, not a change in marble or patient. The Everson decision changed Establishment Clause jurisprudence in the same manner that a stem cell that originates in one tissue turns into a cell of a totally different tissue. The switch from the Establishment Clause providing little federal input to church and state relations outside the federal government's immediate, limited sphere of influence to controlling the states' church and state relations via federal supremacy is the dialectic's plastic ability to *trans-differentiate* (not just differentiate) form. This is plasticity as metamorphosis, but not plasticity as re-creation. Therefore, the Everson decision, despite using a mangled history, demonstrates the dialectic's plasticity for *giving* form in a dramatic, *trans-differentiating* way. The dialectic's plasticity as *explosive* form, however, is yet to come.

The Everson decision was followed by a period in which the dialectic's plasticity returned to the giving (simple differentiating) of form. Previously, the

church and state relations went through a period where dialectical plasticity functioned to give or differentiate Establishment Clause form. However, this post-Everson plasticity (giving of form and differentiation) occurred from the new point in Establishment Clause law that resulted from Everson decision and the transdifferentiation that occurred therein.

4d. Establishment Clause: Competing Theories 1947–2009

Lacking a clear historical definition of the Establishment Clause's role, and finding that the 14th amendment perhaps changed the Constitutional landscape, the post-Everson Supreme Court decisions suggest three competing approaches in analyzing Establishment Clause issues. The approaches are a strict separation analysis, an accommodation approach, and a neutrality theory. Adherents to a strict separation approach assert government and religion should disassociate from each other to the greatest extent possible.[247] That is, government should be exclusively secular and that religion should be relegated and confined to private society.[248] The strict separation approach adopts the Jeffersonian view that there should be a "wall of separation between Church & State."[249] However, that has not completely happened.

The accommodation approach to church/state relations maintains that "Government should accommodate religion by treating it the same as nonreligious beliefs... the government violates the establishment clause only if it establishes a

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[247] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1192 (3rd ed. 2006).
[248] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1192 (3rd ed. 2006).
[249] Thomas Jefferson, Letter to Messrs. Nehemiah Dodge (January 1, 1802); Chemerinsky, at 1192.

church, coerces religious participation, or favors some religions over others." [250] The accommodation approach essentially advocates that religion should not suffer any disability in the public realm. Rather, religion should play a role equal to any other belief. Anything short of the government formally declaring a state religion, according to those advocating the accommodation approach, is acceptable.[251]

The last approach within the Establishment Clause rubric is a neutrality approach. The neutrality approach essentially requires governmental action be neutral toward religion. Government cannot favor religion over the secular and cannot favor one religion over another.[252] In analyzing whether government action is religiously "neutral," the Court adopts a two step analysis. First, determining whether government action is neutral toward and among religions, the Court looks first to whether the law facially differentiates among religions. If there a facially apparent differentiation, then an Establishment Clause violation is found and the Court does not need to move to the second test.[253] If there is no facially apparent differentiation, then the Court, when useful, turns to a traditional balancing test.[254]

The balancing test looks to whether the law at issue has a secular purpose, whether religion is advanced or inhibited, and whether the government and religion will become excessively entangled.[255] This balancing test, however, is not the exclusive means by which the U.S. Supreme Court analyzes Establishment Clause issues. There have been a number of instances where Establishment Clause claims

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[250] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1197 (3rd ed. 2006).
[251] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1198 (3rd ed. 2006); See also, Michael W. McConnell, Accommodation of Religion, 1995 Sup Ct. Rev. 1, 14.
[252] Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 1193 (3rd ed. 2006).
[253] Hernandez v. Commissioner, 490 U.S. 680 (1989).
[254] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[255] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

have been decided without utilizing this balancing test.[256] Perhaps most notable was Everson wherein the Supreme Court set out a strict separationist position only to uphold the payments for all private busing costs whether to public or parochial school.[257]

In 1971, The Supreme Court set out a key balancing test in Lemon v. Kurtzman.[258] That decision ushered in a balancing test and neutrality standard for deciding establishment clause issues. (Some Lemon test proponents use the Lemon test to justify strict separation in church/state relations. As we will see, however, the unstable nature of the balancing test provides an explanation for the Court's leap from Establishment Clause to the free speech clause. The Lemon case set out a three prong test: First, the law must have a secular legislative purpose. Second, the statutes primary principle or primary effect must be one that neither advances nor inhibits religion. Finally, the stature must not foster an excessive government entanglement with religion.[259]

Each prong of the Lemon balancing test has seen substantial litigation. In Wallace v. Jaffree, for example, the Court invalidated a law that authorized public school teachers to invoke a one minute period of silence for meditation or prayer. The Court held that such moment of silence had no secular purpose and was essentially designed to re-introduce prayer in school.[260]

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[256] Chemerinsky, at 1202. Chemerinsky cites Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994); Lynch v. Donnelly, 465 U.S. 668 (1984), and Marsh v. Chambers, 463 U.S. 783 (1983).
[257] Everson v. Board of Ed. of Ewing, 330 U. S. 1 (1947).
[258] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[259] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
[260] Wallace v. Jaffree, 472 U. S. 38 (1985). For similar ruling on the secular purpose prong see also Edwards v. Aguillard, 482 U.S. 578 (1987), and McCreary County, Kentucky v. ACLU of Kentucky, 545 U.S. 844 (2005).

In Estate of Thornton v. Caldor, Court invalidated a Connecticut law prohibiting employers from making persons work on his or her Sabbath. The Court held that such law violated the second prong of Lemon in that the law's primary effect was to advance religion.[261]

The Lemon excessive entanglement prong has seen several interpretations come from the Supreme Court. Excessive entanglement is generally thought to mean that generally a State's involvement in religious activities or assistance programs will violate the third prong of Lemon because such involvement "carries the grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[262] The Lemon test's third prong, however, is not easily applied nor ready apparent when applied to particular situations. For example, the Court held in Aguilar v. Felton[263] that government could not pay teachers salaries in parochial school. The fear was that the government would then be required to become more fully entangled as it monitored whether the teachers were teaching religious or secular subjects. A little more than a decade later the court backed away from that position and held that public school teachers may provide remedial education in parochial schools (but still not pay teachers salaries in those schools).[264]

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[261] Estate of Thornton v. Caldor, 472 U.S. 703 (1985). *Cf* Corporation of Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos, 483 U.S. 327 (1987). For a general discussion of litigation on the three prongs of Lemon see: Chemerinsky, 1202-1206.
[262] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973),
[263] Aguilar v. Fenton, 473 U.S. 373 (1985).
[264] Agostini v. Fenton, 521 U.S. 203 (1997).

The Lemon balancing test has come under attack in recent years, and is even avoided in Establishment Clause cases.[265] Justice Scalia has called for the Lemon test's demise, but finds the test just will not die. Justice Scalia opined:

> As to the Court's invocation of the *Lemon* test: Like some ghoul in a late-night horror movie that repeatedly sit ups in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys... Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's reported opinion repeatedly), and a sixth has joined an opinion doing so...The secret of the Lemon test's survival, I think, is that it is easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will...When we wish to strike down a practice it forbids, we invoke it...when we wish to uphold a practice it forbids, we ignore it entirely...Sometimes, we take a middle course, calling its three prongs 'no more than helpful sign-posts...Such a docile and useful monster is worth keeping around, at least in a somnolent state; no one ever knows when one might need him.[266] (citations omitted).

The competing Establishment Clause theories from Everson through 2009 has resulted in three competing approaches and one significant, although ghoulish,

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[265] See Lamb's Chapel v. Center Moriches Union Free School District (Justice Scalia concurring), 508 U. S. 384, 398 (1993). See also Chemerinsky, 1202, fn 56.

[266] Lamb's Chapel v. Center Moriches Union Free School District (Justice Scalia concurring), 508 U. S. 384, 398-399 (1993).

balancing test. It is the confusion caused by these approaches and the undead Lemon test that is what plasticity in the dialectic may help harmonize.

4d1. Plasticity in Modern Theories – *Giving/Differentiating* Form

The dialectic's plastic nature appears within Establishment Clause jurisprudence from ratification through the 1947 Everson decision. The dialectic's plasticity, however, functioned differently at critical times in that century and a half. Plasticity at ratification saw the Establishment Clause receive form (a creational power). From formation to the Everson decision the dialectic's plastic nature functioned to give form, or differentiate form, to the Establishment Clause much the way a sculptor gives form to marble or a stem cell turns into the same tissue from which it originated. It happen that the giving of form (*differentiation*) that occurred in the pre-1947 time period provided little sculpting to the federal Establishment Clause marble. In 1947, the Everson decision revealed plasticity as giving form beyond *differentiation*. As discussed above, Everson is plasticity seen as *trans-differentiation*. Post-Everson, however, the plasticity's function returned to its earlier seen ability to simply give or differentiate form.

The Everson decision set Establishment Clause jurisprudence on a new course. While the Everson decision itself was a product of plasticity as *trans-differentiation*, this new Post- Everson course was a product of plasticity's capacity to *differentiate* form. Pre-Everson plasticity gave and *differentiated* form to the Establishment Clause by replicating the position that minimized federal involvement and allowed for maximum state determination in church and state relations. The

dialectic's ability or capacity to differentiate form remained present in Establishment Clause jurisprudence after 1947, but the trajectory was changed. The trans-differentiation that occurred in and through Everson altered the direction in which the dialectic's capacity to differentiate subsequently operated.

Post-Everson saw the dialectic's plastic nature similarly differentiate church and state relations, but do so in a direction opposite to first seen following the Establishment Clause's ratification. After 1947, the dialectic's plasticity functioned around the federally centered understanding of the Establishment Clause. Moreover, the Post-Everson period (1947-2009) saw the dialectic's plasticity attempt to reconcile three competing federal Establishment Clause theories arising from federally, not locally, centered and dominating Establishment Clause. These theories gave Establishment Clause jurisprudence essentially three new trajectories. These new trajectories were efforts to reconcile and fix the extent to which the federal government, not the state or local government, would now determine, control, and influence church and state relations.

The three post-Everson Establishment Clause trajectories generally followed either a strict separation analysis, or an accommodation approach, or a neutrality position. This trinity of trajectories, while different, remained within the sphere of federally centered Establishment Clause jurisprudence. Each trajectory represented the dialectic's plastic nature and plasticity's effort to mold, configure, and modify church and state relations.

Recall that something is "plastic" when once it is formed and shaped it cannot return to its initial, starting configuration.[267] The "plastic" characteristics are seen throughout the Establishment Clause's legal developments. Ratification formed the Establishment Clause and subsequent shaping found the national government minimally involved, but church and state relations were never returned to either the colonial or even post-Revolution understanding. The Supreme Court's 1947 Everson decision dramatically reshaped Establishment Clause jurisprudence and gave full federal texture to church and state relations. Subsequent legal developments after Everson could not return the Establishment Clause's scope and direction to pre-1947 formulation.

From 1947 to 2009, plasticity shaped a wildly fragmenting Establishment Clause jurisprudence. In an effort to hold the extremes of church and state relations together in a reciprocal action, plasticity gave rise to several competing Establishment Clause configurations. Plasticity functioned to differentiate the church and state relationship into three competing, but ever federally centered, forms. However, the post-Everson configuration never returned to its pre-federally dominated form. The dialectic's plastic nature gave form to Establishment Clause by promoting at times a position that the government accommodates belief, religious and non-religious alike. The dialectic's plastic nature also gave form to Establishment Clause by seeking at times to adhere to a strict separation (but not total independence) of church and state. Finally, the dialectic's plastic nature gave form to Establishment Clause by asserting at times the government should remain neutral in its treatment of the sacred and the

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[267] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).

secular. Moreover, plasticity gave rise to the plasmatic Lemon balancing test that provided little consistency with or harmony in Establishment Clause application in its post-1947 configuration. While each new trajectory was launched from a federally centered perspective, none of the Post-Everson Establishment Clause perspectives brought consistency, predictability, or harmony to the Establishment Clause.

Plasticity from 1947 to 2009 worked to give form to church and state relations. This plasticity was defined the ability and capacity to differentiate form. This capacity to differentiate or give form, as previously noted, is seen Malabou's stem cell example where the non-specialized stem cell originates from specialized tissue and turns into the same tissue from which it originated. Such plasticity as differentiation describes the post-Everson Establishment Clause jurisprudence. Except, however, there are three different types of stem cells (i.e. accommodation, strict separation and neutrality cells) turning into three types of federally centered Establishment Clause tissue following the trans-differentiation that occurred in 1947.

Dialectical plasticity provides insight into and greater understanding of the dialectic's resiliency in managing the collision between positives and negatives, between opposites, and the synthesis that occurs as a result thereof.[268] Malabou found that "Plasticity refers to *the spontaneous organization of fragments*...As a concept, plasticity is also endowed with the 'dithyrambic gift for synthesis.'"[269] Knowing that plasticity has such a gift for synthesis, it seems unreasonable that the dialectic would leave Establishment Clause jurisprudence in the hands of the ghoulish

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[268] Clayton Crockett and Catherine Malabou, *Plasticity and the Future of Philosophy and Theology, Political Theology*, Vol 11.1, 29 (2010).
[269] Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction* 7 (New York: Columbia University Press 2005).

Lemon test and the other irreconcilable theories. Perhaps the competing federally centered Establishment Clause theories simply cannot be reconciled without the dialectic's plastic nature revealing one final attribute. This last attribute defines plasticity or plastic (or plastique) as the dialectic's explosive nature. The dialectic's explosive plastic nature is seen in the 2009 Pleasant Grove City, Utah v. Summum[270] case.

4e. Establishment Clause: Pleasant Grove City v. Summum

By 2009, Establishment Clause jurisprudence was mired in a three way struggle for a single, cohesive identity and formula. There was no consistent or dominate legal approach to resolving (or even considering) Establishment Clause issues. Malabou's insights into dialectical plasticity helped define and reveal the structure underlying Establishment Clause law from ratification in 1791 through 2009. That structure was based on the dialectic's plastic nature and ability to receive form, differentiate form, and to trans-differentiate form. In the years following the 1947 Everson case, however, the Establishment Clause spun out three competing and contradictory federally centered approaches to addressing church and state relations. By 2009, those competing Establishment Clause formulas reach a critical mass in the inability to resolve church and state questions. It was at that time that the Supreme Court considered and decided the Pleasant Grove City case. It was in that decision that the dialectic's plastic nature revealed its third, and explosive, capacity to resolve conflict that appeared to be irresolvable.

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[270] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125 (2009).

The salient facts in Pleasant Grove City are as follows.[271] In 1971 the local Fraternal Order of Eagles in Pleasant Grove City, Utah, donated a Ten Commandments monument to the city. The Monument was placed in the city's municipal park, Pioneer Park. The Ten Commandments monument remained undisturbed in the city's Pioneer Park until it was rediscovered, cleaned up, and rededicated in 2003. At that time, the Summum religious group out of Salt Lake City, Utah, petitioned Pleasant Grove City requesting permission to erect a Summum stone monument. The Summum wanted to erect a monument displaying the Summum Seven Aphorisms.[272] Pleasant Grove declined the Summum's request. The Summum again petitioned the city in 2005 and were again denied. Thereafter, the Summum sued Pleasant Grove contending the city violated the Summum's Constitutional right of free speech. The Summum claimed the city violated the Constitution's First Amendment Free Speech Clause by displaying the Fraternal Order of Eagles' Ten Commandments monument but rejecting the Summum's Seven Aphorisms monument.[273]

The Summum filed suit in the U.S. District Court, Utah, seeking to compel Pleasant Grove to accept the Seven Aphorisms monument and display it in the city's

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[271] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125 (2009).

[272] In footnote 1 of the Pleasant Grove City opinion, the Court described the Seven Aphorisms as taken from briefs to the Court: Respondent's brief describes the church and the Seven Aphorisms as follows: "The Summum church incorporates elements of Gnostic Christianity, teaching that spiritual knowledge is experiential and that through devotion comes revelation, which 'modifies human perceptions, and transfigures the individual.' See The Teachings of Summum are the Teachings of Gnostic Christianity, http://www.summum.us/philosophy/gnosticism.shtml (visited Aug. 15, 2008). "Central to Summum religious belief and practice are the Seven Principles of Creation (the "Seven Aphorisms"). According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai. . . . Because Moses believed that the Israelites were not ready to receive the Aphorisms, he shared them only with a select group of people. In the Summum Exodus account, Moses then destroyed the original tablets, traveled back to Mount Sinai, and returned with a second set of tablets containing the Ten Commandments. See The Aphorisms of Summum and the Ten Commandments, http://www.summum.us/philosophy/tencommandments.shtml (visited Aug. 15, 2008)."

[273] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)

municipal park. The Summum also sought a preliminary injunction directing the city to immediately place the Summum stone monument in the park pending the out final out of the litigation.[274] The District Court denied the injunctive relief sought. The Summum appealed to the 10th Circuit Court of Appeals, but limited the appeal to First Amendment free speech claim.[275]

The 10th Circuit Court panel reversed the District Court's decision. The 10th Circuit held that Pleasant Grove could not reject the Summum monument because both the Ten Commandments monument and the Summum monument were categorized as private, not governmental, speech. The court held that the city's actions unconstitutionally impaired the Summum's private right of free speech. The Circuit Court further held that the city needed a compelling justification, one sufficient to pass a strict scrutiny test, in order for the city to display the Fraternal Order Eagles' Ten Commandment monument and reject the Summum's Seven Aphorisms monument.[276] The 10th Circuit panel concluded the city could not likely overcome a strict scrutiny test and ordered that the city immediately place the Summum Seven Aphorisms monument in the park.[277] The city requested an en banc review, but was denied. The city then sought Supreme Court review and certiorari was granted.[278]

The case was argued before the U.S. Supreme Court on November 12th, 2008, and the Court handed down its decision on February 25th, 2009. The Supreme Court sided with Pleasant Grove and reversed the 10th Circuit's ruling. The Supreme Court

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[274] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[275] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[276] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[277] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)
[278] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125,____ (2009)

held that the city could rightfully accept and display the Ten Commandments monument and reject the Summum Seven Aphorisms monument without violating any Summum Constitutional Free Speech rights. The Court held that at issue was not Summum's private speech. Rather, the Court held that the issue was the city's First Amendment protected right of governmental free speech. The Court stated:

> A government entity 'is entitled to say what it wishes,' and to select the views that it wants to express. It may exercise this same freedom when it receives private assistance for the purpose of delivering a government-controlled message. This does not mean that there are no restraints on government speech. For example, government speech must comport with the Establishment Clause.[279]

Moreover, Justice Scalia added in his concurring opinion that the city did not violate the Establishment Clause in accepting the Eagles' monument and rejecting the Summum's monument. Justice Scalia stated:

> The city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire. Contrary to respondent's intimations, there are very good reasons to be confident that the park displays do not violate any part of the First Amendment.[280]

Interestingly, Pleasant Grove City was not expressly resolved on a First Amendment Establishment Clause analysis. Justice Scalia even commented that "... it is also obvious that from the start, the case has been litigated in the shadow of the First

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[279] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1133 (2009)
[280] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1139 (2009)

Amendment's Establishment Clause."[281] Rather than being resolved under the Establishment Clause, Pleasant Grove City was ostensibly resolved by applying the Governmental Free Speech Doctrine to the City's acceptance and display of the Ten Commandments monument (which will be discussed infra).

The Court's rationale in Pleasant Grove City appears to side step the critical, and elephant size, Establishment Clause issue. Place this case in line with the other major Establishment Clause cases and it just reinforces the notion that Establishment Clause jurisprudence has no consistency, no predictability, and is perhaps irreconcilable in its presently understood form. Pleasant Grove City's place in Establishment Clause legal history is more understandable, however, when the dialectic's explosive plastic nature is revealed. In fact, the dialectic's explosive capacity was the only remaining dialectical attribute capable of resolving (not just re-cycling) the church and state conflict presented in Pleasant Grove City.

4e1. Plasticity in Pleasant Grove City – *Explosion* to Form

Pleasant Grove City, Utah v. Summum is neither an outlier nor another anomaly in Establishment Clause case law and legal history. When viewed through the plasticity of the dialectic, Pleasant Grove City falls squarely into the Establishment Clause's legal history from the First Amendment's ratification to 2009. Reviewing Establishment Clause cases as political and legal history reveals little consistency or cohesiveness in the development of the church and state legal relationship. Viewing the legal history through the dialectic's plastic nature, however,

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[281] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1139 (2009)

reveals how Pleasant Grove City sits at the Establishment Clause's dialectical break point.

Dialectic plasticity gives structure and provides a means of understanding the erratically appearing Establishment Clause legal history. At ratification, the dialectic's plastic nature acted as the creational (formational) power. From ratification to the mid-twentieth century, the dialectic's plastic nature worked to give form to (differentiate) the Establishment Clause to allow minimum federal involvement into state and local church and state relationship. In 1947, the Supreme Court's Everson decision revealed the dialectic's plastic ability to trans-differentiate form and change the Establishment Clause's direction to work from a federally centered position. Following Everson, dialectical plasticity again showed its capacity to give form to Establishment Clause law, but now allowing maximum federal scrutiny with minimum state and local control. The post-Everson period, however, also saw the dialectic's plasticity split into essentially three conflicting theories concerning the appropriate, acceptable, and tolerable level to which church and state combined or separated. These three theories were different in how they addressed the federal government's involvement into church and state relations, but each theory was produced by the dialectic's plastic capacity to differentiate or give form. Plasticity attempted to give form to post-Everson Establishment Clause jurisprudence, but the federally centered theories could not reconcile into a single, cohesive federally centered Establishment Clause approach to church and state relations. Ultimately, a more potent, yet still plastic, dialectical response was needed to reconcile the three conflicting post-Everson Establishment Clause approaches.

Plasticity's response to, and resolution of, that post-Everson conflict is found in Pleasant Grove City, and the dialectic's plastic capacity to be explosive.

Pleasant Grove City represents the dialectic's plastic ability and capacity to resolve conflict through its *explosive* attribute. Plasticity is able to receive and create form, give (differentiate) and alter (trans-differentiate) form, and ultimately explode form. According to Malabou:

> The term "plasticity,' one should recall, has three principal significations. On one hand, it designates the capacity of certain materials, such as clay or plaster, to receive form. On the other hand, it designates the power to give form - the power of a sculptor or plastic surgeon. *But, finally, it also refers to the possibility of deflagration or explosion of every form - as when one speaks of 'plastique,' 'plastic explosive,' or in French, plastiquage (which simply means bombing). The notion of plasticity is thus situated at both extremes of the creation and destruction of form.*[282] (Emphasis added.)

Plasticity's capacity to alter form includes the ultimate capacity (or capability) to destroy form. It is plasticity's capacity to alter form through its explosive nature that is revealed in the Pleasant Grove City decision.

Following Everson, no single Establishment Clause identity could dominate the modern political and legal Establishment Clause landscape from a federally centered position. The modern theories remained in constant conflict. Moreover, any efforts to return to the early Establishment Clause formulation were not possible, and the modern theories that existed remained irreconcilable. According to Catherine

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[282] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).

Malabou, something is said to be plastic when, once shape has been imparted to it, "there is no possible return to the indeterminacy of the starting point."[283] The Establishment Clause's return to an original interpretation or even a pre-Everson formulation was simply not possible because of the dialectic's plastic nature. The dialectic already operated to give form and shape to the Establishment Clause. Once such form was imparted, and form repeatedly imparted even beyond the Everson decision, the plasticity within the Establishment Clause would not allow a return to the Establishment Clause's original indeterminacy or starting point.

Pleasant Grove City represents the dialectic's plastic ability to radically beget a new, single identity out of the three competing modern Establishment Clause theories. By 2009, the dialectic's plasticity within the Establishment Clause unsuccessfully struggled to produce a single identity. That struggle took place between the impossibility of returning to the Establishment Clause's earlier formulation and the endless re-shuffling of competing, opposing, and irreconcilable modern theories. With neither direction capable of resolving the opposites within the church and state relationship, the dialectic's final recourse for bringing about reconciliation within Establishment Clause law was through the explosive property of dialectical plasticity.

Pleasant Grove City was not plasticity capability to *receive* form because the Supreme Court did not create or ratify a new Establishment Clause. Pleasant Grove City decision was not plasticity as *giving* form (either via differentiation or trans-differentiation) because the decision was not based on or decided within the confines

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[283] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).

of known Establishment Clause jurisprudence. Rather, the Pleasant Grove City decision shows the dialectic's plastic nature to be explosive. Pleasant Grove City was explosive dialectical plasticity because the Court breached through the modern Establishment Clause barriers, and resolved Pleasant Grove City's Ten Commandments monument issue by leaping through that breach into the realm of the newly minted governmental free speech doctrine.

The Court justified application of the government free speech doctrine in Pleasant Grove City essentially two ways. First, the Supreme Court held that the Government as an entity is entitled to the protections of the free speech clause in the First Amendment. Second, even in exercising its right to speak, the Government's message may not be received as it was intended. The message the Government adopts may be understood differently by those receiving it. Specifically, the Ten Commandments may convey God's will, or may be historical doctrine from a religious authority, or may be simply a few good ideas to live by. The message sent may not be the message received.

In an effort to explain how the written word can hold separate meanings for the writer and viewer, the majority opinion looked to the Greco-Roman mosaic that was donated to Central Park following John Lennon's assassination. The Court pondered how different people would interpret the meaning of the word "imagine" in the mosaic.[284] The Court explained that "some observers may 'imagine' the musical contributions that John Lennon would have made if he had not been killed. Others may think of the lyrics of the Lennon song that obviously inspired the mosaic and

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[284] Pleasant Grove City, Utah v. Summum, 555 U.S. ___, (2009); 129 S.Ct. 1125, 1139 (2009)

may 'imagine' a world without religion, countries, possession, greed, or hunger."[285] However, justifying the use of the Governmental Free Speech doctrine in what is essentially an Establishment Clause case by saying words may mean different things to different people failed to appreciate the significance of the dialectic's plastic nature and its explosive capability.

The Supreme Court's use of the governmental free speech doctrine to resolve Pleasant grove's Ten Commandments monument issue was not justified because people can understand, mean, and internalize words and things differently. The governmental free speech doctrine was used to resolve Pleasant Grove City because no reconciliation was possible among the three opposing modern Establishment Clause theories possible. The convergence of the three modern and competing theories (and the inability to return to a previous state) left it up to plasticity's final attribute, its explosive capacity, to resolve the conflicting issue between church and state.

Rather than debating what the word or the song "Imagine" means from various perspectives, perhaps a clearer picture of the dialectic's explosive characteristic can be seen in the 1984 movie Ghostbusters. In Ghostbusters, the three main characters are ultimately called upon to confront a great paranormal destroyer, Gozer. The Ghostbusters must defeat the destroyer and close the gateway between New York City and the Gozer's evil dimension. If they fail, the City (if not the world) will be destroyed. If they succeed, the world will be saved and they will be hailed as heroes (and no longer as harebrained scientists.) To battle the Gozer and close seal the portal, the Ghostbusters's use nuclear (proton) back-packs that generate

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[285] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1139 (2009)

energy streams strong enough to hold and capture paranormal forces. The proton packs, however, can also cause cataclysmic disaster. The conversation between the three Ghostbusters before the battle is revealing.

The Ghostbusters, Egon Spengler (played by Harold Ramis), Peter Venkman (played by Bill Murray), and Raymond Stantz (played by Dan Aykroyd) have the following exchange as they prepare their proton packs to face the evil Gozer:

Egon Spengler:	There's something very important I forgot to tell you.
Peter Venkman:	What?
Egon Spengler:	Don't cross the streams.
Peter Venkman:	Why?
Egon Spengler:	It would be bad.
Peter Venkman:	I'm fuzzy on the whole good/bad thing. What do you mean, "bad"?
Egon Spengler:	Try to imagine all life as you know it stopping instantaneously and every molecule in your body exploding at the speed of light.
Ray Stantz:	Total protonic reversal.
Peter Venkman:	Right. That's bad. Okay. All right. Important safety tip. Thanks, Egon.

Of course, when faced with the inability to close the portal and eliminate the destroyer (who appeared in the form of the Stay-Puff Marshmallow Man), and with no options left, the three Ghostbusters do the unthinkable – they cross the proton pack energy streams.

The Ghostbusters faced an irresolvable situation. All that they tried to defeat the great destroyer and close off the other dimension had failed. New York City and world stood at the brink of destruction. There was no going back to what had been, and the three energy streams alone remained ineffective. The only remaining option was to cross the energy streams and await the cataclysmic explosion that would follow. The streams were crossed, immeasurable energy was generated, and the unthinkable explosion occurred.

The resulting explosion sealed the portal to the other dimension, obliterated the Stay-Puff Marshmallow Man, and crumbled buildings What remained was a gooey, sticky, mess that covered anyone who was near the exploding Stay-Puff Man. New York City was saved, but the world would never be the same. There was a new found affection for the three Ghostbusters, the paranormal was finally acknowledged, and "ghostbusting" became a legitimate endeavor. The explosion that occurred when the energy streams were crossed resolved the immediate destroyer problem and further re-defined the world forever. The total "protonic reversal" was dialectical plasticity in its most explosive form.

Ghostbusters, and not Central Park's John Lennon "Imagine" tribute mosaic, best describes the Court's use of the Governmental Free Speech doctrine in Pleasant Grove City. In 2009, the Court faced a Ten Commandments issue and decided that the resolution was in the Government Free Speech doctrine. The Court was left with little choice on how to resolve the matter. The Court could not return to the Establishment Clause interpretation before Everson or even before ratification of the First Amendment. Moreover, the three modern streams of Establishment Clause

interpretation alone were unable to resolve the church and state issues present in Pleasant Grove City. The dialectic, however, operates to reconcile opposites. By 2009, the Establishment Clause jurisprudence was plagued with opposition. Each modern theory, including use of the balancing act Lemon test, struggled to become the singular identity of church and state relations. The only remaining option left was for the dialectic's plastic nature to exert its explosive capacity.

Essentially, the Court could not return to some distant point of original indeterminacy, and continued differentiation within modern theories caused continued irreconcilability within modern Establishment Clause jurisprudence. The dialectic's plastic nature of receiving and giving of form was exhausted by the time the Court heard Pleasant Grove City. The plasticity within, however, could not leave the conflicts unresolved. The Supreme Court could have perhaps upheld or overturned the lower court's decision by marching out the "ghoulish" Lemon test. But that test offers no resolution and only serves as a justification for a pre-determined decision. The Court could have also looked to the menagerie of post-Everson Ten Commandment cases for an answer, but there was no discernible consistency amongst those cases. The Court perhaps could have continued on its path of inconsistency, but recall the dialectic ultimately seeks to reconcile opposites, provide unity, and offer a pattern of understanding to a contradictory world.[286]

For over a half-century after the Everson decision, there was no cohesive pattern of understanding or unity within the Establishment Clause jurisprudence. A resolution was needed or church and state relations would remain in an endless morass of contradictory cases law. The dialectic's plastic nature in receiving or

[286] Michael Allen Fox, *The Accessible Hegel*, 38 (Humanity Books/Prometheus Books 2005).

giving of form failed to produce any harmony or unity within the Establishment Clause. The dialectic's plastic nature, however, has the capacity to deflagrate, explode, and destroy form.[287]

In Pleasant Grove City, the Supreme Court crossed the energy streams of modern Establishment Clause dialectical plasticity. The Establishment Clause theories as we knew them stopped instantaneously and every molecule in its constitutional body exploded at the speed of light. The only thing that remained was the rubble of the Establishment Clause, and the gooey, sticky mess of the recently minted Government Free Speech doctrine.

Why does Pleasant Grove City represent plasticity's explosive attribute and not the capacity of creation (as in ratification), or capacity of trans-differentiation (as in Everson)? There are several reasons. First, nothing was created or formed as a result of the Pleasant Grove City decision. At ratification, for example, the Establishment Clause was a new creation born from the history that preceded it. The Governmental Free Speech doctrine already existed at the time of Pleasant Grove City, although, as Justice Stevens noted, it was only recently minted.[288] Second, Pleasant Grove City was decided beyond and outside the Establishment Clause. Everson, however, was decided within the Establishment Clause known limits. Everson's trans-differentiation was to flip from a state centered perspective to a federal centered perspective inside the confines of the Establishment Clause boundaries. Additionally, the Pleasant Grove City did not represent simply differentiation as seen in the periods before of after Everson. Pleasant Grove City

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[287] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[288] Pleasant Grove City, Utah v. Summum, 555 U.S. ____, (2009); 129 S.Ct. 1125, 1139 (2009)

actually abandoned plasticity's process of giving (differentiating) form when it made the leap of faith from Establishment Clause to free speech. While plasticity offers many attributes, none of them, save the explosive capacity, remained viable options for resolving conflict between church and state when Pleasant Grove City was decided. The three competing post-Everson Establishment Clause theories created a frame work that provided no single, cohesive (or predictable) means for resolving conflict in church and state relations. While the dialectic's plastic nature to give or receive form provided structure to Establishment Clause jurisprudence, it was plasticity's remaining capacity to be explosive that provided resolution in Pleasant Grove City. Pleasant Grove City represents the ability to resolve church and state conflict through dialectical plasticity's *explosive* form.

4f. Integrating Church and State, Hegel's Concern, and Plasticity

Hegel did not necessarily see the political establishment of the Church as a contradiction.[289] Hegel viewed the separation of church and state as a fracture in the polis. Moreover, Hegel believed the ancient polis mastered the integration of the religious and the political into one totality.[290] Hegel did see a problem with vesting the church with political power,[291] but did not necessarily see the political establishment of the Church as a contradiction.[292] As Hegel noted in his earlier writings, "The whole of the church is a mere fragment only when man in his

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[289] Shlomo Avineri, *Hegel's Theory of the Modern State* 31 (Cambridge University Press 1972, 1994).
[290] Shlomo Avineri, *Hegel's Theory of the Modern State* 30 (Cambridge University Press 1972, 1994).
[291] Shlomo Avineri, *Hegel's Theory of the Modern State* 30 (Cambridge University Press 1972, 1994).
[292] Shlomo Avineri, *Hegel's Theory of the Modern State* 31 (Cambridge University Press 1972, 1994).

wholeness is broken up into political man and church man."[293] The problem for Hegel was how to fuse church and state without causing oppression or tyranny previously seen in history. For Hegel, the question was not whether there could or should be a synthesis between church and state. Rather, Hegel's concern was how to synthesize them without causing oppression and tyranny in the modern world.[294] Not having a satisfactory answer to that question, Hegel settled on the separation of church and state as an available political remedy for avoiding oppression and maintaining the private affairs of religious belief.

As discussed above, dialectical plasticity not only provided structure for understanding the erratically appearing Establishment Clause jurisprudence, it also provided the means of breaching the high wall of separation erected between them. By 2009, the tension within the Establishment Clause reached a critical stage. The three major Establishment Clause theories were in conflict and provided little consistency in the federally orientated Establishment Clause jurisprudence. The dialectic's capacity to receive form, differentiate form, and trans-differentiate form could not bring the three competing Establishment Clause theories into a single, cohesive resolution. It took the dialectic's plastic capacity to be explosive to resolve the church and state issue for Pleasant Grove City.

It is through the dialectic's explosive characteristic that we find a resolution to the divided polis resulting from the separation of church and state. In Pleasant Grove City v. Summum, church and state were combined into a complete polis. This was

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[293] Shlomo Avineri, *Hegel's Theory of the Modern State* 32 (Cambridge University Press 1972, 1994). See also G.W.F. Hegel, *Early Theological Writings* (T.M. Knox, ed., Philadelphia: University Press 1975).

[294] Shlomo Avineri, *Hegel's Theory of the Modern State* 33 (Cambridge University Press 1972, 1994).

accomplished when the barrier between church and state was ruptured and gave way to the governmental free speech doctrine. By resolving the case on governmental free speech principles, the Establishment Clause barrier between church and state was breached, removed, and exploded. As a result, church and state combined, and the polis was re-united in Pleasant Grove's city park. Recall, however, Hegel's fear of political oppression and tyranny that resulted is other historical attempts to combine church and state. The question following Pleasant Grove City is whether the dialectic's plastic capacity to resolve conflicts through its *explosive* capacity by eliminating the Establishment Clause context can do so without political fear or oppression.

That question will only be answered in time as the governmental free speech doctrine evolves around future church and state conflicts. The answer, however, may be found dialectical plasticity's ability to receive and give form to the free speech, and specifically governmental free speech. But, that discussion is beyond the scope of this study.

Chapter V: Summary and Conclusion

This study offers a clarifying explanation of U.S. Establishment Clause jurisprudence, including the explosive impact of the recent Pleasant Grove City case. From inception through present day, the Establishment Clause developed erratically and with no obvious or dominant guiding structure, at least when viewed through the common historical and legal lenses. This study, however, takes the unconventional view that Establishment Clause law and history is understandable, and actually

adheres to an ordered structure, when viewed through the lens of Catherine Malabou's concept of dialectical plasticity.

The first part of the study set out the Establishment Clause's history and major legal developments. These developments start with the First Amendment's (Establishment Clause included) ratification in 1791. The second period reviewed the time frame that covers immediately post-ratification through the 1947 Everson Supreme Court decision. The Everson decision's significance was then set out, and the study then followed with the post-Everson history through 2009. The 2009 Pleasant Grove City case involving the placement by the city of a Ten Commandment's monument in a city park concluded the history review. As a note, while this study stops to discuss the significance of the 2009 Pleasant Grove City case, the historical and legal developments from ratification, to Everson, and then to 2009, represent a standard and common time line of significant Establishment Clause developments. What is not standard, however, is the way that common time line is interpreted.

The second part of the study defines and discusses the Dialectic. The study ultimately ultilizes George W.F. Hegel's concept of the dialectic as articulated by present day philosopher Catherine Malabou. Malabou's contribution to Hegel and the dialectic is in the revelation that the dialectic is plastic in nature. Malabou shows us that there are three essential properties to dialectical plasticity: The capacity to receive form; the capacity to give form, and finally the capacity to be explosive.

Plasticity designates the capacity of certain materials, such as clay, plaster, and marble, to *receive* form.[295] According to Malabou, "Plastic material retains [receives] an imprint and thereby resists endless polymorphism."[296] Plasticity also designates the power to *give* form such as done by the work of a sculptor or a plastic surgeon.[297] This ability to give form demonstrates a "transformative ability" that is either the capacity to *differentiate* within form *or trans-differentiate* among forms. (See Malabou's discussion of the stem cell and its ability to differentiate and trans-differentiate form).[298] The plasticity's final property refers to the "possibility of the deflagration or explosion of every form like the "plastic explosive."[299] Dialectical "plasticity," according to Malabou, allows for the creative giving, taking, destruction, and reconstruction of forms rather than the traditionally conceived dialectic that is simply responsive or passive in its operation.[300]

After setting out the Establishment Clause's legal history from inception through 2009, and after defining Malabou's dialectical plasticity, this study then applies the principles of dialectical plasticity to Establishment Clause jurisprudence. By identifying the dialectic's plastic properties and their functions within Establishment Clause jurisprudence, U.S. church and state relations are better understood as something more than just an out growth of ad hoc personal policy

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[295] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[296] Catherine Malabou, *What Should We Do With Our Brains*, 15 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[297] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[298] Catherine Malabou, *What Should We Do With Our Brains*, 16 (Sebastian Rand, trans. New York: Fordham University Press 2008).
[299] Catherine Malabou, *The New Wounded: From Neurosis to Brain Damage* 17 (Steven Miller, trans. New York: Fordham University Press 2012).
[300] Clayton Crockett and Catherine Malabou, *Plasticity and the Future of Philosophy and Theology, Political Theology*, Vol 11.1, 29 (2010).

preferences, random reflections of public opinion, or a period's sentiments about what is an expected political response. Understanding the dialectical plasticity within Establishment Clause law and history provides structure and clarity in an area traditionally lacking such quality.

The study views the Establishment Clause's ratification as the dialectic's plastic capacity to receive form. This receiving of form was a consolidation and transformation of church and state historical relations that preceded the Constitution. Ratification, as seen through the dialectic's plastic ability to receive form, was a new creation within church and state relations. This new creation set a new starting point, provided a new imprint upon, for church and state relations under the new Constitution and subsequent Bill of Rights.

From the First Amendment's ratification in 1791 forward to 1947, the dialectic's plastic nature reveals a legal and historical period dominated by the dialectic's plastic capacity to give (differentiate) form. The form given was one that provided the greatest latitude in church and state relations to local governments and limited the Establishment Clause's reach to only federal government action. Cases such as Permoli and Barron exemplify that Establishment Clause formulation for evaluating church and state relations. Moreover, this formula was replicated similar to the way a stem cell turns into the same tissue from which it originated from ratification forward until the 1947 Everson decision.

The 1947 Everson case up-ended the traditional Establishment Clause formula and the dialectic's plastic nature provides an understanding of Everson beyond an explanation that simply chalks any decision up to judicial activism or ad hoc decision

making. The Everson case actually reveals the dialectic's plastic capacity and ability to give form beyond simple differentiation. Everson reveals dialectical plasticity as the ability to trans-differentiating form. The Everson decision actually remained confined within Establishment Clause, but the formula for determining when the Establishment Clause was invoked was reversed. In Everson, the Establishment Clause was read to impose federal standards upon state and local governments in order to provide federal oversight where such oversight had been absent since ratification. This was plasticity as trans-differentiation. Again, Malabou's compares trans-differentiation to the stem cell that changes into tissue different (but still tissue) from its originating tissue.

Following Everson, Establishment Clause jurisprudence maintained a federally centered position and oversight, but spun out three competing approaches to considering Establishment Clause matters. These approaches were characterized as strict separation, accommodation, and neutrality. None of these three approaches acquired a dominate position in the Establishment Clause rubric. In fact, the infamous balancing test found in Lemon v. Kurtzman was so erratically applied and haphazardly disregarded that Justice Scalia described the test as "...some ghoul in a late-night horror movie that repeatedly sit ups in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening little children and school attorneys... Such a docile and useful monster is worth keeping around, at least in a somnolent state; no one ever knows when one might need him."[301] Opposition, conflict, and competition

[301] Lamb's Chapel v. Center Moriches Union Free School District (Justice Scalia concurring), 508 U. S. 384, 398-399 (1993).

characterized the modern, post-Everson Establishment Clause law. Such opposition, conflict, and competition between the legal theories prevented a single, coherent Establishment Clause identity from arising. The dialectic's nature to resolve opposites, however, provided a resolution to this revolving constitutional dilemma.

In 2009, the U.S. Supreme Court decided the Pleasant Grove City case wherein the city of Pleasant Grove, Utah, accepted a Ten Commandments monument and displayed the monument in the city's park. In the law suit that attempted to remove the monument (or allow the Summum's own religious monument to be also erected), the Court decided the case by scuttling an Establishment Clause analysis. Instead, the Court resolved the matter by reaching over to the free speech arena and relying upon the recently created governmental free speech doctrine.

The Court's use of a free speech doctrine to decide Pleasant Grove City, as opposed to any one of the three modern Establishment Clause analyses (assuming the Justices could even settle on one), was not a product of ad hoc personal policy preferences, random reflections of public opinion, or a period's sentiments about what is an expected political response. Rather, the Court's Pleasant Grove City decision was a direct product of the Establishment Clause's failure to produce constitutional and legal analyses without opposition and conflict. Moreover, Pleasant Grove City represents a culmination of nearly 220 years of inconsistently operating Establishment Clause law finally meeting the dialectic's desire to reconcile conflict, even if through extreme, explosive measures. By utilizing the new governmental free speech doctrine to resolve the church and state dilemma in Pleasant Grove, the Supreme Court released the dialectic's plastic nature, and specifically its plastic

nature to be *explosive*, and in doing so ruptured the Establishment Clause barrier between church and state.

Pleasant Grove City was not plasticity as *receiving* form because it did not create a new Establishment Clause. The Pleasant Grove City decision was not plasticity as *giving* form (either via differentiation or transdifferentiation) because the decision was not based on the known confines of Establishment Clause jurisprudence. Rather, the Pleasant Grove City decision shows the dialectic's plastic capacity to be explosive. Pleasant Grove City was explosive dialectical plasticity because the Court's decision ruptured the traditional Establishment Clause barriers between church and state. The rupture occurred when the Court approved the city's official display of the Ten Commandments monument in a city park not on existing (and irreconcilable) Establishment Clause formulas, but through the newly minted governmental free speech doctrine. It is the resolution of an Establishment Clause dilemma through application of the governmental free speech doctrine that reveals the dialectic's ability to resolve opposition and conflicts through the dialectical plasticity and its *explosive* capacity.

As an ending note, this study returned to Hegel's concern over the separation of church and state. Hegel saw the combination of church and state as appropriate to creating a total, complete polis. Hegel also understood, however, the political problems historically caused when church and state combined. As a result Hegel accepted the separation of church and state, and the barrier to forming complete polis that it represented, as a means to avoiding the political oppression historically seen when church and state combined. Pleasant Grove City and dialectically plasticity,

however, offer a step towards re-uniting and perhaps ultimately melding church and state into a complete polis.

While the Pleasant Grove City decision united church and state in the city park, was it able to do so without fear or political oppression? The answer is left to the future, but the future will no doubt be a product of dialectical plasticity coming to bear on the people's and government's right to free speech.

What does the future hold for church and state relations? Whatever that answer may be, no doubt dialectical plasticity will play a significant part in resolving future conflict that will surely arise when courts grapple with church and state relations within the rubric of the governmental free speech doctrine. Malabou stated that as a concept, plasticity is also endowed with the 'dithyrambic gift for synthesis' enabling one to perceive the form of fragmentation and find one's my spot in the movement.[302] Perhaps that is an accurate description of dialectical plasticity working within Establishment Clause jurisprudence from the ratification of the First Amendment through Pleasant Grove City, and beyond.

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[302] Catherine Malabou, *Plasticity at the Dusk of Writing: Dialectic, Destruction, Deconstruction* 7 (New York: Columbia University Press 2005).

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