NOTE: FEDERALISM AND RELIGIOUS LIBERTY: WERE CHURCH AND STATE MEANT TO BE SEPARATE?

By

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"Religion and Morality are the essential pillars of Civil society."

- George Washington[2]

INTRODUCTION

The characterization of the separation of church and state, and the balance between law and religion, is one of enduring confusion in current American constitutional theory and conception. An example of this confusion can be discerned from the recent presidential election, where the question of whether a candidate should or should not be allowed to profess his faith before the American public was presented.[3] Furthermore, the claim for separation continues to

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[2] Letter from George Washington to the Clergy of Different Denominations Residing In and Near the City of Philadelphia (Mar.3, 1797), *in* 36 THE WRITINGS OF GEORGE WASHINGTON, 1745-1799, 416 (John C. Fitzpatrick ed., 1931).

[3] *See Bush Asks Court to Reconsider Texas School Prayer Ruling*, CHICAGO TRIBUNE, Mar. 28, 1999, at News 13 C; Bauer Says *Bauer Says Judicial Elites at War with Religion in Public Life*, U.S. Newswire, May 18, 1999, National Desk, Political and Regional Reporters; *see also Today: Democratic Vice Presidential Candidate Joseph Lieberman Coming Under Fire From Major Jewish Group* (NBC television broadcast, Aug. 30, 2000); Gustav Niebuhr, *The 2000 Campaign: New Analysis; Religion on the Hustings*, N.Y. TIMES, Sept. 1, 2000, at A1; Stephen L. Carter, Editorial, *The Right to Pray Whenever God Calls*, N.Y. Times, Sept. 3, 2000, § 4, at 11; *Face the Nation* (CBS television broadcast, Sept. 3, 2000).

remain a source of significant controversy in areas such as legislative acts,[4] judicial decisions related to religion and prayers in schools,[5] the media,[6] and public opinion polls.[7] The Establishment Clause of the First Amendment of the United States Constitution is usually believed to be the derivation of this wall of separation, however, the Framers never purposed such a wall.

Part of the confusion in understanding religious liberty within the context of the political, legal, and social dimensions of America resides in the United States Supreme Court's establishment and free exercise cases, which are frequently logically incomprehensible. While attempting to place the Religion Clauses of the First Amendment into a thoroughly synthesized

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[4] *See* H.R. Res. 86, 105th Cong. (1997) (bolstering the display of the Ten Commandments in all government office buildings); S. Res. 86, 105th Cong. (1998) (promoting the display of the Ten Commandments in the U.S. Capital Building, the White House, the Supreme Court, and courthouses throughout the country); *see also* Sense of Congress Supporting Prayer at Public Sporting Events, H.R. Res. 199, 106th Cong. (1999) (enacted) (the Supreme Court should uphold the constitutionality of invocations and prayers at public school sporting events under the First Amendment of the Constitution).

[5] *See* Wallace v. Jaffree, 472 U.S. 38 (1985) (the Court concluded moments of silence were unconstitutional after examining the policy purpose, effect, and potential church–state entanglement); Grand Rapids Sch. Dist. v. Ball, 473 U.S. 373 (1985); Sch. Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (school policies that allowed Bible reading and other forms of prayer were unconstitutional).

[6] *See, e.g.*, *CNN Crossfire* (CNN television broadcast, Nov. 3, 1999) LEXIS, News Library, Transcript File; *ABC News This Morining* (ABC television broadcast, Oct. 12, 1999) LEXIS, News Library, Transcript File; *Hardball with Chris Matthews: Federal Appeals Court Rules that Alabama Students Can Pray Over a School's Public Address System Under Some Limitations* (CNBC television broadcast, July 21, 1999) LEXIS, News Library, Transcript File; *Hardball with Chris Matthews: Whether Prayer Should Be Allowed in Public Schools* (CNBC television broadcast, June 1, 1999) LEXIS, News Library, Transcript File.

[7] Corresponding to one Gallup Poll, 83% of those surveyed, preferred letting students recite prayer at graduation services. *See* PUBLIC OPINION ONLINE, Gallup Organization, CNN, U.S.A. Today Poll, July 9, 1999, LEXIS, News Library, and News Group File. Of the remaining percentages of those questioned, 17% opposed prayer during graduation and less than .5% had no opinion towards the matter. *Id*.

jurisprudence, not only has the Court withdrawn from the original intent of the framers of the First Amendment, but it has also abdicated the original meaning of the Religion Clauses.[8] First, the Court has transgressed imprudently and directly into the states' domain and indirectly into the people's province of authority by judicially amending the Constitution to employ the First Amendment to the states.[9] Second, by parting from the historical significance of the Constitution, the Court has discounted the notion that the Religious Clauses of the First Amendment are dual proscriptions, which function concurrently to secure the protection of religious liberty. As a consequence, notwithstanding the Court's disembarkation from the text and history surrounding the Constitution and the federalism restrictions placed upon the First Amendment leading to inconsistencies in the American jurisprudence, its latter two deviations have led to a legal and virtual misadventure, generating legal confusion and government-implemented religious discrimination.

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[8] The Religious Clauses of the First Amendment state "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I.

The text of the First Amendment itself sustains a federalist interpretation of the Establishment Clause. The federalist nature of the Establishment Clause is emphasized by the fact that the First Amendment is the only amendment to separate out Congress in this manner. *See* GERALD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 20 (1987)[hereinafter Bradley]. Moreover, the use of the word "respecting" also stresses the federalist intent of the Clause. The meaning behind the word is most often interpreted to represent that government is prohibited not only from establishing a religion, but also from creating any law that could further that end. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) ("A given law might not establish a state religion but might nevertheless be one 'respecting' that end in the sense of being a step that could lead to such an establishment...") (emphasis in original). The use of the word "respecting" was meant to assure that the federal government would either establish a national church or require the states to disestablish their churches. *See* MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 15 (1978). At the same time, this language compelled Congress to esteem the determinations of those states, which had previously disestablished their churches. *Id.*

[9] *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (incorporating the First Amendment of the Constitution and applying it to the states). It may be argued that, although such an act has, and does, presented a stigma to the to the institutional soundness and constitutional jurisdiction of the

This Note addresses the confusion surrounding the question as to where exactly the authority and concerns regarding religion lie between the states and the federal government. That question is analyzed in Part I by examining the historical evolution of the states as a protectorate and authority figure in the development and understanding of religious liberty in America and by examining the sentiment of the framers toward the role of the federal government and the states over religious concerns in a system of federalism. Part II scrutinizes the adoption of the Fourteenth Amendment and its impact on the Religious Clauses of the First Amendment and the states in matters of religious liberty. The recent establishment and free exercise cases and their discordant application to government treatment of religion will also be discussed.

After considering the disparate results of the steady erosion of authority historically held by the states and the aggrandizement of the federal government into the province of religion, Part III, begins by discussing some arguments, which may be made concerning the reversion of religion from the dominion of federal oversight to the states, and how they may be countered with respect to historical patterns of the states toward protecting, as well as, guaranteeing religious liberty. Thereupon, a series of examples will outline the modern prodigy of states as protectorates of religious liberty for a multitude of religious denominations, against illegal governmental activity. Finally, an argument will be presented recommending a restoration of the preceding division of authority between the federal government and the states that more closely recognizes the Religion Clauses' relationship to the rest of the Constitution.

Court, pragmatically, it has become less contentious, because of the variety of religious beliefs in the United States.

PART I: ORIGINS OF RELIGIOUS LIBERTY IN THE UNITED STATES

It may be argued that religious beliefs and values have enlightened American law up to and including the period of the nation's birth.[10] As one author has stated, "religion and jurisprudence are so related," in fact, "that to understand American legal history, one must understand American religion."[11] It has not been until recent generations that "the public philosophy of America [began to shift] radically from a religious to a secular theory of law."[12]

An acknowledgment that religious ideologies have historically appraised American law, however, does not solely vindicate modern legal reliance upon them.[13] Closely affiliated with the historical perspective is the perspective originating from the principles and language of the Federal Constitution, which includes an aggregate of clauses relevant to the interplay between law and religion.[14] As a textual and historical concern interpreting the Establishment Clause to

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[10] *See, e.g.*, KERMIT C. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 14-16, 26 (1989); *see also*, Harold Berman, *The Interaction of Law and Religion*, 31 MERCER L. REV.. 405, 406 (1980); CUSHING STROUT, THE NEW HEAVENS AND NEW EARTH: POLITICAL RELIGION IN AMERICA 99 (1974) (discerning that several early state court determinations "assumed that Christianity was itself part of the common law inherited from England").

[11] *See* Timothy L. Fort, *A Jurisprudence of Faith: An Experiment in Using Theology to Interpret Jurisprudence*, 30 CATH. LAW. 22 (1985).

[12] Berman, *supra* note 10, at 408.

[13] At the same time, it would be equally unreasonable to completely disregard the historical role of religion and to aver whether explicitly or implicitly, that American law is not creation of such reliance. Strout, *supra* note 10, at xiii.

[14] One possible constitutional objection to the use of religious values in legal concerns is that such use may violate the Establishment Clause of the First Amendment. The "wall of separation" between church and state "would be viewed as breached in a most egregious manner" if a judge was able to conclude "a particular Roman Catholic, Protestant, or other moral view is superior to that of competing philosophies." George E. Garvey, *The Constitution, The Courts, and Human Rights*, 33 CATH. U. L. REV.. 801, 805 (1984) (book review). Professor Garvey further observed, that

forbid legal reliance on religious values appears contradictory, when in fact the words and background of the Constitution would seem to suggest against such an advance.[15]

A. Religious Tolerance During the Colonial Period

The religion clauses of state constitutions and that of the First Amendment of the Federal Constitution, created between 1776 and 1791, encompassed both a political and theological ideology.[16] Together they reflected both the dictates of religious believers in the early years of the American republic and the viewpoints of their political leaders.[17] They demonstrated a conception, as espoused by John Adams, that the law is rooted in a common religious tradition.[18]

As an example of this combined ideology, in developing their political and religious systems, in what was then the New England portion of the English colony, the Puritan's ministers and magistrates united in casting out dissenters, implementing church attendance, confining electoral rights solely to members of the community church, and sustaining churches

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> [i]t should be no less shocking, however, for the courts to refuse to consider the moral teachings of religious teachings of religious traditions when making moral value judgments. The constitutionalization of a secular moral philosophy, to the exclusion of a traditional religious moral views, would be tantamount to establishing a secular federal religion.

Id.

[15] *See* Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988); John H. Mansfield, *The Religion Clauses of the First Amendment and the Philosophy of the Constitution*, 72 CAL. L. REV. 847 (1984).

[16] *See* Conkle, *supra* note 15.

[17] *Id.*

[18] *See, e.g.*, KARL RAHNER, FOUNDATION OF RELIGIOUS FAITH 1-175 (William V. Dych trans., 1978); WILLIAM JAMES, THE VARIETIES OF RELIGIOUS EXPERIENCE (New American Library, Inc. 1958).

through taxation.[19] Contrary to a general misconception, however, the Puritans also made lasting contributions to America's tradition of religious liberty by disapproving of an ecclesiastical judiciary, and by cautiously differentiating between civil and religious control.[20]

For approximately four generations, the Puritans experienced an unmitigated independence to carry out their political and religious experiments.[21] The English royal charters

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[19] Although church and state were not to be conjugated, they were still to be "close and compact." Letter from John Cotton to William Fiennes, first viscount Saye and Sele (1636), *in* THE PURITANS 210 (Perry Miller & Thomas H. Johnson eds., Vol. 1, 1963). From the Puritans' point of view, these two institutions were insolubly connected in nature and in purpose. Separately, each was an agent of Godly authority, and each did its part to create and preserve the community. As stated by one mid-eighteenth century writer, "I look upon this as a little model of the Glorious Kingdome of Chri[s]t on earth. Chri[s]t Reigns among us in the Common wealth as well as in the Church, and hath his glorious Intere[s]t involved and wrapt up in the good of both Societies re[s]pectfully." *URIAN OAKES, NEW ENGLAND PLEADED WITH, AND PRESSED TO CONSIDER THE THINGS WHICH CONCERN HER PEACE* 49 (1673). The Puritans, therefore, readily encouraged and advocated the coordination and cooperation of church and state.

[20] In the New England colonies, the Puritans utilized a number of aegis to guarantee the fundamental detachment of the institutions of church and state. As one legal scholar noted,

> [c]hurch officials were prohibited from holding political office, serving on juries, interfering in governmental affairs, endorsing political candidates, or censuring the official conduct of a statesman. Political officials, in turn, were prohibited from holding ministeral office, interfering in internal ecclesiastical government, performing sacerdotal functions of clergy, or censoring the official conduct a cleric.

John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 NOTRE DAME L. REV. 372, 379 (1996). To allow any form of obtrusiveness by either church or state officers, Governor John Winthrop declared he "would confound. . . those Jurisdictions, which Christ hath made distinct." T.H. BREEN, THE CHARACTER OF THE GOOD RULER, 1630-1730 42 n.24 (1970).

[21] It was not until the early eighteenth century that the English authorities, through new casts of legislation, and with the reinforcement of royal control in the other colonies in America, were able to prescribe control over colonial theology and politics. E. RUSSELL, THE REVIEW OF AMERICAN LEGISLATION BY THE KING IN COUNCIL (Hein ed. 1981).

The influence of New England Puritanism on colonial American thought towards religion and politics can scarcely be overstated, because, as a prominent historian indicated, the imprint made by the Puritans "provided the moral and religious background of fully 75 percent of the

that first established the New England colonies bestowed upon the Puritans, broad discretion to envision and develop their ideal polity and theology.[22] The charters decreed neither a religious nor a royalist establishment.[23] The charters granted the New England colonists the freedom to propose and practice their own theological beliefs, given that they "wynn and incite the Natives of Country, to the Knowledg and Obedience of. . .the Christian Fayth."[24] The colonists were generally free to form their own political and legal frameworks, provided that they "be not contrarie or repugnant to the Lawes [and] Statutes of...England."[25] They were given control over the migration of believers, such as themselves, to the colony, provided that "none of the saide Persons be...restrayned" by the Crown and "[t]hat every [one] of them shalbe free and quitt from all taxes."[26]

At the same time that the religious and political turbulence of seventeenth-century England induced the Puritan migration to the New World, it also influenced dissidents to view America as a place for effectuating experiments founded on religious freedom. Similar to the Puritans, the evangelicals who settled in the colonies, including Rhode Island, Pennsylvania, and

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people who declared their independence in 1776." SYDNEY E. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 184, 188 (1972).

[22] *See infra* notes 25-27, and accompanying texts.

[23] *Id.*

[24] Charter of Massachusetts Bay (1629), *reprinted in* 3 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 1846, 1857 (Francis Newton Thorpe ed. 1909) [hereinafter FEDERAL AND STATE CONSTITUTIONS].

[25] *Id*. at 1857. *See also* Charter of Connecticut (1662), *reprinted in* 2 FEDERAL AND STATE CONSTITUTIONS, 529, 534.

[26] FEDERAL AND STATE CONSTITUTIONS, *supra* note 25, at 1855.

New Jersey, fostered a theological theory of religious liberties and rights.[27] They correspondingly encouraged the separation of church and state – the creation of a "wall of Separation between the Garden of the Church and the Wilderness of the world."[28] However, they went farther than the Puritans in their understanding of institutional and individual religious rights and in their arguments for a greater separation between the institutions of church and state.[29] The evangelicals attempted to defend the liberty of conscience of every individual and the license of association of each religious group.[30] Unlike the Puritans, the evangelicals inhibited the legal establishments of religion, as well as all blends of politics and theology.[31]

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[27] Although the evangelical heritage of religious liberty is now and again traced to the seventeenth century – especially to Roger Williams, the founder of Rhode Island, and William Penn, the founder of Pennsylvania – it did not appear as a powerful political force until after the Great Awakening of circa 1720-1780. *See* THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 134-222 (1986); William G. McLoughlin, *The Great Awakening As a Key to the American Revolution*, *in* PREACHERS AND POLITICIANS: TWO ESSAYS ON THE ORIGINS OF THE AMERICAN REVOLUTION 1 (Jack P. Greene & William G. McLoughlin eds., 1977). Though the evangelicals had fewer occasions than the Puritans to institutionalize their religious and political beliefs, they still retained an influence on the early American constitutional experiment. *Id.*

[28] *See* Roger Williams, *Mr. Cotton's Letter Lately Printed, Examined and Answered (1644)*, *reprinted* in 3 THE COMPLETE WRITINGS OF ROGER WILLIAMS 392 (Russell & Russell, Inc. 1963) [hereinafter THE COMPLETE WRITINGS]. Williams announced the "wall of separation" metaphor over 150 years before Thomas Jefferson wrote his letter to the Danbury Baptists in 1802, which utilized the "wall" metaphor. *See infra* note 55 and accompanying text.

[29] *See supra* n. 28, and accompanying text.

[30] *Id.*

[31] Although the evangelicals tried with great earnestness to completely separate the institutions of church and state, compared to the Puritans they did not always succeed, nor did they always strive to entirely separate the two institutions. In one example, fearing that Catholic allegiance to a foreign power would compromise security for the government in Rhode Island, due to contemporary political and religious agitation in Europe, Roger Williams, like other evangelicals, agreed to various limitations upon the freedom and liberty of Catholics. EDMUND S. MORGAN, ROGER WILLIAMS: THE CHURCH AND STATE 136-137 (1967). Despite his strong support of liberty, Roger Williams did not tolerate anarchy at the cost of religious freedom. In the interest of common order and the safety of society, Williams sometimes restricted the equal

Furthermore, in the half-century prior to and including the American Revolution, other English colonies, such as Pennsylvania, New Jersey, New York, and Delaware, afforded broad-minded religious freedom.[32] In New Jersey and New York, each had formal religious establishments, but because of the variety of religious assemblies in each colony, de facto

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liberty of conscience in religious affairs. Roger Williams, *Letter to the Town of Providence* (Jan. 1655), *reprinted in* 6 THE COMPLETE WRITINGS, 278-279.

[32] The Delaware Constitution furnishes representative language.

> That all men have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences and understandings, and that no man ought or of right can be compelled to attend any religious worship or maintain any religious ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul [sic] the right of conscience and free exercise of religious worship.

DEL. CONST. OF 1776, art. II.

The Pennsylvania Constitution adds a safeguard against religious discrimination: "Nor can any man, who acknowledges the being of a God, be justly deprived or abridged of any civil right as a citizen, on account of his religious sentiments or peculiar mode of religious worship." PA. CONST. of 1776, art II. It also included an immunity for conscientious objectors: "Nor can any man who is conscientiously scrupulous of bearing arms, be justly compelled thereto, if he will pay such equivalent." *Id.*.at art. VIII.

The Constitution of New Jersey gave exemptions from religious taxes, applying language, such as "nor shall any person. . . ever be obliged to pay tithes, taxes, or any other rates, for the purpose of building or repairing any other church.. . . or ministry, contrary to what he believes to be right." N.J. CONST. OF 1776, art. XVIII.

The Constitution of New York addressed both church and state intrusions on conscience, and sought

> [n]ot only to expel civil tyranny, but also to guard against the spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind [and therefore] declare, that the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed,within this State, to all mankind.

N.Y. Const. OF 1777, art. XXXVIII.

religious liberty flourished.[33] Similarly, the southern colonies also began to effectuate greater religious freedom.[34] The religious establishments in the Carolinas and Georgia, however, continued to preserve Anglicanism.[35]

B. Religious Liberty, Revolution, and a New Nation

The ideologies that forged the attitudes of the colonies on the eve of the American Revolution encompassed the perception of inalienable rights, the significance of a written constitution, the preeminence of natural law, Puritan covenant theology, and the existence of a

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[33] The creation of this pluralism among various religious sects was a precursor of the future American experience and demonstrates James Madison's understanding that religious liberty is most easily protected in a country with multiple denominations. As Madison argued in *Federalist* "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of interests, and in the other in the multiplicity of sects." THE FEDERALIST NO. 51, at 324 (J. Madison) (Clinton Rossiter ed. 1961)[hereinafter THE FEDERALIST].

[34] The South Carolina Constitution espoused the fact that "no person shall be eligible to a seat in the said senate unless he be of the Protestant religion. . ." S.C. CONST. OF 1778, art. XII. Whereas the North Carolina Constitution went even further, stating in part that

> [n]o person, who shall deny the being of God, or the truth of the Protestant religion, or the divine authority either of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within this State.

N.C. CONST. OF 1776, art. XXXII.

The Georgia Constitution, however, was more generous toward religious liberty than other southern states during this period when it granted its citizens "the free exercise of their religion; provided it is not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession." GA. CONST. OF 1777, art. LVI.

[35] *Id.*

government by popular consent.[36] For instance, although it did not dilate upon the substance of religious freedom,[37] the Declaration of Independence predicated theistic assumptions.[38] These assumptions included four testimonials to a Deity: "nature's God" and "Creator" in the first two paragraphs, and "Supreme Judge of the world" and "Divine Providence" in the closing paragraph.[39] Moreover, the document's most recognizable words reveals its theistic supposition. "We hold these truths to be self-evident: that all men are created equal; that they are endowed, by their Creator, with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."[40]

In addition, in the decade after achieving independence, the Continental Congress authorized legislative and military chaplains, provided for the importation of Bibles, and declared days of thanksgiving, prayer, and fasting.[41] The Articles of Confederation, which functioned as the country's foundational law before the adoption of the Constitution, alluded to

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[36] *See generally,* EDWARD CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955). *See also*, ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DECELOPMENT 36-46 (7th ed. 1991).

[37] *See* 1 ANSON P. STOKES & LEO PFEFFER, CHURCH AND STATE IN THE UNITED STATES 463 (1950) ("most of the church establishments which existed in the United States [in 1776] were not imposed by the English government"). By the commencement of the American Revolution, the issue was not a major cause of friction between the colonies and the Crown. The colonies had withstood the establishment of a dominant religion by the Crown, and had already exerted control over their own religious concerns.

[38] THE DECLARATION OF INDEPENDENCE paras. 1, 2, and 31 (U.S. 1776).

[39] *Id.*

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[40] *Id*. at para. 2

[41] *See generally* 1 Stokes & Pfeffer, *supra* n.37, at 447-448 (noting these and other enactments which disclosed the Founders' understanding of the significance of religion to the young republic).

the "Great Governor of the world" in article XIII and furnished the example for federal noninterference in state religious concerns.[42] Furthermore, according to the preamble of the Northwest Ordinance of 1787, which created a republican form of government and a bill of rights for the Northwest Territory, the bill of rights were proclaimed to spread fundamental principles of civil and religious liberty.[43] These principles form the basis upon which the laws and constitutions of these republics were erected.[44] The Founders identified the impact of religion to the republic when they proclaimed in article III: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[45]

In formulating a Constitution, which created a republic premised on civil and religious liberty,[46] the framers produced a tripartite federal government that expressed only enumerated

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[42] ARTICLES OF CONFEDERATION, art. XIII, *in* 1 FEDERAL AND STATE CONSTITUTIONS, *supra* note 25, at 15. Under article III, the states vowed to support one another when attacked "on account of religion, sovereignty, trade, or any other pretence whatever"; in article II, the states had supremacy over all matters aside from those "delegated to the United States," but the Articles nowhere delegated any power in religious affairs to the federal government. *Id*. arts. III & II at 10.

[43] Northwest Ordinance § 13 (1787), *reprinted in* SOURCES OF OUR LIBERTIES 395 (R. Perry & J. Cooper eds., rev. ed. 1978). Article I stated that "[n]o person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments in the said territory." *Id*. art. I at 395.

[44] *Id.*.

[45] *Id*. art. III at 396.

[46] The understanding between the roles of government and religion at the federal level by the Framers may partially be explained through English philosopher John Locke's pamphlet entitled "A Letter Concerning Toleration." Locke stated that he "esteem[ed] it above all things necessary to distinguish exactly the Business of Civil Government from that of Religion, and to settle the just Bounds that lie between the one and the other." JOHN LOCKE, A LETTER CONCERNING TOLERATION 26 (James H. Tully, ed. 1983) (1689). After discussing the term "church," Locke suggested that:

powers. Article VI of the Constitution expressly provides: "No religious Test [oath] shall ever be required as a Qualification" for public office.[47] Under the Tenth Amendment, any powers not delegated to the federal government by the Constitution, "nor prohibited by it to the States, [were] reserved to the States respectively, or to the people."[48] The Bill of Rights, adopted during Congress' first session, also expressly restrained the authority of Congress in religious affairs.[49]

The legislative history of the First Congress implies that an assortment of beliefs influenced the religious clauses of the First Amendment, including a sentiment that religious exercise was a delicate and inalienable right requiring particular safeguards.[50] Additionally, that power over religion, to the degree it could be applied, was a state concern.[51] The legislative

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> As the Magistrate has no Power to impose by His Laws, the use of any Rites and Ceremonies in any Church, so neither has he any Power to forbid the use of such Rites and Ceremonies as are already received, approved, and practiced by any Church; Because if he did so, he would destroy the Church it self; the end of whose Institution is only to worship God with freedom after its own manner.

Id. at 41.

[47] U.S. CONST. art. VI.

[48] U.S. CONST. amend. X. The Constitution, according to Professor Tribe, necessitated the separation of governmental authority along two lines: "vertically (along the axis of federal, state, and local authority) and horizontally (along the axis of legislative, executive, and judicial authority). . . ." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 1-2, at 2 (2d ed. 1988).

[49] *See supra* n.8, and accompanying text.

[50] Representative Daniel Carroll, during the House debates held on August 15, 1789, supported an amendment certifying religious liberty because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and [because] many sects have concurred in opinion that they are not well secured under the present Constitution." 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 730 (J. Gales ed. 1834)[hereinafter ANNALS].

[51] This viewpoint was couched by Representative Thomas Tucker during the House debates over James Madison's suggested amendment forbidding the states from infringing the "equal rights of

history further implies that, unless deterred, Congress would present a serious threat to religious liberty, or would intercede among the establishments of the individual states.[52] Fundamental to these beliefs was an axiom of federalism based on the political philosophy of the Framers and their trepidation towards centralized power.[53] The conservancy of religious liberty relied upon this principle, which signaled the separation between state and federal authority.[54] As two noted

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conscience." Opposed to the measure, Tucker stated: "[This amendment] goes only to the alteration of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much." *Id*. at 755 (August 17, 1789).

[52] *See infra* notes 55-57 and accompanying text.

[53] *Id.*

[54] Those who champion a broad reading of the Establishment Clause of the First Amendment often cite James Madison and Thomas Jefferson. Nevertheless, Madison's statements in the House debates illustrate the fact that he interpreted the clause only to forbid the creation of a national religion, whereas Jefferson took part in neither the Constitutional convention nor the First Congress.

During the Congressional debate, the proposed amendment, which was the subject of the debate read: "[N]o religion shall be established by law, nor shall the equal rights of conscience be infringed." 1 ANNALS, *supra* note 51, at 137 (August 15, 1789). Madison supported the amendment because:

> [S]ome of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion.

Id. at 730. Madison replied to adversaries of the amendment who though that it could be construed to harm religion overall, by asserting that:

> [I]f the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. [Madison] believed that the people feared once sect might obtain pre-eminence, or two combined together, and establish a religion to which they would compel others to conform.

Id. Although the debates did not define Madison's personal views toward religion, they show that Madison discerned the Establishment Clause as an instrument written merely to avert laws that would benefit a particular religious sect.

In regards to Jefferson, given that he was not a Framer, it is astonishing that the Supreme Court espoused his controversial "wall of separation" metaphor as representative of the First Amendment religious clauses. In a letter dated January 1, 1802, Jefferson, while President, replied to an inquiry from the Danbury Baptist Association, and stated in part:

> Believing with you that religion is a matter which lies solely between man and God, that he owes account to none other for his faith or his worship, that the legislative powers of the government reach action only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and state.

JEFFERSON WRITINGS 510 (Merrill D. Peterson ed. 1984). The statement by Jefferson was first employed in Reynolds v. United States, 98 U.S. 145, 164 (1878) (quoting Thomas Jefferson's letter to the Danbury Baptist Association in holding that the only basis for federal interference with the public worship of God is when it threatens to fracture public order). Reynolds was charged with violating §5352 of the Revised Statues. Reynolds, 98 U.S. at 164. His conviction was affirmed by the Supreme Court. *Id*. It was not until Everson v. Board of Educ., 330 U.S. 1 (1947), however, that the Court raised the figure of speech by Jefferson to constitutional status, averring that the "First Amendment has erected a wall of separation between church and state" that "must be kept high and impregnable." Everson, 330 U.S. at 18.

As President, Jefferson parted with tradition by declining to issue religious proclamations because he considered the national government "interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises." Letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808), in JEFFERSON WRITINGS, *supra*, at 1186. As a state legislator, however, he partook in a sweeping revision of Virginia's laws, which included: A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers; A Bill for Appointing Days of Public Fasting and Thanksgiving; and A Bill Annulling Marriages Prohibited by the Levitical Law, and Appointing the Mode of Solemnizing Lawful Marriage. *Reprinted in* 2 THE PAPERS OF THOMAS JEFFERSON 555-558 (J. Boyd ed. 1950).

How may Jefferson's record on religious proclamations as president and the position taken in the Danbury letter be squared with his legislative acts in Virginia? As Daniel L. Dreisbach noted:

> A careful review of Jefferson's actions throughout his public career suggests that he believed, as a matter of federalism, that the national government had no jurisdiction in religious matters, whereas state governments were authorized to accommodate and even prescribe religious exercises.

historians suggested, there are at least three justifications as to why the religious clauses were addressed only to Congress. They include the belief by the Framers that: a national church offered the greatest threat to religious liberty; civil control over religious affairs was a state function; and the establishment clause was meant to avert congressional intervention with preexisting state establishments.[55]

Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor*, 16 CONST. COMMENT. 627, 658-659 (1999). Therefore, the "wall" metaphor was not intended to be viewed as a universal declaration on the relationship between religion and civil government; instead, it was, more explicitly, an expression describing the proper constitutional jurisdiction of the federal and state governments on concerns relating to religion. It may be argued that Jefferson's "wall" had less to do with the distinction between all civil government and the church than with the distinction between the state and federal governments.

[55] *See* Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1606-09 (1989) [Hereinafter *Religious Liberty*]. Adams and Emmerich noted that while the Founders realized that the existence of an established religion at the state level threatened religious liberty, they were even more aware of possibility that a national church presented the biggest threat to this liberty. *Id*. at 1605-6. This is why they fully advocate the First Amendment which declares "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . " *Id*. at 1560. There was a fear by the Framers that "[a]n alliance of church and state at the national level would result in 'accumulation' of religious and civil power in 'the same hands,' the very essence of tyranny." *Id*. at 1606. As they reflected on Professor Edwin Gaustad's article: "Throughout much of the eighteenth century, colonists were haunted by a fear of episcopacy – i.e., a fear that Anglican bishops would sail to America, there to exercise spiritual and temporal powers – powers made the more fearful because no proper distinction between them was made." Edwin Gaustad, *A Disestablished Society: Origins of the First Amendment*, 11 J. CHURCH & ST. 409, 414 (1969).

At the same time, the Framers also believed that civil authority in religious concerns was the province of the state. Adams & Emmerich, *Religious Liberty*, *supra* at 1607. According to Jefferson, the "power to proscribe any religious exercise or to assume authority in religious discipline" rested not on the federal government but with the states "as far as it could be in any human authority." *Id*. By delegating the Congress with limited and enumerated powers, it was hoped that the individual states would continue to provide for the general health and welfare, and nearly all other governmental concerns involving citizens. *Id*. This separation of political authority evolved in part from the belief that "the national and state governments would 'check' each other from usurping the liberties of the people and in part from the notion that the states would act as a shield between federal power and individual liberty." *Id*. at 1607-08.

Moreover, according to Adams and Emmerich, "the recognition that civil authority in religious affairs was a state rather than a federal concern accounts for the view that some Framers intended the establishment clause to prevent congressional interference with existing

The Constitution nowhere accorded Congress explicit power in religious concerns. While Federalists and Antifederalists discussed the necessity of a bill of rights, they seemed to acknowledge that indemnification for religious injustices should be left chiefly, if not entirely, at the state level.[54] To grant Congress the authority over such affairs would impose on the states and produce a centralized threat to religious freedom.[56] Alexander Hamilton, the chief supporter of a strong national government, imparted the latter apprehension in *The Federalist Papers*: "It may safely be received as an axiom in our political system, that the State governments will, in all possible contingencies, afford complete security against invasions of the public liberty by the national authority."[57]

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state establishments." *Id*. at 1609. It is possible that Congress could have meddled with the states by either adopting a national religion supplanting state-favored churches, or by passing laws that would have benefited or hindered all or most of the state religious establishments. *Id*. Taking this into account, The Framers' consideration of nonintervention, as suggested by Adams and Emmerich, may help to rationalize the application of the word "respecting" in the establishment clause, rather than wording, such as, "nor shall any national religion be established," which would still allow Congress to try, to intervene possibly under the "necessary and proper" clause of Article I. *Id*.

[56] Adams & Emmerich, *Religious Liberty*, *supra* note 56, at 1609.

[57] THE FEDERALIST NO. 28, at 181 (A. Hamilton) Besides separating state and federal power, "the Founders sought to ensure a free society by affording constitutional protection, at both levels, to 'mediating' institutions such as the family, churches, the press, business, and voluntary associations." Adams & Emmerich, *supra* note 56, at 1609. As a whole, these institutions functioned not only as local delegates, by representing different concerns in the civic scene, but as intermediaries between a citizen and the government. *Id*.

In regards to the possibility that liberty may create discordant factions that could threaten civil harmony, Madison suggested in *The Federalist Papers No. 10* that the manner of "curing the mischiefs of faction" was not to eliminate its causes, but to manage its consequences through a well organized and outstretched republican government. "A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source." THE FEDERALIST NO. 10, at 84 (J. Madison). *See also* THE FEDERALIST NO. 51, *supra* note 34, at 324 (J. Madison).

PART II: STATES RIGHTS AND THE FOURTEENTH AMENDMENT

A. The Young Republic and Federal Restrictions on Religion

Clearly, nothing in the Constitution demanded that the states disestablish religion.[58] As Justice Joseph Story, the foremost authority on the Constitution during this period, stated, "this whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice and the State Constitutions."[59] The Supreme Court was first presented with the question of whether any terms of the Religion Clauses of the First Amendment limited the states, in *Permoli v. Municipality No. 1*.[60] In *Permoli*, the Court was introduced, for the first time, to the issue of whether the Religion Clauses of the First Amendment applied to the states.[61] Building upon its earlier decision in *Barron v. Baltimore*,[62]

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[58] *See* ARLIN M. ADAMS & CHARLES J. EMMERICH, A NATION DEDICATED TO RELIGIOUS LIBERTY: THE CONSTITUTIONAL HERITAGE OF THE RELIGIOUS CLAUSES 20 (1990) [hereinafter A NATION DEDICATED].

[59] JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 597 (2d ed. 1851).

[60] In 1833, the Court decided that the Bill of Rights, in general, and the Fifth Amendment in particular, pertained only to the federal government. Barron v. Baltimore, 32 U.S. (7 Pet.) 243 (1833). *Barron* concerned a claim by a wharf owner, who sued the city of Baltimore, for economic losses. He based his claim on the city's diversion of streams lowered the water level surrounding his wharves. *Id*. at 243-244. The wharf owner argued that the action by the city instituted a taking under the Fifth Amendment, and he was entitled to just compensation. *Id*. at 245. The Court disagreed and held the Fifth Amendment Takings Clause did not apply to the states. *Id*. at 250-251. Alluding to the Bill of Rights, Chief Justice John Marshall, for an unanimous Court in *Barron*, stated: "These amendments contain no expression indicating an intention to apply them to the state governments." *Id*. at 250.

[61] Permoli v. New Orleans , 44 U.S. (3 How.) 589 (1845). *Permoli* involved a city ordinance, which made it unlawful to uncover dead bodies for public view in Catholic churches. *Id*. at 590. A priest was convicted of violating this ordinance and fined $50 when he opened a coffin and blessed a dead body during a funeral mass. *Id*.

[62] *Barron*, 32 U.S. (7 Pet.) at 243.

which held the Bill of Rights did not apply to the states,[63] the Court, in an unanimous opinion, deemed the Free Exercise Clause of the First Amendment did not apply to the states. "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states."[64] The idea espoused in *Barron* influenced the Court until the passage of the Fourteenth Amendment.[65]

Within the timeframe between the passage of the First Amendment and the Fourteenth Amendment, the Court decided only six cases that directly or indirectly involved the question of religion.[66] In none of these decisions did the Court even insinuate that, the Religious Clauses of the First Amendment should be applied to the states. Therefore, prior to the War Between the States and the adoption of the Fourteenth Amendment, it was the prevalent understanding that the Religion Clauses of the First Amendment did not function as a restriction on state action pertaining to religion.

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[63] *Id*. at 250.

[64] *Permoli*, 44 U.S (3 How.). at 609.

[65] *See generally,* Adams and Emmerich, A NATION DEDICATED, *supra* note 59.

[66] Baker v. Nachtrieb, 60 U.S. (19 How.) 126 (1856); Smith v. Swormstedt, 57 U.S. (16 How.) 288 (1853); Goesele v. Bimeler, 55 U.S. (14 How.) 589 (1852); Permoli v. Municipality No. 1 of the City of New Orleans, 44 U.S. (3 How.) 589 (1845); Vidal v. Mayor of Philadelphia, 43 U.S. (2 How.) 127 (1844); Terrett v. Taylor, 13 U.S. (9 Cranch) 43 (1815). *See* Carl H. Esbeck, *Table of United States Supreme Court Decisions Relating to Religious Liberty 1789-1994*, 10 J. L. & RELIGION 573 (1993-94).

B. The Evolution of the Fourteenth Amendment and the Modern Interpretation of the Religion Clauses.

The ratification of the Fourteenth Amendment elevated new questions as to whether the states' involvement with religion was limited by the Constitution in any way.[67] Two doctrines

[67] The material section of the Fourteenth Amendment for this question is section one. It reads:

> All person persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1. Following the adoption of the Fourteenth Amendment, and prior to 1934, the Court never suggested that the Religious Clauses could act as restrictions on state action, except in one case where the Court insinuated that religious liberty was one aspect of the liberty protected under the Fourteenth Amendment. In Meyer v. Nebraska, 262 U.S. 390 (1923), the Court, through dictum, discerned that "liberty," as defined under the Fourteenth Amendment and protected from state action, encompasses many rights. Among these rights , the right "to worship God according to the dictates of his own conscience." *Id*. at 399. Other than this minor limitation, states were free to contemplate religious matters as they chose under their state constitutions. *Id.* This was despite the continuous endeavors by members of Congress to pass constitutional amendments that would have foisted the Religious Clauses upon the states. From 1876 until 1930, at least 16 such amendments were introduced, but all of them failed. F. William O'Brien, *The States and "No Establishment": Proposed Amendments to the Constitution Since 1798*, 4 WASHBURN L. J. 183, 210 (1965).

The dispute as to whether the Framers of the Fourteenth Amendment intended the amendment to make the provisions of the Bill of Rights relevant to the states has continued since the ratification of the amendment. One argument concerning incorporation of the Religion Clauses of the First Amendment, which has largely been neglected, centers on the Blaine Amendment, which was introduced in Congress by Representative James G. Blaine on December 14, 1875. The amendment proposed

> [n]o State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public fund therefore, nor any public lands devoted thereto, shall ever be under the control of any religious sect, ; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.

H.R.J. Res. 1, 44th Cong., (1875). Debated by Congress in August 1876, it passed the House by a vote of 180-7, but just fell short of the necessary two-thirds vote required for passage in the Senate, The Senate vote, held on August 14, 1876, was 28-16 in favor of the amendment. 4 Cong. Rec. 5595 (1876). The importance of the proposed amendment, as suggested by one author, is three-fold. First, the first clause of this proposal, aside from its applicability to state action, was in the identical words of the First Amendment. Second, the measure was proposed and discussed only seven years after the ratification of the Fourteenth Amendment. Third, it was considered by the Forty-fourth Congress, which included twenty-three members of the Thirty-ninth Congress, two of whom actively participated in the drafting of the Fourteenth Amendment. Alfred W. Meyer, *The Blaine Amendment and the Bill of Rights*, 64 Harv. L. Rev. 939, 941 (1951)[hereinafter Meyer].

Even more poignant was Senator Fredrick Frelinghuysen's comments regarding the proposed amendment, which attests that the Fourteenth Amendment did not incorporate the First Amendment:

> I call the attention of the Senate to the first alteration the House amendment makes in our Constitution. The first amendment to the Constitution, enacted shortly after the adoption of the Constitution, provides that – 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' This is an inhibition on Congress, and not on the States. The House article very properly extends the prohibition of the first amendment of the Constitution to the States.... Thus the article as amended by the Senate prohibits the States, for the first time, from the establishment of religion, from prohibiting its free exercise, and from making any religious test a qualification to office.

4 CONG. REC. 5561 (Aug. 14, 1876) (statement of Sen. Frelinghuysen).

In arguing against the proposed amendment, Senator Stevenson intriguingly employed the statements of Thomas Jefferson when he declared:

> Friend as he [Jefferson] was of religious freedom, he would never have consented that the States, which brought the Constitution into existence, upon whose sovereignty this instrument rests, which keep it within its expressly limited powers, should be degraded and that the Government of the United States, a Government of limited authority, the mere agent of the States with prescribed powers, should undertake to take possession of their schools and their religion…

4 CONG. REC. 5589 (Aug. 14, 1876) (statement of Sen. Stevenson).

In the end, the amendment failed to achieve the essential two-thirds majority necessary for it to begin the ratification process among the states. Mr. Meyer suggests that " the debates on the Blaine Amendment and the later attempts to make the religious provisions of the First Amendment binding upon the states point out the historical inaccuracy of concluding that the

have emerged from the debate as to the Framers intent. The first doctrine, of "total incorporation," has never been accepted by the Supreme Court.[68] Consequently, the Court has never held that the Framers of the Fourteenth Amendment sought to apply the entire Bill of Rights towards the states.[69] The other doctrine, which was adopted by the Court, applied specific rights established in the Bill of Rights towards the states through the Due Process Clause of the Fourteenth Amendment. This doctrine is called "selective incorporation."[70]

Fourteenth Amendment was intended to incorporate these provisions." Meyer, *supra* at 945. *See also* F. WILLIAM O'BRIEN, JUSTICE REED AND THE FIRST AMENDMENT 116-117 (1957); J. MCCLELLAN, JOSEPH STORY AND THE AMERICAN CONSTITUTION 152-155 (1971).

[68] At most, only ten justices who have served on the Court at varying times have advocated the total incorporation doctrine. A list of justices is given by Justice Douglas. Gideon v. Wainright, 372 U.S. 335, 346 (1963) (Douglas, J., concurring).

[69] The "total incorporation" doctrine, associated most often with Justice Hugo Black, accommodated the belief that the Framers of the Fourteenth Amendment intended to make the provisions of the Bill of Rights applicable to the states either through the "privileges and immunities" clause or the "due process" clause of the amendment. *See* Adamson v. California, 332 U.S. 46, 68 (1947) (Black, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 162 (1968) (Black, J., concurring). *See also* Richard L. Ayres, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57, 103-104 (1993); William W. Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 6 (1954).

[70] The doctrine of "selective incorporation", which was defined by Justice Cardozo in Palko v. Connecticut 302 U.S. 319 (1937), was understood to require adhesion to those fundamentals of liberty and justice that are "implicit in the concept of ordered liberty." *Id*. at 325. "Selective incorporation", however, did not mean or demand sweeping incorporation and exercise of a right found in the Bill of Rights. GERALD GUNTHER, CONSTITUTIONAL LAW 428-29 (11th ed. 1988). Rather, a modified interpretation of the right was applied to the states. Therefore, "the Court viewed due process as encompassing many of the same basic principles as the Bill of Rights guarantees, but generally assumed that due process limits imposed on state action derived from those principles were narrower than the limits imposed on the federal government by the Bill of Rights." Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L. J. 253, 281 (1982).

The Court first addressed a case concerning religious liberty with the application of the "selective incorporation" doctrine in *Hamilton v. Regents of the University of California*.[71] The belief that the Due Process Clause protected multiple facets of religious liberty was recognized not only by a unanimous Court, but by the concurring opinion of Justice Cardozo, who declared, "I assume for present purposes that the religious liberty protected by the First Amendment against invasion by the nation is protected by the Fourteenth Amendment against invasion by the states."[72]

After the *Hamilton* Court's identification that the Due Process Clause of the Fourteenth Amendment protects certain facets of religious liberty from state action, it was only a small step for the Court to incorporate the two Religious Clauses of the First Amendment. Interestingly, however, the Court's incorporation of the Free Exercise Clause in *Cantwell v. Connecticut*[73] and the Establishment Clause in *Everson v. Board of Education*[74] were arrived at with minor deliberation as to why the Religious Clauses of the First Amendment should be incorporated against the states through the Fourteenth Amendment.[75] Even more intriguing, as one author

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[71] Hamilton v. Regents of the University of California, 293 U.S. 245 (1934). A challenge was filed against a University of California policy that all students take part in military drill exercises or face expulsion. A unanimous Court held, the liberty guaranteed by the Due Process Clause of the Fourteenth Amendment contained "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training." *Id*. at 262.

[72] *Id*. at 265 (Cardozo, J., concurring).

[73] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[74] Everson v. Board of Educ., 330 U.S. 1 (1947).

[75] The material language from the Cantwell decision states:

> We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental

points out, is why the Court withdrew from the traditional "selective incorporation" doctrine, and instead, resolved to apply the Religious Clauses of the First Amendment to the states through "total incorporation," By doing so, the court dictated the same limitations on the states via the Fourteenth Amendment as the First Amendment dictates on the federal government.[76]

Subsequent to the incorporation of the First Amendment Religion Clauses in both *Cantwell* and *Everson*, the Supreme Court has delivered an overabundance of decisions regarding the Religious Clauses. In doing so, the court has prescribed the same circumscriptions on state governments as it has foisted upon the federal government.[77] With respect to the free exercise of religion, the Court has distinguished an unmitigated right to believe what one may covet, but this right does not extend into an unquestionable prerequisite to engage in any religious behavior.[78] Accordingly, laws that endeavor to regulate religious ideologies will be

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> concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no laws respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

Cantwell, 310 U.S. at 303. The material language of Everson is even more routine, here the Court 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." Everson, 330 U.S. at 15.

[76] Stuart Poppel, *Federalism, Fundamental Fairness, and the Religion Clauses*, 25 CUMB. L. REV. 247, 260 (1995).

[77] Only one Supreme Court Justice, the second Justice Harlan, in Waltz v. Tax Comm'n of New York, 397 U.S. 664 (1970), has ever championed separate constitutional constraints for states than for the federal government in respect to religion. In his separate opinion in Waltz, Justice Harlan noted "(I)t may also be that the States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion] – on a natural basis – than the Federal Government." *Id*. at 699 (Harlan, J., concurring). Justice Harlan, however, never elucidated precisely how the states should be handled diversely from the federal government.

[78] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940); Reynolds v. United States, 98 U.S. 145, 164 (1878).

considered per se unconstitutional.[79] Prior to 1990, under the tenet espoused in *Sherbert v. Verner*[80] and *Wisconsin v. Yoder,*[81] if a law encumbered the free exercise of religion,[82] the government entity had to meet a strict scrutiny analysis[83] or else, an immunity for that religious activity had to be carved out of the statute in question.[84] The Court, however, did not employ the *Sherbert* test on every occasion upon which a free exercise issue arose,[85] such as those situations

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[79] Cantwell, 310 U.S. at 303; McDaniel v. Paty, 435 U.S. 618, 626 (1978).

[80] Sherbert v. Verner, 374 U.S. 398 (1963). The Sherbert Court portrayed a clear departure from previous cases that had not granted free exercise protection to religious behavior, as opposed to religious beliefs. *See* Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 NOTRE DAME L. REV. 151, 161 (1987); J. Morris Clark, *Guidelines for the Free Exercise Clause*, 83 HARV. L. REV. 327, 328-29 (1969).

[81] Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that Old Amish Order parents could not be compelled by criminal law to send their children to school beyond the eighth grade).

[82] Two separate decisions by the Court have assigned the degree of governmental interference essential to contravene the Free Exercise Clause. *See* Jimmy Swaggart Ministries v. Bd. Of Equalization, 493 U.S. 378, 391 (1990) (cumbers on religion are "not constitutionally significant" except when they solicit a believer to violate particular doctrinal canons of his faith); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 458 (1988) (government may encroach on the free exercise of religion).

[83] The analysis embraced by the Court's strict scrutiny test required that the law, in order to be established as valid, must be vindicated by a compelling state interest and is narrowly tailored to foster that interest. Thomas v. Review Bd., 450 U.S. 707, 718 (1981).

[84] Cases which demonstrate where exemptions were carved out of a statute include: Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas, 450 U.S. at 707 ; Yoder, 406 U.S. at 205; Sherbert, 374 U.S. at 398.

[85] In these situations, the Court relied upon a rational basis standard of review. *See* Marc J. Blootstein, Note, *The "Core"-"Periphery Dichotomy in First Amendment Free Exercise Clause Doctrine: Goldman v. Weinberger, Bowen v. Roy, and O'Lone v. Estate of Shabazz*, 72 CORNELL L. REV. 827 (1987).

pertaining to criminal institutions[86] or the armed forces.[87] Moreover, in several instances, the Court professed to utilize the strict scrutiny test, yet in supplication, used something much less rigid.[88] As a result of this inconsistency by the Court, most free exercise petitioners lost their suits.[89]

Since 1990, and subsequent to the contentious *Employment Division v. Smith*[90] decision, it seems that religious-based exemptions would not have to be formulated out of detached and

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[86] *See* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (upholding transfer of prisoners for work outside of the prison that had the effect of making some Islamic prisoners miss the Jumu'ah religious service on Friday afternoons).

[87] *See* Goldman v. Weinberger, 475 U.S. 503, 507-08 (1986) (sustaining the exercise of Air Force dress regulations prohibiting the wearing of a yarmulke to a Jewish Air Force officer who wished to wear a yarmulke for religious reasons).

[88] As Justice Scalia suggested, "Although we have sometimes purported to apply the *Sherbert* test in contexts other than [unemployment compensation], we have always found the test satisfied." Employment Div. v. Smith, 494 U.S. 872, 883 (1990). *See* Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109 (1990) (prior to the *Smith* decision the Supreme Court "did not really apply a genuine 'compelling interest' test."). *Id*. at 1127. One author has noted "[w] hat Smith brings out into the open is the degree to which the Court in prior cases had finessed free exercise problems by paying lip service to a compelling interest test, while in fact according a lower level of scrutiny to asserted governmental interests." Mary A. Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 523 (1991). *See generally* Richard A. Brisbin Jr., *The Rehnquist Court and the Free Exercise of Religion*, 34 J. CHURCH & ST. 57 (1992); Ira C. Lupa, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

[89] Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 11 n.40 (1994) (only 25 percent of plaintiffs involved in free exercise of religion cases have actually won) (citing James E. Ryan, Note: *Smith and the Religious Freedom Restoration Act: An Iconoclastic Assessment*,78 VA. L. REV. 1407, 1418 (1992)).

[90] Employment Division v. Smith, 494 U.S. 872 (1990). In Smith, the plaintiff was fired from his job after he ingested peyote, which is classified as an illegal substance under Oregon State law. *Id*. at 874. The plaintiff, an American Indian, took the peyote as part of a traditional religious ceremony. *Id*. As a result of losing his position, he was denied unemployment benefits because it was held that he was discharged for misconduct based upon the use of an illegal substance. *Id*. Reversing the decision of the Oregon Supreme Court, the United States Supreme Court sustained the State law and held that the State may refuse the plaintiff's claim for

ordinarily applicable laws that encumber religious behavior, so long as a rational foundation exists.[91] If, on the other hand, the law in question is neither neutral nor ordinarily applicable, or if the function of the law is designed to encroach upon or hinder religious exercises, then the Court will turn to the strict scrutiny test.[92] A number of commentators criticized the *Smith* decision,[93] and various justices called for the decision to be overruled.[94] Furthermore, in reply to

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unemployment benefits without violating the Free Exercise Clause, regardless of the fact that the plaintiff was fired for using an illegal substance for religious purposes. *Id*. at 878. In a 6-3 decision, the Court held that so long as the prohibition of the free exercise of religion is not the purpose of the law but simply the fortuitous outcome of a basically applicable and otherwise valid statute, the Free Exercise Clause of the First Amendment has not been violated. *Id*.

[91] *Id*. at 878-79. Although not directly overruling the strict scrutiny test for ordinarily applicable laws, Smith appears to have constrained the Sherbert path of cases and Yoder to their fact specific situations. Following the decision, most lower courts have understood Smith to appertain to both civil and criminal laws, even though, while both classes were involved in the case, the majority of the Court concentrated chiefly on the affected criminal law. *See e.g.*, Munn v. Algee, 924 F.2d 568 (5th Cir.), *cert. denied*, 502 U.S. 900 (1991); Vandiver v. Hardin County Bd. of Educ., 925 F.2d 927 (6th Cir. 1991); Intercommunity Ctr. for Justice & Peace v. INS, 910 F.2d 42 (2d Cir. 1990); Salvation Army v. Dep't of Cmty Affairs, 919 F.2d 183, 195 (3d Cir. 1990) ("The rationale of the *Smith* opinion is not logically confined to cases involving criminal statutes."). *But see* NLRB v. Hanna Boys Ctr., 940 F.2d 1295, 1305 (9th Cir. 1991) ("Smith is confined to criminal statutes."), *cert. denied*, 112 U.S. 2965 (1992).

[92] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah 508 U.S. 520, 533 (1993).

[93] *See* Douglas Laycock, *Summary and Synthesis: The Crisis in Religious Liberty*, 60 GEO. WASH. L. REV. 841, 848-849, 855 (1992) (arguing that after the *Smith* decision there is no federal constitutional barrier to prevent states from persecuting religion); Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. REV. 591, 592-93 (1991); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 96-97 (1991) (suggesting that the *Smith* decision mistreated precedent, used unskillful reasoning, and prevented the Free Exercise Clause from achieving any independent significance); McConnell, *supra* note 89, at 1111-28 (contending that the holding in *Smith* is contrary to history, text, and precedent). For support of the result in the *Smith* case, *see* William P. Marshall, *In Defense of Smith and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309-313 (1991); Gerald V. Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 HOFSTRA L. REV. 245, 247-58, 263-64 (1991).

[94] Church of Lukumi Babalu Aye, 508 U.S. at 564, 569-571 (Souter, J., concurring), 577 (Blackmun, J., concurring).

Smith, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA)[95] in an attempt to re-establish the strict scrutiny test for the free exercise of religion.[96] In 1996, however, the RFRA was declared unconstitutional as it related to state and local governments.[97] Recognizing Congress' reasoning in enacting the RFRA, the Court in *Boerne* held that Congress had exceeded

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Many lower courts also demonstrated their disapproval of the *Smith* decision. *See* Yang v. Sturner, 750 F. Supp. 558, 559 (D.R.I. 1990); United States v. Philadelphia Yearly Meeting of the Religious Soc'y of Friends, 753 F. Supp. 1300, 1306 (E.D. Pa. 1990); *First Covenant Church v. City of Seattle*, 840 P.2d 174, 187 (Wash. 1992).

[95] 42 U.S.C. § 2000bb-1(b) (2000). The introduction of the act in Congress, following the Smith decision, was not a mere coincidence. The Act's legislative history directly refers to Smith. S. Rep. No. 103-11, at 2 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893(noting that the RFRA is a response to the statutory provisions of Smith, 494 U.S. 872). Furthermore, the findings and purpose section of the RFRA also point to Smith, claiming that the RFRA's goal was to "restore the compelling interest test set forth in Sherbert and Yoder ... and to guarantee its application in all cases where free exercise is substantially burdened." 42 U.S.C. 2000bb-1(b)(1)(2000).

[96] The RFRA prevented either the states or federal government from substantially burdening the free exercise of religion unless the government could overcome a two-prong test. First, the government has to prove that the burden was necessary to further a compelling governmental interest. 42 U.S.C. 2000bb-1(b)(1)(2000). Second, having surmounted that hurdle, the government had to demonstrate the burden would be the least restrictive instrumentality of advancing that compelling interest. 42 U.S.C. 2000bb-1(b)(2) (2000). The RFRA in effect created a statutory right to free exercise, where upon religious exercise could not be substantially burdened unless the government satisfied strict scrutiny.

[97] See City of Boerne v. Flores, 521 U.S. 507 (1997).

Recently, however, with the advent of a federal ruling in the Tenth Circuit, Kikumura v. Hurley, U.S. App. LEXIS 3570 (10th Cir. 2001), the constitutionality of the federal RFRA no longer appears moot. In Kikumura, the U.S. Court of Appeals for the Tenth Circuit, held on March 9, 2001 that, although Congress' power to enforce the Religion Clauses of the First Amendment against the states does not reside in the Fourteenth Amendment, Congress does have the power to apply the RFRA to federal officials through the First Amendment directly. *Id*. at 19-22.

In handing down its decision, the court noted that subsequent to the District Court's ruling denying the plaintiff prisoner's relief, Congress has amended the RFRA's definition of "exercise of religion." *Id*. As a result of the 2000 Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (2001), the definition has been changed from "the exercise of religion under the First Amendment to the Constitution," 42 U.S.C. § 2000bb-2(4) (2000), to "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" 42 U.S.C. § 2000cc-5(7)(2001).

its legislative capability by surpassing its enforcement powers.[98] In declaring the RFRA to be substantive rather than remedial,[99] the Court enunciated that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[100] Thus, for remedial legislation to be valid under the congruence and proportionality test, the Court must be convinced that sufficient constitutional violations of the Free Exercise Clause exist to justify congressional action on the subject.[101]

Regarding the Establishment Clause of the First Amendment, the development of jurisprudence by the Supreme Court is even less comprehensible.[102] The least variable classification of cases under this clause encompasses government assistance or sponsorship of religious activities in public education. In case after case, the Court has continuously struck down such action on the part of a government entity as violating the Establishment Clause.[103] In

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[98] *Id*. at 519.

[99] "Substantive" legislation is attributed to the formulation of new laws that present further rights beyond Congress' implicit enumerated powers, whereas "remedial" legislation delineates Congressional decisions directed at vindicating injustices.

[100] Flores, 521 U.S. at 520.

[101] What constitutes enough cases to satisfy the sufficient constitutional violation requirement, however, is far from clear. *See* Douglas Laycock, *Conceptual Gulfs in the City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 744 (1998) (identifying the various fundamental arguments between the parties in Flores).

[102] *See e.g.*, Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools – An Update*, 75 CAL. L. REV. 5, 6 (1987); William P. Marshall, *"We Know When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495, 497 (1986).

[103] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992) (nondenominational prayer read at graduation); Edwards v. Aguillard, 482 U.S. 578 (1987) (educating creation science); Wallace v. Jaffree, 472 U.S. 38 (1985) (mandatory moment of silence for voluntary prayer); Stone v. Graham, 449 U.S. 39 (1980) (posting Ten Commandments); Epperson v. Arkansas, 393 U.S. 97 (1968) (restriction on the education of evolution); Abington Sch. Dist. v. Schempp, 374 U.S. 203

other domains of the Establishment Clause, however, the Court's decisions have been less conspicuous.[104] As a result of these inconsistencies,[105] the Court has sent mixed signals pertaining to government sponsorship of religious displays[106] and unique tax treatment for religious-based organizations.[107]

(1963) (required reading of the Bible); Engel v. Vitale, 370 U.S. 421 (1962) (mandatory reading of a nondenominational prayer).

[104] *See* Marshall, *supra* note 94, at 495-496 nn. 5, 6, & 7 (listing cases demonstrating inconsistencies by the Supreme Court).

[105] One interesting description of the inconsistencies found throughout the Court's Establishment Clause jurisprudence was written by Justice Scalia when he noted:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the 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.... Its recent burial, only last Term, was, to be sure, not fully six feet under.... The secret of the *Lemon* test's survival, I think, is that it is so 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 grave 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 useful and docile monster is worth keeping around, at least in a somnolent state....

Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring) (citations omitted).

[106] *Compare* Allegheny v. ACLU, 492 U.S. 573, 601-02, 620-21 (1989) (invalidating display of crèche in county courthouse, but permitting display of Christmas Tree and Menorah in public park), *with* Lynch v. Donnelly, 465 U.S. 668, 685 (1984) (sustaining city sponsored public display of crèche).

[107] *Compare* Waltz v. Tax Comm'n of New York, 397 U.S. 664 (1970) (upholding property tax exemptions for religious organizations), *with* Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989) (striking down sales tax exemption for religious publications).

The recognized test by the Court for cases related to the Establishment Clause has been the *Lemon* test.[108] Since its inception, however, *Lemon* has been denounced from both within[109] and without[110] the Court, and in several instances the Court has either reconfigured the test[111] or

[108] In Lemon v. Kurtzman, 403 U.S. 602, (1971), the Court instituted a three part test to be used in order to decide Establishment Clause issues. In order for a state or federal statute or act to survive an Establishment Clause challenge, it must (1) possess a secular legislative purpose; (2) have a fundamental or primary effect that does not either advance or hinder religion; and (3) not promote an excessive entanglement with religion. *Id*. at 612-13.

[109] *See* Lamb's Chapel, 508 U.S. at 398 (Scalia, J., concurring) (presenting a list of the opinions where individual Justices have expressed their aversion toward Lemon).

[110] For observations condemning the Lemon test, *see generally* Carl H. Esbeck, *The Lemon Test: Should It be Retained, Reformulated, or Rejected?*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 513 (1990); Gary J. Stimson, *The Establishment Clause in the Supreme Court: Rethinking the Court's Approach*, 72 CORNELL L. REV. 905 (1987); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 681-83 (1980); Philip B. Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3 (1978).

[111] Of special importance are the varying doctrines attached to Lemon by Justices O'Connor and Kennedy. On the one hand, Justice O'Connor has propounded an Establishment Clause inquiry under Lemon to extrapolate whether the government's intention is to "endorse" religion. *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38 (1985) (O'Connor, J., concurring); Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring). On the other hand, Justice Kennedy has suggested that the crux of an Establishment Clause violation is not sponsorship but coercion, and that the coercion, does not necessarily have to be related to physical coercion. *See* Lee v. Weisman, 505 U.S. 577, 591-97 (1992) (opinion of the Court by Kennedy, J.); Board of Educ. v. Mergens, 496 U.S. 226, 260-61 (1990) (Kennedy, J., concurring); Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring).

More recently, the Court again undertook to modify the Lemon test. *See* Mitchell v. Helms, 120 S. Ct. 2530 (2000); Agostini v. Felton, 521 U.S. 203 (1997). In approving a program under Title I of the Elementary and Secondary Education Act of 1965 that provided for public employees to teach remedial classes at religious and private schools, the Agostini Court altered the Lemon test by examining only the first two factors, namely whether a statute has (1) a secular purpose or (2) a primary effect of advancing or inhibiting religion. Agostini, 521 U.S. at 222-23. Additionally, it altered the third factor of the Lemon test by reformulating the entanglement inquiry as simply one criterion relevant to proving a statute's consequence. *Id*. at 232-33. The Court then established three primary modes for determining a statute's corollary:

> Government aid has the effect of advancing religion if it (1) results in governmental indoctrination, (2) defines its recipients by reference to religion, or (3) creates an excessive entanglement.

opted to abandon it altogether.[112] In several cases, the Court has adopted a historical approach to Establishment Clause challenges, placing importance on the history of government concerns with religious matters.[113] Most confusing, however, is that the Court has applied, over a period of twenty-five years, such subtle distinctions in both upholding and striking down aid to religious schools, that it is difficult, if not impossible, to determine in advance how a specific issue will be adjudicated.[114] Many observers, even various Justices of the Court itself, have criticized the

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Id. at 233-34. In Mitchell, the Court examined the implication of conveying federal funds to state and local educational agencies, which in turn, loaned educational materials and equipment to both public and private elementary and secondary schools under Chapter 2 of the Education Consolidation Improvement Act of 1981 (ECIA). Mitchell, 120 S. Ct. at 2536-38. Building upon the decision in Agostini, the Court in Mitchell applied only the first two criteria in Agostini, since the question of excessive entanglement was not addressed. *Id*. at 2540. It held that not only does Chapter 2 not result in governmental indoctrination, because it establishes suitability for aid neutrally by alloting the aid based on the personal decisions of the parents of schoolchildren, and does not establish aid that has an "impermissible content," but it does not assign its recipients by imputing religion. *Id*. at 2552. According to the Court, simply because many of the private schools receiving aid under Chapter 2 of the EICA were religiously affiliated, did not mean that the act was a law respecting an establishment of religion. *Id*. at 2553.

[112] *See, e.g.,* Lamb's Chapel v. Center Moriches Union free Sch. Dist., 508 U.S. 384 (1993); Marsh v. Chambers, 463 U.S. 783 (1983); Mueller v. Allen, 463 U.S. 388 (1983). Moreover, the Court has also behaved as though it were applying Lemon, but refrained from doing serious analysis under its test. *See* Elizabeth B. Brandt, *Lee v. Weisman: A New Age for Establishment Clause Jurisprudence?* 23 GOLDEN GATE U. L. REV. 535, 543 (1993) (suggesting that the Court's decisions in Wallace, County of Allegheny v. ACLU, Aguillard, and Mergens have continued the "marginalization of the *Lemon* Establishment Clause formula").

[113] *See, e.g*., Marsh, 463 U.S. at 783 (sustaining payment of legislative chaplain); Waltz v. Tax Comm'n of New York, 397 U.S. 664 (1970) (upholding property tax exemptions for churches); McGowan v. Maryland, 366 U.S. 420 (1961) (sustaining Sunday closing laws).

[114] *See* Henry J. Abraham, *Religion, the Constitution, the Court, and Society: Some Contemporary Reflections on Mandates, Words, Human Beings, and the Art of Possible, in* HOW DOES THE CONSTITUTION PROTECT RELIGIOUS FREEDOM? 15, 32-34 (Robert A. Goldwin & Art Kaufman eds., 1987).

The inconsistency and confusion in this arena of judicial interpretation was efficiently summarized by Justice Rehnquist when he noted

Court's Free Exercise jurisprudence.[115] Collectively, the Court's decisions have left the American people with a body of legal doctrine that is essentially unprincipled, incoherent, and unworkable.

PART III: STATES AS CATALYSTS FOR RELIGIOUS LIBERTY

A. The Future Role Of The Incorporation Theory And The Establishment Clause.

Among the demurrals with the Supreme Court's current jurisprudence, there is the problem of the original intent of the Religion Clauses. The only lucid original intent of the Framers is one in which the Religion Clauses were not to pertain to the states.[116] By incorporating both Clauses against the states, the Court nullified the importance of original intent in defining the constitutional limitations placed on the states in comparison to the federal

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> [A] State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class. A State may lend classroom workbooks, but it may not lend workbooks in which the parochial school children write, thus rendering them non-reusable. A State may pay for bus transportation to religious schools but may not pay for bus transportation from the parochial school to the public zoo or natural history museum for a field trip.

Wallace v. Jaffree, 472 U.S. 38, 110-11 (1985) (Rehnquist, J., dissenting).

[115] *See, e.g.*, Walz, 397 U.S. at 668 (the opinions of the Court towards the Religion Clauses are strewn with "considerable internal inconsistency"); Wallace, 472 U.S. at 107 (Rehnquist, J., dissenting) (distinguishing the Court's Establishment Clause cases as "neither principled nor unified").

[116] *See e.g.*, William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1200 (1990); Harold J Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 778 (1986) [hereinafter Religion and Law]; Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 843-844 (1986); Michael A. Paulsen, *Religion, Equality and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 319-21 (1986).

government. The lofty searches for original intent that were laid out in *Everson*, *Cantwell*, and other opinions are essentially fruitless. Although the authors of the First Amendment might have intended to apply the Religion Clauses to the national government, they had no such desire concerning the exercise of the Clauses upon the states except that the Clauses were not intended to apply to the states.[117] As Professor Harold J. Berman stated:

> To speak, then, of the history of the First Amendment, and of the intent of the Framers – as courts and writers continually insist that we must do if we are to understand what the Constitution requires in the sphere of 'Church and State' – is to run up against the plain facts that the first amendment left the protection of religious liberty at the state level to the states themselves and that the Framers expressed no intent concerning how the states should exercise their responsibilities in the matter.[118]

Additionally, having nationalized the legal jurisprudence controlling church-state relationships, the Court has effectively left little leeway for state action in this area. As a consequence, the Court has dramatically suspended the federalism concerns implicit in the Religion Clauses.[119]

Occasionally, however, the Court has seemed indisposed to expand the Religion Clauses to the dimensions required by its theories due to its acknowledgement that any interpretation of the issue at the federal level will, in some manner, affect the states.[120] In these instances, the

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[117] Thomas v. Review Bd., 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting).

[118] Berman, *Religion and Law*, *supra* note 117, at 778.

[119] Adams & Emmerich, A NATION DEDICATED, *supra* note 59, at 46. *See* Conkle, *supra* note 15, at 1118.

[120] This legal situation was noted by Justice Brennan in a speech that he delivered at New York University School of Law in 1986, in which he stated, "the institutional position of the national Supreme Court may cause it to 'under-enforce' constitutional rules. The national Court must remain highly sensitive to concerns of state and local autonomy." William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986) (citations omitted).

Court has curtailed the constitutional right at issue in order to explain giving it a broader application.[121] As a result of the Court's attempt to foster a broader application of the Clauses, several justices, including the second Justice Harlan, have warned the Court against lowering federal standards in order to accommodate state differences.[122] Justice Harlan believed that by doing so, the Court would be exacting a rigid structure of constitutional law.[123]

Given the Federalist essence of the Establishment Clause, such paraphrasing by the Court is unworkable. As originally apprehended, the Establishment Clause was meant to deter the federal government from interfering with state authority over religious matters. Incorporation of the Religion Clauses, on the other hand, has the opposite effect – the elimination of the aforementioned authority. At the same time, the incorporated Establishment Clause has left only a portion of its original purpose to neither prohibit nor require the states to have established churches. Whereas the states were not previously required to establish a religion, the modern interpretation of the Clause by the Court now prohibits the states from establishing one. In other words, not only is it not feasible for the Establishment Clause to be incorporated while accurately reflecting its primary federalist purpose, but it also cannot be incorporated without destroying its overall reason for existing.[124]

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[121] *See e.g.*, Marsh v. Chambers, 463 U.S. 783, 786-91 (1983); Waltz v. Tax Comm'n of New York, 397 U.S. 664, 676-78 (1970); McGowan v. Maryland, 366 U.S. 420, 431-36 (1961).

[122] *See e.g.*, Chimel v. California, 395 U.S. 752, 769 (1969) (Harlan, J., concurring); Ker v. California, 374 U.S. 23, 45-46 (1963) (Harlan, J., concurring).

[123] Although Justice Harlan's caution to the Court in Chimel and Ker about this situation originated in criminal procedure cases, this problem also extends to the Religion Clauses.

[124] Several contemporary legal scholars also accredit the federalist view of the Establishment Clause. *See e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1157-58 (1991); Glendon & Yanes, *supra* note 89, at 481-82; Lietzau, *supra* note 117, at 1201-02; Paulsen, *supra* note 117, at 317; Conkle, *supra* note 15, at 1132-35; William C. Porth &

Attempting to incorporate the Establishment Clause is therefore comparable to attempting to incorporate the Tenth Amendment, which reserves to the states those powers neither "delegated to the United States by the Constitution, nor prohibited by it to the States."[125] The intent of the Tenth Amendment is to reaffirm that the states enjoy all powers not specifically delegated to the federal government by the Constitution.[126] Incorporation of the Tenth Amendment would demand that the states be divested of all powers not specifically granted to them, thereby entirely inverting the Amendment's original intent. To the extent that the Establishment Clause is similar to the Tenth Amendment, its incorporation is likewise disjointed.[127] In fact, one scholar has even gone so far as to suggest that the Establishment Clause be examined as a specific employment of the Tenth Amendment.[128]

An endeavor to reconcile the incorporation of the Establishment Clause with its history was made by Justice Brennan in his concurrence in *Schempp.*[129] He wrote that "[I]t has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation ... is conceptually impossible because the Framers meant the

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Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 136-39 (1987).

Even Professor Laurence Tribe reluctantly admits the burgeoning evidence that a predominant purpose of the Clause was "to protect state religious establishments from national displacement." Tribe, *supra* note 49, §14-3 at 819.

[125] U.S. CONST. amend. X.

[126] *See* Bradley, *supra* note 8, at 95.

[127] *See id*.; Conkle, *supra* note 15, at 1141; Lietzau, *supra* note 117, at 1201.

[128] Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 388 (1954).

[129] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 254 (1963) (Brennan, J., concurring) (footnote omitted).

Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches."[130] He replied to his own comment by stating that, regardless of the meaning of the Establishment Clause at the start of the nineteenth century

> [I]t is clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments.[131]

Although it may be true, however, that the authors of the Fourteenth Amendment were not interested with conserving the religious establishments of the states, it is equally true that they did not intend to end state involvement with religion. This is due partially to the fact that when the individual states voluntarily disestablished themselves from particular religious sects, a majority of them continued to follow a doctrine of government accommodation of religion.[132] Thus, disestablishment by the states should not be taken to intend that the Establishment Clause now dictates strict separation of church and state.

The controversy of incorporating the Establishment Clause also manifests itself upon a review of the Fourteenth Amendment's Due Process Clause, which presumes to safeguard individuals from deprivations of "liberty."[133] Although the Religious Clauses were intended to

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[130] *Id*.

[131] *Id*. at 254-55 (footnote omitted).

[132] *See* CHESTER JAMES ANTIEAU ET AL., FREEDOM FROM FEDERAL ESTABLISHMENT: FORMATION AND EARLY HISTORY OF THE FIRST AMENDMENT RELIGION CLAUSES 205-06 (1964).

[133] U.S. CONST. amend. XIV, § 1. Many scholars have implied that the Establishment Clause is not a stipulation of individual liberty at all. *See* Mark DeWolfe Howe, *The Constitutional Question, in* RELIGION AND THE FREE SOCIETY 49 (1958). Howe suggestes that the Supreme Court "did not seem to be aware of the fact that some legislative enactments respecting an establishment of religion affect most remotely, if at all, the personal rights of religious liberty."

protect religious liberty, such liberty did not encompass – and the Establishment Clause does not mandate – the separation of church and state. The Framers believed that religious liberty would be protected, in part, by preventing the federal government from interfering with state authority over religion.[134] As such, history discredits Justice Brennan's implicit suggestion from his concurring opinion in *Schempp* that separation of church and state is a necessary prerequisite for religious liberty.[135] In fact, all of the states that possessed established churches in the nineteenth century, apart from Connecticut, also had state constitutional guarantees of religious liberty.[136] Furthermore, even if the Establishment Clause does not safeguard a liberty per se, it is not at all

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Id. at 55. Rather, it is a structural demarcation upon the application of federal power and a reservation of authority to the states. *See* Lietzau, *supra* note 117, at 1206; Conkle, *supra* note 15, at 1141; Snee, *supra* note 129, at 373, 392-93, 406; Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3, 14 (1949).

Some authors have therefore insinuated that individuals lack standing to contest certain forms of Establishment Clause violations. *See* Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 40-42 (1962) (indicating that the non-coercive religious establishments do not administer judicially recognizable injustices upon individuals but rather are "political questions" fittingly left to state legislatures); *cf.* Harris v. City of Zion, 927 F.2d 1401, 1419-22 (7th Cir. 1991) (Easterbrook, J., dissenting) (arguing that plaintiffs lacked standing to object on Establishment Clause foundations to certain representations of a Latin cross on their cities' municipal seals). In this sense, the Establishment Clause is practically equivalent to constitutional provisions such as the Guarantee Clause, which concerns the fabric and variety of state government but accords no judicially enforceable rights upon individuals. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government"); *see* Sutherland, *supra*, at 41.

[134] *See supra* notes 54-61, and accompanying texts.

[135] *Id*.; Abington Sch. Dist. v. Schempp, 374 U.S. 203, 254 (1963). In his concurrent opinion, Justice Brennan noted that "[i]t has also been suggested that the 'liberty' guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a 'freedom' of the individual." Schempp, 374 U.S. at 256 (J. Brennan, concurring). In response, Justice Brennan suggested that "the fallacy in this contention...is that it underestimates the role of the Establishment Clause as a coguarantor, with the Free Exercise Clause, of religious liberty." *Id*.

[136] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1455 (1990).

certain that it flows with *Palko's*[137] understanding of individual liberties as "implicit in the concept of ordered liberty."[138] This author suggests that the intent of the Supreme Court to attempt to incorporate the Establishment Clause under *Palko*, while at the same time preserving the Clause's original meaning is difficult, if not impossible. Therefore, this inner incompatibility with the Court's doctrine has to be addressed and corrected if it is not to be viewed by the American public as a product of "WILL instead of JUDGMENT."[139]

Additionally, the employment of the Establishment Clause against the states cannot be maintained under Justice Black's conception that the Authors of the Fourteenth Amendment meant to incorporate the entire Bill of Rights.[140] Although his belief was never shared by a majority of the Court, it is important to decide if it conceivably sustains the incorporation of the Establishment Clause. First, in deciding *Everson*,[141] and in incorporating the Establishment Clause in that opinion, Justice Black neglected to explain selective incorporation as his reasoning behind incorporation. Consequently, an alternative explanation for the holding in *Everson* would be to suggest that Justice Black intended to completely incorporate the Clause rather than to selectively incorporate it. Second, the argument that the *Palko* theory fails to justify the incorporation of the Establishment Clause is unnecessary if it was the purpose of the Fourteenth

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[137] Palko v. Connecticut 302 U.S. 319 (1937).

[138] *See generally*, ADAMS& EMMERICH, A NATION DEDICATED, *supra* note 59, and accompanying text. A cursory examination of comparative law indicates that the separation of church and state is not an essential requirement for religious liberty. In fact, several scholars have suggested that the application of religious liberty in Great Britain is indistinguishable from that in the United States, notwithstanding the existence of a state church in the former. *See e.g.*, Amar, *supra* note 125, at 1159; Corwin, *supra* note 134, at 19.

[139] THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (emphasis in original).

[140] *See supra* notes 69-71, and accompanying text.

[141] Everson v. Board of Educ., 330 U.S. 1 (1947).

Amendment to incorporate the Clause. However, credible historical evidence exists to suggest that whatever else the Framers of the Fourteenth Amendment may have expressed,[142] they did not intend to incorporate the Establishment Clause.[143]

The most remarkably persuasive indication of this fact is furnished by the defeat of the Blaine Amendment, which was proposed in the House of Representatives in 1875 by James G. Blaine.[144] The Blaine Amendment, which was proposed and debated only seven years following the ratification of the Fourteenth Amendment, presents a significant challenge to the suggestion that the Fourteenth Amendment was intended to incorporate the Establishment Clause. It may be argued, that if the Fourteenth Amendment had, in fact, incorporated the Establishment Clause, the Blaine Amendment would have been superfluous. At the time of its introduction in Congress, the Amendment's supporters were well aware that the Amendment would establish a constraint upon state authority over religion[145] and that the Amendment may have been defeated

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[142] Although this Note does not dispute the total incorporation theory *per se*, that theory, has been vigorously denounced in the past. *See e.g.*, Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? – The Original Understanding*, 2 STAN. L. REV. 5, 139 (1949) (derived that "the record of history is overwhelmingly against" Justice Black's position). *But see*, William W. Crosskey, Charles Fairman, *"Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1, 1-43 (1954) (advocating Justice Black's total incorporation theory).

[143] *See supra* note 68, and accompanying text.

[144] For an expansive examination of the Blaine Amendment, *see* O'BRIEN, *supra* note 68, at 137-205.

[145] Comments made by Representative Blaine luminously evince that he did not interpret the Fourteenth Amendment to bind the states concerning religious matters. In an open letter published in the New York Times, Blaine stated that "[a] majority of the people in any State in this Union can therefore, if they desire it, have an established church." James G. Blaine, *Non-Sectarian Schools. Letter from Ex-Speaker Blaine – Constitutional Provisions*, N.Y. TIMES, Nov. 29, 1875, at 2. Senator Frelinghuysen, who was the Amendment's sponsor and foremost champion in the Senate shared this viewpoint. Amid the Senate debates, he stated that the Amendment "very properly extends the prohibition of the first amendment of the Constitution to

for this very reason.[146] Moreover, subsequent to the Blaine Amendment's defeat, proposals comparable to the Amendment were unsuccessfully renewed in Congress on nineteen separate occasions between 1875 and 1930.[147]

Yet, one argument that has been advanced in favor of the incorporation of the Establishment Clause against the states through the Fourteenth Amendment, contends that the Fourteenth Amendment's protection of the free exercise of religion is already an accepted factor in Constitutional jurisprudence.[148] The argument goes on to imply that the Blaine Amendment, had it been ratified, would merely have "added an explicit protection against state laws abridging that liberty."[149] Such an argument, however, proves very little. First, the authors of the Blaine Amendment surely could have questioned whether the Fourteenth Amendment actually incorporated the Free Exercise Clause because the Supreme Court did not construe the

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the States" and "prohibits the States, for the first time, from the establishment of religion." 4 CONG. REC. 5561 (1876) (emphasis added).

[146] Senator Win. Pickney Whyte, who was one of the major opponents of the Amendment in the Senate, was unsympathetic to the Amendment on the reasoning that

> [t]he first amendment to the Constitution prevents the establishment of religion by congressional enactment; it prohibits the interference of Congress with the free exercise thereof, and leaves the whole power for the propagation of it with the States exclusively; and so far as I am concerned I propose to leave it there also.

4 CONG. Rec. 5583 (1876).

[147] *See* O'BRIEN, *supra* note 68, at 203-04, 207; *see also Id*. at 210 (enumerating in an appendix the supporters, dates of introduction, and the eventual defeat of the proposed amendments).

[148] Abington Sch. Dist. v. Schempp, 374 U.S. 257 (1963) (Brennan, J., concurring) (downplaying the significance of the defeat of the Blaine Amendment).

[149] *Id*.

Fourteenth Amendment in this manner for another sixty-five years.[150] Second, the argument neglects to take into account the discrepancy between the structural meaning of the Establishment Clause and the substantive Free Exercise Clause.[151]

One approach the court could follow to provide a solution to the incorporation of the Establishment Clause against the states is to accommodate the incorporation of the Establishment Clause by justifying the need for a constitutional separation of church and state. This approach could be focused, not on the history surrounding the Clause, but rather, on a developing understanding of the conception of "liberty" in the Fourteenth Amendment.[152] A problem may

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[150] *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[151] The intent of this Note is specifically to dispute the incorporation of the Establishment Clause. It does not attempt to do so with regard to the Free Exercise Clause.

The Free Exercise Clause remains a strong aegis of religious liberty and could, potentially, confine a state's authority to establish religion by two methods. *See* Amar, *supra* note 125, at 1159. First, the ability of an individual to chose not to participate in various activities sponsored by the state would be maintained by the Free Exercise Clause. As an example, students may not be forced to salute the flag while reciting a pledge of allegiance, *see* Employment Div. v. Smith, 494 U.S. 872, 882 (1990); Wooley v. Maynard, 430 U.S. 705, 717 (1977); West Virgina State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); or to go to school at all, *see* Pierce v. Society of Sisters, 268 U.S. 510, 534-36 (1925), regardless of whether a state calls for prayer in its public schools. Second, a state is prohibited from disallowing individuals from going to church or exercising their faith, simply because it accepts their religious tenets. *See Smith*, 494 U.S. at 877. Additionally, a state is also prohibited from fining or chastising individuals due to their religious faith. *Id.*

Rights accorded by the Free Exercise Clause, however, are not inexhaustible. First, states need not change its activities to accommodate to the religious practices of some individuals. *See* Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 452-53 (1988); Bowen v. Roy, 476 U.S. 693, 702 (1986). Second, the Free Exercise Clause does not grant a right to obstruct others from participating in ostensibly irreligious or religiously loathsome exercises. *See* Reynolds v. United States, 98 U.S. 145, 164 (1878); Otten v. Baltimore & O.R.R., 205 F.2d 58, 61 (2d Cir. 1953). Taken together, it may be suggested that the Free Exercise Clause simply cannot be implied to prohibit a state from establishing a religion.

[152] *See* Clifton Kruse, Jr., *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 66 (1962). Although Kruse makes an extended argument that the incorporation of the Establishment Clause cannot be contended on historical reasoning, he suggested that incorporation was necessary and appropriate due to "the changing values of society." *Id*.

exist, however, with this position if the separation of church and state is not prescribed by the history of the Establishment Clause, but is nevertheless a fundamental "liberty" protected by the Fourteenth Amendment. The Court could also postulate, without inconsistency, that "liberty" also embraces a Lochner-style[153] absolute right to freedom of contract or an unmitigated right to worship any religious precept regardless of maintaining public order that would require the reversal of *Reynolds*.[154]

A second approach is to recognize that the history of the Establishment Clause is uniformly capricious with the Clause's incorporation and deincorporate it. This approach may not only be more appealing in attempting to restore the original meaning and history behind the creation of the Establishment Clause,[155] but also more realistic and likely to be implemented given the Court's present composition.

B. Examples Of The Competency Of The States To Legislate And Adjudicate Church-State Disputes.

Simply because the First Amendment of the United States Constitution includes provisions regarding the establishment and free exercise of religion at the federal level, it does not mean that state bill of rights offer no independent direction for determining issues encompassing religious liberty or the free exercise of religion.[156] On the contrary, an

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[153] Lochner v. New York, 198 U.S. 45 (1905).

[154] *Reynolds*, 98 U.S. at 145 (1878).

[155] *See supra* notes 55-61, and accompanying texts.

[156] *See* CHESTER ANTIEAU ET AL., RELIGION UNDER THE STATE CONSTITUTIONS 65-99 (1965); G. Alan Tarr, *State Constitutionalism and "First Amendment" Rights, in* HUMAN RIGHTS IN THE STATES: NEW DIRECTIONS IN CONSTITUTUIONAL POLICYMAKING 21, 22 (Stanley H. Freidelbaum ed., 1988).

examination of state constitutional assurances implies just the opposite. For instance, many state constitutions provide safeguards for religious liberty that are more thorough and specific than those originating in the federal constitution. Many of the original thirteen states, for example, acknowledged in their earliest constitutions a "natural and indefeasible right to worship Almighty God according to the dictates of [one's] own conscience."[157] Analogous language has been embraced by subsequent constitutions in other states.[158] Furthermore, nineteen states presently prohibit religious tests for witnesses or jurors.[159]

Additionally, while the First Amendment's Free Exercise Clause presents no explicit method in reconciling the claims of free exercise of religion with the lawful exercise of police power by the states,[160] nearly twenty state constitutions have endeavored to resolve possible clashes by subsuming a police power qualification in the free exercise of religion.[161] At the same time, several state bills of rights have also explicitly taken notice of religious qualms regarding military service by excusing conscientious objectors from service in the state militia.[162] Further,

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[157] *See supra* note 36 and accompanying text.

[158] *See e.g.*, TENN. CONST. OF 1870, art. I § 3, *reprinted in* 6 FEDERAL AND STATE CONSTITUTUIONS, 3449.

[159] *See* Ronald K. L. Collins, *Bills and Declarations of Rights Digest*, *in* THE AMERICAN BENCH: JUDGES OF THE NATION 2483, 2501 (3d ed. 1985/86) (presenting a list of states prohibiting religious tests for witnesses or jurors).

[160] As a result, the Supreme Court has taken it upon itself to develop its own standards for accommodating the demands of free exercise with the states' legitimate police power. *See e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972); Sherbert v. Vernon, 374 U.S. 398 (1963).

[161] An example is N.Y. CONST. art. I, § 3, which states "but the liberty of conscience hereby secured shall not be construed as to excuse acts of licentiousness, or so justify practices inconsistent with the peace or safety of this state." *See* Collins, *supra* note 158, at 2496-99 (containing a full listing of these provisions).

[162] *See e.g.*, IDAHO CONST. art. XIV, § 1; COLO CONST. art. XVII, § 5.

at least two state constitutions – those of Louisiana and Montana – bar various forms of discrimination centered on religion not only by government but also by private actors.[163]

Even more representative of the states' ability to safeguard religious liberty is the failure of the Religious Freedom Restoration Act (RFRA),[164] to pass constitutional muster before the Supreme Court in *Flores*.[165] In a post-*Flores* world, the states have been left in a predicament regarding the protection of religious liberties. The previous semblance of a federal standard is defunct, since states are no longer obliged either statutorily or constitutionally, to excuse the religiously pious from neutral laws of applicability.[166] A number of states have begun to consider whether their constitutions' free exercise clauses could be construed more expansively than the Court's holding in *Smith*.[167] In fact, even before the RFRA was enacted and subsequently deemed unconstitutional, states began enunciating autonomous standards extending greater protection than the Court was willing to grant.[168] Some states invigorated their freedom

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[163] LA. CONST. art. I, § 12; MONT. CONST. art. II, § 4.

[164] *See supra* notes 96-97 and accompanying text.

[165] City of Boren v. Flores, 521 U.S. 507 (1997).

[166] *See* Daniel A. Crane, *Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts*, 10 ST. THOMAS L. REV. 235, 238 (1998) (portraying a "frantic uproar" that religious liberty is dead).

[167] *See* Stuart G. Parsell, *Revitalization of the Free Exercise of Religion Under State Constitutions: A Response to Employment Div. V. Smith*, 68 NOTER DAME L. REV. 747 (1993) (explaining the Supreme Court's egression from strict scrutiny review and the states' rejection of the withdrawl).

[168] *See* Neil McCabe, *The State and Federal Religion Clauses: Differences of Degree and Kind*, 5 ST. THOMAS L. REV. 49, 52-62 (1992) (referring to State v. Hershberger, 462 N.W.2d 393 (Minn. 1990), which preserved the compelling state interest test); *see also* Hershberger, 462 N.W.2d at 395 (stating that Amish are not required to display a slow moving vehicle sign on their buggies because it breached their sincere religious beliefs).

of religion safeguards by espousing the federal language of "compelling state interest" and "least restrictive means" when delineating their own constitutions.[169]

Following the *Flores* decision, states, instead of Congress, have begun to prescribe the legal, political, and social course for religious liberties. Many states have come to rely on the Supremacy Clause,[170] arguing that, apart from the constant tug-of-war between state and federal law, ultimately it is not mandatory for them to construe their constitutions in precisely the same way as the Supreme Court interprets the United States Constitution.[171] After RFRA's application to the states was negated, state legislatures began to implement the axiom that "the federal constitution provides a floor of protection for rights and that the state constitutions provide a ceiling."[172] Although states always retained the power to establish higher standards for preserving individual religious freedom, a majority of states were content to employ only the compelling interest test espoused in *Sherbert* prior to *Smith*.[173] Until recently, therefore, a staple of state religious liberty jurisprudence did not exist.[174] Yet, an absence of state law precedent does not automatically preclude states from protecting the religious liberties of its citizenry, should a state choose to do so.[175]

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[169] *See* Angela C. Carmella, *State Constitutional Protection of Religious Exercise: An Emerging Post-Smith Jurisprudence*, 1993 BYU L. REV. 275, 310 (1993) (relating the fact that both Washington and Minnesota have embraced these phrases).

[170] U.S. CONST. art. VI, cl. 2.

[171] *See* McCabe, *supra* note 169, at 63-64; Crane, *supra* note 167, at 244-45.

[172] *See* McCabe, *supra* note 169, at 50.

[173] *See* Carmella, *supra* note 170, at 293-305.

[174] *See* Tarr, *supra* note 157, at 76-78.

[175] Crane, *supra* note 167, at 244.

Due to the absence of case and statutory law in this territory, many states have been thrust into pronouncing a standard for establishing religious liberty protection without the advantage of a settled precedental record.[176] In fact, the absence of case and statutory law in matters of religious liberty assists in demonstrating that state legislatures are the appropriate institutions to execute more extensive safeguards. States are more favorably accoutered to protect religious freedom than the federal government, both textually and functionally. Many state constitutions demand religious liberty exemptions,[177] and the textual foundation that the states utilize to sustain those exemptions is embedded in their own "peace and safety" restriction provisions.[178] In general, these clauses permit religious liberty only to the extent that public order is not unsettled. Intuitively, this would suggest that local and state governments could prescribe their own compelling interest precisely enough to encompass peace and safety assertions alone and allow exceptions to all other religious liberty claims.

Functionally, the states likewise enjoy institutional advantages over the federal government that enable them to effectively safeguard and preserve religious liberty.[179] Within the confines of state legislatures and courts, states possess an advantage of not having to produce

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[176] Various state courts may contrive their examinations diversely to one another, however, they are constant in their refusal to resort to the Smith standard. *See* People v. DeJonge, 501 N.W.2d 127, 134 (Mich. 1993) (holding that unless Michigan embraces a "hybrid rights" theory to its own constitution, the Smith standard would not be relevant in appertaining state free exercise claims); *see also* Rupert v. City of Portland, 605 A.2d 63, 66-67 (Me. 1992) (arguing that a compelling interest test should be used when proving whether a generic and neutrally applicable law forbidding the possession of illegal narcotic paraphernalia is constitutional; test would not be applicable in establishing free exercise claims).

[177] *See* Crane, *supra* note 167, at 263.

[178] *See* ARIZ. CONST. art. II, § 12; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1 para. III; IDAHO CONST. art. I, § 4,; ILL. CONST. art. I, § 3; N.Y. CONST. art. I, § 3; WASH. CONST. art. I, § 11.

[179] *See* Carmella, *supra* note 170, at 299.

decisions for the entire country and. instead, can concentrate their attention on a much more precise policy goal.[180] By allowing for a more definite focus, state courts and legislatures would be able to perform a more accurate balancing of the sensitive elements necessary for consideration in a compelling interest test.[181] Furthermore, this limited range is beneficial in that it permits a specific receptiveness in choosing and legislating matters that a federal system cannot efficiently manage.[182]

Ultimately, a more decentralized RFRA bestows upon individual citizens the ability to have greater admission to political redress. Protection of this nature ought to put to rest concerns that states will go in as many different directions absent a national standard. At the same time, states are frequently permitted to conduct themselves autonomously.

C. Reinvesting The Preservation Of Religious Liberty Among The States.

The most substantial overtone of deincorporating the Religion Clauses of the First Amendment and relinquishing *Everson* is the fact that the Constitution would no longer impede the states from establishing religion.[183] At first glance the abandonment of *Everson* may appear

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[180] *Id.*

[181] *Id.*

[182] *See* Ira C. Lupu, *Employment Div. V. Smith and the Decline of Supreme Court-Centrism*, 1993 BYU L. REV. 259, 270 (1993).

[183] It may be suggested that Congress could turn to its Commerce Power to compel the disestablishment of religion by the states. U.S. CONST. art. I § 8 ("The Congress shall have Power...To regulate Commerce with foreign Nations, and among the several States..."). As noted above, the Establishment Clause may be understood as a federalism-grounded restriction on federal power similar to the Tenth Amendment. Under current constitutional doctrine, however, the federal government's ability to regulate state activity through the auspices of the Commerce Clause is not confined by the Tenth Amendment. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 547-50 (1985) (overruling Nat'l League of Cities v. Usery, 426 U.S. 833 (1976)). If, in fact, the Establishment Clause may be considered a facet of the Tenth Amendment, the Commerce Clause power of Congress may transcend it. Yet, Congress'

quite disturbing. Yet, there exists no reason to assume that each and every one of the fifty states would scurry to embrace religious establishments.

First and foremost, there were no established churches when *Everson* was decided in 1947. By the early nineteenth century, every state that had permitted some form or another of established religion had voluntarily disestablished those churches.[184] Second, such attempts to establish state-supported religions would be prohibited by a majority of state constitutions.[185] However, this is not to say that abandoning *Everson* would not allow the states much more leeway to acknowledge, accommodate, and advance religion than current legal doctrine permits.

By reinstating state authority over religious concerns, possibly the most meaningful virtue served is the federalist quality of decentralizing the decision-making process. This decentralization of decision-making accords two benefits. First, state and local governments are better suited to respond to the demands and concerns of the majority of their citizenry than the federal government. This is because state and local governments can adapt their laws more

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Commerce Clause power has never been deemed to overcome a clear-cut prohibition on federal authority embodied in the Bill of Rights.

[184] *See* BRADLEY, *supra* note 8, at 24. The last remaining state to disestablish its state church was Massachusetts, which did so in 1833. *Id*.

[185] *See* Mechthild Fritz, *Religion in a Federal System: Diversity Versus Uniformity*, 38 U. KAN. L. REV. 39, 43-44 (1989). The constitutions of thirty-eight states have enumerated restrictions on religious establishments. *Id*. Taken together, these state constitutions possess nearly nine hundred separate provisions associated with religious liberty. *See* Snee, *supra* note 129, at 407 n. 191. Furthermore, the state provisions regulating church-state relations intend to be more circumstantial and explicit than the Religion Clauses in the First Amendment. *See* Fritz, *supra*, at 40, 42; G. Alan Tarr, *Church and State in the States*, 64 WASH. L. REV. 73, 76, 94 (1989). Because the Supreme Court has chosen not to overrule a state court's holding to abrogate a state law under its own state constitution, *see* Murdock v. Mayor of Memphis, 87 U.S. (20 Wall.) 590, 638 (1875), the state provisions regarding the relationship between church and state comport separately from the United States Constitution. This holds true, unless of course a state has chosen to tether its constitution to the Federal Constitution in matters concerning religious liberty. *See infra* notes 192-194 and accompanying text.

easily to conform to local conditions and preferences.[186] Rather, *Everson's* burden of a uniform national rule of strict separation of church and state has made it impracticable to forge compromises regarding the applicable amount of government involvement with religion.[187] A second advantage of a federalist design is the possibility of experimentation by and competition among the states.[188] For instance, during the nineteenth century, the states without religious establishments pressed their sister states, which possessed such establishments, into changing their existing policies toward religion.[189]

As noted above, the present Court has curtailed the scope of what constitutes a forbidden establishment of religion and is likely to continue to do so in the future.[190] Although the states are free to prescribe greater restrictions on their own governments than the United States Constitution provides, as is the case relating to the free exercise of religion, approximately

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[186] *See* ALEX DE TOCQUEVILLE, DEMOCRACY IN AMERICA, 161 (J.P. Mayer ed., George Laurence trans., 1969) ("In large centralized nations the lawgiver is bound to give the laws a uniform character which does not fit the diversity of places and of the mores...."); *see also* Tarr, *supra* note 157, at 110 (suggesting that further growth of state constitutional law relating to church and state is desirable due to the "distinctive perspective[s]" that states can offer on the subject).

[187] *Cf.* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 15 (1991) (asserting that the absolute character of demands of legal right hinders the formulation of adequate political compromises).

[188] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[189] *See* Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1506 (1987).

[190] *See* Lynch v. Donnelly, 465 U.S. 668, 687 (1984); Marsh v. Chambers, 463 U.S. 783, 786 (1983); Mueller v. Allen, 463 U.S. 388, 400 (1983). Writing nearly fifty years ago, Professor Snee was prophetical when he suggested that, "[w]hile the movement of the Court has been toward greater liberality, there is no guarantee that this will always be true." Snee, *supra* note 129, at 407 n. 193.

eleven states have explicitly enunciated that their state constitutional restrictions upon the establishment of religion are no more expansive than those of the United States Constitution.[191] As the Court limits the Establishment Clause, the cohering state restrictions on the establishment of religion are also narrowed.[192] Moreover, subsequent to the incorporation of the Establishment Clause, state courts adjudicating church-state issues have been inclined to rely on the First Amendment instead of their own state constitutions.[193]

It may be proposed that if the Establishment Clause no longer pertained to the states, state constitutional restrictions toward the establishment of religion would inevitably be derived from an independent source, and might therefore be even more rigid than the federal restriction. It may be implied, however, that in most states, greater church-state involvement would presumably succeed following the abandonment of *Everson*. This is partially due to the fact that a majority of the citizenry in the United States remains profoundly religious.[194] There exists an inherent value in permitting majorities to ventilate their beliefs through the modern democratic process. Yet, at the same time, government accommodation of religion is also advantageous to

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[191] *See* Linda S. Wendtland, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 634-35 n. 51 (1985) (listing states cases which rely upon the Establishment Clause of the First Amendment to the United States Constitution to discern their own constitution's meaning behind establishment).

[192] At the same time, the holding of a state court that is grounded on state law may be evaluated by a federal court if its dependence upon a state law is not "clear from the face of the opinion." Michigan v. Long, 463 U.S. 1032, 1041 (1983). Following *Long*, a state court decision centered on a state Establishment Clause may be susceptible to strict scrutiny by a federal court if it seems that it was founded on the federal Establishment Clause.

[193] *See* Snee, *supra* note 129, at 407 n. 193.

[194] *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 4 (1993); GEORGE GALLUP, JR. & JIM CASTELLI, THE PEOPLE'S RELIGION: AMERICAN FAITH IN THE 90'S 23-26 (1989); GARRY WILLS, UNDER GOD: RELIGION AND AMERICAN POLITICS 16 (1990). *See generally*, JON BUTLER, AWASH IN A SEA OF FAITH: CHRISTIANIZING THE AMERICAN PEOPLE (1990).

American society as a whole.[195] In a republic such as the United States, the duties and obligations of the government are not represented by the dictation of values upon its citizens. It is contingent, however, upon the citizenry to foster and nourish its own notions of virtue.[196] The Founders recognized that a virtuous citizenry is fundamental in a political system where the people themselves are self-governing[197] and religion would be a provenance of such virtue.[198] Relinquishing *Everson* would allow the states to tend to their citizens' religious needs, and as a corollary, their civic virtue. Therefore, by returning to the Framers of the Constitution and the author's of the Fourteenth Amendment original understanding of the Religion Clauses, restoring state authority over religion may actually foster the separation of church and state, while preserving and even enhancing individual religious liberties.

PART IV: CONCLUSION

Historically and textually, the Establishment Clause of the First Amendment was intended to prevent Congress from interfering with the states and their efforts to accommodate religion. The Framers of both the First Amendment and of the Fourteenth Amendment of the United States Constitution were agnostic in regards to the desirability of religious establishments among the states and only sought to maintain state sovereignty with respect to religion. Indeed,

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[195] For an expanded explanation of the argument, *see* Bradley, *supra* note 8, at 123; and Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT.. REV. 1, 16-18.

[196] *See* Michael J. Sandel, *The Procedural Republic and the Unencumbered Self*, 12 POL. THEORY 81, 86-87 (1984).

[197] *See* THE FEDERALIST NO. 55, at 346 (James Madison); GORDON S,. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 426-29 (1969).

[198] Upon the end of the second term of his Presidency, George Washington cautioned the nation not to "indulge the supposition that morality can be maintained without religion." George Washington, *Farewell Address, Sept. 17, 1796, in* DOCUMENTS OF AMERICAN HISTORY 169, 173 (Henry S. Commanger ed., 8th ed. 1968).

it was not until the Supreme Court incorporated the Religion Clauses of the First Amendment via *Everson* and *Cantwell* that the Clauses were applicable to the states. Amidst the present doctrine regarding the separation of church and state, the Court has subjugated and cast aside many of the principles of federalism, which has been and remains the essential backbone of the American system of government.

Instead of continuing to rely upon the enduring confusion of the Court's application of the Religion Clauses, the restoration of an independent state jurisprudence over matters bearing upon the relationship between church and state is not only warranted but also appropriate. As part of our system of federalism, state constitutional sureties vary prominently in structure and text from their federal counterpart. In some instances, these discrepancies reflect the continuing outgrowth of constitutional evolution within a particular state, while in other cases, they reflect an implementation of provisions from sister states. Whatever the origins of the differences, the end product has been the federalization of a distinct perspective on the relationship between the separation of church and state. In the end, this distinct relationship at the state level presents an even greater opportunity for the protection and preservation of religious liberties beyond those guarantees that are currently offered by federal jurisprudence.