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## THE FEDERALISM SIDE OF SCHOOL VOUCHERS

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By upholding Ohio's school voucher program against an Establishment Clause challenge to the inclusion of religious schools in the program, the Supreme Court issued what is easily the most significant case of the 2002 term. As a result of the decision, thousands of poor, often minority students will be able to escape the inadequate inner city public education.

The most far-reaching aspect of the decision comes not in the majority opinion, however, but in the concurring opinion by Justice Clarence Thomas. In what is becoming sort of a trademark in his jurisprudence, Justice Thomas has invited the Court to reconsider, "as a matter of first principles," the wholesale incorporation of the Establishment Clause against the states that occurred, without any analysis, in the 1947 case of *Everson v. Board of Education*. It is an invitation worthy of the Court's reply.

Contrary to many recent ACLU-driven court decisions, the First Amendment's prohibition on the Establishment of Religion was not drafted out of hostility to religion. It was drafted, rather, out of concern that the national government might interfere with existing state support of religion if it established a national church of its own. James Madison's first draft of what would ultimately become the Establishment Clause of the First Amendment prohibited Congress from establishing a national religion. During the debate, some Representatives contended that Madison's language did not give enough protection to religion as it was then supported in the states, and the language was ultimately changed to provide that *Congress shall make no law respecting the establishment of religion, perfectly capturing the intended prohibition both of a national church and of federal interference with existing state support of religion.*

None of this original purpose was considered by the Supreme Court when it held in *Everson* that the Due Process Clause of the 14<sup>th</sup> Amendment, adopted nearly 80 years earlier, actually required the federal courts to do the very thing that the First Amendment expressly forbade, namely, interfere with state support of religion. And not only interfere with it, but actually to prohibit any state support of religion whatsoever.

After the last decade of revival of a jurisprudence of federalism, it should be clear just how serious an intrusion on states rights this "incorporation" of the Establishment Clause really is. It is an axiomatic principle of constitutional law that one of the key powers not delegated to the federal government but reserved to the states is the power to regulate the health, safety, welfare and morals of the people – the so-called "police" power. The Founders believed that the effective exercise of this power, particularly the focus on the morals of the people, was critical to developing and sustaining the kind of virtuous citizenry they thought necessary to the perpetuation of our republican form of government.

Yet the Founders also believed that reliance on and support of religion was a critical component of the exercise of this core state power. Indeed, as President George Washington noted in his Farewell Address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." Pennsylvanian Benjamin Rush was even more blunt: "Where there is no religion, there will be no morals." The famous Northwest Ordinance, enacted by the Continental Congress in 1787 and re-enacted by the very first Congress—the same Congress that approved the Establishment Clause of the First Amendment—declared: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

The Founders' views on religion in the states are thus fundamentally incompatible with the strict separationist view of the Establishment Clause that has prevailed in the Supreme Court over the past half century. Whether or not that view is legitimate vis-à-vis the federal government, its application to the states clearly constitutes an intrusion on state sovereignty that makes the other intrusions that have recently given the Supreme Court pause look like child's play. Worse, depriving the states of one of the essential tools, if not *the* essential tool, in their police power arsenal has proved a recipe for disaster. As Justice Thomas noted, it may well be that state action with respect to religion should be evaluated on different terms than similar action by the Federal Government. His proposed test is a simple one: "While the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest." That test gives full protection to the religious liberty interests of the Free Exercise Clause that are properly made applicable to the States via the Fourteenth Amendment, but also protects the States ability to rely on religion—its most potent tool—when fulfilling its police power obligation to protect the health, safety, welfare and morals of the people. If the Court accepts Justice Thomas's invitation, we may finally find the means to reverse the moral decline of our nation and restore to our citizenry the kind of moral virtue our nation's founders thought critical to sustain our republican form of government.

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