THE TIME IS RIPE TO DISINCORPORATE THE ESTABLISHMENT CLAUSE*

FREDERICK W. CLAYBROOK, JR.**

The Supreme Court's 1947 incorporation of the Establishment Clause[1] through the Due Process Clause of the Fourteenth Amendment in *Everson v. Board of Education of Ewing*[2] continues to command the attention of both the Court and commentators. The Supreme Court most recently addressed the subject in *Kennedy v. Bremerton School District*, in which it rebuffed the Ninth Circuit's reliance on the Establishment Clause to deny a high school football coach his right to freely exercise his religion by kneeling with his head bowed at the 50-yard-line of the field after a game.[3] And Professors Nathan S. Chapman and Michael W. McConnell have recently published *Agreeing to Disagree: How the Establishment Clause Protects Religious Diversity and Freedom of Conscience*, in which, as the title indicates, they claim that the Establishment Clause does important work to guard against government encroachment on individual liberties.[4]

---

* Note from the Editor: The Federalist Society takes no positions on particular legal and public policy matters. Any expressions of opinion are those of the author. To join the debate, please email us at info@fedsoc.org.

** Attorney, Claybrook LLC. The author expresses his appreciation for the research assistance provided by David A. Bruce, Esq., with regard to the state constitutional provisions on free exercise and establishment of religion.

[1] The Establishment Clause reads, "Congress shall make no law respecting an establishment of religion." U.S. CONST. amend I.

[2] 330 U.S. 1 (1947). While the Court in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), quoted both Religion Clauses of the First Amendment and referred to them as having been incorporated through the Fourteenth Amendment, *id.* at 303, it did not specifically refer to the Establishment Clause as having been incorporated until its decision in *Everson.*

[3] 597 U.S. 507 (2022), *rev'g* 991 F.3d 1004 (9th Cir. 2021).

[4] NATHAN S. CHAPMAN & MICHAEL W. MCCONNELL, AGREEING TO DISAGREE: HOW THE ESTABLISHMENT CLAUSE PROTECTS RELIGIOUS DIVERSITY AND FREEDOM OF CONSCIENCE (2023) (hereinafter "Agreeing to Disagree"); *see also* Carl H. Esbeck, *The Establishment Clause: Its*

Professor McConnell is perhaps the academic who has most influenced the Supreme Court's turn from its former, "strict separation" interpretation of the Establishment Clause to a more "historical" reading of it.[5] The Supreme Court has repeatedly cited McConnell's work in its opinions,[6] and he has long called for the courts to interpret the meaning of "establishment of religion" in a way that would have been familiar to the Framers, including in those states that still had establishments when the states adopted the Constitution. For McConnell and Chapman, the marks of a true establishment are "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church."[7] The Supreme Court has moved substantially in this direction in

---

Original Public Meaning and What We Can Learn from the Plain Text, 22 FEDERALIST SOC'Y REV. 26 (2021); THE CAMBRIDGE COMPANION TO THE FIRST AMEND. AND RELIGIOUS LIBERTY (Michael D. Breidenbach & Owen Anderson eds., 2020) (hereinafter "THE CAMBRIDGE COMPANION"); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006); PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); ROBERT CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

[5] Professor McConnell is currently the Richard and Frances Mallery Professor and Director of the Constitutional Law Center at Stanford Law School; from 2002 to 2009, he served as a judge on the United States Court of Appeals for the Tenth Circuit. Professor Chapman is currently the Pope F. Brock Associate Professor of Professional Responsibility at the University of Georgia School of Law; he formerly worked with Professor McConnell as the Executive Director of the Stanford Constitutional Law Center. Chapman and McConnell remark with respect to the "no-aid," strict separationist line of cases, with understandable pride, "In all the annals of the U.S. Reports, there is no example of a more complete volte-face in constitutional doctrine." Agreeing to Disagree, *supra* note 4, at 137.

[6] *See, e.g.*, Our Lady of Guadalupe Sch. v. Morrissey-Berru, 591 U.S. 732, 747 n.9 (2020) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105 (2003)); *id.* at 2079 (Sotomayor, J., dissenting) (citing Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990)); Espinoza v. Mont. Dep't of Rev., 591 U.S. 464, 480-81 (2020) (citing MICHAEL W. MCCONNELL ET AL., RELIGION AND THE CONSTITUTION (4th ed. 2016)); *id.* at 2264, 2266 (Thomas, J., concurring) (citing McConnell, *Establishment and Disestablishment at the Founding, Part I*, *supra*, Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933 (1986), and Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992)); *id.* at 2276 (Gorsuch, J., concurring) (citing McConnell, *The Origins and Historical Understanding of Free Exercise*, *supra*).

[7] Agreeing to Disagree, *supra* note 4, at 18; *see* DISESTABLISHMENT AND RELIGIOUS DISSENT: CHURCH-STATE RELATIONS IN THE NEW AMERICAN STATES, 1776-1833 6-7 (Carl H. Esbeck & Jonathan J. Den Hartog, eds. 2019) (hereinafter "DISESTABLISHMENT AND RELIGIOUS DISSENT") (providing similar list of historical establishment practices).

recent years, most notably in *Town of Greece v. Galloway*, in which the Court upheld the common practice of beginning a public meeting in prayer against an Establishment Clause attack;[8] the *Bladensburg Cross Case*, in which the Court upheld a city-maintained World War I memorial cross monument against an Establishment Clause challenge;[9] and in *Kennedy*.

In *Kennedy*, the Supreme Court chided the lower courts for not recognizing that the Court had "long ago" abandoned the "ahistorical" *Lemon v. Kurtzman*[10] approach to adjudicating asserted violations of the Establishment Clause and "its endorsement test offshoot."[11] It summarized:

> In place of *Lemon* and the endorsement test, this Court has instructed that the Establishment Clause must be interpreted by "'reference to historical practices and understandings.'" "'[T]he line'" that courts and governments "must draw between the permissible and the impermissible" has to "'accor[d] with history and faithfully reflec[t] the understanding of the Founding Fathers.'" An analysis focused on original meaning and history, this Court has stressed, has long represented the rule rather than some "'exception'" within the "Court's Establishment Clause jurisprudence."[12]

This stress on the history of the Establishment Clause naturally raises the question of whether the Court should disincorporate the clause, as its incorporation was decidedly contrary to the clause's original purpose and, thus, ahistorical. It is an open secret that the Court's application of the federal Establishment Clause against the states by incorporating it in the Fourteenth Amendment was improper. Thus, it is ironic that Chapman and McConnell—while championing the historical approach to the clause the Court firmly affirmed in *Kennedy* and glorying in the Court's reversal of itself in (historically speaking) short order[13]—argue for continuing its incorporation against the states (albeit through the Privileges or Immunities Clause of the Fourteenth Amendment[14]). Their premise is that the Establishment

---

[8] 572 U.S. 565, 575-77 (2014).

[9] Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29 (2019).

[10] 403 U.S. 602 (1971).

[11] *Kennedy*, 597 U.S. at 510. The endorsement test was first articulated by Justice Sandra Day O'Connor in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring in part and concurring in judgment).

[12] *Kennedy*, 597 U.S. at 535-36 (internal citations omitted) (quoting *Town of Greece*, 572 U.S. at 575-77 (quoting Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 294 (1963) (Brennan, J., concurring)).

[13] *See* Agreeing to Disagree, *supra* note 4, at 87-93.

[14] *See id.* at 78-79. Chapman and McConnell suggest this reinterpretation, criticizing the Supreme Court for incorporating individual, or "personal," rights through the Due Process Clause of the

Clause, to the degree it is properly applied to the states, protects important individual rights that otherwise would be jeopardized.

That premise does not withstand closer scrutiny, especially after developments in Supreme Court case law over the last two decades. This article will analyze how religious diversity and exercise are now fully protected under other provisions of the First Amendment, particularly the Free Exercise, Free Speech, and Freedom of Assembly Clauses, and how any remaining establishment concerns are adequately protected under state law.[15]

Disincorporating the Establishment Clause would require the Supreme Court to overrule precedents dating back to 1947. In considering whether to overrule a precedent or apply *stare decisis*, the Court considers (1) whether the precedent is erroneous and how significant the error is, (2) how well-reasoned the precedent is, (3) whether the rule that would supersede the overruled precedent is workable, (4) how the new rule would affect other areas of law, and (5) the effect of the change on reliance interests.[16] This article in its first section explains why the Supreme Court erred when it incorporated the Establishment Clause into the Fourteenth Amendment. Incorporation runs directly counter to one of the historical purposes of the amendment, i.e., to leave the states free to determine whether to establish a particular religion for themselves, and in what respects. As Chapman and McConnell observe, "There was no doubt or uncertainty about this: The First Amendment Establishment Clause did not restrict the power of the states to establish religion."[17]

Fourteenth Amendment, while recognizing that the Privileges or Immunities Clause covers only personal rights. It might reasonably be suggested that overturning the Supreme Court's limiting construction of the Privileges or Immunities Clause in the *Slaughter-house Cases*, 83 U.S. 36 (1873), would be a much heavier lift than overruling *Everson*'s incorporation of the Establishment Clause. Chapman and McConnell do agree that *Everson* improperly incorporated what they call the "jurisdictional" (sometimes called "structural") parts of the Establishment Clause. Moreover, constitutional privileges and immunities deal with fundamental rights, and it cannot reasonably be contended that any purported personal rights that emanate from the Establishment Clause were considered fundamental by the Constitution's framers and state ratifiers, as establishments were protected under the First Amendment and still in place to some extent when the Fourteenth Amendment was ratified. *See generally* CHESTER J. ANTIEAU, THE INTENDED SIGNIFICANCE OF THE FOURTEENTH AMENDMENT 91-111 (1997) (noting state constitutional provisions when the Fourteenth Amendment was ratified restricting political office to Protestants).

[15] Of course, disincorporation would not affect application of the Establishment Clause to actions of the federal government, to which the clause is expressly directed.

[16] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 218-21 (2022) (citing Ramos v. La., 590 U.S. 83, 120-24 (2020) (Kavanaugh, J., concurring in part); Janus v. Am. Fed'n of State, Cnty., and Mun. Emps., 585 U.S. 878, 916-18 (2018)).

[17] Agreeing to Disagree, *supra* note 4, at 76.

Moreover, there is no indication that the formulators and ratifiers of the Fourteenth Amendment intended to incorporate the Establishment Clause. For these reasons, the first two factors—those related to the merits—support overruling *Everson*'s incorporation of the Establishment Clause against the states.

The second section of this article deals with the other factors the Court considers in determining whether to overturn one of its precedents, principally whether it would upend established reliance interests. Overruling *Everson* and disincorporating the Establishment Clause would have beneficial, not adverse, effects. Any individual or personal rights perceived to be safeguarded by the Establishment Clause are protected by other parts of the Constitution properly incorporated for protection of those rights. Moreover, the states have uniformly adopted disestablishment provisions in their own constitutions. Thus, the Court should overrule *Everson* and reestablish the federal balance provided for in the First Amendment, while giving full play to protections of individuals demanded by the Free Speech, Free Exercise, and Freedom of Assembly Clauses against state action.

I. THE SUPREME COURT IN *EVERSON* IMPROPERLY INCORPORATED THE ESTABLISHMENT CLAUSE VIA THE FOURTEENTH AMENDMENT

Since *Everson*, the Supreme Court has never wrestled with the issues of whether it properly incorporated the Establishment Clause and what effects would follow if it were to correct that mistake. Justice Clarence Thomas is the exception: he has called upon the Court to address these issues multiple times, noting several "barriers to the incorporation of the Establishment Clause."[18] Indeed, *Everson*'s incorporation of the Establishment Clause was

[18] *Town of Greece*, 572 U.S. at 606 n.1 (Thomas, J., concurring in part and concurring in the judgment); *see also, e.g.*, Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 50-51 (2004) (Thomas, J., concurring) (noting that the Establishment Clause is a federalism provision designed to keep the national government out of establishment matters and that, at least on its face, it does not protect individual rights)'; Utah Hwy. Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 1007 (2011) (Thomas, J., dissenting from denial of cert.); McDonald v. Chicago, 561 U.S. 741, 876 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment); Cutter v. Wilkinson, 544 U.S. 709, 726-29 (2005) (Thomas, J., concurring); Zelman v. Simmons-Harris, 536 U.S. 639, 678-80 (2002) (Thomas, J., concurring). Justice Potter Stewart, sixteen years after *Everson*, noted incorporation's incongruence with the original federalism purpose of the clause: "the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy." *Schempp,* 374 U.S. at 310 (Stewart, J., dissenting).

wrong the day it was decided; incorporation is not and never was supported by sound legal reasoning.

A. A Principal Purpose of the Establishment Clause Was to Deny the Federal Government Authority over How and Whether States Established Religion

Incorporation of the Establishment Clause through the Fourteenth Amendment has many, well-noted problems. Perhaps the most obvious one is that, by incorporating it against the states, the Supreme Court upended one of the clause's main purposes: to allow states to regulate the establishment of religion as they saw fit, preventing the federal government from interfering with their preferred arrangements.

1. Prior to Adoption of the First Amendment, Political Attitudes Desired to Limit Federal, but Not State, Power over Religious Establishment

The dominant paradigm in the states when they ratified the First Amendment was still that of England: the state should encourage religion to inculcate virtues important to the body politic.[19] For instance, Virginia in its 1784 general assessment bill, in which it provided for the funding of ministers, noted, "Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society; which cannot be effected without a competent provision for learned teachers."[20]

At the same time, there was a consensus that the religion to be advanced by the state should be some form of Protestantism that rejected the authority of the Catholic pope over temporal matters.[21] In 1774, citizens of the American Colonies were outraged when the British Parliament allowed Quebec to keep Catholicism as its official faith and permitted Catholics to practice their

---

[19] *See* GLENN A. MOOTS, *Religious Exercise and Establishment in Early Am.*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 103.

[20] "*A Bill Establishing a Provision for Teachers of the Christian Religion*" *1784*, quoted in THOMAS J. BUCKLEY, CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787, at 188-89 (1977).

[21] An early Congress illustrated the belief that religion was a positive force on the body politic by funding Christian missionaries to educate and evangelize Native Americans. *See* MICHAEL D. BREIDENBACH, *Religious Tests, Loyalty Oaths, and the Ecclesiastical Context of the First Amendment*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 166, 189-91. Federalists and non-conformists (who were generally anti-federalist) agreed that religion was necessary to inculcate the virtue needed to support a republic and to prevent violent revolution like France experienced. JONATHAN DEN HARTOG, *Church and State in the Nineteenth Century*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 193, 195-96.

religion freely.[22] Concerned that Great Britain's real motive was to encourage Catholic expansion in the colonies "for the ultimate purpose of suppressing their cantankerous American cousins,"[23] Alexander Hamilton railed,

> Does not your blood run cold, to think an English Parliament should pass an act for the establishment of arbitrary power and popery in such an extensive country? . . . If they had been friends to the Protestant cause, they would never have provided such a nursery for its great enemy; they would not have given such encouragement to popery. . . . They may as well establish popery in New York, and the other colonies, as they did in Canada.[24]

To prevent such a thing happening in this country, the federal government was to be denied any authority to impose a national church on the various states and to regulate church offices and practice, leaving such matters exclusively to the states.[25] Reflecting that attitude, when Ambassador Benjamin Franklin forwarded the Vatican's request in 1783 that Congress allow a native vicar apostolic for the newly formed country, the first federal Congress, acting under the Articles of Confederation, responded that powers over spiritual appointments are "reserved to the several States, individually."[26] Indeed, at the time of the constitutional convention and the state ratifying conventions, several states had varying types of church establishments,[27] and seven

---

[22] *See* Francis J. Beckwith, *Church, State, and the Abuse Crisis*, 10 J. OF CHRISTIAN LEGAL THOUGHT 21, 21-22 (2020).

[23] *Id.* at 21.

[24] ALEXANDER HAMILTON, *A Full Vindication of the Measures of Congress*, *in* THE WORKS OF ALEXANDER HAMILTON 26-27 (John C. Hamilton ed., 1850).

[25] *See generally* CHRIS BENEKE, *The Historical Context of the Religion Clauses of the First Amend.*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 140, 141-50.

[26] Journals of the Continental Cong., 25:825-26 (Dec. 22, 1783) (Gaillard Hunt, ed.), *available at* https://tile.loc.gov/storage-services/service/ll/llscd/lljc025/lljc025.pdf. The Vatican was assuming that *ius patronatus*, the right to appoint ecclesiastical officials, would be applied by the United States. The Establishment Clause later expressly denied that right to the federal government. *See* Breidenbach, *supra* note 21, at 168.

[27] *See* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at ch. 1. While the widely discussed views of Roger Williams and Thomas Jefferson on church-state separation played basically no role in the drafting and adoption of the First Amendment, the historical record does show that, by 1783, a shift was underway to allow nonconformists to enjoy unimpeded public worship, even in those states with an established church. *See id.* at 16-17; Moots, *supra* note 19, at 113-14, 138; *see also* MARK DAVID HALL, DID AMERICA HAVE A CHRISTIAN FOUNDING? 59-68 (2019); McConnell, *Establishment and Disestablishment at the Founding, Part I supra* note 6, at 2145 (2003).

of the original thirteen states in their constitutions required their office holders to be Protestant.[28]

When the representatives of the various states met at the Constitutional Convention of 1787, the potential for conflict was great, but so was the need of a more effective organizing instrument. Religion, then as now, was a contentious matter, with different states having different approaches to establishment and with varying denominations being favored in varying states.[29] Attempting to put the reconstituted federal government's larger thumb into the religious pie would almost certainly have poisoned any efforts at coming to consensus on a new constitution, and, even if consensus had been attained at the convention, it would have prevented attaining ratification by the requisite number of states.[30] Simply avoiding the topic in the proposed constitution was considered inadequate in some state ratifying conventions, with states conditioning their acceptance of the proposed document on the addition of a "bill of rights" that would include a clause that would guarantee that the newly constituted federal government would keep its hands off how the states handled the establishment of religion.[31] This "hands-off" attitude was already reflected in the text of the original Constitution when the framers provided

---

[28] *See* GA. CONST. of 1777, art. VI, *available at* https://avalon.law.yale.edu/18th_century/ga02.asp; MASS. CONST. of 1780, ch. VI, *available at* http://www.nhinet.org/ccs/docs/ma-1780.htm; N.H. CONST. of 1784, pt. II, *available at* http://candst.tripod.com/cnst_nh.htm; N.J. CONST. of 1776, art. XIX, *available at* https://avalon.law.yale.edu/18th_century/nhj15.asp; N.C. CONST. of 1776, art XXXII, *available at* https://avalon.aw.yale.edu/18th_century/nc07.asp; S.C. CONST. of 1778, art. III, *available at* https://avalon.aw.yale.edu/18th_century/sc02.asp; VT. CONST. of 1777, ch. I, § III; ch. II, § IX, *available at* https://avalon.aw.yale.edu/18th_century/vt01.asp.

[29] *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at 4, 10-11, 12; Esbeck, *supra* note 4, at 29 ("In 1787, church-government relations (as distinct from safeguarding private religious conscience) were highly divisive, were widely regarded as a state-level matter, and varied considerably from state to state.").

[30] *See* Esbeck, *supra* note 4, at 28-29; DONALD L. DRAKEMAN, *Which Original Meaning of the Establishment Clause Is the Right One?*, *in* THE CAMBRIDGE COMPANION, *supra* note 4, at 365, 393 ("The reason that congressmen with impressively diverse church-state views could agree on the clause is that its anti-establishment reach would extend only as far as the national government.").

[31] *See generally* ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 36-48 (1997); *see, e.g.*, N.C. Ratification Resolution (Nov. 21, 1789) (proposing amendment that "no particular religious sect or society ought to be favoured or established by law in preference to others" by the federal government), *available at* https://avalon.law.yale.edu/18th_century/ratnc.asp (last visited Dec. 28, 2021).

that there would be no religious test for *federal* offices, while not including any similar provision for *state* office holders.[32]

2. The Drafting History and Text of the Establishment Clause Fulfilled the Original Purpose to Limit Federal, but Not State, Power over Religion

The overriding purpose of the Bill of Rights was to make explicit areas in which the reformed federal government was divested of power.[33] Madison's initial draft of the Bill of Rights for the first House of Representatives under the Constitution included, "nor shall any national religion be established."[34] The select committee to which it was referred recommended, "no religion shall be established by law."[35] After debate, the House passed, "Congress shall make no law establishing religion,"[36] and sent it to the Senate. The Senate passed a more limited clause, restricting Congress only from "establishing articles of faith or a mode of worship."[37] The Conference Committee resolved the differences in the ultimately adopted language: "Congress shall make no law respecting an establishment of Religion."[38]

The final text of the clause targets "Congress," the law-making instrument of the newly reconstituted federal government. On its face, this provision (a) does not restrain an establishment of religion by state governments but (b) expressly withholds power from Congress to pass a law relating to state establishments.[39] This plain reading is reinforced by the reason the clause was amended to target Congress: it was specifically inserted to negate any inference, as feared by Rep. Huntington during the congressional debates on

---

[32] U.S. CONST. art. VI, cl. 3. This is not to say that there was not some implicit recognition of religion in the Constitution's original text, as it still required oaths, which were understood to be made in the name of God, although leeway was given for nonconformists like Quakers and Anabaptists by allowing them to affirm, rather than swear. *See id.* at art. I, § 3, cl. 6; art. II, § 1, cl. 9; art VI, cl. 3; *see generally* Breidenbach, *supra* note 21, at 166-75 (observing that religious oaths were universally required in the United Kingdom and in the States at the time).

[33] *See generally* RICHARD LUBINSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS (2006); Esbeck, *supra* note 4, at 30.

[34] 1 Annals of Cong. 450-51 (June 8, 1789).

[35] *Id.* at 699 (July 28, 1789).

[36] *Id.* at 795-96 (Aug. 20, 1789).

[37] S. JOURNAL, 1st Cong., 1st Sess. 129 (Sept. 9, 1789).

[38] H. JOURNAL, 1st Cong., 1st Sess. 121 (Sept. 24, 1789); S. JOURNAL, 1st Cong., 1st Sess. 150-51 (Sept. 25, 1789).

[39] *See* Esbeck, *supra* note 4, at 32.

the provision, that the amendment was directed at the states.[40] Indeed, given the circumstances at the time, it is impossible to imagine that the amendment would have been adopted if it were thought to encroach on the power of the states over religion.[41]

Despite the clause's original purpose and express text *restraining* federal interference with the way a state might establish religion, the Supreme Court's incorporation of the Establishment Clause through the Fourteenth Amendment gives it the opposite effect. This result could only be correct if the Fourteenth Amendment required the states to protect rights under the Establishment Clause as a liberty interest via its Due Process Clause or as a privilege or immunity.[42] As discussed in the next section, the Establishment Clause is different in kind from provisions that protect personal rights; those provisions, unlike the Establishment Clause, are properly incorporated against the states by the Fourteenth Amendment.

B. The Fourteenth Amendment Protects Individual Rights, but the Establishment Clause Does Not

As the Supreme Court has repeatedly observed, the Fourteenth Amendment demands incorporation only of individual rights that are "fundamental to our scheme of ordered liberty" and "deeply rooted in this Nation's history

---

[40] 1 Annals of Cong. 758-59 (Aug. 15, 1789); *see* Esbeck, *supra* note 4, at 32-33 (noting Huntington's concern that the clause not be construed to restrain state establishment of religion). It is also how the Supreme Court consistently read the clause prior to *Everson*. *See, e.g.*, Permoli v. Municipality No. 1 of New Orleans, 44 U.S. 589, 609 (1845) ("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."); *see also* Timbs v. Ind., 586 U.S. 146, 150 (2019) ("When ratified in 1791, the Bill of Rights applied only to the Federal Government.") (citing Barron *ex rel.* Tiernan v. Mayor of Balt., 32 U.S. 243 (1833)).

[41] *See* Drakeman, *supra* note 30, at 392-93; Esbeck, *supra* note 4, at 32-34; Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385.

[42] The debate over whether incorporation is proper through the provision protecting liberty through the Due Process Clause or through the Privileges or Immunities Clause of the Fourteenth Amendment is not attempted or rehearsed here, as this article argues that incorporation of the Establishment Clause is appropriate under neither. *See generally* Steven W. Fitschen, *From Civil Rights to Blackmail: How the Civil Rights Attorney's Fees Act of 1976 (42 U.S.C. § 1988) Has Perverted One of America's Most Historic Civil Rights Statutes*, 29 WM. & MARY BILL OF RIGHTS J. 107, 150-55 (2021) (discussing scope of Privileges or Immunities Clause of the Fourteenth Amendment and marshalling evidence that the Framers did not consider the Establishment Clause to contain personal rights covered by the amendment).

and tradition."[43] This requirement must be met even when the rights in question are found in the Bill of Rights.[44]

Disestablishment at the state level cannot be understood as either fundamental to or deeply rooted in our nation's polity. Many states had religious establishments when the Constitution was ratified, and the Establishment Clause protected, rather than threatened, those establishments.[45] Thus, any proof that Congress and the ratifying states intended to incorporate the Establishment Clause against the states through the Fourteenth Amendment would have to be explicit, indeed. There is no such proof.

The legislative and ratification history contains no mention of any such intended incorporation.[46] The text of the Fourteenth Amendment on its face protects only the rights of *individuals* from interference by the states: "No State shall make or enforce any law which shall abridge the privileges or 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."[47] For instance, parents have a fundamental liberty interest in the care, education, and upbringing of their children, a right which is personal to individual parents.[48] The same is true of the incorporated rights to free exercise of religion, to free speech, to free assembly, and to bear arms, which are articulated in the Constitution expressly as individual freedoms and personal rights.[49]

The Establishment Clause varies in kind from other rights incorporated through the Fourteenth Amendment. Indeed, it is not described as a freedom or a right at all. It is nonsensical to suggest that the Constitution recognized a right in an individual to either regulate a state establishment or not to establish a national religion. Establishments are by definition the work of governments, not individuals.[50] Thus, the interests protected by the

---

[43] *Timbs*, 586 U.S. at 154 (internal quotation marks omitted); *see also Dobbs*, 597 U.S. at 237-39.

[44] *See id.* at 238-39.

[45] *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at 5-18.

[46] *See generally* Fitschen, *supra* note 42, at 150-55.

[47] U.S. CONST. amend XIV, § 1 (emphases added).

[48] *See* Troxel v. Granville, 530 U.S. 57 (2000); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925).

[49] *See* U.S. CONST. amends. I, II. The Eighth Amendment's prohibitions of excessive bail and fines and cruel and unusual punishment are also individual protections, rather than federalism measures. *See Timbs*, 586 U.S. at 150-51.

[50] *See* Esbeck, *supra* note 4, at 38 ("[T]he object of the participial phrase 'respecting an establishment' is not about acknowledging an intrinsic human right, but is a reference to a discrete subject matter ('an establishment of religion') that is being placed off limits to or outside the government's

Establishment Clause do not fit neatly into the rationale supporting incorporation under the Fourteenth Amendment. That amendment, by its terms, protects *individual* rights. But the Establishment Clause is a structural provision; in other words, it is a provision directed to governments that was expressly designed to protect the rights of state governments against encroachment by the federal government.[51] To infer an individual right *not* to have a state establish a religion turns the Establishment Clause inside out, allowing that alleged individual right to override the protection the clause expressly gave to state governments to establish religion. To maintain the original meaning and purpose of the clause, any individual right emanating from the Establishment Clause would have to be limited to a right to prohibit the *federal* government from establishing a *national* religion.[52] But incorporation would not be needed to vindicate such a right. The clause itself, combined with existing standing rules, would enable complainants to sue under the federal Establishment Clause to prevent the establishment of a national religion.[53]

Nevertheless, Chapman and McConnell perceive several personal rights emanating from the Establishment Clause that, in their view, permit incorporation against the states. They acknowledge the federalism or "jurisdictional" nature of the clause in requiring the federal government to keep its hands off state establishments.[54] At the same time, they assert that the clause

---

authority."); *see also Elk Grove*, 542 U.S. at 50-51 (Thomas, J., concurring) ("The Establishment Clause does not purport to protect individual rights.")

[51] *See Elk Grove*, 542 U.S. at 50-53 & n.4 (Thomas, J., concurring); *see also* Muñoz, *supra* note 4; Esbeck, *supra* note 4, at 38 ("This difference in the nature of these participial phrases [in the Free Exercise and Establishment Clauses] leads to a difference in their function: creating a structural relationship versus acknowledging an intrinsic right.").

[52] *See Elk Grove*, 542 U.S. at 51 (Thomas, J., concurring) (suggesting the Establishment Clause at most arguably contains that individual right).

[53] *See* Carl H. Esbeck, *The Establishment Clause as a Structural Restraint: Validations and Ramifications*, 18 J.L. & POLITICS (UVA) 445 (2002) (collecting Establishment Clause standing cases to vindicate it as a structural restraint).

[54] Agreeing to Disagree, *supra* note 4, at 79-80. While first acknowledging that it makes no sense to claim what they call the "jurisdictional" part of the Establishment Clause could be incorporated against the states, Chapman and McConnell then assert, without explanation and in apparent contradiction, that the Fourteenth Amendment "superseded" this aspect of the clause, but that it troubled no one at the time because the states had all disestablished by then. Obviously, the more satisfactory answer is that it troubled no one at the time because no one thought the Establishment Clause had been converted to a restriction on the states by the Fourteenth Amendment. And it is not accurate that no vestiges that Chapman and McConnell would consider Establishment Clause violations remained at the time of the Fourteenth Amendment's ratification. *See* Antieau, *supra* note

protects individual freedoms insofar as its purposes include preventing the national government from establishing religion by regulating any particular doctrine or requiring attendance at a denominational observance.[55]

But that approach does not solve the "special problem" of incorporating the Establishment Clause, as they phrase it.[56] Concededly, the Establishment Clause, when it prohibited the *federal* government from specifying a favored national church, at the same time disallowed the *federal* government from doing that indirectly by favoring one denomination over another or dictating religious doctrine or practice. However, the key point is that, when it restricted *federal* action in (indirectly or directly) establishing a national religion, the clause *allowed* the *state* governments to continue to do so at the state level and prevented the federal government from regulating "respecting" them. Splitting up the clause between direct and indirect establishments does nothing to advance Chapman and McConnell's argument. Conceding that incorporation is illogical for direct establishments necessarily concedes the same for indirect ones. Chapman and McConnell's argument boils down to the fact that people are affected by indirect establishments of religion, such as a state compelling attendance once a year at a favored church.[57] But that proves too much. People are affected by direct establishments just as they are by indirect establishments, and all structural provisions of the Constitution—not just the Establishment Clause—ultimately affect individuals. The point remains that the Establishment Clause is different in kind from other provisions of the Bill of Rights in the very way that makes those other rights amenable to incorporation: they expressly protect freedoms and rights of individuals, while the Establishment Clause does not.[58]

The Establishment Clause with respect to the *federal* government was wholly anti-establishment. It prohibits the national government from replicating England's practices of, for example, demanding adherence to published doctrinal statements, ordering personal attendance at a particular church, or legislating that taxes be given for support of certain ministers and

---

14, at 91-111 (discussing remaining establishment provisions at the state level when the Fourteenth Amendment was drafted and ratified).

[55] Agreeing to Disagree, *supra* note 4, at 80-81.

[56] *Id.* at 79.

[57] *Id.* at 80.

[58] *See* Drakeman, *supra* note 30, at 393 (observing that the Establishment Clause "differed from the remainder of the First Amendment, which was a series of statements in favor of the general principles of free exercise of religion, freedom of speech, freedom of the press, and so on. There was no equivalent nonestablishment value underlying the establishment clause").

not others. But it simply does not follow that, because the federal government cannot do such things, the states may not, either. In fact, the purpose of the Establishment Clause was to provide just such a distinction. All the Establishment Clause did with respect to the *states* was to set up a structural block to prevent the national government from regulating what the states did in this area, whether the states were pro- or anti-establishment or a mixture of both.

That is not to say that the ratification of the Fourteenth Amendment made no difference. The type of individual or personal rights Chapman and McConnell find implicit in the Establishment Clause for protection against overreach by the *federal* government overlap with rights protected by the Free Exercise, Free Speech, and Freedom of Assembly Clauses, which have been properly incorporated through the Fourteenth Amendment as fundamental, personal rights and so reach state action as well as federal.[59] As will be discussed further below, because of the incorporation of these clauses, there are no individual or personal rights of the type even arguably protected by the Establishment Clause that are not already protected against incursion by the states.

Finally, the unsuccessful federal Blaine Amendment provides some inferential support for the argument that the Fourteenth Amendment does not incorporate the Establishment Clause. The federal Blaine Amendment, which passed the House by the requisite two-thirds majority but fell just short in the Senate, in its opening phrase provided, "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . ."[60] A logical inference is that, if the sponsors and ratifiers of the Fourteenth Amendment thought that it had already incorporated the Establishment Clause less than a decade earlier, they would not have tried to do it in the Blaine Amendment. However, that inference is admittedly weak: incorporation was not yet in its heyday in 1876, and the amendment also expressly

---

[59] *See Elk Gove*, 542 U.S. at 51 (Thomas, J., concurring).

[60] 4 Cong. Rec. 5453 (1876). Chapman and McConnell brush off this language and its inference that, shortly after ratification by the Fourteenth Amendment, the Establishment Clause was not understood to be incorporated to the states, by describing it as a "rhetorical strategy" and "sideshow" to aid the amendment's real purpose to deny state funding to "sectarian," i.e., mainly Catholic, schools. Agreeing to Disagree, *supra* note 4, at 81-84.

calls for incorporation of the Free Exercise Clause, which everyone agrees is properly incorporated through the Fourteenth Amendment.[61]

C. The Everson *Court Could Not, and Did Not, Support Its Incorporation Holding*

The *Everson* Court made the Establishment Clause applicable to the states through the Fourteenth Amendment. It did so without principled analysis, first in its conclusory statement that "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .'"[62] The Court went on a few pages later:

> The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause. The interrelation of these complementary clauses was well summarized in a statement of the Court of Appeals of South Carolina, quoted with approval by this Court in *Watson v. Jones*, 13 Wall. 679, 730: "The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority."[63]

These passages simply assume their predicate that the Establishment Clause is identical in character to the other First Amendment protections and so should receive identical treatment with respect to incorporation.[64] The

---

[61] Montana's version of the Blaine Amendment as applied to deny religious schools generally available tax funds was declared unconstitutional in *Espinoza v. Montana Department of Revenue*, 591 U.S. 464, discussed further *infra.*

[62] *Everson*, 330 U.S. at 8 (citing Murdock v. Pa., 319 U.S. 105 (1943)). While the *Murdock* Court used basically the same words, 319 U.S. at 108, that case dealt with restrictions on door-to-door evangelization protected by the Free Exercise Clause.

[63] *Everson*, 330 U.S. at 14-15 (footnotes omitted).

[64] The dissenting Justices did not discuss the incorporation issue. While the majority upheld the challenged state law under the incorporated Establishment Clause, the dissenters argued that the

Everson Court avoided discussion of the text or drafting history of the clause and cited in support only Free Exercise Clause cases.[65] But those free exercise cases protected only individual rights, most of them invalidating restrictions against door-to-door evangelism by individuals and *West Virginia State Board of Education v. Barnette* protecting school children from being forced to salute the flag.[66] Ironically, the Supreme Court in *Everson* recognized all of these as dealing with "an *individual's* religious freedom."[67] And the very language the *Everson* Court quoted from *Watson v. Jones* recognized that the Establishment Clause provided, not an individual right, but a *structural* restraint.[68] The Court certainly did not grapple with the central issue: when a major purpose of the Establishment Clause was to keep the *federal* government's hands off how the *states* dealt with establishing religion—i.e., when it was required to allow pro-establishment actions by the states—how could it possibly be proper to convert that shield for the states into a sword granting the federal government jurisdiction to forbid their establishments?[69] And the Supreme Court since *Everson* has neither attempted to answer that fundamental

---

state law in question violated the Establishment Clause. *Id.* at 18 (Jackson, J., dissenting), 28 (Rutledge, J., dissenting).

[65] Many have critiqued the *Everson* Court's slanted use of the history of the formation of the Establishment Clause. *See, e.g.*, Hall, *supra* note 27, at 59-85 (discussing the errors of the "*Everson* syllogism" and the exaggerated weight and misconstructions given to the views of Jefferson and Madison).

[66] *See Everson*, 330 U.S. at 15 n.22 (citing *Cantwell*, 310 U.S. 296 (door-to-door evangelization by individuals); Jamison v. Tex., 318 U.S. 413 (1943) (same); Largent v. Tex., 318 U.S. 418 (1943) (same); *Murdock*, 319 U.S. 105 (same); Follet v. McCormick, 321 U.S. 573 (1944) (same); Marsh v. Ala., 326 U.S. 501 (1946) (same); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (forced flag salute by individuals struck down as compelled speech)). The *Everson* Court also cited for support *Bradfield v. Roberts*, 175 U.S. 291 (1899), with a "*cf.*" signal. *Bradfield* upheld incorporation of a Catholic hospital by the District of Columbia against an Establishment Clause attack; of course, D.C. is a federal territory, not a state, and so is irrelevant to the incorporation question.

[67] *Id.* at 15 (emphasis added).

[68] *Id.* (recognizing that the "structure of our government" provides for separate spheres of civil and religious authority).

[69] *See Schempp*, 374 U.S. at 310 (Stewart, J., dissenting) ("[I]t is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy."). Justice Joseph Story in his *Commentaries* wrote that an attempt by the federal government to disallow the states to favor Christianity officially—as many of them did when the Establishment Clause was adopted—would have "created universal disapprobation," and that "the general, if not universal, sentiment" at the time was "that Christianity ought to receive encouragement from the state." 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 78 (1833).

question nor made any principled defense of its incorporation of the Establishment Clause.

The most important of the *stare decisis* factors are those which ask whether the decision under challenge was right—or at least well-reasoned—in the first place. *Everson*'s incorporation of the Establishment Clause is very difficult to justify on the merits; indeed, the decision itself barely even tried to justify that landmark constitutional development, and incorporation is starkly inconsistent with the federalism principle that is at the core of the clause itself. Therefore, the most important *stare decisis* factors cut against maintaining incorporation of the Establishment Clause and in favor of overruling *Everson*.[70]

II. DISINCORPORATING THE ESTABLISHMENT CLAUSE WOULD HAVE BENEFICIAL, NOT ADVERSE, EFFECTS, AND NO SUBSTANTIAL RELIANCE INTERESTS MILITATE AGAINST IT

Professor Carl Esbeck recognizes that *Everson* wrongly incorporated the Establishment Clause through the Fourteenth Amendment, but he would leave it be, as it has proven sometimes efficacious to religious liberty. He summarizes as follows:

> *Everson*'s incorporation of the Establishment Clause was a mistake if one follows the interpretive rules of original public meaning. Nonetheless, [we] should accept incorporation as settled law by virtue of *stare decisis*. Americans have already worked their way through incorporation's many difficulties, many citizens have come to rely on it, and its reversal would be disruptive. Moreover, such a proposition is not a one-sided bargain; the Establishment Clause often serves to protect religious freedom when it comes to matters such as the prohibition on courts becoming entangled in religious questions and the resurgent protection of church autonomy.[71]

Contra Esbeck, it is not too late to turn back, to correct *Everson*'s error, and to disincorporate the Establishment Clause. *Stare decisis* does not require adherence to *Everson*, as disincorporation would not upset substantial reliance interests or cause significant disruption of expectations built on the edifice of the concededly improper incorporation in *Everson*. The Supreme Court

---

[70] *See Janus*, 585 U.S. at 916-17 (listing *stare decisis* factors). *Cf. Dobbs*, 597 U.S. at 218 (finding *Roe* "egregiously wrong and . . . on a collision course with the Constitution from the day it was decided").

[71] Esbeck, *supra* note 4, at 39 (footnote omitted).

demonstrated this somewhat dramatically when, in *Kennedy*, it overruled (without expressly saying it was doing so) the infamous *Lemon* test that supported a strict separationist view of the Establishment Clause.[72] The Court chided the Ninth Circuit for applying the *Lemon* test when the Court itself had not applied it for over a decade and had exclusively used a historical analysis (championed by McConnell, Esbeck, and others) in several recent decisions.[73] The Court made no mention of the *stare decisis* factors when parking *Lemon* at the curb, and no great wail of disappointed reliance has erupted since it did so.

The *stare decisis* factors do not include, "We like the results the erroneously decided decision produces."[74] Thus, Esbeck's contention that *Everson*'s improper incorporation of the Establishment Clause has not been "a one-sided bargain"[75] is not a persuasive reason to retain *Everson*'s error. In a similar vein, the Supreme Court in *Engel v. Vitale* pointed to its view of a favorable result to justify striking down New York State's prayer for public school children as violative of the Establishment Clause.[76] It recounted the multiple state establishments during the colonial period and labeled it "an unfortunate fact of history" that the states, often founded by nonconformists persecuted in their native lands, would almost uniformly favor by law their own religious beliefs when they achieved political power in the colonies, a favoritism that continued in most nascent states.[77]

But simply liking the anti-establishment result does not provide a principled basis for overriding the purpose of the clause to protect state prerogatives. The Establishment Clause, while preventing the *federal* government from putting its weight behind any particular denomination, also protected the rights of the states to make up their own minds on the matter. And the inference that disincorporating the Establishment Clause would upset substantial expectations or reliance interests in this area is also unfounded. As will be discussed further below, where compulsion is involved, the results praised by Esbeck, as well as by Chapman and McConnell,[78] can be

---

[72] *Kennedy*, 597 U.S. at 530-42 (criticizing the *Lemon* test as "ahistorical" and "atextual" and declaring that it is no longer used by the Court).

[73] *Id.*

[74] *See Janus*, 585 U.S. at 916-18 (identifying *stare decisis* factors).

[75] Esbeck, *supra* note 4, at 39.

[76] 370 U.S. 421 (1962).

[77] *Id.* at 426-29.

[78] Chapman and McConnell, like Esbeck, argue that the Court should leave incorporation alone because it produced what they consider to be a positive result in *Engel*, i.e., advancing toleration in

accomplished by the protections afforded by the properly incorporated Free Speech, Free Exercise, and Freedom of Assembly Clauses of the First Amendment.

State neutrality on religious matters, rather than favoritism of a particular denomination, may well be the most prudent political decision in our country's current political and social circumstances—and, in fact, that is how all the states currently see the matter—but that decision is reserved to the states by the Establishment Clause. The Supreme Court in *Engel* provides no further argument, but only assumes, along with *Everson*, that the Fourteenth Amendment incorporated the clause against the states. *Engel*'s point that what the state was doing would violate the clause if done by the federal government begs the question,[79] and a personal preference for anti-establishment policies does not cure the legal problem.[80]

Any upset of reliance interests or other negative effects from overruling *Everson* and disincorporating the Establishment Clause would be minimal and offset by significant advantages: the clause would still operate in full with respect to the actions of the federal government; both institutional and individual religious liberty interests are robustly protected by the Free Exercise Clause (and often by the Free Speech and Freedom of Assembly Clauses as well); and the federal courts would be relieved of state and local religious display cases and the like brought by "offended observers" who suffer no compulsion but are only intolerant of religious views being expressed in the public square. Undergirding all, and further undercutting any reliance-type

---

our society. They point out that there was no early precedent for religious observance in public schools because, at the founding, there were no public schools. Agreeing to Disagree, *supra* note 4, at 146. They admit that, when the "common school" movement began, it had as a purpose to inculcate a common set of generally held views of morality and religious truths, but they observe that that purpose generated contention from the start with Catholics and others, and then they applaud *Engel*'s rationale that "Government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.* at 146-47 (quoting *Engel*, 370 U.S. at 430). But, once again, their approval of the result and its perceived effect does not solve the *legal* problem of incorporating the Establishment Clause to take away a decision from state and local authorities that the clause was designed to *allow* them to make.

[79] *See Engel*, 370 U.S. at 430.

[80] Chapman and McConnell criticize one aspect of *Engel*—its incorrect dicta that compulsion never is a factor in Establishment Clause analysis and always is in Free Exercise Clause analysis. Agreeing to Disagree, *supra* note 4, at 147-51 (quoting *Engel*, 370 U.S. at 430). With respect to non-coercive official prayers involving adults—e.g., prayers opening government sessions—they argue that coercion is required before it is an Establishment Clause violation. *Id.* at 151-54.

argument, is that no state now has an established religion and that, instead, state constitutions uniformly have their own anti-establishment provisions.

A. The Disincorporated Establishment Clause Would Still Protect Against Federal Incursions into Religious Matters

Consistent with its original design, a disincorporated Establishment Clause would still have full operation against the federal government and all its components. It would continue to apply to federal territories as well.[81] For instance, under the Establishment Clause, the federal government could not require devotional recitations of prayers and religious literature in federally operated schools, such as those on military bases.[82]

B. The Religious Question Doctrine Is Adequately Supported by the Incorporated Free Exercise Clause

The religious question doctrine prevents secular courts from attempting to resolve issues that are, at their base, religious in character, including adjudicating the importance or centrality of those beliefs to a faith.[83] In a leading decision articulating the doctrine, *Thomas v. Review Board*,[84] the Supreme Court based the doctrine firmly in the Free Exercise Clause:

> the guarantee of *free exercise* is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.[85]

---

[81] *See, e.g.*, Gonzalez v. Roman Cath. Archbishop of Manila, 280 U.S. 1 (1929); *Bradfield*, 175 U.S. 291.

[82] It is important to note that, even in the federal sphere in which the Establishment Clause properly operates, the clause is not anti-religion, as it has so often been assumed to be. It does not prevent government action "about" or "concerning" or "respecting" religion generally, but only about an *establishment* of religion. Thus, as the Supreme Court has repeatedly held, it does not violate the Establishment Clause for Congress to exempt religious organizations and individuals from otherwise applicable laws and regulations, i.e., to leave them alone. *See, e.g.*, Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (upholding religious organization exception to Civil Rights Act of 1964); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (upholding charitable deduction in tax code); Selective Draft Law Cases, 245 U.S. 366 (1918) (upholding religious exemption from draft laws); *see generally* Hall, *supra* note 27, at 133-46 (discussing historical accommodations exemptions for religious views).

[83] *See Our Lady*, 591 U.S. at 751 n.10; *see, e.g.,* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 843-44 (1995); Widmar v. Vincent, 454 U.S. 263, 269-70 n.6, 272 n.11 (1981); *Walz*, 397 U.S. at 674; *Cantwell*, 310 U.S. at 305-07.

[84] 450 U.S. 707 (1981).

[85] *Id.* at 715-16 (emphasis added).

Thus, incorporation of the Establishment Clause is not required for maintaining the religious question doctrine.

C. The Church Autonomy Doctrine Is Adequately Supported by the Incorporated Free Exercise and Freedom of Assembly Clauses

An important aspect of religious freedom is protected by the "church autonomy" doctrine. This doctrine protects against government interference in the internal affairs of religious organizations. The Supreme Court in *Kedroff v. St Nicholas Cathedral of Russian Orthodox Church in North America* observed that the Constitution provides "a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[86]

The Court in *Kedroff* identified the constitutional font for the doctrine solely as the Free Exercise Clause. Looking back to *Watson v. Jones*,[87] the progenitor of the doctrine that applied federal common law, the *Kedroff* Court observed that *Watson*

> radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the *free exercise* of religion against state interference.[88]

This, the Supreme Court later observed, "converted the principle of *Watson* . . . into a constitutional rule."[89]

While some of the Court's later church autonomy cases identified the constitutional locus of the church autonomy doctrine more generally as the

---

[86] 344 U.S. 94, 116 (1952) (footnote omitted); *see also* Serbian E. Orthodox Diocese for U.S. and Can. v. Milivojevich, 426 U.S. 696, 713-14, 724 (1976). *Milivojevich* also did away with the ability of courts to determine whether an internal church decision was "arbitrary," as it would intrude into religious questions beyond a secular court's ken, leaving courts only able to review church decisions for collusion and fraud. *See id.* at 712-16.

[87] 80 U.S. (13 Wall.) 679 (1872). The Court's more recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC* also relied on *Watson v. Jones*. 565 U.S. 171, 185 (2012).

[88] 344 U.S. at 116 (footnote omitted) (emphasis added); *see also* Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 446 (1969) (noting that *Watson* had "a clear constitutional ring").

[89] *Presbyterian Church*, 393 U.S. at 447.

"First Amendment,"[90] the fact remains that the Court in *Kedroff* found the Free Exercise Clause wholly sufficient to support the doctrine. And there is no reason why the Free Exercise Clause would be inadequate for this task, especially as it is augmented by the incorporated Freedom of Assembly Clause, which protects the associational rights of individuals and institutions.[91] Indeed, *Watson* itself echoed the protections of those clauses:

> Laws then existed upon the statute-book [in England] hampering the *free exercise* of religious belief and worship in many most oppressive forms, and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. . . .
>
> In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. . . . The *right to organize voluntary religious associations* to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith *within the association* . . . is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed.[92]

In the church autonomy context, the incorporated Free Exercise and Freedom of Assembly Clauses operate in tandem. These cognate freedoms[93] do not need an incorporated Establishment Clause to protect religious associations from state interference.

---

[90] *See, e.g.*, *Milivojevich*, 426 U.S. at 712; *Presbyterian Church*, 393 U.S. at 449.

[91] *See* DeJonge v. Ore., 299 U.S. 353, 364 (1937); *compare id. with* Bouldin v. Alexander, 82 U.S. 131, 139-40 (1872) ("[W]e cannot decide who ought to be members of the church, nor whether the excommunicated have been regularly or irregularly cut off."); *see generally* Nikolas Bowie, *The Constitutional Right of Self-Government*, 130 YALE L.J. 1652 (2021); JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012).

[92] *Watson*, 80 U.S. at 728-29 (emphasis added). Of course, even without a constitutional underpinning, the *Watson* church autonomy privilege would remain the law and not need incorporation of the Establishment Clause to support it, as *Watson* predated *Everson*.

[93] *See DeJonge*, 299 U.S. at 364 ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

D. Ministerial Exception Cases Are Adequately Supported by the Free Exercise Clause

The "ministerial exception" is a subset of the church autonomy doctrine, which shields from governmental interference "internal management decisions that are essential to the institution's central mission," including "the selection of the individuals who play certain key roles."[94] It is not confined to those styled "ministers" or the chiefs of religious organizations, but is available to anyone who functions as a "messenger or teacher of its faith,"[95] at the very least.[96]

In its two decisions embracing the ministerial exception, *Hosanna-Tabor* and *Our Lady*, the Supreme Court stated that the doctrine is supported by both the Establishment Clause and the Free Exercise Clause.[97] This raises the question of whether the Establishment Clause is a necessary support for the exception. It is not, for three basic reasons.

First, the ministerial exception is a subset of the church autonomy doctrine. As noted earlier, that doctrine is adequately undergirded by the incorporated Free Exercise and Freedom of Assembly Clauses of the First Amendment.[98] Indeed, before the Supreme Court took up the issue, the First, Third, and Fifth Circuits grounded their recognition of the exception in the Free Exercise Clause alone.[99]

---

[94] *Our Lady*, 591 U.S. at 746.

[95] *Id.* at 751-52 (quoting *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring)). The Seventh Circuit has highlighted this point by suggesting that the ministerial exception is better termed the "'internal affairs' doctrine." Schleicher v. Salvation Army, 518 F.3d 472, 474 (7th Cir. 2008).

[96] The Court has not fully resolved how to define those who are covered by the exception and how much weight courts should give to the claim of the religious organization that its employee should qualify for it. *See Hosanna-Tabor*, 565 U.S. at 190-91 (refusing to determine full contours of the exception); *id.* at 196-97 (Thomas, J., concurring) (arguing that an organization's assertion that the employee should adhere to the ministry's faith and practice should be conclusive if sincere); *id.* at 199, 204-05 (Alito, J., concurring) (describing those who qualify as "key" employees, but also noting the inability of secular courts to second-guess an organization's assertion); *Our Lady*, 591 U.S. at 757 ("[J]udges cannot be expected to have a complete understanding and appreciation of the role played by every person who performs a particular role in every religious tradition. A religious institution's explanation of the role of such employees in the life of the religion in question is important."), 2069 ("Here, as in *Hosanna-Tabor,* it is sufficient to decide the cases before us.").

[97] *Hosanna-Tabor*, 565 U.S. at 184, 188-89; *Our Lady*, 591 U.S. at 745-47.

[98] *See supra* notes 86-93 and accompanying text.

[99] *See* Natal v. Christian & Missionary Alliance, 878 F.2d 1575, 1578 (1st Cir. 1989); Petruska v. Gannon Univ., 462 F.3d 294, 307 (3d Cir. 2006); Combs v. Central Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343, 345 (5th Cir. 1999).

Second, the Court in deciding *Hosanna-Tabor* and *Our Lady* did not have to ask whether the Establishment Clause was needed as a support for the ministerial exception, and it did not decide the question. It only recognized that the Establishment Clause shares the Free Exercise Clause's purpose of prohibiting the federal government from dictating who will be a church's ministers, and it implicitly assumed that the clause was incorporated against the states. However, a closer analysis of how the Court used the Establishment Clause for support demonstrates that the same support is supplied by the Free Exercise and Assembly Clauses.

In *Hosanna-Tabor*, the Court stated, "The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to select their own."[100] Similarly, it later said in the same opinion:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[101]

It repeated in *Our Lady*, "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion."[102] One immediately notices the overlap. When the Free Exercise Clause "prevents [the government] from interfering with the freedom of religious groups to select their own" key employees, it necessarily stops the government from "appointing" them, even though the Court characterizes the Establishment Clause as the source of the latter prohibition.[103] When the Free Exercise Clause forbids the government from imposing an "unwanted" employee on the religious organization, the Establishment Clause does no more when it "prohibits government involvement in such ecclesiastical decisions"[104] or from "dictat[ing]" or "influenc[ing]"

---

[100] 565 U.S. at 184. In this and other language recognizing a religious organization as being a "group" or "association," the Court implicitly acknowledged that the ministerial exception is also supported by the Freedom of Assembly Clause.

[101] *Id.* at 188-89.

[102] 591 U.S. at 745-47.

[103] *Hosanna-Tabor*, 565 U.S. at 184.

[104] *Id.* at 188-89.

them.[105] The incorporated Establishment Clause plays a duplicative, not a necessary, role in such a case.

Third, as also noted earlier, the church autonomy doctrine found sufficient support—before incorporation of any of the First Amendment through the Fourteenth—in principles of general law that acted as a type of immunity that religious organizations could assert.[106] In essence, a "constitutional" or "free exercise immunity" similar to that recognized as running in favor of state officials in actions alleging unconstitutional conduct by them.[107] To allow the secular courts to become involved with religious voluntary associations and their employment decisions necessarily would involve the secular courts in matters of doctrine and religious practice that they lack the competence to determine, and it would influence the way such organizations operate.[108] But these dangers are fully protected against by the incorporated Free Exercise and Assembly Clauses, which also adequately support the church autonomy doctrine of which the ministerial exception is one facet.[109]

---

[105] *See Our Lady*, 591 U.S. at 745-47.

[106] In *Hosanna-Tabor*, the Court explained that a religious organization is to assert the ministerial exception as an affirmative defense, consistent with the exception's grounding in the Free Exercise Clause, rather than as a jurisdictional defense, which would have been more consistent with grounding the exception in the Establishment Clause. 565 U.S. at 195 n.4 ("the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar"); *see* Agreeing to Disagree, *supra* note 4, 178-79; Esbeck, *supra* note 4, at 38-39 (noting that, because the Establishment Clause is structural, it serves as a jurisdictional bar).

[107] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecuting attorney has absolute immunity when acting within the scope of his duties). As should be the case when a religious organization asserts the ministerial exception as a defense, in § 1983 cases, initial discovery may be limited to the immunity question, and a court's determination that immunity does not lie is immediately appealable. *See* Mitchell v. Forsyth, 472 U.S. 511 (1985). This immunity is absolute, but only in the area covered by the church autonomy doctrine; it is not a general immunity from all civil laws. *See Our Lady*, 591 U.S. at 746 ("This does not mean that religious institutions enjoy a general immunity from secular laws, but it does protect their autonomy with respect to internal management decisions.").

[108] *See Hosanna-Tabor*, 565 U.S. at 196-97 (Thomas, J., concurring).

[109] *See id.* at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."); *see generally* Michael W. McConnell, *Religion & Constitutional Rights: Why Is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243, 1245-46 (2000); Robert J. Renaud & Lael D. Weinberger, *Spheres of Sovereignty: Church Autonomy Doctrine & the Theological Heritage of the Separation of Church & State*, 35 N. KY. L. REV. 67, 71-72 (2008).

E. Religious Discrimination Cases Are Adequately Supported by the Properly Incorporated Free Exercise Clause

The Supreme Court in a recent series of cases has reaffirmed that the government may not discriminate against a religious organization solely because of its religious nature. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, it disallowed the state from barring a church school from receiving a public benefit solely because of its religious nature.[110] In *Espinoza v. Montana Department of Revenue*, the Court held that the state could not deny tax credits for participation in a school scholarship program solely because religious schools would benefit.[111] In *Fulton v. Philadelphia*, it prohibited the city from refusing to allow Catholic Social Services to continue to serve foster care needs because of its religious beliefs about same-sex marriage when the city could make exceptions, in its discretion, for other perceived violations of its anti-discrimination laws.[112] And in *Tandon v. Newsom*[113] and *Roman Catholic Diocese of Brooklyn v. Cuomo*,[114] the Court instructed, in the context of Covid-19 restrictions, that governments may not treat secular activity more favorably than comparable religious activity.

In none of these cases was the Establishment Clause a necessary pillar supporting the decision; indeed, in some cases, that clause was rejected as a defense to the free exercise violations. The Court based its decisions in *Fulton, Tandon*, and *Brooklyn Diocese* expressly and solely on the Free Exercise Clause.[115] In *Trinity Lutheran*, it held that the Free Exercise Clause does not allow a state to deny a generally applicable benefit due to an individual's or organization's religious status; it overrode a state Establishment Clause defense in the process, even citing *Everson* for the proposition.[116] Similarly, in *Espinoza*, the Court relied on the Free Exercise Clause to override the state's Blaine Amendment that prohibits aid to sectarian schools,[117] noting that the

---

[110] 582 U.S. 449 (2017).

[111] 591 U.S. 464.

[112] 593 U.S. 522 (2021).

[113] 593 U.S. 61 (2021).

[114] 592 U.S. 14 (2020).

[115] *Fulton*, 593 U.S. at 532-36; *Tandon*, 593 U.S. at 62-64; *Brooklyn Diocese*, 592 U.S. at 16.

[116] *Trinity Lutheran*, 582 U.S. at 455-61.

[117] 591 U.S. at 474-78 (citing Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 449 (1988) (The Free Exercise Clause protects against laws that "'penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.'"); Sherbert v. Verner, 374 U.S. 398, 405 (1963) (same)).

Establishment Clause "is not offended when religious observers and organizations benefit from neutral government programs."[118]

In short, disincorporating the Establishment Clause would not undercut the freedom of religious organizations not to be discriminated against due to their religious nature and practice. Those freedoms are independently and adequately supported by other First Amendment protections properly incorporated against the states through the Fourteenth Amendment.

F. Unwinding the Improper Incorporation of the Establishment Clause Would Eliminate the False Tension Between It and the Free Exercise Clause Found in Some Cases While Leaving Properly Incorporated Clauses as a Check Against State Action Coercing Religious Observance

It has become almost a hackneyed expression that the Establishment and Free Exercise Clauses sometimes work at cross-purposes.[119] This perceived tension was not perceived until the Court began incorporation under the Fourteenth Amendment, for the simple reason that both the Free Exercise and Establishment Clauses negated federal power.[120] Once the Court incorporated those clauses (and the Speech and Assembly Clauses) against the states, however, some potential for conflict arose. It became especially acute during the reign of "strict separation," as that theory interpreted any government recognition of religion or religious observance as a forbidden "establishment," even as it encroached on free exercise and evenhanded treatment of religious organizations when it came to otherwise available public benefits. With disincorporation of the Establishment Clause, some tension would remain between state anti-establishment interests and the properly incorporated Free Exercise, Speech, and Assembly Clauses, but the resolution of that tension will hardly ever be in doubt: the federal provisions will trump state

---

[118] 591 U.S. at 473-75. The same is true when there is discrimination against religious speech, press, and assembly. *See Widmar*, 454 U.S. 263 (speech); *Rosenberger*, 515 U.S. 819 (press); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (assembly).

[119] *See, e.g.*, *Hosanna-Tabor*, 565 U.S. at 181 (citing *Cutter*, 544 U.S. at 719, and Tilton v. Richardson, 403 U.S. 672, 677 (1971) (plurality opinion)) ("Numerous cases considered by the Court have noted the internal tension" between the clauses.).

[120] *See generally* Esbeck, *supra* note 4, at 37-38.

ones when there is conflict,[121] as "strictest scrutiny" will be applied.[122] The stringency of that test is demonstrated in *Espinoza*, where the Court brushed aside as unworthy of consideration the state's proffered interest in having a greater-than-constitutionally-required separation between church and state by enforcing its "no aid to religion" provision: "An infringement of First Amendment rights, however, cannot be justified by a State's alternative view that the infringement advances religious liberty. Our federal system prizes state experimentation, but not 'state experimentation in the suppression of free speech,' and the same goes for the free exercise of religion."[123] Thus, any so-called balancing of free exercise and anti-establishment interests will be largely pro forma, as even state laws championing anti-establishment interests carry no weight against the First Amendment's free exercise protections.

The key to proper interpretation in these contexts is to recognize the following balance struck by our constitutional design: (a) we live in a diverse society and must practice tolerance toward each other, even when that means being exposed to people and ideas with which we differ, especially if we are in a minority; and (b) the properly incorporated clauses of the First Amendment prohibit compelled or coerced speech, religious exercise, and assembly. The Supreme Court in *Kennedy* made the toleration point, while rejecting a strict separation view:

> Respect for religious expressions is indispensable to life in a free and diverse Republic—whether those expressions take place in a sanctuary or on a field, and whether they manifest through the spoken word or a bowed head. Here, a government entity sought to punish an individual for engaging in a brief, quiet, personal religious observance doubly protected by the Free Exercise and Free Speech Clauses of the First Amendment. And the only meaningful justification the government offered for its reprisal rested on a mistaken view that it had a duty to ferret out and suppress religious

---

[121] U.S. CONST. art VI, para. 2 (Supremacy Clause). It appears that this potential tension was observed by Congress during its consideration in 1875 of the federal Blaine Amendment. The House version incorporated against the states the language of both the Establishment and Free Exercise Clauses: "No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." The Senate amended the proposal to prohibit it from being "construed to prohibit the reading of the Bible in any school or institution." *See* Agreeing to Disagree, *supra* note 4, at 82-83.

[122] *See Espinoza*, 591 U.S. at 484 (citing *Trinity Lutheran*, 582 U.S. at 458; Church of Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 546 (1993); McDaniel v. Paty, 435 U.S. 618, 628 (1978)).

[123] *Espinoza*, 591 U.S. at 484 (quoting Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000)).

> observances even as it allows comparable secular speech. The Constitution neither mandates nor tolerates that kind of discrimination.[124]

Of course, if the Establishment Clause had not been incorporated improperly in *Everson*, in Coach Kennedy's case there would have been no "tension" with the Free Exercise Clause to be manufactured, even if unsuccessfully, by the school district and the lower courts.[125] The school district took no direct action when he knelt at midfield after games; it only allowed individual religious speech on an evenhanded basis, and so no compulsion was present. If the school district had required all team members to pray with Coach Kennedy upon pain of benching, the Free Speech Clause and Free Exercise Clauses would have come into play to prohibit the school district from compelling speech and religious exercise. The fact that people voluntarily joined Coach Kennedy on the field to show their support after the school district threatened to fire him did not convert his practice into state action.[126]

This brings into focus Chapman and McConnell's assertion that incorporation of the private or individual rights protected by the Establishment Clause is proper. As discussed above, the Establishment Clause is a structural, or federalist, provision that, as originally intended, prohibited certain actions by the *federal* government, such as compelling church attendance, but that *preserved* the power of the states to take such actions. Chapman and McConnell list personal rights that emanate from the Establishment Clause, but, putting to one side that the Establishment Clause does not speak in terms of personal rights, the rights they list all overlap with those protected by other, incorporated clauses that do guard individual freedoms. For example, they

---

[124] *Kennedy*, 597 U.S. at 542-44; *see also Town of Greece*, 572 U.S. at 566-67 ("From the Nation's earliest days, invocations have been addressed to assemblies comprising many different creeds, striving for the idea that people of many faiths may be united in a community of tolerance and devotion, even if they disagree as to religious doctrine."). This result was nascent in the Court's approach in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), in which it rejected an Establishment Clause challenge based on an assertion that allowing a religious club after-school use on the same basis as other clubs would constitute a prohibited "endorsement": "we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum." *Id.* at 118.

[125] *Bronx Household of Faith v. Board of Education of the City of New York*, 750 F.3d 184 (2d Cir. 2014), is another example of a manifestly incorrect decision defeating free exercise rights by use of supposed Establishment Clause concerns. In *Bronx Household*, New York City refused to allow a church to rent school facilities for worship services after school hours when the facilities were generally available for rent by others.

[126] *See Kennedy*, 597 U.S. at 540-42.

refer to a right not to have the state "compel religious attendance or support."[127] But any such compulsion would be in violation of the Free Exercise, Speech, and Assembly Clauses.[128] And any state attempt to "control religious doctrine or personnel"[129] would also be prohibited by the Free Speech and Free Exercise Clauses, as neither speech nor religious expression may be compelled.[130]

Chapman and McConnell point to the "school cases" first and foremost as examples of why the Court should preserve incorporation of the Establishment Clause, arguing they have promoted tolerance among our nation's citizenry. This is where Chapman and McConnell believe that incorporation of the Establishment Clause has done its best work, labeling it, in Churchillian fashion, the Court's "finest hour."[131] In particular, they praise *Engel* and *School District of Abington Township v. Schempp*, in which the Court used the incorporated clause to stop compulsory religious practices such as prayer[132] and Bible reading[133] in the public schools.

Several of the school cases the Supreme Court decided under the incorporated Establishment Clause reached the right result by the wrong rationale. As the *Kennedy* Court pointed out, in *Lee v. Weisman,*[134] school officials coerced students to attend a public recital of prayers by clergy '"as part of [an] official school graduation ceremony' because the school had 'in every practical sense compelled attendance and participation in' a 'religious exercise.'"[135] Forcing someone to participate in a religious exercise violates both the Free Exercise and Assembly Clauses; resort to the Establishment Clause was

---

[127] Agreeing to Disagree, *supra* note 4, at 80.

[128] While laws requiring financial assistance to specific religious organizations are a thing of the past, they would be a violation of the Free Speech Clause under the reasoning of *Janus*. 585 U.S. 878 (finding a state law forcing public employees to subsidize a union, even if they choose not to join, violates the free speech rights of nonmembers by compelling them to support private speech to which they object).

[129] Agreeing to Disagree, *supra* note 4, at 80.

[130] Chapman and McConnell also list "favoring one religion over another," *id.*, but that cannot properly be construed as a personal right. They concede that several Establishment Clause prohibitions do not involve individual rights, such as the state declaring an official religion, proclaiming holy days, and displaying religious symbols. *Id.* at 80-81. They only imply the logical conclusion from that: that such features of the Establishment Clause are not properly incorporated.

[131] Agreeing to Disagree, *supra* note 4, at 145.

[132] *Engel,* 370 U.S. at 422-23.

[133] *Schempp*, 374 U.S. at 205-08.

[134] 505 U.S. 577 (1992).

[135] *Kennedy*, 142 U.S. at 2431 (quoting *Lee,* 505 U.S. at 598).

unnecessary. With respect to *Santa Fe Independent School District v. Doe*,[136] the *Kennedy* Court noted that the school district broadcasted a prayer over the public address system before each football game, with required attendance of "cheerleaders, members of the band, and the team members themselves."[137] Again, the compulsion in the situation violated the Free Exercise and Freedom of Assembly Clauses.

Barnette provides another example of compelled speech in a school setting. There, in the midst of a time of nationalistic fervor during World War II, schools in West Virginia mandated that all students recite the pledge of allegiance and physically salute the flag. Jehovah's Witnesses objected to this "idolatry" on religious grounds, and the failure of their children to obey led to unexcused expulsion, which resulted in truancy and criminal violations by the parents.[138] Despite their objection being rooted in religious belief, the case was not decided on free exercise grounds, but on free speech principles. Finding not only the pledge but the flag salute "a form of utterance,"[139] the Court, eschewing reliance on the religious nature of the objection,[140] struck down the requirement based on the Free Speech Clause prohibiting a government from compelling utterance of a belief.[141]

The compelled speech principle of *Barnette*, most recently applied in *303 Creative LLC v. Elenis*,[142] would obviously apply if a public school required students, as a devotional exercise, to recite the Lord's Prayer or read Bible or Koran passages. And there is no doubt that students or teachers who objected to reciting New York's "Regents' Prayer" at issue in *Engel*[143] or reading the Bible passages or reciting the Lord's Prayer challenged in *Schempp*[144] could

---

[136] 530 U.S. 290 (2000).

[137] *Kennedy*, 142 U.S. at 2431-32 (quoting *Santa Fe*, 530 U.S. at 294, 311).

[138] *Barnette*, 319 U.S. at 625-30.

[139] *Id.* at 632.

[140] *Id.* at 634-35.

[141] *Id.* at 633-35, 642.

[142] 600 U.S. 570 (2023) (prohibiting application of state's public accommodations law to require web site designer to prepare and publish material objectionable to her); *see also* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557 (1995) (holding that state's public accommodations statute could not be used to force veterans organizing a parade to include a group of gay, lesbian, and bisexual individuals because the parade was protected speech). The result in *303 Creative* was not just dictated by the state compelling her to create her own speech, but by the state compelling her to associate with and foster the speech of the same-sex wedding ceremony participants.

[143] 370 U.S. at 422-23.

[144] 374 U.S. at 205.

not be *compelled* to do so under the reasoning of *Barnette*. Compulsion is the key.

Engel and *Schempp* present much closer questions, as the laws challenged there both allowed students to opt out.[145] In *Engel*, students did not have to recite the prayer, only listen to it, and they could be excused from the room when it was read if they or their parents so desired.[146] In *Schempp*, children also could be excused by their parents from being present during the Bible reading and recitation of the Lord's Prayer.[147] However, as Chapman and McConnell point out, mandatory school attendance laws add a level of compulsion that might make such activities compelled religious exercise,[148] in which case they would violate the Free Exercise Clause. By excusing a child from a class, the child might be viewed by her peers as acting "differently" and be considered an "odd ball."[149] Moreover, teachers and school administrators could overtly or subtly exert influence on the child. The age and disposition of the particular child is also relevant. These cases, then, are better suited for case-by-case factual development on the issue of coercion, rather than a one-size-fits-all rule.[150]

Torcaso v. Watkins,[151] which considered Maryland's constitutional requirement that state office holders declare a "belief in the existence of God,"[152] provides another example of the right result but wrong reasoning. In 1961, the Supreme Court was in the heyday of its strict separationist period, and it relied on the following language from *Everson* explaining the reach of the Establishment Clause: "we have staked the very existence of our

---

[145] *See* Ill. ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 232-33 (1948) (Jackson, J., concurring) (expressing view that humiliation from being perceived as different because of opting out of a religious exercise does not equate to unconstitutional coercion); *see also Lee*, 505 U.S. at 597-98 (remarking that, absent compulsion, "social isolation or even anger may be the price of conscience or nonconformity").

[146] *Engel,* 370 U.S. at 430.

[147] *Schempp*, 374 U.S. at 205, 211-12.

[148] *See* Agreeing to Disagree, *supra* note 4, at 145; *see also Lee*, 505 U.S. at 592-97; *id.* at 643-44 (Scalia, J., dissenting). Obviously, if a state or locality adopted a full-bodied voucher system, permitting voluntary choice as to which school children attend, the compulsion would be greatly diminished, if not eliminated. *Cf. Zelman,* 536 U.S. 639 (upholding public school voucher program against Establishment Clause challenge).

[149] Agreeing to Disagree, *supra* note 4, at 145.

[150] Of course, state anti-establishment provisions will likely also be relevant in each case.

[151] 367 U.S. 488 (1961).

[152] *Id.* at 489 (quoting MD. CONST. DECL. OF RIGHTS art. 37). This provision has not been removed from the Maryland Declaration of Rights. *See* https://ballotpedia.org/Declaration_of_Rights,_Maryland_Constitution.

country on the faith that complete separation between the state and religion is best for the state and best for religion."[153] Religious tests for office, however, were widely used by the states at the time of the ratification of the Constitution and the Bill of Rights, and the Establishment Clause was designed to give the states full leeway over them, not to discredit them. Indeed, the same intent can readily be seen in the Constitution's Oath Clause.[154] It extends the duty to support the federal Constitution to state officials: "Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ."[155] But the Constitution declaims religious tests only for *federal* officials: "but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."[156] The latter clause leaves the states free to require religious tests for their own officials. Thus, the *Torcaso* Court improperly read the Establishment Clause to proscribe what it historically had protected.

However, in *Torcaso*, there was no need to rely on an improper incorporation and overly broad reading of the Establishment Clause to strike down Maryland's religious test. The properly incorporated Free Exercise Clause was available to do the job, as the Court made obvious several years later in *McDaniel v. Paty*.[157] Tennessee by its constitution prohibited clergy from serving as state legislators, foreclosing a minister who won election as a delegate to a constitutional convention from serving.[158] After what it termed a "brief" (and unnecessary) review of the pros and cons of clergy disqualification provisions in the colonial period,[159] the Court turned to the by-then-incorporated Free Exercise Clause. It noted that McDaniel's free exercise of religion as a minister was conditioned on his giving up a right generally available to other state citizens to serve in the legislature for which he otherwise qualified, effectively penalizing his free exercise without any compelling

---

[153] *Torcaso,* 367 U.S. at 494 (quoting *McCollum*, 333 U.S. at 232 (quoting *Everson*, 330 U.S. at 59)).

[154] U.S. CONST. art VI, cl. 3.

[155] *Id.*; *see generally* Hall, *supra* note 27, at 50-53 (describing debates over the clause in the Constitutional Convention).

[156] U.S. CONST. art VI, cl. 3.

[157] 435 U.S. 618 (1978).

[158] *Id.* at 621-22.

[159] *Id.* at 622-25.

justification.[160] The religious test challenged in *Torcaso* would have fallen under the same reasoning—even without the incorporated Establishment Clause.[161]

Not all cases decided under the Establishment Clause would come out the same way if it were disincorporated. For example, the Supreme Court held in *Wallace v. Jaffree* that a law that required a one-minute period of silence by students for "meditation or voluntary prayer" violated the incorporated Establishment Clause.[162] While it seems doubtful that the Supreme Court would have decided *Wallace* the same way if it had applied its current, historical approach to interpreting the Establishment Clause, a "moment of silence" law does not compel speech or religious exercise or give a leg up to any sect or belief system. Thus, it would be constitutional if the Establishment Clause were disincorporated.

Incorporation of the Establishment Clause against the states also led the Supreme Court astray in *Locke v. Davey*,[163] in which it upheld a state anti-establishment practice that should have been repudiated under the anti-discrimination principles of the Free Exercise Clause.[164] At issue was Washington State's refusal, pursuant to its Blaine Amendment, to provide otherwise generally available scholarship assistance to a student for the sole reason that he had chosen to study "devotional theology" to prepare for pastoral ministry.[165] The majority upheld application of the state's Blaine Amendment,

---

[160] *Id.* at 626-29 (citing *Sherbert*, 374 U.S. at 406).

[161] The Court in *McDaniel* said *Torcaso* "does not govern," *id.* at 626, but construed it as being decided under the Free Exercise Clause and only distinguishable because Maryland's prohibition was based on *beliefs*—which made it automatically invalid per *Cantwell*, 310 U.S. at 304—while Tennessee's prohibition was based on actions, which could be justified if the state pursued a compelling interest in the least restrictive manner. *McDaniel*, 435 U.S. at 627-29 (citing Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)). Three concurring Justices in *McDaniel* found the clergy restriction to violate both the Free Exercise and Establishment Clauses and to be controlled by *Torcaso*. *See id.* at 629-35 (Brennan, J., concurring); *id.* at 642-43 (Stewart, J., concurring). Justice White concurred on the grounds of the Equal Protection Clause of the Fourteenth Amendment. *See id.* at 643-46 (White, J., concurring).

[162] 472 U.S. 38 (1985).

[163] 540 U.S. 712 (2004).

[164] *See Espinoza*, 591 U.S. at 490-93 (Thomas & Gorsuch, JJ., concurring) (noting that *Locke* was wrongly decided).

[165] *See Locke*, 540 U.S. at 716-17 (citing WASH. CONST. art I, § 11 and implementing laws).

finding no religious animosity in its anti-establishment provisions and only a "slight" burden on the student's free exercise rights.[166]

The Supreme Court has backpedaled from *Locke* ever since, limiting it to its facts, while striking down under the incorporated Free Exercise Clause state discriminations against religious institutions in the distribution of public benefits such as funds for playgrounds[167] and school tuition aid;[168] it has also recognized the anti-religious animosity and discrimination baked into the Blaine Amendments.[169] Having said that, the Court should either overrule *Locke* explicitly or "*Lemon*-ize" it.[170] The Court in *Locke* wrongly failed to apply strict scrutiny in spite of the Free Exercise Clause violation, and its supposed historical justification—whereby it found Washington had a longstanding, anti-establishment interest against funding ministers that overcame the student's federally guaranteed free exercise interests—simply doesn't withstand scrutiny. Under that rationale, the case would have come out differently if it had arisen in Virginia or Massachusetts, as they both have a history of funding ministers.[171]

In truth, there is no real balancing to be done in cases of this type: the incorporated Free Exercise Clause prevails, whatever the pro- or anti-establishment interests of the state. As the Supreme Court stated in *Carson v. Makin*, "[a] State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise."[172] Disincorporating the

---

[166] *Id.* at 722-25; *see generally Blaine Info Central*, BECKET, https://www.becketlaw.org/research-central/blaine-amendments-info-central/ (last visited June 11, 2024) (discussing state Blaine Amendments).

[167] *See Trinity Lutheran*, 582 U.S. at 464 (distinguishing *Locke* on the theory that it withheld the scholarship funds because of what the student did, rather than who he was, a status/use distinction later found to be no real distinction by the Court in *Carson v. Makin*, 596 U.S. 767 (2022)).

[168] *See Espinoza*, 591 U.S. at 479-81 (distinguishing *Locke* based on status/use distinction); *Carson*, 596 U.S. at 770 (applying neutrality principle to use as well as status, and limiting *Locke* to its facts because it involved the "historic" state interest in not using tax funds for ministry education).

[169] *See Espinoza*, 591 U.S. at 482-83; *see also* Mitchell v. Helms, 530 U.S. 793, 828 (2000) (plurality opinion).

[170] To "*Lemon*-ize" a precedent is to abandon it without explicitly overruling it, as the Court did when it declared it had abandoned use of the *Lemon* test without expressly overruling the case. *See Espinoza*, 591 U.S. at 493. The Court has since referred to *Lemon* as "abrogated." *See* Groff v. DeJoy, 600 U.S. 447, 460 (2023).

[171] *See* CARL H. ESBECK, *Disestablishment in Virginia, 1776-1802*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at ch. 8; JOHN WITTE JR. & JUSTIN LATTERELL, *The Last American Establishment*, *in id.*, at ch. 21.

[172] 596 U.S. at 768.

federal Establishment Clause will make that point, and *Locke*'s justified demise, even clearer. The Court in *Locke* based its rationale on the notion that the Free Exercise and Establishment Clauses are "frequently in tension" but that there is "play in the joints" between them,[173] giving them equal weight in a balancing.[174] Notably, with a disincorporated Establishment Clause, the properly incorporated Free Exercise Clause would have supremacy in such cases, along with the benefit of strict scrutiny analysis. Overruling *Everson* in this respect would be a boon to freedom of religion, not a disadvantage.

G. State Religious Displays and Similarly Non-Coercive Cases Would Be Resolved by the States

The principal effect of disincorporating the Establishment Clause would be to leave the regulation of religious establishment matters that don't involve infringement of individual rights exactly where the Constitution left them: with the states. That will get the federal courts out of the business of evaluating the appropriateness of displaying the Ten Commandments in county courthouses,[175] having Christmas crèches on city grounds,[176] and conducting prayers in state legislative chambers.[177] In these instances, there is no compelled speech or compelled association or coerced religious exercise. Such practices recognize that general exposure to religious history, artifacts, people, and ideas is simply part and parcel of living in a pluralistic society.[178] Disincorporating the Establishment Clause recognizes that the United States Constitution does not give the non-religious the right to require that the state purge the public square of anything smacking of religious sentiment or require that the religious shelve their beliefs and practices when going out in the open. And while it may not be as universally true today as it was at the

---

[173] 540 U.S. at 718-19 (citing Norwood v. Harrison, 413 U.S. 455, 469 (1973); *Tilton*, 403 U.S. at 677; and *Walz*, 397 U.S. at 669).

[174] The *Locke* majority also "took sides" in the establishment battles among the states. It pointed out that, in many states, citizens oppose the funding of ministers with tax dollars. This was meant to buttress Washington State's antiestablishment interest in the case at hand. *Id.* at 722-23. The purpose of the federal Establishment Clause, however, was to keep the national government neutral in that discussion, and the U.S. Supreme Court, as a federal institution, may not properly weigh in on one side of the debate—pursuant to the Establishment Clause itself.

[175] *See* McCreary Cnty. v. ACLU of Ky., 545 U.S. 844 (2005); *see also* VanOrden v. Perry, 545 U.S. 677 (2005) (adjudicating whether display of a Ten Commandments monument on the state capitol grounds violated the Establishment Clause).

[176] *See* Lynch v. Donnelly, 465 U.S. 668 (1984); *see also Allegheny Cnty.*, 492 U.S. 573.

[177] *See* Marsh v. Chambers, 463 U.S. 783 (1983). Adults, of course, are not as easily "coerced" to engage in religious exercises as are children in a public school setting.

[178] *See Kennedy*, 597 U.S. at 542-44.

founding or when the Supreme Court made the statement in 1952, it remains true that "[w]e are a religious people whose institutions presuppose a Supreme Being."[179]

H. Disincorporating the Establishment Clause Would Not Disturb Reliance Interests Because the States Have Uniformly Adopted Anti-Establishment Provisions, Almost All by Constitution

Disincorporating the Establishment Clause will not harm any reliance interests or instigate a regime of "anything goes" at the state level, for the simple reason that all the states currently have their own religious freedom protections. When the original states adopted the First Amendment, several of them still had church establishments of one variety or another.[180] The trend was against them, though, and in 1833 Massachusetts became the last state to disestablish formally.[181] Now, all states have religious freedom protections in their constitutions, including non-establishment provisions.[182]

For example, Massachusetts in its constitution now contains a provision that tracks the Free Exercise Clause—"No law shall be passed prohibiting the free exercise of religion"[183]—and one that serves as an anti-establishment clause—"no such grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society."[184] Its courts interpret these provisions generally in conformity with the U.S. Supreme Court's interpretations of the federal Religion Clauses.[185]

Alabama and other states prohibit establishment in phraseology that closely tracks the historical understanding and examples as expounded by Chapman and McConnell.[186] And Alaska and other states simply track the

---

[179] Zorach v. Clauson, 343 U.S. 306, 313 (1952); *see generally* Hall, *supra* note 27.

[180] *See generally* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at 3-17.

[181] *See* Witte & Latterell, *supra* note 171, at 399-424.

[182] This survey does not include state statutes. In some cases, despite some anti-establishment provisions in the constitution, other types of establishments were still practiced in the state. *See, e.g.*, BRIAN FRANKLIN, *Towns and Toleration: Disestablishment in N.H.*, *in* DISESTABLISHMENT AND RELIGIOUS DISSENT, *supra* note 7, at ch. 18.

[183] MASS. CONST. art. XVII, § 1 (as amended by art. XLVI); *see also id.* art. II.

[184] *Id.* at § 2. Maryland's Declaration of Rights in Article 36 provides another example of a state non-establishment provision: "nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, . . . any place of worship, or any ministry."

[185] *See* Atty. Gen. v. Desilits, 636 N.E.2d 233 (Mass. 1994) (noting close correspondence of the Massachusetts and federal Free Exercise Clauses).

[186] Agreeing to Disagree, *supra* note 4, at 18.

Religion Clauses of the federal Constitution.[187] Alabama also has enacted, as have several other states, a state "Religious Freedom Restoration Act" to repudiate by legislation the U.S. Supreme Court's holding in *Employment Division v. Smith*[188] that laws of general applicability that impose a burden on the free exercise of religion must only meet a rational basis, rather than a compelling interest, test to survive a free exercise challenge.[189] Other states have refused to follow *Smith* when interpreting their religious freedom constitutional provisions.[190]

The anti-establishment provisions in the state constitutions are practically uniform and cut out of the same cloth.[191] However, some might object that

---

[187] Alaska Const. art. I, § 4, *available at* https://ballotpedia.org/Article_I,_Alaska_Constitution.

[188] 494 U.S. 872 (1990).

[189] *See* ALA. CONST. amend. 622 ("Alabama Religious Freedom Amendment"), *available at* https://ballotpedia.org/Amendments_501_through_900,_Alabama_Constitution. *See generally State Religious Freedom Restoration Acts*, WIKIPEDIA, https://en.wikipedia.org/wiki/State_Religious_Freedom_Restoration_Acts#States (last visited June 12, 2024) (collecting state-level RFRA statutes and similar state judicial decisions).

[190] *See, e.g.*, Vlaming v. West Point Sch. Bd., 895 S.E.2d 705, 717-18 (Va. 2023); State v. Mack, 249 A.3d 423, 441-42 (N.H. 2020); *Desilits*, 636 N.E.2d at 233.

[191] *See* ALA. CONST. art. I, § 3 ("Religious Freedom"); ALASKA CONST. art. I, § 4 ("Freedom of Religion); ARIZ. CONST. art. 2, § 12,; *id.* art 20, § 1; ARK. CONST. art. 2, § 24 ("Religious Liberty"); CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4 ("Religious Freedom"); CONN. CONST. art. VII ("Of Religion"); *id.* at art. I, § 3; DEL. CONST. art. I, § 1 ("Freedom of Religion"); FLA. CONST. art I, § 3 ("Religious Freedom"); GA. CONST. art. I, para. 1, § III ("Freedom of Conscience"); *id.* at § IV ("Religious Opinions; Freedom of Religion"); HAW. CONST. art. I, § 4 ("Freedom of Religion, Speech, Press, and Assembly"); IDAHO CONST. art. I, § 4 ("Guarantee of Religious Liberty"); ILL. CONST. art. I, § 3 ("Religious Freedom"); IND. CONST. art I, §§ 2, 3, 4; IOWA CONST. art. I, § 3 ("Religion"); KAN. CONST. Bill of Rights, § 7 ("Religious liberty; property qualification for public office"); KY. CONST. § 1 ("Rights of life, liberty, worship, pursuit of safety and happiness, free speech, acquiring and protecting property, peaceable assembly, redress of grievances, bearing arms"); *id.* at § 5 ("Right of Religious Freedom"); LA. CONST. art. I, § 8 ("Freedom of Religion"); ME. CONST. art I, § 3 ("Religious Freedom; Sects Equal; Religious Tests Prohibited; Religious Teachers"); MD. CONST. DECL. OF RIGHTS arts. 36, 37; MASS. CONST. art XI, art. XVIII, § 1; MICH. CONST. art I, § 4 ("Freedom of worship and religious belief; appropriations"); MINN. CONST. art. I, § 16 ("Freedom of Conscience; No Preference to Be Given to Any Religious Establishment or Mode of Worship"); MISS. CONST. art. III, § 18 ("Freedom of Religion"); *id.* at art. VIII, § 208 ("Control of Funds by Religious Sect; Certain Appropriations Prohibited"); MO. CONST. art. I, §§ 5 ("Religious Freedom—Liberty of Conscience and Belief—Limitation"), 6 ("Practice and Support of Religion Not Compulsory—Contracts Therefor Enforceable"), 7 ("Public Aid for Religious Purposes—Preferences and Discriminations on Religious Grounds"); MONT. CONST. art. II, § 5 ("Freedom of Religion"); NEB. CONST. art. I, § 4 ("Religious Freedom"); NEV. CONST. art. I, § 4 ("Liberty of Conscience"); N.H. CONST. pt. 1, arts. 4 ("Rights of Conscience Unalienable"), 5 ("Religious Freedom Recognized"), 6 ("Morality and Piety"); N.J. CONST. art. I, §§ 3, 4; N.M. CONST. art. II, § 11 ("Freedom of Religion"); N.Y. CONST. art. I, § 3 ("Freedom of worship; religious liberty"); N.C. CONST. art. I, §§ 13 ("Religious Liberty"), 19 ("Law of the Land; Equal Protection of the Laws");

returning establishment concerns to the various states for treatment under their own laws might result in similar cases having different results. One answer to that concern is that state anti-establishment provisions are practically uniform, but there are three more answers. First, almost all the states give strong weight to United States Supreme Court decisions in the religious liberty arena (although, as has been noted, that Court has modified its jurisprudence concerning establishment concerns recently). Second, it is unlikely that any differences that do eventuate will be major or of any significant concern. Although it is beyond the scope of this article, a survey of state precedent in the area would likely show some existing differences among the states, but none has provoked any widespread angst. Third, it is built into a federal system that there may be different results on similar issues arising in the various states. Indeed, that was exactly what the federal Establishment Clause was designed to allow. It can hardly be considered a weighty objection that permitting states to handle their own establishment concerns is a negative result when that was a purpose of the clause.

* * * *

No tremors will disturb the constitutional landscape if the Supreme Court disincorporates the Establishment Clause; no substantial reliance interests will be disturbed. The properly incorporated federal Free Exercise, Speech, and Assembly Clauses will police state action that discriminates against religion or compels religious observance or support, and the Establishment Clause will still safeguard the federal sphere. Moreover, all the states have free exercise and anti-establishment provisions. Disincorporation of the federal Establishment Clause will return the constitutional landscape to the

---

N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7 ("Rights of conscience; education; the necessity of religion and knowledge"); OKLA. CONST. art. I, § I-2 ("Religious liberty—Polygamous or plural marriages"); *id.* at art. II, § 5 ("Public Money or Property—Use for Sectarian Purposes"); ORE. CONST. art. I, §§ 2 ("Freedom of Worship"), 3 ("Freedom of religious opinion"), 5 ("No money to be appropriated for religion"); PA. CONST. art. I, § 3 ("Religious Freedom"); R.I. CONST. art I, § 3 ("Freedom of Religion"); S.C. CONST. art. I, § 2 ("Religious freedom; freedom of speech; right of assembly and petition"); S.D. CONST. art. VI, § 3 ("Freedom of religion—Support of religion prohibited"); TENN. CONST. art. I, § 3; TEX. CONST. art. I, §§ 6-a, 6 ("Freedom of Worship"), 7 ("Appropriations for Sectarian Purposes"); Utah Const. art. I, § 4 ("Religious Liberty"); VT. CONST. ch. I, art. 3 ("Freedom in religion; right and duty of religious worship"); VA. CONST. art. I, § 16 ("Free exercise of religion; no establishment of religion"); WASH. CONST. art. I, § 11 ("Religious Freedom"); W. VA. CONST. art. III, § 15 ("Religious freedom guaranteed"); WIS. CONST. art. I, § 18 ("Freedom of worship; liberty of conscience; state religion; public funds"); WYO. CONST. art. 1, §§ 18 ("Religious Liberty"), 19 ("Appropriations for sectarian or religious societies or institutions prohibited").

condition in which it should be, with the states policing their own, non-coercive expressions of religion.

III. CONCLUSION

Everson's incorporation of the Establishment Clause, seven decades ago, has the benefit of age. But it was wrong from the start, and it has not aged gracefully. Instead, it has involved the federal courts in a multitude of state-action cases that state courts are well equipped to handle under their own religious freedom and anti-establishment principles. Moreover, the First Amendment's Free Exercise, Speech, and Assembly Clauses provide oversight on improper coercion or discrimination by the states, as the Supreme Court has demonstrated repeatedly and recently in *Espinoza*, *Carson*, *Tandon*, and *Kennedy*. The time is ripe for the Court to overrule *Everson* and to disincorporate the Establishment Clause.

Other Views:

- Carl H. Esbeck, *The Establishment Clause: Its Original Public Meaning and What We Can Learn from the Plain Text*, 22 FEDERALIST SOC'Y REV. 26 (2021), *available at* https://fedsoc.org/commentary/publications/the-establishment-clause-its-original-public-meaning-and-what-we-can-learn-from-the-plain-text.
- Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669 (2013), *available at* https://digitalcommons.law.byu.edu/faculty_scholarship/283/.
- Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Non-Establishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995), *available at* https://core.ac.uk/download/pdf/232786337.pdf.