Federalism & Separation of Powers

The Establishment Clause, Federalism and the States

*By John Eastman**

Introduction

At the conclusion of its 2001-2002 term, the Supreme Court issued its opinion in *Zelman v. Simmons-Harris*,[1] a 5-4 decision that rejected an Establishment Clause challenge to the Cleveland, Ohio, school voucher program. Chief Justice Rehnquist's majority opinion was straightforward, describing the decision as compatible with "an unbroken line of decisions rejecting challenges to similar programs."[2] Justice Thomas' concurring opinion, however, was more far-reaching, questioning "as a matter of first principles . . . . [w]hether and how [the Establishment] Clause should constrain state action under the Fourteenth Amendment."[3]

The Establishment Clause, Justice Thomas noted, "originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government."[4] When the Fourteenth Amendment was adopted, it "fundamentally restructured the relationship between individuals and the States," giving further protection to individual liberty.[5] Accordingly, incorporation of Establishment Clause rights against the States through the Fourteenth Amendment "should advance, not constrain, individual liberty. . . . [and] it may well be that state action should be evaluated on different terms than similar action by the Federal Government."[6] The states, Justice Thomas noted, "'should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government.'"[7] Justice Thomas concluded, "There would be a tragic irony in converting the Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice."[8]

Justice Thomas' concurrence reflects a view of the Constitution that is in line with the beliefs of our nation's founding generation. The Founders repeatedly emphasized the importance of education, including a moral education, in a free republic. Only a virtuous people, they believed, could govern themselves, and the Founders thought it would be folly to expect to foster moral virtue throughout the entire citizenry without at least some recourse to religion. The Founders would therefore not have seen the Establishment Clause as an obstacle to a school voucher program. Instead, they would have valued the improved educational opportunities being offered to children and applauded any incidental benefit to religion that resulted. In evaluating a program such as the Cleveland Scholarship Program, the Founders would also have given weight to the differences between the federal government, a government of limited and enumerated powers, and the state governments, to which all other powers are reserved, including the power to regulate the health, safety, welfare, *and morals* of the people.

I. Moral Instruction: Crucial in a Republic

America's founders believed that the education of children was vital to keeping America a free and functioning society. "If a nation expects to be ignorant and free," said Thomas Jefferson, "it expects what never was and never will be."[9] James Madison agreed:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[10]

But by "education," the Founders did not merely mean the dissemination of the facts of science or history; they meant also the inculcation of moral character. Following Montesquieu's well-known admonition that education in a republic, unlike that in a despotism or a monarchy, must necessarily be designed to inculcate virtue in the citizenry,[11] our nation's Founders repeatedly acknowledged the role that moral virtue had to play if their experiment in self-government was to be successful. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."[12] The Massachusetts Constitution of 1780 echoes the sentiment: "the happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality."[13]

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of *The Federalist Papers*:

> Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are], the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another.[14]

In short, the Founders viewed a virtuous citizenry as an essential pre-condition of republican self-government. They were also fully cognizant of the fact that virtue must be continually fostered in order for republican institutions, once established, to survive. Many of the leading Founders, therefore, proposed plans for educational systems that would help foster the kind of moral virtue they thought necessary for self-government.

Perhaps the best example of this sentiment is expressed in the Northwest Ordinance, adopted by Congress in 1787 for the government of the territories: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[15] Even Thomas Jefferson, who coined the phrase "a wall of separation between church and State,"[16] provided in his famous proposal for a public education system in Virginia that "[t]he first elements of morality" were to be instilled into students' minds.[17]

As the Northwest Ordinance makes clear, the fostering of moral excellence was, for the Founders, a task intimately tied to religion. President Washington, for example, noted in his Farewell Address that "reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle."[18] Benjamin Rush was even more blunt: "[W]here there is no religion, there will be no morals."[19] Accordingly, he proposed a public school system whose curriculum included religious instruction, noting that such an education would make "dutiful children, teachable scholars, and, afterwards, good apprentices, good husbands, good wives, honest mechanics, industrious farmers, peaceable sailors, and, in everything that relates to this country, good citizens."[20]

In addition, several of the States explicitly provided for religious education in their State constitutions. The Pennsylvania Constitution of 1776, for example, provided that "all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged and protected."[21] The Massachusetts Constitution of 1780 and the New Hampshire Constitution of 1784 went even further. The Massachusetts Constitution provides:

> The people of this Commonwealth have the right to invest their legislature with power to authorize and require . . . the several towns . . . or religious societies to make suitable provision, at their own expense, . . . for the support and maintenance of public protestant teachers of piety, religion and morality.[22]

And New Hampshire's Constitution authorized the legislature to empower the "several towns . . . to make adequate provision at their own expense for the support and maintenance of public protestant teachers of piety, religion and morality" because "morality and piety . . . will give the best and greatest security to government." [23]

While no State has, since the 1830s, supported such a starkly sectarian establishment of religion as is evident in the Massachusetts and New Hampshire Constitutions' references to "protestant teachers," several continue to recognize the importance of moral-religious instruction in fostering the kind of citizen virtue the Founders thought necessary to the continued security of the republic.[24]

Particularly where individual parents remain free to direct the state's tuition support to schools of their own choosing, any incidental benefit to religion would have been viewed by the Founders as an added benefit, not a constitutional impediment. Benjamin Rush addressed this point in his proposal for a public education system: "[T]he children of parents of the same religious denominations should be educated together," he wrote, "in order that they may be instructed with the more ease in the principles and forms of their respective churches."[25] "If each society in this manner takes care of its own youth," he noted, "the whole republic must soon be well educated."[26]

Given the Founders' views on the subject, it would be extraordinary to conclude that the Constitution they drafted and ratified mandates the *exclusion* of religious schools from a general tuition support program. Indeed, from the Founders' vantage point, such a holding would have been viewed as dangerous, because it thwarts rather than supports the very kind of moral-religious education that they thought so necessary to the preservation of free government.[27]

II. The Establishment Clause and Federalism

A. Education, a Core Function of State and Local Governments

The Supreme Court has often acknowledged that the Constitution creates a federal government of limited and enumerated powers, with the bulk of powers reserved to the states or to the people.[28] As James Madison explained:

> The powers delegated by the proposed Constitution to the Federal Government, are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects . . . . The powers reserved to the several States will extend to all the objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.[29]

Education is among the most important of those duties not delegated to the federal government but reserved to the states or to the people, and as the discussion in Part I above demonstrates, moral instruction, especially the kind of moral instruction fostered by religion, has for most of our nation's history been viewed as an essential component of that core state function. Thus, any proper interpretation of the Establishment Clause—at least as it applies to the states—simply must recognize the important place religion has always played in state efforts to undertake this core police power.

B. Regulating the Morals of the People, A Core State Police Power

It has long been settled that the First Amendment (like the other provisions of the Bill of Rights) was originally intended to apply only to the federal government, not to the state governments. "*Congress* shall make no law . . . ." meant precisely that.[30] This is particularly true with respect to the Establishment Clause, whose language, "Congress shall pass no law *respecting* the establishment of religion," was designed with a two-fold purpose: to prevent the federal government from establishing a national church; and to prevent the federal government from interfering with the state estab-

lished churches and other state aid to religion that existed at the time.[31]

Of course, the Fourteenth Amendment affected a fundamental change in our constitutional order and was intended to afford individuals federal protection against state governments that would interfere with their fundamental rights. But the Establishment Clause is on its face different in kind than the other provisions of the Bill of Rights that had previously been incorporated and made applicable to the states via the Fourteenth Amendment. The Free Speech and Free Exercise Clauses, for example, are much more readily described as protecting a "liberty" interest or a "privilege" of citizenship than is the Establishment Clause, yet when the Supreme Court in *Everson v. Board of Education*[32] held that the Establishment Clause was incorporated and made applicable to the States via the Due Process clause of the Fourteenth Amendment, it merely cited its prior cases incorporating the Free Speech and Free Exercise clauses, without any analysis of the evident differences between them and the Establishment Clause.[33]

Moreover, the application of the Establishment Clause to the states has allowed the federal courts and the Congress, via Section Five of the Fourteenth Amendment, to do the very thing the clause was arguably designed to prevent, namely, interfere with state support of religion. Indeed, the constitutional prohibition on federal intrusion into this area of core state sovereignty is much more explicit than the prohibition on federal commandeering of state officials,[34] the limits of federal power inherent in the doctrine of enumerated powers,[35] or even the barrier to federal power erected by the doctrine of state sovereign immunity the Supreme Court has held to be implicit in the Eleventh Amendment.[36] Yet in each of these latter areas, the Supreme Court has in recent years given renewed attention to the limits of federal power.

One need not revisit the long-standing precedent incorporating the Establishment Clause in order to give due consideration to federalism concerns; the scope of activity prohibited by the Establishment Clause, as incorporated, may well be narrower with respect to the States than with respect to the federal government. Such a distinction is particularly important in light of the fact that the states rather than the federal government have historically been viewed as the repository of the police power—that power to regulate the health, safety, welfare, *and morals* of the people.[37] Thus, even if a "no aid to any or all religions, directly or indirectly," rule were an appropriate interpretation of the Establishment Clause vis-à-vis the federal government, the application of such a rule in the incorporated Establishment Clause context intrudes upon core areas of state sovereignty in a way that simply finds no support in either the text or theory of the Fourteenth Amendment.

Conclusion

The Founders valued moral teaching, viewing it as indispensable in a free republic. They knew that a people without virtue would be unable to govern themselves, and the school systems that they established during their time reflected this belief. They would have been surprised at modern arguments that the Establishment Clause should prohibit the use of a school voucher program because of an incidental benefit to religion, the institution that has been among the most successful at fostering moral virtue. The Founders' views that a school voucher program is constitutionally sustainable would have been further supported by their recognition that the republic they created is federalist in nature. Limits placed upon the federal government cannot necessarily be directly translated against the state governments, to which all "powers not delegated to the United States by the Constitution" have been entrusted.[38]

In *Zelman*, the Supreme Court reached a decision that was certainly compatible with its line of Establishment Clause decisions restricting actions that the *federal* government may take; however, the decision would have been justified in reaching even further, as Justice Thomas' concurrence did. The tests for state and federal action should not be identical. States should be "'freer to experiment with involvement [in religion].'"[39] As the court evaluates such state action, it "can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other."[40] As Justice Thomas concluded, failing to do so could result in a "tragic irony" if the "Fourteenth Amendment's guarantee of individual liberty [were to become] a prohibition on the exercise of educational choice."[41]

* John Eastman is a Professor of Law at the Chapman University School of Law and Director of the Claremont Institute Center for Constitutional Jurisprudence. This essay was adapted from an amicus brief filed in *Zelman v. Simmons-Harris* by the Claremont Institute Center for Constitutional Jurisprudence. The assistance of then-Chapman Law School student Timothy Sandefur on the brief, and Tara Ross on this essay, is gratefully acknowledged.

Footnotes

1. 122 S. Ct. 2460 (2002).
2. *Id.* at 2473.
3. *Id.* at 2480-81 (Thomas, J., concurring).
4. *Id.* at 2481.
5. *Id.*
6. *Id.*
7. *Id.* (quoting Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 699 (1970) (Harlan, J., concurring)).
8. *Id.* at 2482.
9. Letter from Thomas Jefferson to Colonel Charles Yancey (Jan. 6, 1816), *in* 11 The Works of Thomas Jefferson 493, 497 (Paul Leicester Ford ed., federal ed. 1905).
10. Letter from James Madison to William T. Barry (Aug. 4, 1822), *in* James Madison: Writings 790, 790 (Jack N. Rakove ed., 1999).
11. *See* Charles de Secondat, Baron de Montesquieu, The Spirit of Laws (1748), *reprinted in* 38 Great Books of the Western World 1, 13, 15 (Thomas Nugent trans., Robert Maynard Hutchins et al. eds., Encyclopaedia Britannica, Inc. 1952).
12. Va. Const. of 1776, Bill of Rights, § 15.

13. Mass. Const. of 1780, pt. 1, art. III.

14. The Federalist No. 55, at 378 (James Madison) (Jacob E. Cooke ed., 1961).

15. An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, Art. 3, 1 Stat. 51, 53 n.a (July 13, 1787, re-enacted Aug. 7, 1789); *see also*, *e.g.*, Mass. Const. of 1780, pt. 2, ch. V, § 2 ("Wisdom and knowledge, as well as virtue, diffused generally among the body of the people [are] necessary for the preservation of their rights and liberties.").

16. Letter to Messrs. Nehemiah Dodge and Others, a Committee of the Danbury Baptist Association, in the State of Connecticut (Jan. 1, 1802), *in* Thomas Jefferson: Writings 510, 510 (Merrill D. Peterson ed., 1984).

17. Thomas Jefferson, Notes on the State of Virginia (1785), *reprinted in* Thomas Jefferson: Writings 123, 273 (Merrill D. Peterson ed., 1984).

18. George Washington, Farewell Address (Sept. 19, 1796), *reprinted in* George Washington: A Collection 512, 521 (W.B. Allen ed., 1988).

19. Benjamin Rush, Speech in Pennsylvania Ratifying Convention (Dec. 12, 1787), *reprinted in* 2 The Documentary History of the Ratification of the Constitution 594, 595 (Merrill Jensen ed., 1976).

20. Benjamin Rush, To the Citizens of Philadelphia: A Plan for Free Schools (Mar. 28, 1787), *reprinted in* 1 Letters of Benjamin Rush 412, 414 (L.H. Butterfield ed., 1951) [hereinafter Rush, To the Citizens of Philadelphia].

21. Pa. Const. of 1776, § 45; *see also* Vt. Const. of 1777, ch. II, § XLI ("[A]ll religious societies or bodies of men that have or may be hereafter united and incorporated, for the advancement of religion and learning . . . shall be encouraged and protected.").

22. Mass. Const. of 1780, pt. I, art. III.

23. N.H. Const. of 1784, pt. I, § 6.

24. *See, e.g.*, Neb. Const. art. 1, § 4 ("Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the Legislature . . . to encourage schools and the means of instruction."); Vt. Const. ch. II, § 68; Ind. Const. art. 8, § 1; Iowa Const. art. IX, § 3; *see also* Mass. Gen. Laws ch. 71, § 30 (2001) (providing that it is the duty of Harvard professors and other teachers of youth "to impress on the minds of children and youth committed to their care and instruction the principles of *piety* and justice") (emphasis added).

25. Rush, To the Citizens of Philadelphia, *supra* note 20, at 414.

26. Benjamin Rush, To The Citizens of Pennsylvania of German Birth and Extraction: Proposal of a German College, *reprinted in* 1 Letters of Benjamin Rush, *supra* note 20, at 364, 364.

27. *Cf.* Martin Luther King, Jr., The Words of Martin Luther King, Jr. 41 (Coretta Scott King ed., 1983) ("[E]ducation which stops with efficiency may prove the greatest menace to society. The most dangerous criminal may be the man gifted with reason but with no morals. We must remember that intelligence is not enough. Intelligence plus character—that is the goal of true education.").

28. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 552 (1995); U.S. Const. amend. X.

29. The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961).

30. U.S. Const. amend. I (emphasis added); *see also* Barron v. Mayor & City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833); Permoli v. Municipality No. 1 of New Orleans, 44 U.S. (3 How.) 589 (1845) (holding the Free Exercise clause inapplicable to the states).

31. *See, e.g.*, School Dist. of Abington Township v. Schempp, 374 U.S. 203, 309-310 (1963) (Stewart, J., dissenting); Constitutional Law 1418 (G. Stone et al. eds., 4th ed. 2001) (citing W. Katz, Religion and American Constitutions 8-10 (1964)); *see also* Neil H. Cogan, The Complete Bill of Rights 1-8, 53-62 (1997) (reprinting the debates in Congress leading to the proposal of the First Amendment's religion clauses).

32. 330 U.S. 1 (1947).

33. *See id*. at 8 (citing *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), a free exercise case); *id*. at 15 (citing *Cantwell v. Connecticut*, 310 U.S. 296 (1940), a free exercise case, which in turn relied upon *Schneider v. State*, 308 U.S. 147 (1939), a free speech case).

34. *See* New York v. United States, 505 U.S. 144 (1992).

35. *See* United States v. Lopez, 514 U.S. 549 (1995).

36. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996).

37. *See, e.g.,* Barnes v. Glen Theatre, Inc.; 501 U.S. 560, 569 (1991); New State Ice Co. v. Liebmann, 285 U.S. 262, 304 (1932).

38. U.S. Const. amend X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.").

39. Zelman v. Simmons-Harris, 122 S. Ct. 2460, 2481 (2002) (Thomas, J., concurring) (quoting Walz v. Tax Comm'n of N.Y., 397 U. S. 664, 699 (1970) (Harlan, J., concurring)).

40. *Id.*

41. *Id.* at 2482.