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## Federalism and Faith

Ira C. Lupu

*George Washington University Law School*

Robert W. Tuttle

*George Washington University Law School*

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## FEDERALISM AND FAITH

Ira C. Lupu & Robert W. Tuttle<sup>1</sup>

Throughout history, religion has been a powerful force, capable of producing immense and transformative social change. At its best, religious commitment may facilitate advances in culture and humane improvements in the quality of life. At its worst, religious fervor may lead to abiding animosities and destructive conflict. Consequently, those who design institutions of civil government must take care to articulate a set of policies on the subject of religion. In a government for a religiously homogeneous and geographically compact area—a small city-state,

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<sup>1</sup> Ira C. Lupu is the F. Elwood & Eleanor Davis Professor of Law, and Robert W. Tuttle is Professor of Law, at George Washington University Law School. The authors are the co-directors of the Legal Tracking Project of the Roundtable on Religion and Social Welfare (hereafter “Roundtable,” website at [www.religionandsocialpolicy.org](http://www.religionandsocialpolicy.org)), an enterprise sponsored by the Pew Charitable Trusts and operated by the Nelson A. Rockefeller Institute on State and Local Government (State University of New York). The opinions in the Article are those of the authors, and do not necessarily reflect the views of the Pew Charitable Trusts or the Rockefeller Institute. Our deepest thanks to Emory University School of Law for the gracious invitation to deliver this paper at a Symposium held in February, 2006; to Tom Berg, Steve Green, Fred Lawrence, Marty Lederman, and Richard Schragger for comments on earlier versions of this paper; to Deborah Tobolowsky for her research assistance; and once again to Dean Fred Lawrence of George Washington University Law School for his support for our research. As always, the mistakes are ours.

for example—the policies are likely to tend toward a simple or unitary approach. As the area under governance grows larger, religious pluralism increases, and the structure of the polity becomes more complex, religion policies too are likely to develop multiple layers, inner tensions, and rich subtleties.

This movement toward a more complex governmental structure, and a multi-textured set of religion policies, is reflected in the history of the United States. What started as a collection of relatively homogenous communities—the Massachusetts Bay Colony, for example<sup>2</sup>—evolved into a diverse set of colonies, each having some degree of religious pluralism and its own distinct arrangements on the subject of religious practices and institutions. As those colonies declared their independence from Great Britain, each of them struggled to define its own religion policies, and to articulate those norms in a state constitution, other founding documents, or statutory enactments on the status of religious institutions.<sup>3</sup> Simultaneously, these new states became

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<sup>2</sup> For detailed accounts of the Massachusetts Bay Colony, see generally LEO BONFANTI, *THE MASSACHUSETTS BAY COLONY: MASSACHUSETTS BAY COLONY TO 1645* (1980); *see also* GEORGE FRANCIS DOW, *EVERY DAY LIFE IN THE MASSACHUSETTS BAY COLONY* (1935).

<sup>3</sup> For thorough accounts of the religion policies in colonial America and the earliest years of the new republic, see generally THOMAS J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (2d ed., Univ. of N.C. Press 1994). *See also* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 *HARV. L. REV.* 1409, 1421–30 (1990) (discussing religion policies in colonial America).

engaged in the enterprise of nation-building, which ultimately involved a collective effort to shape religion policies for the new national government.

From the beginning, the relationship between the religion policies of the national government and those of the states contained the seeds of conflict. Prior to the creation of the Bill of Rights, the most obvious conflict involved Article VI's prohibition on the use of a "religious Test" as a "Qualification to any Office or public Trust under the United States."<sup>4</sup> This provision prevented the states from limiting to persons of a particular faith the state's choice of Federal Representatives, Senators, or Presidential Electors. Thus, even if a state's own internal religion policy, as specified in its constitution, limited elected office to those who professed a particular creed,<sup>5</sup> the Federal Constitution required that state's policy to give way with respect to its federal officers.

With the passage of the Bill of Rights, the opportunities for conflict between federal and state religion policies expanded considerably. Article VI is limited to the narrow context of office-holding, but the First Amendment's Religion Clauses, like the religion clauses of the various state constitutions, address the entire range of government authority on the subject of religion. This expanded ambit of the relevant provisions, state and federal, did not produce

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<sup>4</sup> U.S. CONST. art. VI, cl. 3. For more information about the history and abolition of the religious oath for office-holding, see Arlin M. Adams & Charles J. Emmerich, *A Heritage of Religious Liberty*, 137 U. PA. L. REV. 1559, 1575–79 (1989).

<sup>5</sup> At the time of the Founding, many state constitutions had such limitations. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 166, 555 n.98 (2005). See also McConnell, *supra* note 3, at 1436–60.

actual conflict until the dramatic revision of federal-state relations in the wake of the Civil War and Reconstruction. With the Fourteenth Amendment in place, and a new national understanding of the role and the authority of the federal government in preserving national unity and individual freedom, the stage was set for the ensuing struggle over federal limitations on state power to formulate religion policy.

This paper explores the intersection of federal and state policy on the subject of religion. From the middle of the twentieth century until quite recently, the dominant force in that intersection has been the Supreme Court's interpretation of federal constitutional law. That interpretation has included, at least since 1947, the full incorporation of both the Establishment Clause and Free Exercise Clause into the Fourteenth Amendment.<sup>6</sup> Thus, states, like the federal government, may make "no law respecting an establishment of religion, or prohibiting the free exercise thereof."<sup>7</sup> Under the doctrine of incorporation, as it now stands, the states and the federal government operate under identical restrictions with respect to the subject of religion. Moreover, for much of the last half of the twentieth century, the Court's interpretations of both Religion Clauses imposed rather substantial restrictions on all levels of government. These included stringent limitations on direct financing of religious education,<sup>8</sup> a firm prohibition on

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<sup>6</sup> The Supreme Court first applied the Free Exercise Clause to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and it first applied the Establishment Clause to the states in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>7</sup> U.S. CONST. amend. I.

<sup>8</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

state-sponsored prayer or other religious observance in public schools,<sup>9</sup> and at least some degree of obligation under the Free Exercise Clause to accommodate religious practices burdened by government policies.<sup>10</sup>

The structure of the Religion Clauses adds an additional complication to the analysis of federal-state relations on the subject of religious faith and practice. The Clauses approach the problem of religion policy from two distinct angles. One Clause, requiring nonestablishment, constrains government in its attempt to create a religious identity for itself; the other Clause, protecting free exercise, protects individuals against government coercion that affects private religious practice. This pairing presents a constitutional strategy that appears nowhere else in the Bill of Rights. Most sections of the Bill are rights-protecting only; they create, in the conventional terminology, federal floors under certain entitlements, while permitting the states to protect such rights more strenuously against state interference.<sup>11</sup> But this image of a federal floor beneath rights against the states, without federal constraint on the state's power to promote the same rights, does not fit the structure of the Religion Clauses because the Establishment Clause may limit the state's power to accommodate private religious freedom, or otherwise to promote

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<sup>9</sup> *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>10</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>11</sup> For example, states are free to protect rights of privacy against state law enforcement officers more stringently than the Fourth Amendment requires. See, e.g., *Commonwealth v. Baird*, 507 N.E.2d 1029 (Mass. 1987); *State v. Hunt*, 450 A.2d 952 (N.J. 1982). See generally, William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 *Harv. L. Rev.* 489 (1977).

the cause of faith. The Religion Clauses thus create both a floor under and a ceiling over the formulation of religion policy by the states. When the Religion Clauses expand in their content, the floor rises and the ceiling lowers, creating the peril of constitutional claustrophobia for any state-based religion policy.<sup>12</sup>

The combination of incorporation of the Religion Clauses, substantial limitations on government imposed by the Clauses, and a pair of Clauses that create both a floor under rights and a ceiling on some forms of promotion of those rights has been triply disabling to the states in the development of their own, independent religion policies. States that had a rich version of such policy for the first two-thirds of our national history found themselves by the 1970's and 1980's thoroughly hamstrung.<sup>13</sup> And it is no surprise that states, finding themselves in such a role, have become enervated in their own initiatives as independent policy-makers in the field of religion. Though occasional exceptions have appeared, state and local officials—especially in matters of education—have tended to internalize the notion that federal law confines their every move on this subject.

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<sup>12</sup> For an intriguing attempt to escape the trap of ceiling and floor, see Jesse R. Merriam, *Finding a Ceiling in a Circular Room: Locke v. Davey, Federalism, and Religious Neutrality*, 14 TEMP. POL. & CIV. RTS. L. REV. (forthcoming 2006) (ms. at 63: “Reducing the Clauses to a linear equation of ceilings and floors therefore appears futile—it is like finding a ceiling in a circular room.”) (ms. on file with authors and Emory Law Review).

<sup>13</sup> See *infra* Part III.A (discussing *Lemon v. Kurtzman*, 411 U.S. 192 (1973), and its no-aid Separationist brethren) and Part III.B (discussing limitations on public sponsorship of religious speech in public schools).

Over the past twenty years, however, the Supreme Court has in a number of contexts relaxed its interpretations of the Religion Clauses, thus giving all levels of government greater freedom in which to act with respect to religion. In addition, one sitting Justice has recently and repeatedly challenged the doctrine of incorporation as applied to the Establishment Clause.<sup>14</sup> And a number of commentators have similarly argued that the Establishment Clause should never have been applied to the states,<sup>15</sup> or that courts should apply a relaxed version of the

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<sup>14</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 727–28 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment). For a more detailed discussion of why incorporation is an unsatisfactory theory for applying the First Amendment to the states, see Jay S. Bybee, *Taking Liberties With the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539, 1614–16 (1995).

<sup>15</sup> See STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM* (1995); Bybee, *supra* note 14, at 1557–63 (discussing the historical debates as evidence of the original intent of the Framers); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157–58 (1991); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1206–11 (1990) (discussing incorporation and the Establishment Clause). See also Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 n.25 (1992).



Religion Clauses to government beneath the federal level.<sup>16</sup> In addition to the arguments based on original intent, these commentators suggest that states are less threatening to religious liberty than the federal government,<sup>17</sup> or that smaller units of government are more likely than the nation as a whole to represent worthwhile enclaves of community, in which religion may play an important part.<sup>18</sup>

These developments and arguments—all of which tend (or, if implemented, would tend) to expand the discretion of state and local policymakers on the subject of religion—have set the stage for a focused reconsideration of federalism and faith. In what follows, we proceed to such a reconsideration. Part I offers a succinct look at federal-state relations on the subject of religion prior to Reconstruction. Part I.A touches on the position of the states prior to the ratification of the 1789 Constitution; Part I.B discusses the impact of the Constitution, as originally ratified, on

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<sup>16</sup> See generally Richard Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1811 (2004).

<sup>17</sup> *Id.* at 1820–31.

<sup>18</sup> *Id.* at 1874–88. See also Mark Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U.PA. L. REV. 1513, 1618 (2005) (arguing for “tailoring” instead of a “one-size-fits-all” approach to First Amendment analysis); Mark Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 669–70, 706, 709 (2003) (“This Article suggests that it may be desirable in the Establishment Clause context to ‘size’ constitutional limitations to the level of government—federal, state, or local—that is acting. That is to say, it may be the case that states or localities should be permitted to regulate in ways that the federal government cannot, and vice versa.”).

state religion policy; and Part I.C proceeds briskly through the controversy over the extent to which the Framers of the First Amendment intended the Establishment Clause explicitly to protect state religion policy. Part II confronts the constitutional developments, including the failed Blaine Amendment of the mid-1870's, that emerged from the Civil War and Reconstruction. It traces the Reconstruction story into the twentieth century, when the Supreme Court first applied the Religion Clauses to the states, and relates the issues of Religion Clause incorporation—in which the usually (and openly) antagonistic Hugo Black and Felix Frankfurter quietly joined forces—to the larger, mid-century battle over the relationship between the Bill of Rights and the states. Part III chronicles the rise of Separationist interpretations of both Religion Clauses, pursuant to which religion is treated as constitutionally distinctive,<sup>19</sup> and the incomplete recession to narrower, Neutralist interpretations of the Religion Clauses that mark the past several decades.

Part IV represents our contextualized effort to add particular value to the conversation about faith and federalism. The open space within which states may have their own religion policy is a function of two considerations: the substantive content of the First Amendment and the extent to which the First Amendment binds the states. The current contraction of both Religion Clauses provides state and federal government alike with more discretion to adopt religion policies, so only the incorporation question gives rise to considerations of federalism. Although the potential boundaries of a revised doctrine of Religion Clause incorporation are highly malleable, in Part IV we articulate and apply some assumptions about the contours of

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<sup>19</sup> For elaboration of the idea of religion as constitutionally distinctive, see *infra* p. 59

such a revision. As Part IV demonstrates, manipulation of these boundaries produces an intriguing variety of new possibilities for state religion policy.

In order to demonstrate these possibilities, we analyze in Part IV a series of three problems involving state-based religion policy.<sup>20</sup> Briefly described, these are as follows:

**State-based separationism.** The State of North Carolina operates a tuition voucher program for higher education, the North Carolina Legislative Tuition Grant Program. The program permits eligible students to use the vouchers at any accredited institution, except a “seminary, Bible school, Bible college or similar religious institution.”<sup>21</sup> In addition, students at other institutions are ineligible for vouchers under the program if they are “enrolled in a program of study the objective of which is the attainment of a degree in theology, divinity, or religious education or in any other program of study that is designed by the institution primarily for career

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<sup>20</sup> A fourth problem, involving issues of religion policy and cooperative federalism as they are manifested in implementation of President Bush’s Faith-Based and Community Initiative, though rich in its potential for insight, is beyond the scope of this article. For discussion of federalism issues raised by the Faith-Based and Community Initiative, see Ira C. Lupu & Robert W. Tuttle, *The State of the Law-2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations*, THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POL’Y 91-101, available at [http://www.religionandsocialpolicy.org/docs/legal/reports/State\\_of\\_the\\_Law\\_2005.pdf](http://www.religionandsocialpolicy.org/docs/legal/reports/State_of_the_Law_2005.pdf).

<sup>21</sup> N.C. GEN. STAT. § 116-22(1)(c) (2006) (describing the institutions that qualify for the tuition grant program codified in N.C. GEN. STAT. § 116-21.2 (2006)).

preparation in a religious vocation.”<sup>22</sup> May the state thus exclude religious institutions and/or religious courses of study from its general voucher program for higher education?

**McCreary County revisited.** County officials place a large documentary copy of the Ten Commandments in the foyer to the County Courthouse. The officials boldly claim that the Decalogue represents a set of divinely inspired truths, and constitutes evidence of God’s role in the development of American law. Does the Fourteenth Amendment bar such a display and accompanying declaration?

**State financial support for religion.** The State of California wants to preserve its Spanish heritage, represented in part by religious missions. No private party is able and willing to maintain these missions. May the State do so, operating the missions as active houses of worship as well as tourist attractions?

Part IV focuses on these three problems as useful illustrations of policy-making by states in the field of religion. The first problem (a voucher plan with religious schools and religious vocational study excluded) involves a state disfavoring entities with a religious character. Because the state’s policy is more Separationist than the First Amendment requires, it raises Free Exercise Clause issues rather than Establishment Clause concerns.<sup>23</sup>

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<sup>22</sup> This language, based on the limitation on any state grant found in N.C. GEN. STAT. § 116-15(d) (2006), appears in the current North Carolina grant application, *available at* <http://www.duke.edu/student-service-center/ncltg.html>.

<sup>23</sup> For reasons we explain below, we analyze this problem in light of current law only. *See infra* Part IV.

The latter two problems—county display of the Ten Commandments and state money for historic preservation—involve state actions that are religion-friendly. Such state policies play into the mood suggested by Justice Thomas and others who seek to roll back incorporation of the Establishment Clause. Part IV suggests three distinct regimes of federalism within which to consider these two problems. These include 1) the current regime of full incorporation of the First Amendment’s Religion Clauses, as presently construed by the Supreme Court, 2) the regime suggested by Justice Thomas, and some commentators, that the Free Exercise Clause remain fully incorporated but that states be released entirely from the binds of the First Amendment’s Establishment Clause, and 3) an imagined—but never before articulated—regime of partial incorporation designed to maintain core non-Establishment norms while explicitly expanding state leeway to promote and support religious enterprise.

## **I. Faith and Federalism Prior to Reconstruction—**

### **A Brisk Tour**

#### **A. Pre-Constitutional Arrangements**

Prior to the ratification in 1789 of our current Constitution, the United States of America had no centralized religion policy.<sup>24</sup> Whether the Founding had theological underpinnings is of

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<sup>24</sup> See LEVY, *supra* note 3, at 11 (“Even before the liberating effect of the American Revolution, . . . [t]he American experience, always remarkably diverse, comprehended exclusive establishments, dual establishments, and general or multiple establishments of religion.”).

course a different question. The Declaration of Independence,<sup>25</sup> which constituted the first formal announcement to the world of the new nation's birth, did reference a "Creator," and credited that "Creator" with having endowed all men with "certain unalienable rights."<sup>26</sup> That list of rights included "liberty," but made no reference to religious liberty in particular.<sup>27</sup> And though the Declaration concluded with a reference to its authors' "firm reliance on the protection of divine providence,"<sup>28</sup> its long list of grievances against King George included nothing of a religious character.<sup>29</sup>

Nor did the Articles of Confederation say anything on the subject of religious liberty or religious establishment. The single reference to "religion" in the Articles appears in Article III, in which the states entered into a mutual defense pact, and bound themselves to assist each other against attacks "made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretense whatever."<sup>30</sup> The reference to religion in this provision does contemplate the possibility that a state would have a religious identity, that such an identity might create the occasion for armed conflict, and that such a conflict would obligate all states to defend the

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<sup>25</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776). *See also* GARRY WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE 374–79* (1978) (setting out Jefferson's draft, as well as the Declaration as ultimately declared by the Continental Congress).

<sup>26</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at para. 30.

<sup>29</sup> *Id.* at para. 3–27.

<sup>30</sup> THE ARTICLES OF CONFEDERATION art. III (U.S. 1787).

attacked state. Moreover, the appearance of religion as the first item on this list suggests it was prominent in the minds of the drafters as a potential cause for invasion of a state.<sup>31</sup> But Article III's inclusive reference to "any other pretense whatever,"<sup>32</sup> as a ground for attack, and corresponding obligation to defend, suggests that the Framers of the Articles gave no special weight to a state's autonomy in maintaining a particular religion policy.

The laws and constitutions of the several states, by contrast, were replete with policies on the subject of religion.<sup>33</sup> A policy of toleration of all faiths, at least those of the Christian variety, was commonplace.<sup>34</sup> At the time of the Declaration, state constitutions typically

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<sup>31</sup> See Joel A. Nichols, *Religious Liberty in the Thirteenth Colony: Church-State Relations in Colonial and Early National Georgia*, 80 N.Y.U. L. REV. 1693, 1748–49 (2005) (attributing exclusion of Catholics from Georgia to, among other causes, "a fear of military conflict with the Catholic French or Spanish").

<sup>32</sup> THE ARTICLES OF CONFEDERATION art. III (U.S. 1787).

<sup>33</sup> Justice Black's opinion for the Court in *Everson* reviews some of this ground. *Everson v. Bd. of Educ.*, 330 U.S. 1, 8–9 (1947). For more comprehensive accounts, see generally CURRY, *supra* note 3; LEVY, *supra* note 3; McConnell, *supra* note 3.

<sup>34</sup> For examples of this policy of toleration, see McConnell, *supra* note 3, at 1436 (asserting that by the late 1770s, Georgia, South Carolina, North Carolina, and New York had eliminated special preferences for the Church of England; South Carolina had established the Protestant religion but did not give it any government support; and New York, North Carolina, Pennsylvania, New Jersey, Delaware, and Rhode Island had no establishment). *See id.* at 1456 ("Freedom of religion was universally said to be an unalienable right; the status of other rights

included protections for religious liberty, or, as sometimes framed, liberty of religious conscience.<sup>35</sup> But a number of states maintained established churches, and taxed everyone to support those churches.<sup>36</sup> Several states included official articles of faith in their founding legal documents.<sup>37</sup> Still others licensed the clergy, denied such licenses to religious dissenters, and recognized marriages only if performed by a licensed clergyman.<sup>38</sup> As very recent historiography about religion in the states has shown, a number of states had sharply defined—and hotly contested—religious identities during the Revolutionary period.<sup>39</sup>

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commonly found in state bills of rights, such as property or trial by jury, was more disputed and often considered derivative of civil society.”).

<sup>35</sup> *Id.* at 1455.

<sup>36</sup> *Id.* at 1441 (discussing provisions in the Massachusetts and Virginia Constitutions at the time of the Declaration).

<sup>37</sup> *Id.* at 1437 (discussing articles of faith in the founding legal documents of Connecticut, Massachusetts, New Hampshire, Vermont, Maryland, South Carolina, and Georgia).

<sup>38</sup> *Id.* at 1438–39 (discussing licensing and religion in Virginia and New England).

<sup>39</sup> Pennsylvania, with its unique Quaker influences, presents an intriguing story of the development of state religion policy. See Jim Wedeking, *Quaker State: Pennsylvania's Guide to Reducing the Friction for Religious Outsiders Under the Establishment Clause*, July 2005, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=787265](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=787265); Philip Hamburger, *Religious Freedom in Philadelphia*, 54 EMORY L.J. 1603 (2005) (discussing the conflict between Quakers and other religious groups on the question of duty to participate in the American Revolution). See also Nichols, *supra* note 31 (discussing state religion policy in Georgia).



The dramatic events of the 1770's and 1780's—including the Declaration of Independence and the Revolutionary War, internal religious strife within a number of states, and the rise of libertarian consciousness—led many states to abandon or revise a number of these policies.<sup>40</sup> Virginia's disestablishment of the Anglican Church—a tale which, in the mid-1780's, culminated in Madison's *Memorial and Remonstrance Against Religious Assessments*,<sup>41</sup> the

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<sup>40</sup> See *supra* note 39 (describing developments in Pennsylvania and Georgia). See also CURRY, *supra* note 3, at chs. 6–7; W. MCLOUGHLIN, *NEW ENGLAND DISSENT 1630–1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE* (1971) (describing disestablishment in Connecticut and the Reverend Lyman Beecher's role in it); Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. Rev. 1386, 1448–1540 (recounting the experience of disestablishment in each of the states in the late eighteenth and early nineteenth centuries; Stuart W. Bowen, Jr., *Is Lemon A Lemon? Crosscurrents in Contemporary Establishment Clause Jurisprudence*, 22 ST. MARY'S L.J. 129, 136 (1990) (“By 1775, ten of the thirteen colonies had established some form of state religion. However, by the time of the Constitutional Convention in 1787, only five state-established churches remained.”). As Bowen describes it, “the trend towards disestablishment, inaugurated by the Revolutionary War, continued until, by 1833, all states had abolished denominational preferences.” *Id.* (citing R. CORD, *SEPARATION OF CHURCH AND STATE* 4 (1982) and Adams & Emmerich, *supra* note 4, at 1582).

<sup>41</sup> James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785), available at [http://www.au.org/site/DocServer/James\\_Madisons\\_Memorial\\_and\\_Remonstrance.pdf](http://www.au.org/site/DocServer/James_Madisons_Memorial_and_Remonstrance.pdf) (arguing that a proposed Virginia bill to fund “Teachers of the Christian Religion” violated

defeat of Patrick Henry's proposed Assessment Bill, and the enactment instead of Jefferson's Bill for Religious Liberty<sup>42</sup>—represents the best-known, and historically most influential episode of this character. But the Virginia experience also may represent the most radical and complete disestablishment of religion in the period between 1776 and the formation of the Constitution.<sup>44</sup> When the delegates to the Constitutional Convention met in Philadelphia in the summer of 1787, state policies touching the subject of religion remained omnipresent, even though some of them had changed.<sup>45</sup> By sharp contrast, federal policy on the subject did not exist. This federal silence on religion is attributable in large part to the then-prevailing concept of the nation as a

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the unalienable right of free exercise of religion).

<sup>42</sup> This story is recounted in *Everson v. Bd. of Educ.*, 330 U.S. 1, 11–13 (1947); *id.* at 35–38 (Rutledge, J., dissenting). For considerably more detail about the Virginia story and Madison's role in it, see generally WILLIAM LEE MILLER, *THE FIRST LIBERTY: AMERICA'S FOUNDATION IN RELIGIOUS FREEDOM* (2003).

<sup>44</sup> See Michael M. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2116–30 (2003) (comparing the disestablishment movements in the different states).

<sup>45</sup> See generally *id.* at 2194–2204 (discussing the emerging view on government's role vis a vis religion in the wake of the Revolutionary War).

federation of political communities, each largely autonomous in its internal, domestic concerns. To a considerable extent, those domestic concerns included matters of religion policy.

B. The 1789 Constitution.

The new Constitution, prior to ratification of the Bill of Rights, did little to alter this state of affairs. The religion policies reflected in the document that took effect in 1789 were all focused on requirements for occupying public office. The Constitution liberated federal officers from religious criteria for holding office, and took a step in the same direction for state officers as well.<sup>46</sup> Not first but foremost, Article VI prohibits the imposition of any “religious Test . . . as a Qualification to any Office or public Trust under the United States.”<sup>47</sup> By so constraining the states (as well as the United States) on the matter of eligibility to serve as Representative, Senator, or Elector, the Constitution cut across the widespread state-law pattern of imposing religious qualification for office.<sup>48</sup> Moreover, the President and all other federal and state officers are given the option to either swear an oath to support the Constitution, or instead to

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<sup>46</sup> U.S. CONST. art. VI, cl. 3.

<sup>47</sup> *Id.* See generally Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that Has Gone of Itself*, 37 CASE W. RES. L. REV. 674, 681–82 (1987).

<sup>48</sup> In the 1780's, many state constitutions included religious qualifications for office. AMAR, *supra* note 5, at 166, 555 n.98. The Federal Constitution turned out to be a democratizing model for the states, five of which in the 1790's dropped or softened these religious qualifications for state office. *Id.* at 166, 555 n.99.

affirm their support for it;<sup>49</sup> the Constitution offers the latter choice for those whose religious commitments forbid a religious swearing of allegiance.<sup>50</sup>

Significant as these provisions are in establishing a religion-neutral cadre of federal office-holders, and permitting the states to create a similar cadre for themselves, they are nevertheless highly limited in scope.<sup>51</sup> The 1789 Constitution did little to create a national religion policy, and left untouched the great bulk of what we have been calling the “religion policies” of the states.<sup>52</sup>

### C. The Religion Clauses of the First Amendment: Jurisdiction or Substance?

It is only with the ratification of the Bill of Rights, and its first sixteen words in particular, that the United States first adopted sweeping religion policies of its own. “Congress shall make no law,” the Bill begins, “respecting an establishment of religion, or prohibiting the

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<sup>49</sup> U.S. CONST. art. II, § 1, cl. 8 (requirement of presidential oath or affirmation); *Id.* at art. VI, cl. 3 (requirement of oath or affirmation from all legislative, executive, and judicial officers of the states and the United States).

<sup>50</sup> AMAR, *supra* note 5.

<sup>51</sup> *See* Bradley, *supra* note 46, at 678 (“[T]he full story of article VI definitively reveals the ‘constitutional philosophy’ for church and state: there wasn’t any, and none was intended.”).

<sup>52</sup> *Id.* One might also note that the Preamble declares that the Constitution emerges from “We the People” and does not claim any Divine provenance. U.S. CONST. pmbl. It would be stretching, however, to treat this kind of silence in the Preamble as a “religion policy” of the United States.

free exercise thereof.”<sup>53</sup> The people and legal institutions of the United States are, of course, still struggling over the meaning of those sixteen words. For purposes of addressing the question of federalism and faith, it will suffice for this portion of our historical narrative to sort the possibilities into two basic categories: jurisdictional and substantive. The jurisdictional view, advanced most purely and prominently by Professor Steven Smith, holds that the Religion Clauses of the First Amendment have no substantive content at all.<sup>54</sup> Rather, Smith asserts, the Clauses are meant to confirm what Madison and others had been claiming all along in their contention that the Bill of Rights was unnecessary.<sup>55</sup> The Madisonian view was that Congress, being a body of enumerated powers, had no authority over the subject of religion.<sup>56</sup> Instead, that subject, like all others left reserved to the states, was the subject of state and local policy only.<sup>57</sup>

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<sup>53</sup> U.S. CONST. amend. I.

<sup>54</sup> See generally SMITH, *supra* note 15.

<sup>55</sup> SMITH, *supra* note 15, at 28–29 (“In the House of Representatives, Roger Sherman of Connecticut reiterated the argument that no constitutional provision on the subject of religion was needed because Congress had no power to establish religion anyway. Again, Sherman may have been wrong insofar as Congress did have power to regulate and establish religion in the territories. But no one challenged Sherman on this ground. Instead, Madison acknowledged that Sherman might be right but suggested that the provision would nonetheless help to allay fears expressed in the state conventions.”). See also CURRY, *supra* note 3, at 199–202 (discussing the Framers’ views on the religion clauses).

<sup>56</sup> Madison believed that the 1789 Constitution had done nothing to alter the arrangements under the Articles of Confederation with respect to the allocation of power

Smith argues that the Religion Clauses of the First Amendment were designed to confirm that absence of power; Congress could make “no law” because it lacked power to make law on the subject of religious establishment by government or the subject of religious exercise by individuals.<sup>58</sup> Smith reasons from his jurisdictional view of the Religion Clauses that the judicial project of giving them substantive content is a “foreordained failure,” because those who drafted the Clauses did not intend them to have such content.<sup>59</sup>

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between nation and states on the subject of religion. *See* SMITH, *supra* note 15, at 29; McConnell, *supra* note 3, at 1484 (“Significantly, Madison did not propose that the establishment clause be made applicable to the states; this reflects the prevailing view at the time that states should be permitted to set their own course with respect to establishment, but that liberty of conscience was an unalienable right.”).

<sup>57</sup> *See supra* note 55.

<sup>58</sup> SMITH, *supra* note 15, at 29. *See also* Schragger, *supra* note 16, at 1825; McConnell, *supra* note 3, at 1484; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1092–1099 (1995); Lietzau, *supra* note 15, at 1200–04; Bybee, *supra* note 14, at 1614–16.

<sup>59</sup> SMITH, *supra* note 15, at 17 (“[W]e can discern what was probably their essential meaning, and when we do so we discover that the religion clauses were purely jurisdictional in nature; they did not adopt any substantive right or principle of religious freedom.”). *See id.* at 30 (describing instances of Congressional action which are “troubling as long as we assume that the religion clauses were understood by the founders as adopting some substantive principle regulating the relationship between government and religion. Conversely, if we relinquish that

The contrary view of the Religion Clauses, to which the Supreme Court has steadfastly and continuously adhered, is that they are substantive rather than jurisdictional.<sup>60</sup> That is, each of the Clauses gives rise to a set of principles to govern a set of concerns that fall within the ambit of religion policy. The Establishment Clause controls government support, promotion, or sponsorship of religion; the Free Exercise Clause controls state prohibition, suppression, or inhibition of religion.<sup>61</sup> The particulars of the relevant principles must be worked out over time;

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assumption, Congress's behavior becomes understandable. The religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom.”).

<sup>60</sup> See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (Stevens, J., majority) (“The first Clause in the First Amendment to the Federal Constitution provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.’ The Fourteenth Amendment imposes those *substantive* limitations on the legislative power of the States and their political subdivisions.”) (emphasis added).

<sup>61</sup> U.S.CONST. amend. I. On this substantive view, some practices, such as explicit discrimination in favor of one faith and against one or more other faiths, may violate both Clauses, because such practices simultaneously promote a faith and inhibit others. Similarly, the Supreme Court's decisions about judicial resolution of disputes internal to a church community implicate both Clauses. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). These cases are also “jurisdictional” in a different way, allocating power between the public and private spheres rather than between nation and states. See generally Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002); Kathleen Brady, *Religious Organizations and Free Exercise: The*

among other things, the polity must decide if the Clauses are limited to laws that explicitly target religion for favored or disfavored treatment, or whether they extend to situations of formally religion-neutral laws that generate incidental benefits to, or burdens upon, religious practice.<sup>62</sup>

The oft-told drafting history of the Religion Clauses lends at least some support to each view.<sup>63</sup> Madison's initial draft of what became the Religion Clauses had included prohibitions on both the federal government and the states.<sup>64</sup> The prohibitions on federal action, which in Madison's draft were to become part of the list of restrictions on the federal government in Article I, section 9, provided that "[t]he civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed."<sup>65</sup> Madison's second proposal, designed to become a part of the enumerated restrictions on the states in Article I,

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*Surprising Lessons of Smith*, 2004 B.Y.U. L. REV. 1633; Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1 (1998).

<sup>62</sup> Even on a jurisdictional view of the Clauses, boundary questions of this sort are inescapable, because the scope of the jurisdictional limit must be worked out.

<sup>63</sup> Some of this history is recounted in then-Associate Justice Rehnquist's dissent in *Wallace v. Jaffree*, 472 U.S. 38, 91–114 (1985). The story is told in more complete terms in Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761 (2005). See also GERARD V. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); Lash, *supra* note 57, at 1089–92; Lietzau, *supra* note 15.

<sup>64</sup> Green, *supra* note 62.

<sup>65</sup> *Id.* at 786 (quoting ANNALS OF CONG. 451 (Joseph Gales ed., 1789)).



Section 10, specified that “[n]o State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.”<sup>66</sup> In the process of consideration and drafting of the Bill of Rights, the first Congress eliminated Madison’s focus on the states. And, after the House and Senate produced several versions of the Religion Clauses, the drafters eliminated the focus on a “national religion,” and settled on a prohibition aimed at federal laws “respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>67</sup> As we elaborate further in Part II, the Free Exercise Clause seems inescapably substantive, but the reconfigured Establishment Clause may well have had a jurisdictional component designed to protect states against federal interference with state religion policy, as well as to block the creation of a national church.<sup>68</sup>

The debate about jurisdiction versus substance might never have been identified, much less resolved, but for the great cataclysm of the Civil War. So long as the states remained

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<sup>66</sup> *Id.* (quoting ANNALS OF CONG. 452 (Joseph Gales ed., 1789)).

<sup>67</sup> U.S. CONST. amend. I.

<sup>68</sup> If either or both of the Religion Clauses are jurisdictional, rather than substantive, they do not create “rights” in the conventional sense. That is, they entail limits on the federal government, but they do not recognize entitlements in citizens. Rather, they purposefully leave the question of entitlements—of substantive religion policy—to the states. Moreover, to the extent the Clauses were understood as jurisdictional, they may not have been enforceable by the courts in ordinary lawsuits by or against citizens. By contrast, if either or both Clauses are substantive, they do indeed create claims and defenses, enforceable in the courts in ordinary proceedings involving the federal government.

outside of the First Amendment's general constitutional policies about religion, and those policies only applied to federal action,<sup>69</sup> adjudication under either Religion Clause was virtually nonexistent.<sup>70</sup> Through most of the nineteenth century, the federal government remained small, federal courts lacked general federal question jurisdiction, and Separationist interests did not see litigation as a tool of political action.<sup>71</sup> As a result, from the time of ratification of the First Amendment in 1791 until ratification of the Fourteenth Amendment in 1868, the Supreme Court had no opportunity to construe either the Free Exercise Clause or the Establishment Clause.<sup>72</sup>

## **II. Faith and Federalism after Reconstruction: The Religion Clauses and the Incorporation Debate**

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<sup>69</sup> The Supreme Court held in *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), that the Bill of Rights applied only to federal action.

<sup>70</sup> See Bybee, *supra* note 14, at 1571 (“Between ratification of the Bill of Rights in 1791 and ratification of the Fourteenth Amendment in 1868, there were few decisions in the United States Supreme Court even mentioning the guarantees of the First Amendment. The first Supreme Court decision to analyze substantively any First Amendment guarantee was not until 1879 in *Reynolds v. United States*.”).

<sup>71</sup> See PHILIP HAMBURGER, *THE SEPARATION OF CHURCH AND STATE* (2002) (describing political rather than legal deployment of Separationist principles in the nineteenth century).

<sup>72</sup> See *supra* note 69. *Bradfield v. Roberts*, 175 U.S. 291 (1899), was the Court's first Establishment Clause decision, though the Court said very little in *Bradfield* about the scope or meaning of the Clause.

The Civil War, and the constitutional project of Reconstruction that followed in its wake, highlighted a debate that has swept well beyond the Religion Clauses. Described simply, that debate is about the extent to which federal constitutional norms—on equality, criminal justice, and expressive freedom, as well as the relationship between religion and government—will control the policies of the states. Once that debate focused on the context of religion policy, questions of both the content and the character of the Clauses eventually moved to center stage.

The issue of application of the Religion Clauses to the states has a profound influence on the substantive content of those Clauses. First, far more than the federal government, the states are engaged in a wide variety of activities that are likely to trigger conflicts over religion policy. The states and their subdivisions, for example, are the primary providers of education for the young, a policy context in which questions of religion frequently arise. The broad scope of the police power also provides abundant opportunities for conflict between religious practice and state law. Second, there is only one federal government, and a multitude of states. This quantitative difference means that questions involving religion and government will proliferate, even within a particular policy context. One state will impose prayer in its public schools, while another may exclude all references to God from its curricular materials. Both states' policies will trigger constitutional controversies.

Antecedent to questions of content, however, are questions of the overarching character of the Religion Clauses as jurisdictional or substantive. If either Clause is jurisdictional, designed in part to protect the policymaking autonomy of states with respect to religion, the application of that Clause to the states is constitutionally inappropriate.

Only in the twentieth and twenty-first centuries—after the Supreme Court fully, and rather unreflectively, incorporated the Religion Clauses into the Fourteenth Amendment—has

the question of the jurisprudential character of the Religion Clauses come to the fore. In *Cantwell v. Connecticut*,<sup>73</sup> decided in 1940, the Court held for the first time that the Free Exercise Clause applied to the states. Seven years later, in *Everson v. Board of Education*,<sup>74</sup> the Court unanimously took what now seems the far more controversial step of holding that the Establishment Clause, too, applies to the states. As we chronicle below, application of the Establishment Clause to the states represents a move that at the very least deserved some focused attention. As the law of the twentieth and twenty-first centuries has developed, the interaction of incorporation with a strongly Separationist reading of the Establishment Clause has pushed the Supreme Court into a central place in the conflicts between secular and religious forces.

A. *Cantwell* and *Everson*: Incorporation Without Reflection.

Those who have studied the development of constitutional law in the middle third of the twentieth century are familiar with the longstanding and intense debate over application of the Bill of Rights to the states. Justice Hugo Black and Justice William Douglas were the principal banner-carriers for the proposition that the entirety of the Bill of Rights applied to the states, while Justice Felix Frankfurter was their major antagonist. The most famous expression of these opposing viewpoints occurred in *Adamson v. California*,<sup>75</sup> which involved the permissibility of prosecutorial comment to the jury on a criminal defendant's failure to testify in his own defense. The Court held that such comment did not violate the Fourteenth Amendment's Due Process

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<sup>73</sup> 310 U.S. 296 (1940).

<sup>74</sup> 330 U.S. 1 (1947).

<sup>75</sup> 332 U.S. 46 (1947), *overruled by* Griffin v. California, 380 U.S. 609 (1965).

Clause.<sup>76</sup> Justices Frankfurter concurred in the Court’s judgment,<sup>77</sup> and devoted his opinion to rebutting Justice Black’s assertion in dissent that the Fourteenth Amendment made applicable to the states the Fifth Amendment’s privilege against self-incrimination.

Frankfurter’s view was that the Due Process Clause of the Fourteenth Amendment had its own, independent content, and did not simply reflect the provisions of the first eight amendments.<sup>78</sup> The protections of the Due Process Clause, as Justice Frankfurter saw the matter, converged with some, but by no means all, of the concerns reflected in the Bill of Rights.<sup>79</sup> Even when such convergence occurred, the Due Process Clause did not necessarily impose on the states the entire judicial gloss on the relevant Bill provision. The Due Process Clause, in Justice Frankfurter’s view, guarantees “fundamental fairness” in criminal procedure, but not everything in the Bill of Rights is essential to such a concept of fairness.<sup>80</sup> Thus, concurring in *Adamson*,

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<sup>76</sup> *Adamson*, 332 U.S. at 59.

<sup>77</sup> *Id.* at 59–68 (Frankfurter, J., concurring).

<sup>78</sup> *Id.* at 62 (“Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments.”).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 61 (“For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal

Frankfurter argued that comment on a criminal defendant's failure to take the stand did not offend the Fourteenth Amendment, even if the same comment offended the Fifth Amendment's privilege against self-incrimination.<sup>81</sup>

Justice Black, joined by Justice Douglas, argued that the first section of the Fourteenth Amendment made the entire Bill of Rights applicable to the states.<sup>82</sup> Thus, if the Fifth Amendment privilege forbade prosecutorial comment to the jury in a federal court on a defendant's failure to take the stand in his own defense, the Fourteenth Amendment's Due Process Clause imposed an identical restriction in state criminal proceedings.<sup>83</sup>

Given the intensity of that debate over the addressee of the Bill of Rights, the Court's unreflective decisions in *Cantwell*<sup>84</sup> and *Everson*<sup>85</sup> to fully incorporate both Religion Clauses

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prosecutions. . . . But to suggest that such a limitation can be drawn out of 'due process' in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States.'").

<sup>81</sup> *Id.* at 59 ("Less than 10 years ago, Mr. Justice Cardozo announced as settled constitutional law that while the Fifth Amendment, 'which is not directed to the states, but solely to the federal government,' provides that no person shall be compelled in any criminal case to be a witness against himself, the process of law assured by the Fourteenth Amendment does not require such immunity from self-incrimination: 'in prosecutions by a state, the exemption will fail if the state elects to end it.'").

<sup>82</sup> *Id.* at 71–72 (Black, J., dissenting).

<sup>83</sup> *Id.* at 90.

<sup>84</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

deserve attention. As the discussion below reveals, incorporation of the Free Exercise Clause is far easier to explain and justify than incorporation of the Establishment Clause.

1. *Cantwell* and Free Exercise. The decision in *Cantwell* in 1940 to incorporate the Free Exercise Clause is readily explicable. In earlier decisions, the Court had found that the Fourteenth Amendment imposed some regime of freedom of speech and press upon the states.<sup>86</sup> Because the Free Exercise Clause sounds in liberty in ways that strongly resemble the Speech and Press clauses of the First Amendment, the textual logic of incorporating the Free Exercise Clause seems strong.<sup>87</sup> Moreover, *Cantwell* itself involved street preaching;<sup>88</sup> that is, the claim of free exercise of religion mapped precisely onto the claim of freedom of expression. That the First Amendment protects religious freedom against “prohibition,” while protecting expressive freedom against “abridgment,” may support a difference in the scope of the limitation. It is difficult, however, to see how that linguistic difference supports incorporation of one clause and not the other.

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<sup>85</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>86</sup> *Gitlow v. New York*, 268 U.S. 652 (1925); *Whitney v. California*, 274 U.S. 357 (1927). The Court in these two decisions was still operating on *Lochner*-like premises about the substantive content of liberty in the Fourteenth Amendment, rather than on any theory about partial or full “incorporation” of the Bill of Rights. *Lochner v. New York*, 198 U.S. 45, 53 (1905).

<sup>87</sup> See generally Robert Baugh, *Applying the Bill of Rights to the States: A Response to William P. Gray, Jr.*, 49 ALA. L. REV. 551 (1998).

<sup>88</sup> *Cantwell*, 310 U.S. at 300–03.

Nor did the prior law on application of free speech norms to the states suggest that freedom of speech or press meant something different when applied to the states than when applied to the federal government. Thus, incorporation of expressive freedoms appeared to include the entirety of the Speech and Press Clauses, not some narrower version to which the Fourteenth Amendment might be limited.<sup>89</sup> Accordingly, one would expect that the analogous principles of free exercise would have the same scope against the states and federal government alike.

That conclusion is strongly buttressed by the minimalist content of the Free Exercise Clause at the time of incorporation. As of 1940, and for another two decades thereafter, the Free Exercise Clause was very weak. The Court had long before, in *Reynolds v. United States*,<sup>90</sup> said that the Clause protected religious beliefs but not religiously motivated actions.<sup>91</sup> As a result, the Clause, as of 1940, overlapped with the protections of the Speech and Press clauses, but did

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<sup>89</sup> In the 1920's, when the Court first held that freedom of speech applied to the states, the Court's conception of that freedom was very weak as applied to the nation. *See Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919). Nor was that conception stronger when applied to the states, see *Gitlow*, 268 U.S. 652, and *Whitney*, 274 U.S. 357. The government always won, and the radical speakers always went to prison.

<sup>90</sup> 98 U.S. 145 (1878).

<sup>91</sup> *Id.* at 162–67.



nothing more.<sup>92</sup> On this state of affairs, applying the Free Exercise Clause to the states was unsurprising, and a matter of extremely low impact.

Moreover, as Professor Kurt Lash has argued persuasively,<sup>93</sup> the Free Exercise Clause plays a central part in the emancipation narrative that accompanies the incorporation project. Those held in African slavery were systematically deprived of religious freedom, and the sponsors of the Reconstruction Amendments appear to have been quite conscious of a practical necessity to protect the religious liberty of persons freed from bondage as an essential part of making that freedom whole.<sup>94</sup> Lash's account of the understanding of Free Exercise in the Reconstruction period is buttressed by the Supreme Court's opinion in *Reynolds v. United*

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<sup>92</sup> Compare *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (decisions holding unconstitutional a range of restrictions on street preaching and door-to-door distribution of religious pamphlets), with *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding application of child labor law to Jehovah's Witness doing door-to-door distribution of pamphlets). See also *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding on grounds of freedom from compelled speech rather than freedom of religion, that Jehovah's Witnesses cannot be forced to participate in school flag salute exercises).

<sup>93</sup> Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106, 1131–37 (1994).

<sup>94</sup> See *id.*

*States*.<sup>95</sup> *Reynolds* embraced—in a purely federal context—a wholly substantive interpretation of the Free Exercise Clause. Even if the drafters and ratifiers of the First Amendment in 1791 believed that they had exclusively jurisdictional goals for the Free Exercise Clause, the architects of Reconstruction and the Justices who sat on the Court in the 1870s had a very different view indeed. We agree with Professor Lash that Fourteenth Amendment originalism must anchor itself to the meaning of the new text in 1868, not to the meaning of the older text of 1791.<sup>96</sup>

2. *Everson* and Nonestablishment. Incorporation of the Establishment Clause in *Everson* is another matter altogether. Although the decision upheld, on grounds of public safety, the challenged policy under which the Township reimbursed parents for transportation expenses to both public and religious schools,<sup>97</sup> the Court’s opinion offered a strikingly Separationist version of the Clause.<sup>98</sup> The opinion relied heavily on the history of disestablishment in Virginia,<sup>99</sup> asserting unequivocally that Madison’s experience in the Virginia struggle provided the dominant coloration of the meaning of the Establishment Clause,<sup>100</sup> and concluding that the Establishment Clause is a limitation on the states as well as the federal government.<sup>101</sup> Writing

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<sup>95</sup> 98 U.S. 145 (1878).

<sup>96</sup> Lash, *supra* note 92, at 1111–14; *see also* Lash, *supra* note 57, at 1099–1100.

<sup>97</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 17–18 (1947).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 11–13.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 15. All of the cases cited by Justice Black to support the notion that the Religion Clauses apply to the states involve the Free Exercise Clause. *Id.* at 15 n.22. Of course, given

for the Court, Justice Black declared that the Township’s policy of reimbursement goes to the verge of state power with respect to financial support of religion, and the bulk of the opinion is highly supportive of that assessment.

The four-Justice dissent in *Everson*<sup>102</sup>—written by Justice Rutledge and joined by Justice Frankfurter, the implacable foe of mechanical incorporation of the Bill of Rights—is still more stridently Separationist. Riding the same history as Justice Black’s majority opinion, the dissent gallops to the more aggressive conclusion that the Ewing Township’s reimbursement for bus fares to religious schools indeed involved unconstitutional aid to religious education.<sup>103</sup> The Rutledge dissent disposes of the incorporation question in a single sentence:<sup>104</sup> “[n]either so high nor so impregnable today as yesterday is the wall raised between church and state by Virginia’s great statute of religious freedom and the First Amendment, now made applicable to all the states by the Fourteenth.”

Thus, all nine Justices supported full incorporation of an Establishment Clause with real and strenuous consequences for state policies concerning the financing of education. Not a

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Justice Black’s overall philosophy about the relationship between the Bill of Rights and the states, his failure to distinguish among the Clauses of the First Amendment is unsurprising.

<sup>102</sup> *Id.* at 28–63 (Rutledge, J., dissenting).

<sup>103</sup> *Id.* at 44–63.

<sup>104</sup> *Id.* at 29. All of the cases cited by Justice Rutledge at this point rested on the Free Exercise or Free Speech Clauses, and not on the Establishment Clause. *Id.* at 29 n.2.

single Justice raised a note of doubt about the question of incorporation.<sup>105</sup> And all nine Justices announced their willingness to treat the story of disestablishment in Virginia—the state in which disestablishment had been most thorough and complete<sup>106</sup>—as the model for the nation.<sup>107</sup>

Appearing as it does in 1947, this unreflective choice to incorporate the Establishment Clause is deeply unsettling. First, the Establishment Clause is not framed in libertarian terms.<sup>108</sup> Thus, a court conscientiously trying to construe the Due Process Clause, which protects “life, liberty, and property”<sup>109</sup> against deprivation without due process of law, might at least stop and ask whether the principle of nonestablishment fits the language or structure of Section One of the Fourteenth Amendment.<sup>110</sup> Second, unlike the Free Exercise Clause, which

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<sup>105</sup> *Id.* at 15–17 (Black, J., majority); *id.* at 26–27 (Jackson, J., dissenting); *id.* at 29 (Rutledge, J., dissenting).

<sup>106</sup> See McConnell, *supra* note 43.

<sup>107</sup> *Everson*, 330 U.S. at 11 (Black, J., majority); *id.* at 29 (Rutledge, J. dissenting).

<sup>108</sup> See generally William, P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509 (1998) (distinguishing the Establishment Clause from the remaining text of the First Amendment).

<sup>109</sup> U.S. CONST. amend 14.

<sup>110</sup> Similarly, an attempt to identify the “privileges and immunities” of U.S. citizens might exclude “nonestablishment,” because it is not framed in the Constitution as an individual

at the time had been construed in ways that made it highly redundant of the Speech and Press Clauses, the Establishment Clause in 1947 presented an extraordinarily clean slate on which to write.<sup>111</sup> The Court's few earlier decisions involving the federal government had both rejected Establishment Clause claims and had said little—even in dicta—about the sweep of the Clause.<sup>112</sup> Writing on that clean slate, the Court in *Everson* announced bold and constitutionally novel principles. Despite the pro-government outcome of the case, its approach laid the predicate for both a substantial barrier to any direct state aid to the educational mission of religious schools<sup>113</sup> and the eventual prohibition of state-supported religious exercises in the public schools.<sup>114</sup> Given the substance of the views expressed in *Everson*, the stakes for state and local government were considerably larger than the consequences for the federal government, which at the time had almost no contact with primary and secondary education.<sup>115</sup>

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right. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 221 (1998).

<sup>111</sup> See *supra* note 69 and accompanying text.

<sup>112</sup> See *Bradfield v. Roberts*, 175 U.S. 291 (1899); *Quick Bear v. Leupp*, 210 U.S. 50 (1908).

<sup>113</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>114</sup> See, e.g., *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963).

<sup>115</sup> See, e.g., Michael Heise, *The Political Economy of Education Federalism*, 56 EMORY L.J. (forthcoming 2006).

*Everson's* timing may have been even more stunning than its content. On top of the Court's substantive boldness in *Everson*, its unanimity on the incorporation point appeared a scant four months before the release of its bitterly warring opinions in *Adamson* over incorporation of the privilege against self-incrimination.<sup>116</sup> The Court heard argument in *Everson* in November, 1946 and announced its decision in February of 1947. *Adamson* was argued in January of 1947—a month during which the *Everson* opinions must have been circulating—and the Court announced its *Adamson* opinion in June of 1947. Justices Jackson, Burton, and Frankfurter all agreed with the Court's approach in *Adamson*, yet all three had joined the Rutledge dissent in *Everson*. Justices Black and Frankfurter, open antagonists in the incorporation fight in *Adamson*, as well as every other Justice on the Court in the 1946 Term, must have been aware of the unacknowledged potential for deep doubt and disagreement on the relationship between the Establishment Clause and the states. Yet none of these Justices ever wrote a single public word on that subject.

How did this unanimity of views on incorporation of the Establishment Clause—a strongly Separationist one, never before seen in the pages of the U.S. Reports—come about? Perhaps the answer is as simple as a notion of First Amendment holism. Having gone down

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<sup>116</sup> See *supra* pp. 26–28 (discussing the intellectual battle between Justice Frankfurter and Justice Black in *Adamson*).

the trail of what at least looked like full incorporation of other parts of the First Amendment,<sup>117</sup> perhaps the Justices no longer saw any path of reasoning away from the conclusion that the First Amendment as a whole must apply to the states.<sup>118</sup> Plausible as that line of thought may seem, there is no direct evidence to support it. Moreover, it is not fully consistent with Cardozo's dictum in *Palko v. Connecticut*<sup>119</sup> that the Fourteenth Amendment absorbs only those liberties, like "freedom of thought and speech . . . [which represent] the matrix, the indispensable condition, of nearly every other form of freedom."<sup>120</sup> To whatever extent the free exercise of religion may be coincidental with "freedom of thought," the argument that prohibitions on all forms of religious establishment (particularly the kind represented by aid to

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<sup>117</sup> By 1947, the Court had repudiated the *Lochner* approach to liberty in the Fourteenth Amendment, and had begun to rely on a theory of selective incorporation in speech cases. *See* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>118</sup> The brief references in *Everson* to the relationship between the Establishment Clause, as a part of the First Amendment, and the states, tend to support this analysis. 330 U.S. at 8–9; *see also* *Lash*, *supra* note 57, at 1088 ("To the extent that incorporation of *any* right can be justified as a matter of historical intent, there is *no less reason* to incorporate the Establishment Clause than any other provision in the First Amendment.").

<sup>119</sup> 302 U.S. 319 (1937).

<sup>120</sup> *Id.* at 326–27.

religious schools) protect freedom of thought, or are otherwise indispensable to freedom, is not self-explanatory.<sup>121</sup>

Scholars have suggested possibilities somewhat more sinister than a methodological commitment to First Amendment holism. Professor Hamburger, among others, has advanced the view that *Everson* is at least in part a product of widely shared (both within and without the Supreme Court) anti-Catholic sentiment.<sup>122</sup> The opinion approved of public reimbursement for transportation to religious schools, but did so in terms that thoroughly impeded the movement in favor of aid to religious schools, most of them operated by arms of the Roman Catholic Church.<sup>123</sup>

We do not take a position on the “true motivation” of those nine Justices in *Everson* who sailed past the question of incorporation. But the issue of aid to religious schools in general, and Catholic schools in particular, strikes at a constitutional nerve with deep roots.<sup>124</sup>

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<sup>121</sup> To this day, the British seem quite confident that religious freedom and an established church are not incompatible, and many European nations share this view. By contrast, all Western democracies protect private freedom of religious belief and worship.

<sup>122</sup> PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 454–63 (2002) (linking the *Everson* rhetoric about separation to Hugo Black’s prior connections with the Ku Klux Klan and its anti-Catholic views).

<sup>123</sup> *Id.*

<sup>124</sup> An exploration of the relationship between nonestablishment and Reconstruction may shed some light on the Catholic question, and its connection to the incorporation issue in



## B. Religion Clause incorporation reconsidered

As the tale of the Court's decisions in *Cantwell* and *Everson* reveals, the Court's determination to apply the Religion Clauses to the states was characterized by what appears to be willful ahistoricity. As early as 1954, Professor Joseph Snee challenged the *Everson* court's view that the Establishment Clause should apply to the states,<sup>125</sup> but few were paying attention, perhaps because Establishment Clause doctrine had not yet produced wildly unpopular results.<sup>126</sup> In the past several decades, however, a number of prominent scholars have discovered this fight<sup>127</sup> and Justice Thomas has picked up their cudgels.<sup>128</sup>

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*Everson*, even if the same journey cannot put us into the minds of those on the *Everson* Court. See *Mitchell v. Helms*, 530 U.S. 793, 796–97 (2000) (plurality opinion) (calling for a rejection of the disqualification of “pervasively sectarian” organizations from public aid, on the ground that the disqualification rests on anti-Catholic animus).

<sup>125</sup> See Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371.

<sup>126</sup> Several years later, such results began to appear. See e.g., *Engel v. Vitale*, 370 U.S. 421 (1962) (barring recitation of New York State Regents' Prayer at opening of public school day); *Abington Sch. Dist. v. Schemp*, 374 U.S. 203 (1963) (barring state-sponsored Bible readings at beginning of public school day).

<sup>127</sup> See *supra* note 15.

<sup>128</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 726–29 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring). Justice

Disquieting as it may be to Separationists, the argument that the Constitution recognizes—and to some extent protects—the authority of states to declare a religious identity cannot be easily ignored. The First Amendment’s text gives plausible credence to an argument that the prohibition on “law[s] respecting an establishment of religion” has a federalism component. The choice of the word “respecting” discloses a possible intent to protect state establishments against federal interference, as well as to keep the Congress out of the business of establishing a national religion. And, as noted above, the history of the day—both the history of then-existing state religion policy and the “legislative history” of the debates in the First Congress—lends at least some support to the originalist argument that the Establishment Clause, though understood to relate to the project of religious liberty, had protection of state religion policy among its objectives.<sup>129</sup>

For most twenty-first century purposes, the question more intriguing and important than the original substance of the Clause is whether the Fourteenth Amendment imposes that substance on the states. As noted above, a number of scholars have argued that the Establishment Clause, unlike most of the rest of the Bill of Rights, made an explicit constitutional promise to the states that the federal government would not interfere with certain

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Thomas’s position is more refined than is frequently noticed. We discuss his view in some detail, *infra* pp. 52–56.

<sup>129</sup> So viewed, the Clause has a counterpart in the Second Amendment, which more explicitly refers to state institutions—in that case, the “well regulated Militia.” U.S. CONST. amend. II.

forms of state religion policy.<sup>130</sup> Sounding in federalism rather than “liberty” (as protected by due process) or “privileges and immunities” (protected by the relevant clause of the Fourteenth Amendment),<sup>131</sup> the Establishment Clause could not be absorbed by the Fourteenth Amendment and passed on to the states.<sup>132</sup> To hold otherwise, as *Everson* did, is both to break an earlier promise made to the states by the Clause and to misconstrue the original design of the Fourteenth Amendment.

As a sign that the issue has true salience, the battle has now been joined by those who defend the legal status quo of Establishment Clause incorporation against this history-based attack. Professors Green and Lash have both responded to the disincorporationists,<sup>133</sup> though in ways quite dissimilar from one another. As Professor Green interprets the relevant text and history, the drafters of the First Amendment were mindful of state religion policy, but preserving that policy was not their concern.<sup>134</sup> Indeed, as Madison claimed, it is not at all

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<sup>130</sup> *See supra* note 15.

<sup>131</sup> Professor Amar argues that the Fourteenth Amendment applies the “privileges and immunities” of citizens to the states, and that the category of “privileges and immunities” includes some (though not all) Bill of Rights provisions, as well as some rights found in other places in the document, such as the protection in Art. I, § 9 for the writ of habeas corpus. AMAR, *supra* note 5, at 249–56, 389, 475.

<sup>132</sup> *See, e.g.*, Gray, Jr., *supra* note 108.

<sup>133</sup> Lash, *supra* note 57, at 1089–92; Green, *supra* note 62.

<sup>134</sup> *See* Green, *supra* note 62.

clear what grant of power in Article I would have permitted federal regulation of a state's religion policy.<sup>135</sup> By contrast, the power to “lay and collect Taxes” and “provide for the . . . general Welfare” might well have been thought to support the creation of a national church. Professor Green thus concludes that the framers of the Establishment Clause did not intend to protect state religion policy from federal interference.<sup>136</sup> Rather, in Green's view, they were creating a federal religion policy, which had implications for the states even in the absence of promises to leave the states unregulated on this subject.<sup>137</sup> And, in Professor Green's view, the federal policies mandated by the Establishment Clause are those associated with Madison's *Memorial and Remonstrance*—in Green's words, “freedom of conscience; no compelled support of religion; no delegation of authority to religious institutions; and equal treatment of all sects.”<sup>138</sup> This, according to Professor Green, is the original substance of the Clause<sup>139</sup> and

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<sup>135</sup> In the eighteenth century, the contemporary notion of broad federal power to spend conditioned on a state's surrender of policy-making power had not yet arisen, and Madison in any event would have opposed such a concept. *See United States v. Butler*, 297 U.S. 1, 65 (1936) (attributing to Madison a narrow theory of conditional federal spending).

<sup>136</sup> *See Green, supra* note 62.

<sup>137</sup> Green, *supra* note 62, at 767. Even a prohibition on the creation of a national church has implications for federalism, because any effort to establish a governmentally approved “national church” would create a potential and powerful rival to state-established churches. *Id.* at 766–67.

<sup>138</sup> *Id.* at 767.

there is no reason for constitutional disquiet over application of this same set of policies to the states as part of our national commitment to a uniform floor under religious freedom.

Professor Lash takes a different route to the destination of applying non-establishment norms to the states.<sup>140</sup> Lash concedes the presence of a federalism component within the original Establishment Clause, but argues that national understandings of religion policy, state and federal, had changed by the time of the Fourteenth Amendment.<sup>141</sup> Lash asserts that the Fourteenth Amendment applies to the states an 1868 conception of religion policy, under which the idea of state establishments had disappeared, rather than a 1791 conception, pursuant to which state establishments still appeared legitimate.<sup>142</sup>

Lash's view, which involves application to the states of a nineteenth rather than eighteenth century understanding of national religion policy, finds judicial underpinnings in a colloquy between Justices Stewart and Brennan in *School District of Abington Township v. Schempp*.<sup>143</sup> When Justice Stewart suggested that Establishment Clause history was consonant with the concept of official state recognition of faith in God,<sup>144</sup> Justice Brennan's reply focused

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<sup>139</sup> *Id.* at 797.

<sup>140</sup> *See generally* Lash, *supra* note 57.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> 374 U.S. 203 (1963).

<sup>144</sup> *Id.* at 308–20 (Stewart, J., dissenting).

on the complete disestablishment of churches in the states and the changes in the general understanding of religious liberty that had taken place by the time of Reconstruction.<sup>145</sup>

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<sup>145</sup> *Id.* at 254–55 (Brennan, J., concurring) (“The absorption of the Establishment Clause has, however, come later and by a route less easily charted. It has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation ‘respecting an establishment of religion’ is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches. Whether or not such was the understanding of the Framers and whether such a purpose would have inhibited the absorption of the Establishment Clause at the threshold of the Nineteenth Century are questions not dispositive of our present inquiry. For it is clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments. Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause to any greater degree than it would, for example, have deterred the absorption of the Free Exercise Clause. That no organ of the federal government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable. It is equally plain, on the other hand, that the Fourteenth Amendment created a panoply of new federal rights for the protection of citizens of the various States. And among those rights was freedom from such state

Picking up on those themes, Lash contends that in the first half of the nineteenth century, in addition to the disestablishment of state churches, state courts profoundly transformed their understanding of religious freedom.<sup>146</sup> In cases involving Sunday Closing laws, state blasphemy prosecutions, and other religion-based contexts, Lash argues, state courts began to reject the notion that the common law had a Christian component.<sup>147</sup> These courts turned instead to secular justifications to uphold the embedding of Christian customs and

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governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.”) (citations omitted). *See also id.* at 258 n.24 (“There is no doubt that, whatever ‘establishment’ may have meant to the Framers of the First Amendment in 1791, the draftsmen of the Fourteenth Amendment three quarters of a century later understood the Establishment Clause to foreclose many incidental forms of governmental aid to religion which fell far short of the creation or support of an official church.”).

<sup>146</sup> Lash, *supra* note 57, at 1105 (“[A]t the same time state courts were reinterpreting their own law on matters of Church and State, they also reinterpreted the federal Establishment Clause.”).

<sup>147</sup> *Id.* at 1105–08, 1112–14. *See also id.* at nn.121–132 (list of cases and summaries about the Pearson Rule being overruled); *id.* at 1107–08 (citing *Bloom v. Richards*, 2 Ohio St. 387, 387 (1853) (“[N]either Christianity nor any other system of religion is a part of the law of this state”)); *id.* at 1117 (“By the 1860s, state courts for the most part had disentangled blasphemy and Sabbath laws from their religious origins.”).

concerns in American law.<sup>148</sup> Lash concludes that the architects of the Fourteenth Amendment, influenced by these trends toward secularization of law and government, operated on a substantive conception of religious freedom that included significant anti-establishment norms, as well as conventional free exercise principles.<sup>149</sup> He thus charts a path by which a sincere Fourteenth Amendment originalist might conclude that the states were bound by the substance of nonestablishment norms as they existed in 1868, not 1791.

Any historical account of faith and federalism, post-Reconstruction, must come to grips with one additional chapter of nineteenth century history. The substantial influx of Catholic

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<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1153–54 (“The original Establishment Clause cannot be incorporated against the states. But time did not stop at the Founding. Our modern understanding of religious liberty did not spring full grown from the head of Thomas Jefferson, nor, for that matter, from the head of Justice Black. Obscured by decades of references to the Virginia Experience is a long and painful struggle over the meaning of ‘establishment’ and ‘free exercise.’ In arguments played out in countless state court proceedings, state legislative assembly meetings, and the debates of the Reconstruction Congress, lines were drawn between the proponents of religious toleration and the advocates of nonestablishment. Gradually, case by case, the federal Constitution's declaration of ‘no power’ was reinterpreted to express an aspect of the freedom of conscience. By 1868, the (Non)Establishment Clause was understood to be a liberty as fully capable of incorporation as any other provision in the first eight amendments to the Constitution.”).



immigration in that century, and the ensuing fights about the character of publicly financed education, led several states to amend their constitutions to explicitly bar the use of tax monies to support religious education.<sup>150</sup> By the middle 1870s, the issue of taxpayer support of Catholic schools had become an issue in national politics. President Grant recommended a federal constitutional amendment that would have imposed nonestablishment and free exercise norms on the states, and would have specifically barred the use of state resources for the support of religious schools or denominations.<sup>151</sup> Soon thereafter, Speaker James Blaine — with an eye on the presidency — introduced a comparable amendment in the House of Representatives.<sup>152</sup> After passing the House and receiving extensive consideration and debate,

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<sup>150</sup> Massachusetts and New York are the earliest examples. *See* MASS. CONST. art. XVIII; N.Y. CONST. art. XI, § 3. The Becket Fund has for years been litigating against provisions of the Massachusetts Constitution that the Fund asserts were driven by unconstitutional, anti-Catholic animus, but to date such litigation has been unsuccessful. *See, e.g.,* *Wirzburger v. Galvin*, 412 F.3d 271 (1st Cir. 2005).

<sup>151</sup> Lash, *supra* note 57, at n.267 (citing Ulysses S. Grant, Seventh Annual Message (December 7, 1875), *reprinted in* ULYSSES S. GRANT, 1822–1885: CHRONOLOGY-DOCUMENTS-BIBLIOGRAPHICAL AIDS 92 (Philip R. Moran ed., 1968). For further discussion, see Lash, *supra* note 57, at 1146–47.

<sup>152</sup> Lash, *supra* note 57, at n.263 (citing 4 CONG. REC. 205 (1875)). For a discussion of the legislative history of the Blaine Amendment, see *id.* at 1145–51. *See also* Joseph P.

the proposed Amendment failed in the Senate.<sup>153</sup> Nevertheless, a number of states thereafter added “Baby Blaine” amendments—prohibiting state aid to sectarian schools—to their state constitutions.<sup>154</sup>

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Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law*, 21 HARV. J.L. & PUB. POL'Y 657, 670–72 (1998).

<sup>153</sup> Lash, *supra* note 57, at 1146, 1148 (quoting 4 CONG. REC. 205 (1875)); *see generally* Bybee, *supra* note 14, at 1596–98 (discussing the Senate debate).

<sup>154</sup> *See* THE BECKET FUND FOR RELIGIOUS LIBERTY, BLAINE AMENDMENTS: STATES (2003), <http://www.blaineamendments.org/states/states.html> (providing information about the various state Blaine Amendments). For additional discussion, *see* Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEGAL HIST. 38 (1992); Nicole Stelle Garnett & Richard W. Garnett, *School Choice, the First Amendment, and Social Justice*, 4 TEX. REV. L. & POL. 301, 337–38 (2000); Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493 (2003); Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 957–72 (2003); Toby J. Heytens, Note, *School Choice and State Constitutions*, 86 VA. L. REV. 117, 140–52 (2000); Joseph P. Viteritti, *supra* note 152, at 673 (“By 1876, fourteen States had enacted legislation prohibiting the use of public funds for religious schools; by 1890, twenty-nine States had incorporated such provisions into their constitutions.” (citing Green, *supra*, at 43)). Baby Blaine Amendments are always focused on transfers of state assets to religious entities, usually schools, and rarely if ever

What does the rise and fall of the Federal Blaine Amendment in 1875 say about the question of incorporation of the Religion Clauses in 1868, when the Fourteenth Amendment was ratified? The appearance of “general” Religion Clauses in the Blaine Amendment suggests that its designers and supporters may have believed that the Fourteenth Amendment did not impose non-establishment and free exercise norms on the states.<sup>155</sup> On the other hand, as Professor Lash has argued, the true impetus for the federal Blaine Amendment was not a generalized concern for a federal religion policy to bind the states, but a focused attempt to keep public resources out of the hands of the Catholic hierarchy.<sup>156</sup> Moreover, by 1875, the Supreme Court’s miserly interpretation in *The Slaughterhouse Cases*<sup>157</sup> of the Privileges and Immunities Clause of the Fourteenth Amendment had created substantial uncertainty about the relationship between the Bill of Rights and the states.<sup>158</sup> Perhaps the architects of the Blaine Amendment were trying to restore what they understood as the Fourteenth Amendment’s original assertion of control over the states’ religion policies. It is thus difficult to draw any firm inferences about Religion Clause incorporation from the introduction and defeat of the Blaine Amendment.

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contain “general” religion clauses because the state constitutions already included such clauses prior to the Blaine movement.

<sup>155</sup> See Lash, *supra* note 57, at 1145–46.

<sup>156</sup> *Id.* at 1147.

<sup>157</sup> 83 U.S. (16 Wall.) 36 (1873).

<sup>158</sup> Lash, *supra* note 57, at 1147.

It is not so difficult, however, to connect the dots between the Blaine Amendment and the opinions in *Everson*. The same vision of Protestant-Catholic political conflict that drove Grant, Blaine, and other Republican leaders of the late 19th century to oppose public aid to Catholic education—indeed, to describe the Democrats as the party of “Rum, Romanism, and Rebellion”<sup>159</sup>—may have similarly influenced the Justices in *Everson* to both apply the Establishment Clause to the states and to interpret the Clause to bar any direct government assistance to religious schools. The Black-Frankfurter truce over incorporation may thus have

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<sup>159</sup> See Richard G. Bacon, *Rum, Romanism, and Romer: Equal Protection and the Blaine Amendment in State Constitutions*, 6 DEL. L. REV. 1, 39–40 (2003); Peter H. Hanna, *School Vouchers, State Constitutions, and Free Speech*, 25 CARDOZO L. REV. 2371, 2388 n.98 (2004) (quoting 2 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 417 (1950)); Mark Edward DeForrest, *An Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*, 26 HARV. J.L. & PUB. POL'Y 551, 566 (2003) (“One of Blaine's supporters, the Reverend Samuel Burchard, had denounced the Democrats as the party of ‘rum, Romanism and rebellion,’ all referring to the Democratic Party's opposition to prohibition, its strong identification with Catholicism, and the party's then-solid base in the former Confederate states of the American South.”) (quoting Frank J. Conklin & James M. Vaché, *The Establishment Clause and the Free Exercise Clause of the Washington Constitution—A Proposal to the Supreme Court*, 8 U. PUGET SOUND L. REV. 411, 433 (1985)); Green, *supra* note 154, at 56 (quoting 1 DONALD BRUCE JOHNSON, NATIONAL PARTY PLATFORMS 53–54 (rev. ed. 1978)).

been designed to complete Blaine's handiwork, regardless of whether that accomplishment was consistent with the control reflected in the Reconstruction Amendments over state religion policies.

With all respect to Professor Lash and Justice Brennan, we do not think it possible to arrive at any incontrovertible conclusions about the connection between the nineteenth century constitutional history, recited above, and the question of federal constitutional control over state religion policy. We do believe, however, that these debates about the extent to which the states have over time relinquished their religion policies to federal control tee up a series of vital and currently contested questions. The fullest and most plausible account of our constitutional past is that the states—at least the original thirteen—came into the Union with full autonomy over the question of internal policy on the subject of religion. This autonomy was a corollary of their status as heirs to an English common law tradition, in which sovereign political entities claimed political authority over all matters of the common good, including matters of a religious character. In their constitutional understandings and eighteenth century practices, the thirteen original states manifested such authority, and none of them yielded significant control over the subject of religion to the central government in the period between the Declaration of Independence and the ratification of the Constitution, including its Bill of Rights. Rather, in ratifying a Federal Constitution with an extremely limited focus on state religion policy, and in later approving the Establishment Clause, the states appeared to be committing to a pact on the subject of religion, pursuant to which no religious sect would attempt to capture control of the central government or exclude members of other sects from participation in that government.

So framed, the question of faith and federalism thus becomes one of surrender or relinquishment of a conceded power over a subject both entrusted and important to the states. The story of incorporation of federal free exercise norms against the states is conceptually straightforward and uncontroverted, though the scope of free exercise norms—and their effect on state-based Separationism—is not. The more vexed question by far involves nonestablishment norms, because application of those to the states erases their capacity to declare and follow a religious identity, even if private religious freedom is fully respected by the form and content of such a declaration. When, and to what extent, did the states surrender jurisdiction over that portion of the common good that may be reflected in widely (though not universally) shared religious beliefs and commitments?

At least one current Justice on the Supreme Court takes these questions very seriously indeed. Justice Thomas twice has asserted that the states should be bound by free exercise norms, but should not be bound by Establishment Clause norms.<sup>160</sup> The fullest exposition of

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<sup>160</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 731 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring); *see also* *Zelman v. Simmons-Harris*, 536 U. S. 639, 678-80 (2002) (Thomas, J., concurring) (“[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal government. . . . Whatever the textual and historical merits of incorporating the Establishment Clause, I can accept that the Fourteenth Amendment protects religious liberty rights. But I cannot accept its use to oppose neutral programs of school choice through the incorporation of the Establishment Clause.”).

his views appears in his concurring opinion in *Elk Grove Unified School District v. Newdow*.<sup>161</sup> Justice Thomas’s opinion begins by indicating his agreement with the Ninth Circuit that student recitation of the Pledge of Allegiance in public schools violates the principles adopted in the Court’s Establishment Clause precedents.<sup>162</sup> He proceeds to dispute the validity of those precedents, especially *Lee v. Weisman*.<sup>163</sup> He goes on to address with particularity the question of the application of the Religion Clauses to the states:

I accept that the Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment. . . . But the Establishment Clause is another matter. The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause.

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. . . As a textual matter, [the Establishment Clause] probably prohibits Congress from establishing a national religion. Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments. . . .

Nothing in the text of the Clause suggests that it reaches any further. . . . This textual analysis is consistent with the prevailing view that the Constitution left religion to the states.<sup>164</sup>

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<sup>161</sup> 542 U.S. at 45–54.

<sup>162</sup> *Id.* at 46.

<sup>163</sup> *Id.* at 46–49 (citing 505 U.S. 577 (1992)).

<sup>164</sup> *Id.* at 49–50 (citations omitted). In *Cutter*, Justice Thomas voted to uphold a federal statutory imposition on the states of religious liberty norms for prisoners, on the ground that such a federal regime did not disturb any state “establishment” of religion. 744 U.S. at 731–33 (Thomas, J., concurring).

The views of Justice Thomas are more subtle than these paragraphs may indicate. He believes that the Free Exercise Clause applies to the states,<sup>165</sup> and he has suggested that legal coercion—though not social coercion or simple “peer pressure” of the sort relied upon by the Court in *Lee*<sup>166</sup>—of taxpayers to support religious worship, or of individuals to participate in such worship, would violate the Fourteenth Amendment.<sup>167</sup> Moreover, his views on free exercise norms extend to a concern about the potentially coercive effect of religious preferences,<sup>168</sup> as well as use of state funds to prefer secular private programs over their religious counterparts.<sup>169</sup>

Justice Thomas would thus free the states from constitutional inhibitions on promoting religious sentiments, and focus his entire constitutional concern about state religion policy on the problems of preference and coercion, narrowly understood. His views would liberate the

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<sup>165</sup> *Newdow*, 542 U.S. at 49 (Thomas, J., concurring) (citing *Zelman*, 536 U.S. at 679 n.4).

<sup>166</sup> *Id.* at 53 n.4 (citing *Zorach v. Clauson*, 343 U.S. 306, 311 (1952)).

<sup>167</sup> *Id.* at 52 (citing *Lee*, 505 U.S. at 641 (Scalia, J., dissenting)).

<sup>168</sup> *Id.* at 53 (“Legal compulsion is an inherent component of ‘preferences’ [for particular religious faiths].”).

<sup>169</sup> In *Locke v. Davey*, 540 U.S. 712 (2004), which we consider in detail below, Justice Thomas dissented from the Court's holding that the Free Exercise Clause did not inhibit a state's choice to be more Separationist in its funding policies than the Federal Establishment Clause requires.



states from several extant Establishment Clause norms, but would—in the name of individual religious liberty and free exercise—recapture at least some of what is lost by disincorporation of the Establishment Clause. Justice Thomas’s views remind us both that there may be no neat separation between the Clauses, and that the content of the Clauses may be a greater determinant of a state’s freedom to pursue its own religion policy than abstractions about the incorporation of the Establishment Clause.

Justice Thomas is thus focused on the variety of constitutional strategies by which the Court might reshape and expand the states’ discretion to create independent religion policy. At the most rhetorically extreme, the Court might overturn *Everson*, so that the Establishment Clause (however narrow or broad) does not apply to the states. Alternatively, the Court might systematically alter the substantive scope of the Religion Clauses, even if they do apply to the states. The first strategy has not yet borne real fruit. In the section of this paper that follows, we briefly trace the Supreme Court’s efforts to pursue the second strategy, which has reshaped the authority of both the nation and the states to formulate religion policy.

### **III. Faith and Federalism after Reconstruction –**

#### **Substantive Ebb and Flow**

As we noted at the end of Part II, two distinct paths of change can lead to an expansion of the power of the states to formulate their own religion policy. The first, on which the prior section focused, involves the basic question of applying the Religion Clauses to the states.<sup>170</sup>

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<sup>170</sup> *See supra* Part II.B.

The second, which this section will discuss, is to leave full incorporation of the Religion Clauses in place, but narrow the scope of one or both Clauses.

This latter strategy is not explicitly concerned with issues of federalism. But Religion Clause doctrine frequently has consequences for the states that are greater than the same doctrine's impact on the federal government.<sup>171</sup> Shrinking one or both Clauses will tend to differentially liberate states and localities far more than the federal government. Moreover, this differential is both quantitative and qualitative. The quantitative differences arise from the simple fact that the states and localities represent an enormous number of political communities, each of which may have some unique set of religion policies. To take just one example, the Supreme Court's decision in *Employment Division v. Smith*<sup>172</sup> to severely limit the possibility of exemptions under the Free Exercise Clause, freed the states and localities from the potential for claims that range across the full breadth of the police power.<sup>173</sup>

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<sup>171</sup> See *supra* p. 25 (noting that the states had much more at stake in terms of freedom to establish or support religion than the federal government in *Everson*).

<sup>172</sup> 494 U.S. 872 (1990).

<sup>173</sup> The Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as amended at 42 U.S.C. § 2000bb to 2000bb-4 (2000) [hereinafter RFRA]). RFRA attempted to reinstitute the pre-*Smith* regime, but the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997) held RFRA unconstitutional as applied to the states. That RFRA retains vitality against the federal government is evidenced by this Term's decision in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006)

The major source of qualitative difference arises from the fact that states and localities, rather than the federal government, are the primary operators and financiers of education at the elementary and secondary level.<sup>174</sup> Education of the young is the policy context in which a considerable portion of the law of the Establishment Clause arises.<sup>175</sup> Change in the constitutional law governing elementary and secondary education thus has a significant impact on states and localities, which have been traditionally responsible for the administration of such education. By contrast, the federal government, which operates very few educational institutions, has not felt the brunt of these changes.<sup>176</sup>

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(affirming grant of preliminary injunction, based on RFRA, against federal interference with importation of hoasca tea, a liquid containing a controlled substance and used in respondent's religious rituals).

<sup>174</sup> See Heise, *supra* note 115.

<sup>175</sup> See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (discussing whether the Establishment Clause permits state-sponsored recitation of the Pledge of Allegiance at a public school); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (determining whether Amish children were exempt from the state compulsory education requirements).

<sup>176</sup> There are occasional federal interests in the role of religion in the educational program of public elementary and secondary schools. See, e.g., *Bd. of Educ. v. Mergens*, 496 U.S. 226, 253 (1990) (upholding constitutionality of federal Equal Access Act, which requires school systems receiving federal school funds to permit students to create non-curricular religion clubs if schools permit other non-curricular student groups).

Over the past several generations, the law of the Religion Clauses has changed considerably. Many scholars, including ourselves, have canvassed these developments. In what follows, we provide only a thumbnail sketch of what has transpired over these decades. As in our earlier work, we use the early 1970's as a benchmark.<sup>177</sup> The law of the Religion Clauses in that period reached the zenith of Separationism, which we define in terms of the law's treatment of religion as constitutionally distinctive from other forms of human activity. Most Establishment Clause adjudication concerns the extent to which the Clause disables the government from assisting religious activity in ways—typically involving money or speech—in which the government may assist analogous secular activity. Likewise, most Free Exercise adjudication concerns the extent to which government is obliged to limit its regulation of religious activity, even though it is free to regulate analogous secular activity. Religion can be deemed constitutionally distinctive if government is disabled in either or both of these ways.

For our purposes in this paper, the major categories of change in the law of the Religion Clauses fall into the following four areas:

A. The Rise and Decline of “No-aid Separationism.”

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<sup>177</sup> See, e.g., Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 15–37 (2005) [hereinafter *Faith-Based Initiative*]; Ira C. Lupu & Robert W. Tuttle, *Historic Preservation Grants to Houses of Worship: A Case Study in the Survival of Separationism*, 43 B.C.L. REV. 1139, 1142–52 (2002) [hereinafter *Historic Preservation Grants*].

The *Everson* decision of 1947 was replete with Separationist rhetoric, but reached the Neutralist result of permitting Ewing Township to reimburse parents of all children in public and Catholic schools for the costs of bus transportation.<sup>178</sup> By the early 1970's, however, the principles of No-aid Separationism were in full flower. These principles, articulated with the strongest force in *Lemon v. Kurtzman*,<sup>179</sup> disqualified “pervasively sectarian”<sup>180</sup> entities from receipt of any direct government transfers of cash or in-kind aid to their religious mission. Though the matter was not clearly settled at the time, similar restrictions arguably applied to any substantial indirect aid, transferred through the choices of beneficiaries.<sup>181</sup> Thus, at the zenith of no-aid principles, a program of tuition vouchers that included religious schools as eligible providers would have been under a significant constitutional cloud.<sup>182</sup> Moreover, as an explicit element of the no-aid regime, the Court appeared to lay down an absolute principle

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<sup>178</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947). The opinion gives no indication that the Township’s children attended any schools other than public schools or Catholic schools. In any event, no one challenged this limitation on the reimbursement policy. *Id.*

<sup>179</sup> 403 U.S. 602 (1971).

<sup>180</sup> *Hunt v. McNair*, 413 U.S. 734, 743–44 (1973). The category included intensely religious schools, and a fortiori extended to houses of worship. *Id.*

<sup>181</sup> *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 782 n.38 (1973).

<sup>182</sup> *See id.* (invalidating program of tuition tax credits for low- and middle-income families with children in religious schools).

against state support for the construction or maintenance of physical structures that might be used by religious entities for worship or religious instruction.<sup>183</sup>

By 2005, major elements of the no-aid regime initiated in *Lemon v. Kurtzman* had fallen by the wayside. The prophylactic exclusion of thickly religious entities from all direct aid programs had been abandoned,<sup>184</sup> and in its place stood a more refined prohibition of direct government assistance to “specifically religious activities.”<sup>185</sup> Moreover, in a series of decisions culminating in the validation of the Cleveland voucher scheme, the Court approved a variety of programs through which the government made indirect transfers, through the mechanism of beneficiary choice, to religious entities.<sup>186</sup> No decision has yet reconsidered the

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<sup>183</sup> *Id.* at 777; *Tilton v. Richardson*, 403 U.S. 672, 683 (1971).

<sup>184</sup> *See Agostini v. Felton*, 521 U.S. 203, 234 (1997); *Mitchell v. Helms*, 530 U.S. 793, 829 (2000). Although no view commanded a majority in *Mitchell*, six Justices agreed that the outcome required overruling of *Meek v. Pittenger*, 421 U.S. 349 (1975), and *Wolman v. Walter*, 433 U.S. 229 (1977), both of which had relied on the doctrine of exclusion of “pervasively sectarian” organizations. *Mitchell*, 530 U.S. at 808, 861.

<sup>185</sup> This proposition rests uneasily on the concurring opinion by Justice O’Connor, joined by Justice Breyer, in *Mitchell*. 530 U.S. at 860–64. For elaboration of the significance of the O’Connor opinion in *Mitchell*, see Lupu & Tuttle, *Faith-Based Initiative*, *supra* note 176 at 24–26, 75–102.

<sup>186</sup> *See Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (upholding a program that neutrally provided tuition aid that could be used for parochial school); *Zobrest v. Catalina*

principles governing decisions about government aid devoted to physical structures used for worship or instruction in faith, but straws in the wind point to relaxation of those norms as well.<sup>187</sup>

B. The Uneven Expansion of Constitutional Limitations on Government Promotion of Religious Messages.

Government promotion of religious messages and symbols is the sole area of Religion Clause concern in which the Supreme Court arguably has expanded, rather than narrowed, the reach of the Establishment Clause. In the 1960's, the Court struck down policies which required state-sponsored recitation of prayers and Bible verses in public schools,<sup>188</sup> and systematically expanded the concerns of those cases in the forty years thereafter.<sup>189</sup>

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Foothills Sch. Dist., 509 U.S. 1, 13–14 (1993) (allowing government to pay for a sign language interpreter for a student enrolled in a sectarian school); *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481, 488–89 (1986) (allowing government to finance blind person's training at Christian college through neutrally available vocational rehabilitation program).

<sup>187</sup> We discuss this point, *see infra* Part IV, in connection with Problem 2, concerning public funding for historic Spanish missions.

<sup>188</sup> *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

<sup>189</sup> *Santa Fe Indep. Sch. Dist v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980).

Outside of the public schools, however, the record has been considerably more mixed. The Court decided no cases involving government religious speech outside of public schools prior to the early 1980's. Thereafter, the Court upheld legislative prayer;<sup>190</sup> rendered a series of split decisions about government-sponsored displays acknowledging religious holidays;<sup>191</sup> and most recently did likewise in two cases involving government displays of the Ten Commandments.<sup>192</sup> The controlling norms in these cases have meandered through the anti-doctrine of *Lynch v. Donnelly*,<sup>193</sup> the temporary triumph of Justice O'Connor's endorsement test in *Allegheny County v. ACLU*,<sup>194</sup> the momentary appearance of a loose coercion test in *Lee v. Weisman*,<sup>195</sup> and the conflict between history-based and purpose-based approaches, leavened by Justice Breyer's personal brand of pragmatism, in the Ten Commandments decisions.<sup>196</sup>

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<sup>190</sup> *Marsh v. Chambers*, 463 U.S. 783 (1983).

<sup>191</sup> *County of Allegheny v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

<sup>192</sup> *McCreary County v. ACLU*, 125 S. Ct. 2722 (2005); *Van Orden v. Perry*, 125 S. Ct. 2854 (2005).

<sup>193</sup> *Lynch*, 465 U.S. at 679 (“[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.”).

<sup>194</sup> 492 U.S. at 623–37.

<sup>195</sup> 505 U.S. 577, 592 (1992).

<sup>196</sup> Compare *McCreary*, 125 S. Ct. at 2745 (invalidating display of Ten Commandments and emphasizing considerations of religious purpose and effect) with *Van Orden*, 125 S. Ct. at



Although the precise content and trajectory of these decisions cannot be captured simply, it does seem fair to say that the current law is quite hostile to government promotion of religious speech in the public schools, and extremely mixed about government promotion of religious messages in all other contexts. Despite the confusion outside of schools, the overall trend is more Separationist now than was the case thirty years ago, when government displays of crèches, menorahs, and Decalogues were constitutionally unquestioned.

### C. The Decline of Free Exercise Exemptions.

From the Supreme Court's first encounter with the Free Exercise Clause in the Mormon polygamy cases<sup>197</sup> until the early 1960's, the controlling doctrine offered no room for religion-based, mandatory exemptions from general laws. The Clause, the Court declared in *Reynolds*, protected religious belief but it did not protect religiously motivated action.<sup>198</sup> For example, if

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2862–63, 2869–70 (plurality opinion) (emphasizing traditional practice of governments to invoke religious sentiments as elements of our national history, and as instrumental in support of secular goals). For a withering critique of Justice Scalia's view, manifest in his *McCreary* dissent, that government may both privilege and venerate Judeo-Christian beliefs as expressed in the Ten Commandment, see Thomas Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U.L. REV. 1097 (2006).

<sup>197</sup> *Reynolds v. United States*, 98 U.S. 145 (1878); *Davis v. Beason*, 133 U.S. 333 (1890).

<sup>198</sup> *Reynolds*, 98 U.S. at 167.

the laws of liquor prohibition had included religious uses of wine,<sup>199</sup> the Constitution would not have been of any aid to those who sought to avoid dry laws in order to follow religious custom or obligation.

In the 1960's and 1970's, however, the Court repudiated the belief-action distinction, first by implication in *Sherbert v. Verner*,<sup>200</sup> and thereafter explicitly in *Wisconsin v. Yoder*.<sup>201</sup> Both decisions insisted that when general norms substantially burden religiously motivated conduct, courts should strictly scrutinize the application of those norms to that conduct. Such conduct should be held exempt from the general norm unless the state has a very strong reason for denying the exemption. The *Sherbert-Yoder* test reflected the constitutional distinctiveness of religion; religiously motivated action, and no other kind, was entitled to its beneficial treatment.

Although the Court in the ensuing two decades frequently honored the *Sherbert-Yoder* approach in the breach,<sup>202</sup> the test articulated in those cases remained the governing law until

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<sup>199</sup> The law exempted religious uses of wine during the era of Prohibition. Volstead Act of Oct. 28, 1919, tit. 2, § 3, 41 Stat. 305, 307–08 (1919) (repealed 1935).

<sup>200</sup> 374 U.S. 398, 404–06 (1963).

<sup>201</sup> 406 U.S. 205, 220 (1972).

<sup>202</sup> See Ira C. Lupu, *Of Time and the RFRA: A Lawyer's Guide to the Religious Freedom Restoration Act*, 56 MONT. L. REV. 171, 176–185 (1995) (analyzing the pattern of Free Exercise decisions in which the Court refused to apply, or applied weakly, the *Sherbert-Yoder* test).

the Court’s broad and quite stunning repudiation of it in 1990 in *Employment Division v. Smith*.<sup>203</sup> *Smith* effectively returned the general law of the Free Exercise Clause to the regime of *Reynolds*, and recast the decisions in *Sherbert* and *Yoder* as exceptions to that regime.<sup>204</sup> *Smith* moved the general law of Free Exercise from a posture of religious distinctiveness to a posture of neutrality; under *Smith*, the state is generally free to regulate religious action, so long as that regulation is part of a formally religion-neutral scheme that is applicable to religious and secular behavior alike.<sup>205</sup>

Several years later, in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>206</sup> the Court further reinforced the regime of free exercise neutrality by invalidating a set of local ordinances designed to stop the practice of animal sacrifice by a particular religious sect. The Court unanimously condemned the ordinances as lacking the general applicability and religion-neutrality required to claim *Smith*’s safe harbor.<sup>207</sup> When government singles out religion for coercive regulation, or worse, targets a particular religious community for such regulation, government is effectively condemning the religious sentiment behind certain practices, rather

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<sup>203</sup> 494 U.S. 872, 884–86 (1990).

<sup>204</sup> *Id.* at 881–85 (distinguishing *Yoder* as a special case involving “hybrid” constitutional rights, and distinguishing *Sherbert* and its progeny as cases involving individualized, discretionary exceptions to a general norm).

<sup>205</sup> *Id.* at 890.

<sup>206</sup> 508 U.S. 520 (1993).

<sup>207</sup> *Id.* at 531–32.

than the material consequences or moral content of those practices.<sup>208</sup> The Free Exercise Clause forbids this kind of religion-specific condemnation.

The most recent—and, for this paper, distinctly important—chapter in the story of free exercise law arrived in 2004, in *Locke v. Davey*.<sup>209</sup> *Locke* upheld, against Free Exercise and other challenges, Washington’s exclusion from its state scholarship program of students majoring in theology at religiously affiliated colleges.<sup>210</sup> Washington defended that policy by referencing its own Constitution, which explicitly prohibits public support of religious instruction.<sup>211</sup> The Court emphasized the constitutional leeway to be given to states in allocating resources, and recognized that states have legitimate interests in pursuing their own religion policies, even if those policies do not coincide precisely with those reflected in federal constitutional law.<sup>212</sup>

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<sup>208</sup> *Id.* at 546–47.

<sup>209</sup> 540 U.S. 712 (2004).

<sup>210</sup> *Id.*

<sup>211</sup> WASH. CONST. art. I, § 11 (“No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”).

<sup>212</sup> *Locke*, 540 U.S. at 721. Under the U.S. Supreme Court’s ruling in *Witters v. Wash. Dep’t. of Servs. for the Blind*, 474 U.S. 481 (1986), Washington would have been free to include in its scholarship program those students who chose to major in theology at religious schools.

We will have considerably more to say below about *Locke*, because the decision is squarely about state freedom to pursue an independent policy of Separationism.<sup>213</sup> For purposes of this summary, however, its contribution to Free Exercise norms is straightforward. After *Locke*, those norms have three major elements. First, religion-neutral policies that impose burdens on religion generally will not violate the Free Exercise Clause. Second, religion-specific condemnation of certain practices is highly likely to violate the Clause, but (third) religion-specific failure to subsidize certain practices is permissible.<sup>214</sup> As we elaborate more fully in Part IV, Free Exercise norms have now been stripped rather close to the constitutional bone.

#### D. The Gap Between the Religion Clauses: Discretionary Accommodation and Discretionary Separationism.

The discussion of Free Exercise norms above veered from formally religion-neutral laws, like those at issue in *Smith*, to religion-specific laws, like the Hialeah ordinances and the

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<sup>213</sup> See *infra* Part IV.A.1.

<sup>214</sup> We have omitted from this summary the line of cases dealing with judicial reluctance to interfere in disputes that are “internal” to a religious community. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976). This line of cases rests on both Religion Clauses, represents a separate and distinct category of Religion Clause problems, and has changed little in the past thirty years save for the possibility, identified in *Jones v. Wolf*, 443 U.S. 595 (1979), of judicial deployment of “neutral principles” in adjudication of church property disputes.

Washington State scholarship exclusion. State laws that treat religion specially are sometimes viewed through the lens of accommodation, a constitutional term of art which typically refers to religion-specific relief from general burdens.<sup>215</sup> An exemption from taxation or regulation, available only to religious institutions, constitutes such an accommodation.<sup>216</sup> To return to an earlier example, the federal law of liquor prohibition did indeed permit the use of wine for “sacramental purposes,” an exemption which relieved religious communities from a burden on certain religious customs and practices.<sup>217</sup> Accommodations, as we use the term in this part, are permissive, not mandatory.

The law of permissive accommodation is impossible to frame as a series of straightforward rules, tests, or standards.<sup>218</sup> When constitutional distinctiveness was at its peak

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<sup>215</sup> The problem of defining “accommodation” for constitutional purposes is discussed in Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 559–66 (1991).

<sup>216</sup> See, e.g., Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc (2000) (accord[ing] special legal protections for religious land uses).

<sup>217</sup> Volstead Act of Oct. 28, 1919, tit. 2, § 3, 41 Stat. 305, 307-08 (1919) (repealed 1935).

<sup>218</sup> For differing perspectives on the questions raised by permissive accommodations, see Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007 (2001); Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60

in the early 1970's, the gap between the Religion Clauses was at its smallest, and the zone within which permissive accommodation might occur may have been at its narrowest. If a strong Free Exercise Clause makes some accommodations mandatory, and a strong Establishment Clause forbids generic favoring of religion, the zone for discretionary and favorable treatment of religion shrinks. At that time, however, the Court had decided no cases relating to the scope of permissive accommodations, so the notion that the zone was small is primarily theoretical.

If strong versions of both Clauses will in theory lead to a narrow zone of permissive accommodation, the weakening of both Clauses—that is, the trend to Religion Clause neutrality reflected in the “no-aid” decisions and free exercise decisions discussed above—should in theory lead to an expanded zone of permissive accommodation. Yet it is not clear that the zone has actually expanded at all. Over the past twenty years, the Court has decided a number of such cases, with mixed results. *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*<sup>219</sup> upheld the statutory exemption of religious entities from Title VII’s prohibition on religious discrimination in employment, and *Cutter v. Wilkinson*<sup>220</sup> very recently upheld on its face a federal statutory accommodation of the religious liberty of persons incarcerated for crime. In between those two decisions, however, the Court

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GEO. WASH. L. REV. 685 (1992); Lupu, *supra* note 214; Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992).

<sup>219</sup> 483 U.S. 327 (1987).

<sup>220</sup> 544 U.S. 709 (2005).

struck down religion-specific accommodations in *Texas Monthly, Inc. v. Bullock*,<sup>221</sup> and *Estate of Thornton v. Caldor, Inc.*,<sup>222</sup> and invalidated what it perceived to be a sect-specific accommodation in *Board of Education of Kiryas Joel Village School District v. Grumet*.<sup>223</sup>

There are themes rather than rules to be extracted from this set of five cases, most significantly that permissive accommodations will fare best when they relieve demonstrable, government-imposed burdens on religiously distinctive activity.

*Locke v. Davey*<sup>224</sup> suggests a new and important category of actions that occupy the gap between the Religion Clauses—permissive Separationism. Although *Locke* involves distribution of largesse rather than coercive regulation, it nevertheless reflects an important element of discretion in the implementation of a state’s religion policy. Moreover, *Locke*’s validation of state Separationism is inextricably linked to a weakening of the First Amendment’s no-aid principle of nonestablishment; as the Court in *Locke* acknowledged, the First Amendment was no bar to including theology majors in the state’s voucher-like scholarship program.<sup>225</sup> *Locke*, sounding in federalism, is thus entirely about the scope of state discretion in the zone between the First Amendment’s Religion Clauses: that is, religion-specific actions which those Clauses permit but do not require. In the first of our three

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<sup>221</sup> 489 U.S. 1 (1989).

<sup>222</sup> 472 U.S. 703 (1985).

<sup>223</sup> 512 U.S. 687 (1994).

<sup>224</sup> 540 U.S. 712 (2004).

<sup>225</sup> *Id.* at 719.



hypothetical problems, analyzed in Part IV below, we return to the new and significant question of the scope of *Locke v. Davey*'s permission to the states to pursue their own Separationist vision.

#### **IV. Evaluating and Reimagining the Permissible Scope of State Religion Policy**

As outlined in the two preceding sections, the flow of recent arguments about federalism and religion, and the rate and direction of legal change concerning the Religion Clauses, are both crucial to analyzing the issues addressed in this paper. We believe, however, that the most fruitful way of comprehending these questions is through analysis of concrete problems. To that end, we will analyze three discrete problems in this section. The first of these tests the limits of permissive Separationism in light of *Locke v. Davey*, and raises questions under the current law of the Free Exercise Clause. The latter two problems test the boundaries of state discretion to escape current Establishment Clause norms. As explained in more detail below, we suggest that a new regime of partial incorporation of the Establishment Clause—that is, a halfway house between full incorporation and full disincorporation of the Establishment Clause—may provide the most constitutionally desirable resolution of these problems.

Our first problem—exclusion of certain religious schools, and courses of religious study, from a state voucher program—involves state policies that withhold material benefits from religious entities and religiously motivated persons. These policies do not implicate Establishment Clause concerns, because they do not involve the state in promoting or

advancing religion. Instead, these policies test the boundaries of *Locke v. Davey*,<sup>226</sup> which refused to recognize Free Exercise Clause limitations on state selectivity in subsidizing private religious activity.<sup>227</sup> As the analysis of problem one will reveal, the key questions involve (1) the extent of state discretion to exclude religious conduct and entities from subsidy programs, and (2) the issue of whether the states have any greater discretion of this type than the national government. This second issue is purely a matter of federalism. Problem one tests the limits and the underpinnings of current law, and does not implicate the disincorporation premises offered by Justice Thomas and the scholars on whose work he relies.<sup>228</sup>

For the last two problems, involving county display—for explicitly religious purposes—of the Ten Commandments, and state financial support for historic preservation of religious missions, we will apply three discrete analytic approaches. First, we will suggest the likely resolution under current law, in which the Establishment Clause still applies to the states, but which nevertheless affords the states more room to fashion religion policy than they had a quarter century ago. Second, we will imagine that the urging of Justice Thomas and others that the Establishment Clause should no longer apply to the states has become the law, and analyze the problems accordingly.

Our third and final approach will involve a bolder act of imagination. This third way of conceiving the relationship between federalism and faith will reinvigorate the jurisprudential legacy of Justices Cardozo, Frankfurter, and Harlan. All three of these Justices argued that the

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<sup>226</sup> *Locke v. Davey*, 540 U.S. 712 (2004).

<sup>227</sup> *Id.* at 715.

<sup>228</sup> *See supra* pp. 52–55.

Fourteenth Amendment imposed on the states some of the core values represented by various Bill of Rights provisions, but did not impose upon the states all of the limitations fastened on the federal government by the relevant parts of the Bill.<sup>229</sup> That is, all three at times suggested that Bill provisions had a core and a periphery, and—at least with respect to some Bill provisions—that the Fourteenth Amendment imposed values derived from the core, but not the periphery, upon the states.<sup>230</sup>

Justice Harlan, as an intellectual descendant of Cardozo and Frankfurter with respect to concerns of federalism as they informed Fourteenth Amendment adjudication,<sup>231</sup> argued that

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<sup>229</sup> See *Palko v. Connecticut*, 302 U.S. 319 (1937) (Cardozo, J., majority), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 794 (1969); *Adamson v. California*, 332 U.S. 46, 59–68 (1947) (Frankfurter, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring) (citing Cardozo’s interpretation of the reaches of the Fourteenth Amendment in *Palko*).

<sup>230</sup> See *supra* note 228. This approach shrinks the metaphor of light and shadow made famous in *Griswold v. Connecticut*, 381 U.S. 479 (1965). The Court opinion in *Griswold* imposes on the states the penumbras as well as the full umbras of the provisions of the Bill of Rights. *Id.* at 485. Justice Harlan, while concurring in the judgment, specifically disapproved of this approach. *Id.* at 499–500 (Harlan, J., concurring). The Harlan-Frankfurter-Cardozo approach would impose on the states something less than the entire umbra of the relevant provision of the Bill of Rights..

<sup>231</sup> For example, Justice Cardozo believed that the Fourteenth Amendment prohibited the states from retrying a person who had been completely acquitted by a jury in a criminal

the First Amendment in some cases should impose more stringent limitations on the federal government than the Fourteenth Amendment imposed on the states.<sup>232</sup> Harlan’s approach to these questions went beyond the question of marking the core, rather than the periphery, of Bill of Rights concerns. Harlan argued as well that the degree of local interest in a subject might play a role in deciding whether, at the margin of core and periphery, federal constitutional

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case, but did not similarly forbid a state from retrying a defendant for first degree murder after a conviction for second degree murder coupled with a legal error in the instructions on the first degree charge. *Palko*, 302 U.S. at 328. Justice Frankfurter believed that the Fourteenth Amendment imposed on the states a requirement that searches in criminal cases be reasonable, but he also held the view that the Fourteenth Amendment did not require the imposition of the Fourth Amendment’s exclusionary rule. *See Wolf v. Colorado*, 338 U.S. 25, 33 (1949), *overruled by Mapp v. Ohio*, 367 U.S. 643, 654–55 (1961). Dissenting in *Mapp*, Justice Harlan (joined by Justice Frankfurter) reiterated *Wolf*’s approach to the relationship between the Fourth and the Fourteenth Amendments. 367 U.S. at 678–86.

<sup>232</sup> In the companion cases of *Roth v. United States* and *Alberts v. California*, 354 U.S. 476 (1957), Justice Harlan concurred in an affirmance of the state court conviction in *Alberts*, while dissenting from the affirmance of a federal conviction in *Roth*. *Id.* at 496–508. His argument rested squarely on the proposition that the states should have more leeway to regulate sexually explicit material than the United States. *Id.* *See also Duncan v. Louisiana*, 391 U.S. 145, 172 (1968) (Harlan, J., dissenting) (“The Due Process Clause of the [Fourteenth] Amendment requires that [state] procedures be fundamentally fair in all respects. It does not . . . impose or encourage nationwide uniformity for its own sake . . .”).

restrictions should apply to the states.<sup>233</sup> With respect to government control over the distribution of sexually explicit material, for example, Harlan argued that regulation of such material was of intense local concern in the formation of a community's moral values, thus rendering inappropriate the application of the full force of the First Amendment.<sup>234</sup> In this focused regard for local interests in First Amendment matters, Harlan's thought presages that of Professor Richard Schragger, who has recently argued that local interests should play a special role in adjudication under the Religion Clauses.<sup>235</sup>

Of course, for the third, most imaginative, approach to create a useful analytic path, we must articulate a definition of the core and periphery of both Religion Clauses. We realize that there is no way to do this that will satisfy the constitutional intuition of most or all readers. Nevertheless, we will proceed in this direction, in what we hope will be a useful thought experiment in the analysis of faith and federalism.

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<sup>233</sup> See, e.g., *Roth*, 354 U.S. at 501–02 (state has a legitimate interest in making decisions in areas that might affect the development and behavior of its citizens).

<sup>234</sup> *Id.* (Harlan, J., concurring in part and dissenting in part).

<sup>235</sup> Richard Schragger, *supra* note 16. Our proposal to apply the core, but not the periphery, of the Establishment Clause to the states differs from Schragger's approach, because we tend to focus more on the history of state authority and on Religion Clause values than on concerns of localism in defining the core and periphery of the Religion Clauses. However, Professor Schragger's piece did provoke us to consider the concept of what became our 'third way' of harmonizing faith and federalism.

In our own scholarly consideration of the Religion Clauses, we have returned repeatedly to a particular vision of their core purposes.<sup>236</sup> Aside from the most general invocations of a monotheistic God, where history and longstanding practice persistently have their claims,<sup>237</sup> we believe that the Religion Clauses constrain government from promoting or hindering any particularized conception of theological truth.<sup>238</sup> Policies designed to specify or

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<sup>236</sup> See, e.g., Lupu & Tuttle, *supra* note 176; Ira C. Lupu & Robert W. Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J. L. & POLITICS 539 (2002); Lupu & Tuttle, *supra* note 60.

<sup>237</sup> See *Lynch v. Donnelly*, 465 U.S. 668, 713–18 (1984) (Brennan, J., dissenting) (criticizing the Court’s excessively broad assertion of the government’s authority to “acknowledge” religion, but recognizing a much narrower and nondenominational form of such acknowledgment); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 37–45 (2004) (O’Connor, J., concurring) (approving the use of the phrase “under God” in the Pledge of Allegiance in accordance with the definition of “ceremonial deism” as a constitutionally permissible set of government-sponsored activities that have generic and broadly ecumenical religious content).

<sup>238</sup> The general conflict between historical acknowledgment of the role of religion in American history and government, on the one hand, and the threat of excessive governmental identification with a particular religious tradition, on the other, is captured in Chief Justice Rehnquist’s plurality opinion in *Van Orden v. Perry*, 125 S. Ct. 2854, 2859 (2005): “Our cases, Januslike, point in two directions in applying the Establishment Clause. One face looks toward the strong role played by religion and religious traditions throughout our Nation’s history. . . .

inculcate such a conception, or to promote the practices associated with such a conception, represent a violation of the core of the Establishment Clause. By the same reasoning, laws designed explicitly to deny or impede such a conception constitute undeniable violations of the Free Exercise Clause. In what follows, we will use this concept of purposeful advancement or purposeful inhibition of theological beliefs and practices to demarcate the core of the Clauses.

At the periphery of the Religion Clauses, one may encounter formally religion-neutral government policies, such as prohibitions on drug use,<sup>239</sup> or financial assistance to a broad range of accredited schools,<sup>240</sup> that touch upon such religious belief and experience. Similarly, the Clauses may permit (or even encourage) government policies that relieve religious entities or religiously motivated persons from distinctive burdens.<sup>241</sup> Government policies of that

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The other face looks toward the principle that governmental intervention in religious matters can itself endanger religious freedom.” *Id.*

<sup>239</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990) (religiously-motivated use of peyote is entitled to no special protection from burdens imposed by religion-neutral laws).

<sup>240</sup> *See, e.g., Mitchell v. Helms*, 530 U.S. 793 (2000).

<sup>241</sup> *See* Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (religion clauses allow government to permissively accommodate religion in a manner that enhances religious liberty without conferring unwarranted benefits on religion). For a different perspective on the problem of accommodation, see Lupu, *supra* note 214 (accommodation may unreasonably favor the Free Exercise Clause over the Establishment Clause). *See also* Lisa Schultz Bressman, *supra* note 217 (permissive accommodation of religion may infringe on the Constitution’s commitment to equal treatment with respect to religion).

sort—those that touch religion, but do not single out its theological premises for purposeful advancement or inhibition—fall outside the core, but within the periphery of the Religion Clauses.

We recognize that an analysis framed around the concept of “purposeful advancement or inhibition” of distinctively religious experience will frequently raise difficult issues involving both the reasons for, and the extent to which, the state is choosing to support identifiably religious activity. In all of our illustrative problems, issues of this sort may appear. At times, such as in our Ten Commandments problem,<sup>242</sup> the choice to characterize state or local action in this way will not be difficult. For reasons of political gain, constitutional ignorance, or otherwise, state and local decision makers will sometimes directly broadcast their intentions to use state power to promote a particular vision of religious truth, and will take action that can be understood in no other way.<sup>243</sup>

At other times, however, questions of whether the state has transgressed core Establishment Clause principles will present far more difficult questions of proof and constitutional methodology. We do not intend to propose any simple test or method for answering these questions. Rather, as we hope our analysis of problem three will demonstrate, subtle and refined tools will be necessary to identify violations of the Establishment Clause core.<sup>244</sup> Frequently, second-best methods will be all that are available. When the state is engaging in religious activity but is trying to hide its desire to do so, the appearance of

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<sup>242</sup> *See infra* Part IV.B.

<sup>243</sup> *See infra* Part IV.B.

<sup>244</sup> *See infra* Part IV.C.



sectarian preferences may prove especially revealing. Moreover, in some instances, that the state may have pursued less constitutionally questionable alternatives—that is, alternatives that are less commingled with religious activity per se—may lead us to conclude that the state is impermissibly supporting religious activity. We do not pretend, however, that proper characterization of activities with multiple effects will be easy, and we recognize that the move to a core-periphery distinction is likely to increase the opportunities for courts to resolve close cases in the government’s favor.

We cannot confidently say that any particular Member of the Supreme Court would define the core of the Religion Clauses, or the methods for policing that core, precisely as we do. But we think the approach we suggest is consistent with the historical evolution of religion policy in America. States that maintained explicitly Christian identities in the first half-century of the Republic all eventually turned away from such public establishments;<sup>245</sup> none have made any explicit move to reestablish a strong, denomination-specific religious identity, and a move of that sort would likely be met with wide-spread political condemnation.<sup>246</sup> Put more simply, the American ethos of religion and state simply would not tolerate a state attempt to adopt a particular set of religious truths beyond general acknowledgment of a God. It is on the basis of this (hopefully correct) understanding that we will proceed in our analysis of the third way, in

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<sup>245</sup> See *supra* Part I (discussing the history of nonestablishment in the American colonies).

<sup>246</sup> An example of this wide-spread political condemnation may be found in the nationwide reaction to the recent display of the Ten Commandments in an Alabama Courthouse. See *infra* Part IV.B.

which states must respect the core of the Establishment Clause but have more discretion than the federal government at what we have deemed the periphery.<sup>247</sup>

As we hope the analysis of particular problems will demonstrate, there may be functional as well as historical reasons to afford the states greater discretion to formulate religion policy. States and local communities may have a strong sense of political identity that is enmeshed with a particular attitude toward religion, be it separation, accommodation, or generic recognition. A national religion policy, however, imposes a single pattern on all of America's political communities, leaving little or no room for local variation. We wonder, for example, whether a state-originated Faith-Based Initiative would generate the same constitutional concerns as have been provoked by the national government's effort to impose such a policy upon all the states as a condition of federal social welfare spending.

*A. State-based Separationism.*

The State of North Carolina finances and administers a wide range of scholarship and loan programs for state residents attending public and private institutions of higher education in the state.<sup>248</sup> Among these is the North Carolina Legislative Tuition Grant Program

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<sup>247</sup> See *supra* Part III.C. The Court's current approach to the Free Exercise Clause has already stripped that Clause to its core by minimizing Free Exercise exceptions to state government actions. Accordingly, all of the departures from current law in accordance with our imagined third approach will appear on the Establishment Clause side of the ledger.

<sup>248</sup> See generally *The College Foundation of North Carolina: Paying for College—A Financial Aid Primer*, [http://www.cfnc.org/site/paying/info\\_paying\\_start.jsp](http://www.cfnc.org/site/paying/info_paying_start.jsp) (last visited Jun. 11, 2006).

(NCLTGP),<sup>249</sup> which provides grants to residents of North Carolina attending certain non-public colleges and universities. The NCLTGP places two germane conditions on its funding. First, students may only use the grants for undergraduate education, and eligible students may not be “enrolled in a program of study the objective of which is the attainment of a degree in theology, divinity, or religious education or in any other program of study that is designed by the institution primarily for career preparation in a religious vocation.”<sup>250</sup> Second, students are ineligible to receive NCLTGP funds if they attend “a seminary, Bible school, Bible college or similar religious institution,”<sup>251</sup> even if the institution is accredited and the student is pursuing a non-religious course of study, such as chemistry or accounting.<sup>252</sup>

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<sup>249</sup> N.C. GEN. STAT. § 116–21.2 (2005).

<sup>250</sup> This language comes from the most recent grant application form, available at: <http://www.duke.edu/student-service-center/ncltg.html>. This specific exclusion is not contained in the statutes relating to the NCLTGP. The law limits the use of such funds to “secular educational purposes.” N.C. GEN. STAT. § 116–21.4(a) (2005). However, the language closely resembles N.C. GEN. STAT. § 116–15(d) (2005), the provision that provides a general bar on the use of a state educational grant towards religious programs of study.

<sup>251</sup> N.C. GEN. STAT. § 116–22(1)(c) (2005) (definition of eligible private institution).

<sup>252</sup> North Carolina added a new program in 2003 to extend funding to students ineligible to receive grants under the NCLTGP because of the institutional restriction. N.C. GEN. STAT. § 116–43.5 (2005). This new grant program is entitled “Grants to Students Attending Certain Private Educational Institutions” (CPEI). Interestingly, the CPEI program does not have the same subject-matter restriction on funding students’ course of study, which

This first scenario offers a program in which the government manifests a religion policy that is more Separationist than is required by the current Establishment Clause jurisprudence of the Supreme Court. After *Witters*,<sup>253</sup> *Zobrest*,<sup>254</sup> and *Zelman*,<sup>255</sup> there can be little doubt that a state-financed program of tuition vouchers—especially for higher education—may permit their use for theological education.<sup>256</sup> This is true both with respect to the NCLTGP’s condition on students’ choice of majors, and also its restriction on eligible institutions.

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means that students attending religious colleges under the CPEI program can use the grants to prepare for a career in the ministry, but those attending institutions eligible under the NCLTGP may not do so. Emails from Steve Prescott, former Professor, Southeastern Baptist University (on file with authors).

<sup>253</sup> *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986) (finding no Establishment Clause violation where a state vocational rehabilitation program funded petitioner’s education at a Christian college).

<sup>254</sup> *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (finding no Establishment Clause violation where a state-funded support program provided a sign language interpreter to a deaf student enrolled at a Roman Catholic high school) .

<sup>255</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (finding no Establishment Clause violation where students chose to use state-funded vouchers at religiously-affiliated private schools).

<sup>256</sup> *Locke v. Davey*, 540 U.S. 712, 719 (2004) (“[T]here is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology . . . .”) (citing *Witters*, 474 U.S. at 489).

The federal constitutional questions presented by this scenario involve the Free Exercise rights of students and institutions denied eligibility for funding under the NCLTGP because of their religious major or identity.<sup>257</sup> The scholarship program will finance any undergraduate course of study at an eligible accredited institution, excepting only theology or those intended to prepare students for a career in ministry.<sup>258</sup> Moreover, the program provides tuition vouchers to eligible state residents who attend any accredited institutions except seminaries, Bible colleges, or “similar religious institutions.” Students who choose theology majors or church careers lose a significant benefit (\$1800 for 2005–06) because of that choice.<sup>259</sup> Institutions with deep and explicit religious connections and commitments also lose a significant benefit. Their students must forego the NCLTGP funding as the price of attending such an explicitly religious institution, even if the student’s chosen major is no different than one she would have selected at a non- (or less-) religious private college.

1. *Locke v. Davey*. In *Locke v. Davey*,<sup>260</sup> the Supreme Court confronted a Washington State scholarship program with subject-matter restrictions nearly identical to those of the NCLTGP. The Promise Scholarship program at issue in *Locke* provided that “no aid shall be awarded to any student who is pursuing a degree in theology.”<sup>261</sup> The program did not, however, exclude institutions based on religious character. Under the Washington State

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<sup>257</sup> See *infra* note 269.

<sup>258</sup> <http://www.duke.edu/studentsservicecenter/ncltg.html> (NCLTGP application).

<sup>259</sup> *Id.*

<sup>260</sup> 540 U.S. 712 (2004).

<sup>261</sup> REV. CODE WASH. § 28B.92.100 (2006).

program, students may use the scholarship at any in-state institution “accredited by a nationally recognized accrediting body.”<sup>262</sup> Joshua Davey was awarded a scholarship, but the funding was halted when he chose a major in pastoral ministry.<sup>263</sup> Davey brought suit to restore the scholarship, alleging that the exclusion of his chosen course of study amounted to discriminatory treatment based on the religious character of his vocation.<sup>264</sup> After the district court rejected his claim, the Ninth Circuit reversed, finding that the state of Washington’s exclusion of theology majors from the program unconstitutionally burdened Davey’s free

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<sup>262</sup> WASH.ADMIN.CODE § 250–80–020(13) (2005) (definition of eligible post-secondary institution), *available at* <http://apps.leg.wa.gov/WAC/default.aspx?cite=250-80-020>.

<sup>263</sup> *Locke*, 540 U.S. at 717.

<sup>264</sup> *Id.* at 718. Davey’s claims were also based on the Speech Clause of the First Amendment. Relying on the Court’s decision in *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995), Davey claimed that the scholarship program constituted a public forum for speech, and that the exclusion of devotional theology majors represented an impermissible content-based restriction on speech. The Court rejected the first premise in a footnote: “Our cases dealing with speech forums are simply inapplicable.” *Locke*, 540 U.S. at 720 n. 3. For a detailed analysis of Davey’s claim based on the Free Speech Clause, see Douglas Laycock, Comment, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV.L.REV. 155, 191–94 (2004).

exercise of religion, and rejecting the state’s claim that such a burden was justified by the state’s policy of church-state separation.<sup>265</sup>

With his case before the Supreme Court, Davey’s supporters had reason for optimism. In two earlier decisions during the 1990s, the Court seemed to have laid the foundation for a robust understanding of religious neutrality.<sup>266</sup> The first, *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,<sup>267</sup> involved a city’s ban on animal sacrifice, an ordinance transparently targeted at the practices of a Santerian religious congregation.<sup>268</sup> In *Lukumi*, the Court held that the city had violated the congregation’s free exercise rights because its ordinance singled out an activity – sacrificial slaughter – for a burden specifically because of its religious character, rather than any religion-neutral characteristic that invited secular concern.<sup>269</sup>

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<sup>265</sup> *Davey v. Locke*, 299 F.3d 748, 757–59 (9th Cir. 2002), *rev’d*, 540 U.S. 712, 725 (2004).

<sup>266</sup> *See generally* Steven K. Green, *Locke v. Davey and the Limits to Neutrality Theory*, 77 *TEMPLE L. REV.* 913, 933–45 (discussing emergence of neutrality theory in Establishment Clause jurisprudence); Toni M. Massaro, *Religious Freedom and “Accommodationist Neutrality”: A Non-neutral Critique*, 84 *OR. L. REV.* 935 (2005) (defending *Locke v. Davey* and criticizing the move to neutrality).

<sup>267</sup> *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>268</sup> *Id.* at 542.

<sup>269</sup> *Id.* at 533–40.

The second decision, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*,<sup>270</sup> involved the eligibility of an evangelical Christian student group for a printing subsidy that the public university provided to other student groups.<sup>271</sup> The school denied the group funding because of the religious content of its publication,<sup>272</sup> and the group sued, alleging that the denial amounted to content-based discrimination against private religious speech in a limited public forum.<sup>273</sup> The University defended its exclusion as necessary to comply with the Establishment Clause.<sup>274</sup> The Court found that the school's printing subsidy constituted a limited public forum for speech, and that the university had violated the student group's rights by excluding the group based on its viewpoint.<sup>275</sup> Most importantly, the court determined that the university's exclusionary policy could not be justified by Establishment Clause concerns, because the religious group's message would not reasonably be attributed to the university.<sup>276</sup> Moreover, the public aid did not flow to the group, but was paid directly to the printing vendor,

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<sup>270</sup> *Rosenberger*, 515 U.S. 819.

<sup>271</sup> *Id.* at 822.

<sup>272</sup> *Id.* at 822–23.

<sup>273</sup> *Id.* at 827–30.

<sup>274</sup> *Id.* at 837–38. Although the University ultimately opted against pressing the Establishment Clause claim in the U.S. Supreme Court, the Court granted certiorari on this issue. *Id.* at 837.

<sup>275</sup> *Id.* at 845–46.

<sup>276</sup> *Id.* at 842–44.



thus ensuring that public funds would not be diverted for purposes other than those of the ‘community of ideas’ sponsored by the university.<sup>277</sup>

Taken together, *Lukumi* and *Rosenberger* offered the promise of a powerful theory of equal funding of religious entities and enterprises. If religious entities or activities are singled out for a distinctive burden—the denial of funding—when such funding is extended to analogous non-religious entities or activities, then the burden should be removed, just as in *Lukumi* and *Rosenberger*. Although this theory had been rejected in several lawsuits involving financial support for secondary education,<sup>278</sup> it has exerted significant influence in other contexts, most notably in the plurality opinion in *Mitchell v. Helms*,<sup>279</sup> in which Justice Thomas

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<sup>277</sup> *Id.* at 850 (O’Connor, J., concurring) (stating that the University’s direct payment to the printer, rather than to the religious group, “makes this case analogous to a school providing equal access to a generally available printing press (or other physical facilities) . . . and unlike a block grant to religious organizations.”).

<sup>278</sup> *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999) (finding no Free Exercise or equal protection violation where state excludes religiously affiliated schools from public grant program); *Bagley v. Raymond Sch. Dep’t*, 728 A.2d 127 (Me. 1999) (finding no Free Exercise, Establishment, or equal protection violation where state-funded tuition program excludes religious schools). Relying on *Locke v. Davey*, the Maine Supreme Judicial Court recently reaffirmed the *Bagley* result. *Anderson v. Town of Durham*, 895 A.2d 99 (Me. 2006).

<sup>279</sup> *Mitchell v. Helms*, 530 U.S. 793, 801–35 (2000).

questioned the constitutionality of public benefit programs that exclude “pervasively sectarian” institutions.<sup>280</sup>

In *Columbia Union College v. Oliver*,<sup>281</sup> a Maryland state administrative board denied funding to a college because the board deemed the college too religious to receive a grant under the state’s program of grants to private colleges.<sup>282</sup> The U.S. Court of Appeals for the Fourth Circuit applied the *Rosenberger* Court’s speech analysis,<sup>283</sup> and found that Maryland’s program for funding higher education constituted a limited public forum.<sup>284</sup> Therefore, it held, the exclusion of schools based on the religious content of their academic programs and the more generally religious messages conveyed by their institutions represented impermissible discrimination.<sup>285</sup> As in *Rosenberger*, the court in *Columbia Union* concluded that the state’s

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<sup>280</sup> *Id.* at 826–29; *see also* *Peter v. Wedl*, 155 F.3d 992 (8th Cir. 1998) (finding a genuine issue of material fact as to First Amendment protections of religion where a student attending a religious school is precluded from receiving state-funded special education benefits); *Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (finding a First Amendment religion clause violation where the U.S. Army prohibited on-base home daycare facilities from conducting religious practices).

<sup>281</sup> 159 F.3d 151 (4th Cir. 1998), *cert. denied*, 527 U.S. 1013 (1999) (*Columbia Union I*); 254 F.3d 496 (4th Cir. 2001) (*Columbia Union II*).

<sup>282</sup> 159 F.3d at 154–55.

<sup>283</sup> *See supra* notes 269–75.

<sup>284</sup> *See Columbia Union I*, 159 F.3d at 156.

<sup>285</sup> *Id.* at 156–57.

professed concern about violating the Establishment Clause was not a sufficiently compelling interest to justify the viewpoint-based restriction on speech in a limited public forum.<sup>286</sup>

In his plurality opinion in *Mitchell v. Helms*, and in his dissent from the denial of certiorari in *Columbia Union I*,<sup>287</sup> Justice Thomas characterized the disparate treatment of religious entities and expression as a form of “invidious discrimination.” Such discrimination, he argued, is a legacy of—and perhaps even a contemporary expression of—hostility to particular religious traditions or religion in general. The remedy for discriminatory funding is neutrality; that is, a practice of equal eligibility for public benefits, without regard to the grantee’s “religious status or sincerity,” or the extent to which grantees “insist upon integrating their religious and secular functions.”<sup>288</sup>

The promise of *Lukumi* and *Rosenberger* has had an even greater rhetorical impact in policy debates, especially those involving the financing of education and social welfare services.<sup>289</sup> In the area of social welfare funding, the Charitable Choice movement, now

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<sup>286</sup> *Columbia Union II*, 254 F.3d at 504–09 (4th Cir. 2001) (applying Establishment Clause analysis from *Mitchell v. Helms*, 530 U.S. 793 (2000), to determine that the lower court was not “clearly erroneous” in concluding that the Establishment Clause permits direct public funding of Columbia Union College).

<sup>287</sup> 527 U.S. 1013 (1999).

<sup>288</sup> *Id.* at 1014–15.

<sup>289</sup> Carl H. Esbeck, *The Neutral Treatment of Religion and Faith-Based Social Service Providers: Charitable Choice and Its Critics*, in WELFARE REFORM & FAITH-BASED ORGANIZATIONS (Derek Davis and Barry Hankins eds., 1999). *See generally* Thomas C. Berg,

matured into the Faith-Based and Community Initiative, had its genesis in claims for a “level playing field” for access to social welfare grants. The exclusion of faith-based organizations from eligibility for such grants has shifted from the norm to an aberration that must be explained or erased, as federal agencies have done with dozens of regulations over the past four years.<sup>290</sup>

The jurisprudence of strictly neutral treatment of religion received its most forceful statement to date in *Locke v. Davey*, but not in the Court’s opinion. Instead, that defense of neutrality was left to Justice Scalia’s dissenting opinion, which was joined by Justice

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*Vouchers and Religious Schools: the New Constitutional Questions*, 72 U. CIN. L. REV. 151 (2003) (discussing equal access requirement in the context of voucher-financed education). For a description of Equal Access as a concept that encompasses both equal ability to use public speech fora and public funding, see the Alliance Defense Fund (“ADF”) website at <http://www.alliancedefensefund.org/issues/ReligiousFreedom/EqualAccess.aspx>. ADF is one of a number of organizations that litigate to advance a vigorous vision of religion-neutrality.

<sup>290</sup> See generally Lupu & Tuttle, *supra* note 20; Ira C. Lupu & Robert W. Tuttle, *THE STATE OF THE LAW 2004: Partnerships Between Government and Faith-Based Organizations*, THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POL’Y [hereinafter 2004]; Ira C. Lupu & Robert W. Tuttle, *The State of the Law 2003: Developments in the Law Concerning Government Partnerships with Religious Organizations*, THE ROUNDTABLE ON RELIGION AND SOC. WELFARE POL’Y [hereinafter 2003] (discussing regulatory changes under the Faith-Based and Community Initiatives).

Thomas.<sup>291</sup> In his dissent, Justice Scalia argued that any law “that facially discriminates against religion” should be deemed presumptively unconstitutional.<sup>292</sup> The Washington program, he wrote, creates a generally available benefit, and then “withholds that benefit from some individuals solely on the basis of religion.”<sup>293</sup> Such discrimination requires strict judicial scrutiny—that is, a showing by the state that the restriction furthers a compelling governmental interest, which cannot be achieved without the discriminatory restriction.<sup>294</sup>

The government’s duty to comply with the Establishment Clause, Justice Scalia reasoned, constitutes an interest sufficiently compelling to justify the facially discriminatory treatment of religion.<sup>295</sup> Indeed, that duty seems to be the only plausible candidate for a governmental interest sufficiently compelling to justify the facially discriminatory treatment of religion. Because the inclusion of theology majors in the scholarship program would be permitted under the Court’s current jurisprudence of the Establishment Clause, Justice Scalia argued, Washington State lacked a compelling rationale for their exclusion.<sup>296</sup> Even if the state

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<sup>291</sup> *Locke v. Davey*, 540 U.S. 712, 726 (Scalia, J., dissenting).

<sup>292</sup> *Id.* at 729.

<sup>293</sup> *Id.* at 726–27.

<sup>294</sup> *See id.* at 730, 730 n.2 (discussing appropriate standard of review).

<sup>295</sup> *See id.* at 728–30 (discussing interaction of Free Exercise and Establishment Clause analyses).

<sup>296</sup> *Id.* at 729–30. Scalia discusses and rejects other reasons that the state offered or could have offered for the ban on aid for theology majors. These alternatives either restate parts of current federal Establishment Clause jurisprudence, or are easily rejected as trivial. *Id.*

could show a compelling interest advanced by the exclusion, the dissent continued, the facially discriminatory rule is not the only means by which the state could achieve that end.<sup>297</sup> The state could restrict the scholarships to public universities or eliminate the program.<sup>298</sup> In either case, Washington could avoid the use of public funds for theological education without imposing a facially discriminatory burden on religion.

Justice Scalia’s approach to Religion Clause neutrality, however, did not carry the day in *Locke*. In a 7-2 decision, the Court rejected the principle of strict religious neutrality, and upheld the constitutionality of the Washington State scholarship program and its exclusion of theology majors.<sup>299</sup> Writing for the majority, Chief Justice Rehnquist asserted that the plaintiff’s understanding of religious neutrality failed to take account of religion’s unique status under the federal and state constitutions: “[T]he subject of religion is one in which both the United States and state constitutions embody distinct views—in favor of free exercise, but opposed to establishment—that find no counterpart with respect to other callings or professions.”<sup>300</sup> Because of this distinctive constitutional status, the Court held, laws that single out religion for different treatment are not inherently suspect. A generic distinction

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<sup>297</sup> *Id.* at 729.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 725 (Rehnquist, C.J., majority).

<sup>300</sup> *Id.* at 721 (Rehnquist, C.J., majority).

cbetween religion and nonreligion is as likely to have arisen from legitimate as from illegitimate grounds.<sup>301</sup>

In rejecting Justice Scalia’s argument that a state scholarship program that distinguishes between religious and secular education is presumptively invalid, the Court started by drawing a sharp distinction between the Washington scholarship program and the printing subsidy at issue in *Rosenberger*.<sup>302</sup> “The purpose of the Promise Scholarship Program is to assist students from low- and middle- income families with the cost of post-secondary education, not to ‘encourage a diversity of views from private speakers.’”<sup>303</sup> With that one sentence, consigned

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<sup>301</sup> *Id.* “That a State would deal differently with religious education for the ministry than with education for other callings is a product of these views [about the constitutional distinctiveness of religion], not evidence of hostility toward religion.” *Id.*

<sup>302</sup> *See supra* notes 299–300 and accompanying text.

<sup>303</sup> *Locke*, 540 U.S. at 720 n.3. Professor Laycock, *supra* note 263, argues that the Court’s assessment of this claim collapses into a single analysis that should, in fact, be treated as two distinct lines of constitutional doctrine: the exercise of governmental control over access to limited public fora (citing *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003)); and governmental imposition of content-based restrictions on publicly subsidized private speech (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Legal Servs. Corp. v. Velasquez*, 531 U.S. 533 (2001)).

By addressing only the issue of access to public fora (and concluding that the scholarship program was not such a forum), Laycock contends, the Court ignores the more fundamental claim that the government was censoring private speech, and doing so based

to a footnote, the Court decisively constricted the reach of the neutrality principle which many, including Justice Thomas in *Columbia Union College*, had drawn from *Rosenberger*.<sup>304</sup>

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entirely on the speaker's religious viewpoint. Laycock, *supra* note 263, at 192. While we agree that the Court seems to have intermingled these two distinct analyses, the majority opinion does address the more fundamental claim of censorship. As we discuss below, the Court held that the state does not burden an individual's constitutional rights when it "has merely chosen not to fund a distinct category of instruction." *Locke*, 540 U.S. at 721. The Court's characterization of this putative burden returns the constitutional analysis to the most basic questions: what reasons does the government offer for excluding a particular kind of speech from a program of state support, and under what standard should courts review such reasons?

For a further response to Professor Laycock, and a spirited defense of *Locke* on normative (not federalism-based) grounds, see Massaro, *supra* note 265, at 984–97, n.267. For another response to Professor Laycock, and a defense of *Locke* on both normative and federalism grounds, see Merriam, *supra* note 12.

<sup>304</sup> *Columbia Union Coll. v. Clark*, 527 U.S. 1013, 1014–15 (1999) (Thomas, J., dissenting) (disagreeing with a denial of certiorari because the case presents an opportunity to affirm that the Free Exercise Clause requires strict religious neutrality in government funding); *see also* Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, Memorandum Opinion by the Assistant Attorney General (Sept. 25, 2002), *available at* <http://www.usdoj.gov/olc/FEMAAssistance.htm> (addressing the eligibility of a religious entity to receive federal disaster relief); Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as The Old North Church,



Although the Court peremptorily dismissed the speech forum argument, that dismissal provides important insight into the Court’s reading of *Rosenberger* and its applicability to programs of public aid. Apart from programs that are specifically and narrowly intended to create a public marketplace of ideas, government spending programs and decisions will not be required to adhere to standards of viewpoint neutrality.<sup>305</sup>

To succeed in his challenge, the Court held, Davey needed to show either that the exclusion of theology majors represented a cognizable burden on his religious exercise, or that the exclusion was motivated by anti-religious animus.<sup>306</sup> Because these two conditions represent the law that governs our analysis of the North Carolina problem, they merit close attention.

First, the Court found that the Washington program’s restriction on theology majors did not amount to a legally significant burden on Davey’s Free Exercise rights.<sup>307</sup> The Court’s analysis of the burden is, to put it charitably, thin. Unlike *Lukumi*, the Court reasoned, Davey’s claim does not involve a rule that “imposes . . . civil or criminal sanctions on any type of

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Memorandum Opinion by the Acting Assistant Attorney General (Apr. 30, 2003), *available at* <http://www.usdoj.gov/olc/OldNorthChurch.htm> (addressing the eligibility of religious entities to receive federal historic preservation grants). We discuss these memoranda in connection with Problem 3, see *infra* notes 378–408 and accompanying text.

<sup>305</sup> Laycock, *supra* note 263, at 194–95.

<sup>306</sup> *Locke*, 540 U.S. at 275.

<sup>307</sup> *Id.* at 720–21.

religious service or rite.”<sup>308</sup> In the pivotal moment of the Court’s opinion, Rehnquist distinguished the Washington program’s restriction from unemployment compensation rules held by the Court to violate the free exercise rights of those denied benefits. The Washington program “does not require students to choose between their religious beliefs and receiving a government benefit.”<sup>309</sup> The Court’s understanding of the burden on theology students arises from this comparison with *Sherbert*,<sup>310</sup> *Thomas*,<sup>311</sup> and *Hobbie*.<sup>312</sup> In those cases, all involving unemployment compensation, the state had forced beneficiaries to choose between violating their religious consciences or forfeiting unemployment compensation.

Davey, the Court argued, was not required to forego his training for the ministry in order to receive the scholarship benefit.<sup>313</sup> He could major in any other subject at any other school and receive the scholarship, while still pursuing his degree in devotional theology. The burden on Davey, then, is focused on the cost of complying with Washington’s requirement that its funding must be segregated from the expense of studying for a career in pastoral

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<sup>308</sup> *Id.* (discussing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993)).

<sup>309</sup> *Id.* at 721.

<sup>310</sup> *Sherbert v. Verner*, 374 U.S. 398 (1963).

<sup>311</sup> *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707 (1981).

<sup>312</sup> *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136 (1987).

<sup>313</sup> *Locke*, 540 U.S. at 721 (2004).

ministry.<sup>314</sup> Because he remained theoretically free to study for a degree in devotional theology, albeit without the benefit of the scholarship, and at the same time to receive the benefit of the scholarship by pursuing a different degree in a separate institution, the Court concluded that the burden on Davey does not trigger strict review under the Free Exercise Clause.<sup>315</sup>

Second, the Court implied that facially discriminatory treatment of religion arising from anti-religious animus would constitute a free exercise violation, even if the restriction did not impose a choice between material benefits and religious conscience.<sup>316</sup> The Court concluded, however, that the scholarship program's restriction is not a product of anti-religious sentiment, but instead embodies Washington's deeply entrenched and consistently Separationist religion policy.<sup>317</sup> Although the exclusion is statutory, its restriction is directly traceable to the text of

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<sup>314</sup> Thomas C. Berg and Douglas Laycock, *The Mistakes in Locke v. Davey and the Future of State Payments for Services Provided by Religious Institutions*, 40 TULSA L. REV. 227, 236–38 (2004) (analyzing the practical burden imposed on Davey and similar students under the Washington scholarship program). For a wide-angle look at the problem of what constitutes a burden on free exercise rights, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

<sup>315</sup> *Locke*, 540 U.S. at 721.

<sup>316</sup> *Id.* at 721, 724; Laycock, *supra* note 263, at 187–91 (discussing the Court's analysis of legislative animus).

<sup>317</sup> *Locke*, 540 U.S. at 722–25 (discussing the absence of proof that anti-religious hostility animated Washington's Separationist policy).

the state Constitution, which provides that “[n]o public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”<sup>318</sup> Moreover, Washington’s Supreme Court has regularly interpreted its own state’s constitutional clauses on religion as more protective of religious liberty, and more restrictive about the funding of religion, than the U.S. Supreme Court’s interpretations of the Constitution’s Religion Clauses.<sup>319</sup>

No better example of this legacy can be found than *Witters v. Washington Dep’t of Services for the Blind*.<sup>320</sup> In *Witters*, the U.S. Supreme Court ruled that the Establishment Clause does not preclude a state from providing resources to aid a blind person in studying for

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<sup>318</sup> WASH. CONST. art. I, § 11.

<sup>319</sup> *First Covenant Church of Seattle v. Seattle*, 840 P.2d 174, 186–88 (Wash. 1992) (applying heightened judicial scrutiny to a religion-neutral law that imposed a burden on religious activity, while rejecting the argument that Washington’s religious liberty provision should conform to the U.S. Supreme Court’s decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990), which held that religious activity is entitled to no special protection from burdens imposed by religion-neutral laws); *Witters v. Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989) (holding that indirect financing of religious activity violates the state constitutional prohibition on support for religion, notwithstanding U.S. Supreme Court decisions, interpreting the Establishment Clause, which permitted indirect aid for religious activity).

<sup>320</sup> 474 U.S. 481 (1986) (indirect aid for religious education does not violate Establishment Clause); *Witters v. Comm’n for the Blind*, 771 P.2d 1119 (Wash. 1989) (indirect aid for religious education is prohibited under state constitution).

the ministry.<sup>321</sup> On remand, the Washington Supreme Court held that the use of such resources violated the state constitution’s prohibition on aid for “religious worship, exercise or instruction.”<sup>322</sup> The state court declined—and has continued to decline—to interpret the Washington religion clause in a way that recognizes the distinction between direct and indirect aid that the U.S. Supreme Court has made a central feature of Federal Religion Clause jurisprudence.<sup>323</sup>

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<sup>321</sup> *Witters*, 474 U.S. at 486–87 (Establishment Clause does not prohibit indirect state financial support for religious education).

<sup>322</sup> *Witters*, 771 P.2d 1119, 1121 (indirect aid for religious education is prohibited under state constitution).

<sup>323</sup> In *State ex rel. Gallwey v. Grimm*, 48 P.3d 274 (Wash. 2002), the Washington Supreme Court upheld against constitutional challenge the state’s Equal Opportunity Grant (EOG) program, which provided scholarship aid for higher education. The Court based its decision on the explicit—and broad—restrictions on religious use of EOG funds. The restrictions provide that the student:

- (a) Will not be required by the institution to be involved in any educational program that includes any religious worship, exercise, or instruction;
- (b) Will not, for the duration of the academic year during which the grant is disbursed, be enrolled for any classes that include any religious worship, exercise, or instruction, or be pursuing a degree in religion, seminarian, or theological academic studies; and further,

The Court's analysis in *Davey* is certainly open to serious question. The opinion brushes off *Rosenberger* with little explanation, and the Court treats the burden imposed on theology students as a mere inconvenience, though it is sufficiently onerous that no one follows the "two schools, two majors" path that the Court describes as the way to keep the scholarship without surrendering entirely the right to study devotional theology.<sup>324</sup> Moreover, the Court's significant emphasis on the absence of anti-religious animus seems wholly untethered to precedent. Animus appears as a consideration in other cases, including *Lukumi*,<sup>325</sup> but never with the weight apparently assigned to it in *Davey*.<sup>326</sup> The Court also declined to take seriously the possibility that the anti-religious hostility latent in Washington's Blaine Amendment<sup>327</sup>

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(c) Is precluded by the institution, for the duration of the award period during which the grant is disbursed, from enrolling in any classes determined by the institution to include any religious worship, exercise, or instruction, or from pursuing a degree in religion, seminarian, or theological academic studies.

*Id.* at 453 (citing administrative rules promulgated by the Washington Higher Education Coordinating Board).

<sup>324</sup> Berg & Laycock, *supra* note 313, at 236–39; Laycock, *supra* note 263, at 178–81.

<sup>325</sup> 508 U.S. 520, 533–36, 540–42 (1993) (analyzing legislators' hostility to Santerian worship); *but see id.* at 558–59 (Scalia, J., concurring) (rejecting inquiry into the subjective motivations of legislators).

<sup>326</sup> *See supra* notes 322–25 and accompanying text.

<sup>327</sup> Blaine Amendments are state constitutional provisions, enacted by a significant number of states during the late nineteenth century, that were designed to prohibit public funds

might have tainted as well the state's separate Religion Clause, on which the state relied.<sup>328</sup> In short, the Court failed to provide a thorough and fully persuasive account of how its decision fits with existing free exercise law.

That failure, however, can be remedied—or at least mitigated—by restating the central issue of *Locke v. Davey* as one of Religion Clause federalism. Should it matter that *Locke* involves the exercise of state, rather than federal, discretion over the financing of religious study? Close inspection of *Locke*'s central premises concerning government discretion suggests that the federal-state distinction indeed does matter. The Court depicts the decision as one that involves the interplay of the two components of the Religion Clauses in the First Amendment.<sup>329</sup> By refusing to strike down the scholarship restriction on free exercise grounds,

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from being used for the support of Roman Catholic schools. *See supra* Part II. Several amici in *Locke v. Davey*, and a number of legal scholars, have argued that these state Blaine Amendments are constitutionally vulnerable because anti-Catholic animus was the primary motivation for the provisions' adoption. Berg, *supra* note 288, at 167–68; Duncan, *supra* note 153; Green, *supra* note 265, at 918–20; Laycock, *supra* note 263, at 187–90; Lupu & Tuttle, *supra* note 153, at 967–70 (assessing strength of claim that animus in original enactment should render such provisions constitutionally vulnerable).

<sup>328</sup> *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004) (finding that the challenged state constitutional provision was not a Blaine Amendment, and thus any evidence of discriminatory motives traceable to such amendments did not taint the separate state constitutional provision that required the exclusion of theology majors from the scholarship program).

<sup>329</sup> *Locke*, 540 U.S. at 719.

the Court sees itself as preserving the “play in the joints” between the Establishment and Free Exercise Clauses. Such “play,” emphatically proclaimed by the majority opinion, exacerbates critics’ concern that federal Religion Clause doctrine now tolerates, and perhaps even celebrates, a marked increase in government’s discretionary power over religion.<sup>330</sup>

But the majority opinion is not focused on the interaction between the First Amendment’s Religion Clauses with respect to a federal program. Consider how the Court would have analyzed a similar restriction on the use of federal scholarship funds, if one were to be included in the federal G.I. Bill program.<sup>331</sup> While the restriction would have been created by an appropriate legislative or administrative process, its claim for respect is categorically different than that of Washington’s scholarship restriction. The hypothetical federal restriction would not be grounded in the text or jurisprudence of the Establishment Clause. Nor would it reflect a consistent tradition of Separationist policy on the funding of religious higher

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<sup>330</sup> Berg & Laycock, *supra* note 313, at 240–41; Laycock, *supra* note 263, at 195–200. The best defense of this discretion appears in Merriam, *supra* note 12. Merriam argues that states should have considerable discretion to advance the values protected in each Religion Clause, so long as the states respect the values in the competing Clause. Merriam does not specifically address the distinction between state and federal religion policy.

<sup>331</sup> 38 U.S.C. 3451 et. seq. (2006). For general information on the G.I. Bill, including a statement of eligible educational expenses, see the Department of Veterans Affairs website, <http://www.gibill.va.gov>.



education. Indeed, in the sixty years since its introduction, there has never been such a condition imposed on the use of aid under the G.I. Bill.<sup>332</sup>

By contrast, the Washington program's exclusion of theology students derives immediately from the text of the state constitution, which bans all aid for religious instruction.<sup>333</sup> Moreover, Washington courts have crafted a coherent body of state constitutional law on religion, including a liberty right that is significantly stronger than the post-*Smith* law of the First Amendment's Free Exercise Clause,<sup>334</sup> and a more restrictive limit on government aid for religion than is required by the First Amendment's Establishment Clause.<sup>335</sup>

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<sup>332</sup> *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 782 n.38 (1973) (G.I. Bill education benefits, if used for religious education, do not violate Establishment Clause). Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV.L. REV. 1229, 1239–40 (2003) (on G.I. Bill and funding of religious education).

<sup>333</sup> WASH. CONST. art. I, § 11 (“No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.”).

<sup>334</sup> *See, e.g., Munns v. Martin*, 930 P.2d 318 (Wash. 1997) (church exempted from historic preservation restrictions, where such restrictions burden religious exercise).

<sup>335</sup> *See supra* notes 318–21 and accompanying text (discussing *Witters v. Comm'n for the Blind*).

The difference between the Washington program and the hypothetical G.I. Bill provision involves more than just the passage of time or the wording of the relevant constitutional texts. It involves the core question presented in *Locke*: how should courts assess the governmental interest in Separationist regulations? The interest in the federal program could not have risen above the level of current policy preference, one without support in Establishment Clause jurisprudence.<sup>336</sup> Washington's interest—despite Justice Scalia's deprecation—is not mere solicitude for the hyper-sensitive consciences of taxpayers who do not want their funds used to pay for others' religion. Indeed, the taxpayer-conscience rationale is the least persuasive argument available to defenders of Separationism.

Instead, Washington's interest resides in the core purposes of disestablishment.<sup>337</sup> A strong policy of disestablishment suggests stringent limitation of state subsidy for, control over, or engagement with distinctively religious activities. Such a limit reflects concern that

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<sup>336</sup> The lack of support for such a position is not a recent development. *Witters* was a unanimous decision of the Court, even at a time in which the Court's Establishment Clause law remained near the high-water mark of Separationism. Compare *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (indirect public financial support of religious higher education does not violate Establishment Clause), with *Aguilar v. Felton*, 473 U.S. 402 (1985) (provision of secular, remedial education services to parochial schools by government-paid special education teachers violates Establishment Clause), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>337</sup> See generally Lupu & Tuttle, *supra* note 60 (discussing constitutional justifications for the distinctive treatment of religion).

the state will prefer or discriminate against particular faiths. The limitation also reflects a constitutional worry that entanglement of government with religion will result in government use of religion for political purposes, or incentives to religious entities to pursue governmental power for religious purposes. Although these concerns are also reflected in federal Establishment Clause jurisprudence, Washington has committed to a considerably greater degree of prophylaxis in order to effectuate these disestablishment interests.

Federal Establishment Clause law, as we have discussed above, has weakened this strategy of prophylaxis by, among other methods, distinguishing between direct and indirect aid for religion.<sup>338</sup> The former requires separation, which is achieved through a variety of safeguards against diversion. The latter does not require separation if the aid is provided through a mechanism that effectively detaches government from the beneficiary's decision to use the voucher at a religious provider. However, as reflected in the dissenting opinions in *Zelman v. Simmons-Harris*, permitting such indirect government assistance to religious schools risks potentially dangerous interaction between the state and those entities.<sup>339</sup> Sensitive to such dangers, Washington has rejected the distinction between direct and indirect aid to religious

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<sup>338</sup> See *supra* notes 320–22 and accompanying text.

<sup>339</sup> Each of the three dissents in *Zelman* articulate somewhat different objections to the majority's approval of indirect aid for religious activity. *Zelman v. Simmons-Harris*, 536 U.S. 639, 684 (2002) (Stevens, J., dissenting); *id.* at 686 (Souter, J., dissenting); *id.* at 717 (Breyer, J., dissenting).

activity.<sup>340</sup> It has chosen to draw the line based on the religious character of the activity that public funds ultimately support.

In the scholarship program, Washington implements its disestablishment interest by excluding aid for the only major that is unquestionably religious – devotional theology. Its religious character is a function of both the subject matter of the course of study and the institutional focus of the vocational training. Unlike other courses of study, participation in the study of devotional theology (as it seems to be understood by the parties in *Davey*)<sup>341</sup> depends on the student’s confessional acceptance of the doctrine studied, and commitment to serve the religious community. State refusal to pay for such study manifests the state’s concern to maximize the distance between its financial responsibilities and preparation for religious ministry, a context which is thick with constitutional perils and concerns.<sup>342</sup>

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<sup>340</sup> *Witters v. Comm’n for the Blind*, 771 P.2d 1119, 1122 (1989).

<sup>341</sup> In his separate dissenting opinion, Justice Thomas questioned whether the restriction on theology majors is limited to the study of devotional theology. *Locke v. Davey*, 540 U.S. 712, 734–35 (2004) (Thomas, J., dissenting).

<sup>342</sup> The legally and constitutionally distinctive status of religious leaders appears in a number of contexts. The most significant of these distinctions is the so-called “ministerial exception” to civil rights laws and other employee-protecting rules. *See, e.g.*, *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455 (D.C. Cir. 1996); *Gellington v. Christian Methodist Episcopal Church*, 203 F.3d 1299 (11th Cir. 2000). Under this exception, priests and other religious leaders are barred from filing employment discrimination claims against their religious employers. The exception arose from concerns that adjudication of such claims

## 2. *Analysis of the NCLTGP*

The Court's decision in *Locke v. Davey* should not be interpreted as a categorical bar to free exercise claims against discriminatory funding schemes.<sup>343</sup> The best account of *Locke* rests on the nexus between Washington's longstanding disestablishment policy and the religious character of the prohibited aid. Challenges to other religious funding restrictions must focus on this nexus. Seen in that light, the North Carolina program stands on constitutionally unstable ground.

First, in significant contrast to Washington State, North Carolina has neither text nor tradition to support a distinctive and robust state religion policy. Indeed, North Carolina's

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inevitably requires courts to determine the quality of the minister's performance in his or her professional role, and civil courts are not competent to make such determinations. Lupu & Tuttle, *supra* note 60, at 41–42, 90–92 (2002) (discussing the ministerial exception).

Moreover, many states have explicit constitutional prohibitions on financial support for religious ministers. See ALA. CONST. art. I, § 3; ARK. CONST. art. II, § 4; DEL. CONST. art. I, § 1; IND. CONST. art. I, § 4; IOWA CONST. art. I, § 3; MD. DECLARATION OF RIGHTS art. XXXVI; MO. CONST. art. I, § 7; N.J. CONST. art. I, para. 3; OKLA. CONST. art. II, § 5; R.I. CONST. art. I, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; VT. CONST. art. III; VA. CONST. art. I, § 16; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18.

<sup>343</sup> See Berg & Laycock, *supra* note 313, at 246–52 (on the implications of *Locke v. Davey* for other programs of indirect public aid for religious entities).

Constitution has no explicit provision that bars state aid for religion.<sup>344</sup> North Carolina—like many states—has through judicial interpretation linked its state religion clause to the U.S. Supreme Court’s interpretation of the First Amendment’s Religion Clauses.<sup>345</sup> The scholarship restriction itself seems to have been adopted on the assumption that it conformed to a mandatory national policy of Separationism.<sup>346</sup> Thus, in this context, North Carolina has little

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<sup>344</sup> Article I, § 13 of the North Carolina Constitution provides that: “All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.” Section 19 of the same article prohibits religion-based discrimination. No provision in the North Carolina Constitution addresses public funding of religion.

<sup>345</sup> Over the past three decades, the Supreme Court of North Carolina has consistently linked the state constitution’s religion provisions with the U.S. Supreme Court’s Religion Clause jurisprudence. *See In re Appeal of Springmoor, Inc.*, 498 S.E.2d 177 (N.C. 1998). Quoting from the state constitution’s religion provisions, the North Carolina Supreme Court wrote: “we have recognized that while the religion clauses of the state and federal Constitutions are not identical, they secure similar rights and demand the same neutrality on the part of the State. Thus, we may utilize Establishment Clause jurisprudence to examine legislation for ‘aspects of religious partiality’ prohibited by both constitutions.” *Id.* at 180 (quoting *Heritage Village Church & Missionary Fellowship, Inc. v. North Carolina*, 263 S.E.2d 726, 730 (1980)).

<sup>346</sup> In *Smith v. Bd. of Governors*, 429 F. Supp. 871 (W.D.N.C. 1977), a federal district court rejected a constitutional challenge to several North Carolina tuition assistance programs,

basis for a claim to respect as an independent, norm-creating authority in matters of religion policy.

Second, the weakness in North Carolina's claim is exacerbated by the breadth of its discriminatory restriction on scholarships. Unlike the Washington program, the NCLTGP also excludes a class of religious schools, even though the schools meet the program's accreditation requirement.<sup>347</sup> As in *Locke*, the degree of permitted prophylaxis stands as the central legal issue.<sup>348</sup> The class of schools excluded under the NCLTGP have an explicit and deep religious identity.<sup>349</sup> The schools have as their primary purpose the preparation of candidates for

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including the NCLTGP, alleging that use of state-funded scholarships at church-affiliated colleges violated the Establishment Clause. The court ruled that the North Carolina programs were constitutional because they barred use of the scholarships at "pervasively sectarian" schools, and also prohibited the use of funds by "any student enrolled in a program designed as preparation for a religious vocation." *Id.* at 873, 879. The court's discussion of the tuition programs strongly suggests that the religious use restrictions were imposed to satisfy constitutional concerns arising from the U.S. Supreme Court's Establishment Clause jurisprudence, rather than any independent state religion policy.

<sup>347</sup> N.C. GEN. STAT. § 116–22(1)(c) (2005) (definition of eligible institution does not include "a seminary, Bible school, Bible college or similar religious institution.").

<sup>348</sup> *See supra* p. 103.

<sup>349</sup> N.C. GEN. STAT. § 116–22(1)(c) (2006) (describing the institutions that qualify for the tuition grant program codified in N.C. GEN. STAT. § 116–21.2 (2006)).

professional ministries (defined broadly),<sup>350</sup> and enrollment at such schools invariably depends on students' profession of religious faith.<sup>351</sup> But the exclusion is significantly broader than Washington's. Whereas a study of devotional theology is directly and strongly linked in content and purpose with the proclamation of religion, enrollment at a thickly religious institution is likely to have more attenuated links. Students attend for the religious character of the school environment, even if they desire to pursue—and some do pursue—vocations that do not involve pastoral ministry.<sup>352</sup>

Taken together, these two features of North Carolina law and the NCLTGP suggest that North Carolina's restrictions merit significantly less judicial deference than the Washington State program upheld in *Locke*. North Carolina lacks a long-standing, independent, and

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<sup>350</sup> See e.g., Roanoke Bible College Information Sheet, available at <http://www.roanokebible.edu/aboutus/index.htm> (mission includes both professional and volunteer service to the church).

<sup>351</sup> See, e.g., Application form for Southeastern College at Wake Forest, a school excluded from participation in the NCLTGP, available at [http://www.secwf.edu/downloads/pdf/College\\_APPLICATION.pdf](http://www.secwf.edu/downloads/pdf/College_APPLICATION.pdf).

<sup>352</sup> See, e.g., Degree Requirements from Course Catalog of Roanoke Bible College, available at <http://www.roanokebible.edu/academics/catalog/programsofstudy.htm> (a school ineligible to receive funding under the NCLTGP, but now permitted to receive scholarship funding for its students under the recently enacted CPEI program, providing State grants to aid eligible students attending certain private institutions of higher education (N.C. GEN. STAT. § 116-43.5)).



consistent policy of Separationism, and the prophylaxis that the program uses to advance a Separationist policy excludes a broader class of beneficiaries than Washington's restriction. The question, no doubt, would be much closer if North Carolina shared Washington's text and tradition of Separationism, or if North Carolina imposed only the restriction at issue in *Locke*. But the combination of a broad exclusion and a thin basis in state law for separation should make North Carolina's program vulnerable to challenge under the Free Exercise Clause. North Carolina can show neither a sufficient interest in the exclusion, nor that the exclusion is appropriately tailored to achieve the state's interest. Under such circumstances, we do not believe that *Locke*'s deference to independent, state-based Separationism is warranted.

Of course, there may be cases that fall between Washington's robust policy of state-level Separationism, and North Carolina's unreflective adherence to a policy that may once have been required by federal law, but is no longer. We will not try to draw a precise line here about the necessary pedigree of state discretion in such matters; perhaps a common law tradition of Separationism within the state, even if not required by explicit state constitutional text, would suffice to support such a broad exclusion. Our primary argument is simply that states must be reflective and consistent about Separationism if they seek respite from federal constitutional claims that they are arbitrarily discriminating against religion. State constitutional history may provide a defense to such claims, as may longstanding political or cultural arrangements that buttress the state's decision to generically disfavor religious entities in the distribution of largesse. It cannot, however, be a sufficient reason to do so that federal law once demanded it.

## B. State Promotion of Religious Truth – McCreary County Revisited

Our second scenario involves explicit state promotion of a particular and highly focused set of theological premises. Imagine that in the wake of the Supreme Court's decisions in June, 2005, regarding government sponsorship of displays of the Ten Commandments, officials in a Kentucky county place a large documentary copy of the Ten Commandments in the foyer of the County Courthouse. The officials boldly assert that the Decalogue represents a set of divinely inspired truths, and constitutes evidence of God's role in the development of American law. Would full disincorporation of the Establishment Clause, or disincorporation of the Clause's periphery, affect the outcome of any litigation that might ensue?

### *1. Current Law.*

In *McCreary County v. ACLU of Kentucky*,<sup>353</sup> a 5-4 majority of the Supreme Court invalidated a display of the Ten Commandments in a County Courthouse. Throughout the litigation, the case revolved around disputed evidence concerning the display's purpose. After the complaint had been filed, and on advice of counsel, County officials modified the display several times, each time seeking to tie the display to a concern for the history and development of American law.<sup>354</sup> The final version of the display included several documents—including the Declaration of Independence and the lyrics to the Star Spangled Banner—that linked a monotheistic God to the history of American political and legal norms.<sup>355</sup>

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<sup>353</sup> 125 S. Ct. 2722 (2005).

<sup>354</sup> *Id.* at 2777–78.

<sup>355</sup> *Id.*

Despite this attempt to frame the Ten Commandments against a backdrop of American jurisprudence, Justice Souter’s opinion for the Supreme Court invalidated the display.<sup>356</sup> The opinion asserted the continued validity of the constitutional requirement that government action have a secular purpose,<sup>357</sup> and insisted that such a secular purpose be nonpretextual and predominant in every government action. In the face of considerable evidence that the display had been created to advance an explicitly Judeo-Christian conception of both legal duty and religious obligation,<sup>358</sup> the *McCreary* majority concluded that the County’s attempt to demonstrate secularity of purpose by widening the display’s historical frame was a sham.<sup>359</sup> Accordingly, the Court affirmed the order of the U.S. Court of Appeals for the Sixth Circuit, and upheld a preliminary injunction against the display, on the ground that it violated the Establishment Clause.<sup>360</sup>

In light of the narrative represented by *McCreary*, the display and accompanying official explanation that we hypothesize in this second problem cannot possibly withstand Establishment Clause review. This display is limited to the Ten Commandments,

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<sup>356</sup> *Id.* at 2745.

<sup>357</sup> *Id.* at 2732–33.

<sup>358</sup> *Id.* at 2729.

<sup>359</sup> *Id.* at 2736. For a recent and significant application of the principles and methodology displayed in *McCreary*, see *Staley v. Harris County*, U.S. Court of Appeals for the Fifth Circuit (No. 04-20667, Aug. 15, 2006) (holding that a monument that includes an open Bible, on display in the County Civil Courthouse, violates the Establishment Clause).

<sup>360</sup> *Id.* at 2745.

unaccompanied by any documents pertaining to American law or any narrative about the secular value of those Commandments. And the display is explicitly accompanied by an official declaration of the Commandments' divine authorship and claim to religious truth. Our hypothetical case is thus considerably more extreme than *McCreary* in the exclusive religiosity of the County's purpose.<sup>361</sup> Accordingly, the outcome under current law is beyond any dispute.<sup>362</sup>

## 2. *The Establishment Clause Disincorporated*

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<sup>361</sup> In this regard, the hypothetical closely resembles the conflict presented by the conduct of Alabama's Chief Judge, Roy Moore, who installed a large, three-dimensional display of the Ten Commandments in the courthouse of the Alabama Supreme Court, and then defended the display with explicit invocation of his view of the divinely inspired and created content of the Ten Commandments. *Glassroth v. Moore*, 335 F.3d 1282 (11th Cir. 2003).

<sup>362</sup> The exclusive religiosity of county purpose in the hypothetical places the case cleanly outside of the reasoning in *Van Orden v. Perry*, 125 S. Ct. 2854 (2005), in which the Supreme Court was willing to uphold the display of a monument displaying the Ten Commandments on the grounds of the Texas State House, because of 1) the display's connection to a campaign to achieve the secular goal of combating juvenile delinquency, and 2) the contextual setting of the monument among others commemorating secular aspects of Texas history. The *Van Orden* opinion is a plurality only, and the decisive opinion was authored by Justice Breyer (who had joined with Justice Souter in *McCreary County*) on the explicit grounds that the Texas display had adequate secular justification and, in addition, had not generated religious divisiveness in the community. *Id.* at 2870–71.

In a world in which the Establishment Clause did not apply to the states, the question raised by our reimagined version of the McCreary County displays is just as simple as the question of its validity under current law. To be sure, we do not have an opinion from any Supreme Court Justice that addresses this possibility. But Justice Thomas, the only Justice who has openly called for disincorporation, joined Justice Scalia’s dissenting opinion, in which Scalia argues that the Establishment Clause must be construed in light of a longstanding American tradition of acknowledging and invoking the protection of the monotheistic God of Judaism, Christianity, and Islam.<sup>363</sup> The dissent treats a public posting of the Ten Commandments—despite their having a religious content far more detailed and particularistic than the typical invocation of God in a Presidential Inaugural Address—as consistent with that tradition.<sup>364</sup>

The *McCreary* dissent thus takes the tack of arguing for a narrow Establishment Clause (applicable to both states and nation with equal force) rather than the erasure of the Clause as applied to the states. And, on the surface, it seems quite obvious that such an erasure could only create more room, rather than less, for state or local expression of religious sentiment. So it is impossible to conceive that Justice Thomas, who joined in this dissent, would reach any different result if the Establishment Clause no longer applied to the states. Nothing in the

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<sup>363</sup> *McCreary*, 125 S.Ct. at 2748 (Scalia, J., dissenting). For a strenuous criticism of Justice Scalia’s opinion as constitutionally insensitive to those who do not share majoritarian monotheism, see Colby, *supra* note 195.

<sup>364</sup> *McCreary*, 125 S. Ct. at 2748–52.

dissent suggests that a more explicitly religious narrative, concerning the same document, from public officials would change the outcome.

Nevertheless, the *McCreary* dissent also contains some provocative hints for those, like us, who try to imagine the shape of a constitutionally reconfigured world in which the Free Exercise Clause, but not the Establishment Clause, applies to the states. First, the dissent emphasizes its view that the Ten Commandments, like the invocations of God by Presidents in various addresses to the American people, is “nondenominational” as well as monotheistic.<sup>365</sup> That is, according to the dissenters, the Commandments “are not so closely associated with a single religious belief that their display can reasonably be understood as preferring one religious sect over another.”<sup>366</sup> Second, the dissent emphasizes that those who do not believe in monotheism in general, or the Ten Commandments in particular, nevertheless retain their full rights to contrary religious belief (or none at all) under the Free Exercise Clause.<sup>367</sup>

Recall that Justice Thomas also emphasizes full Free Exercise rights, and the constitutional impermissibility of sect preferences, in his vision of a regime in which the Establishment Clause does not apply to the states.<sup>368</sup> Moreover, both Justice Thomas and Justice Scalia dissented in *Locke v. Davey*, so we know that they take the idea of religious

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<sup>365</sup> *Id.* at 2753, 2753 n.3.

<sup>366</sup> *Id.* at 2762 (associating the Commandments with recognition as “divinely given” within Judaism, Christianity, and Islam).

<sup>367</sup> *Id.* at 2761–63.

<sup>368</sup> *Cutter v. Wilkinson*, 125 S. Ct. 2113, 2126 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring).

preferences—in that case, negative preferences about the distribution of state funds—seriously indeed. Might it be that a County display that manifested an indisputable sectarian preference—for example, a Latin cross permanently mounted on City Hall<sup>369</sup>—would violate their view of the Free Exercise Clause? This outcome does not comport with conventional models of Free Exercise reasoning, but there are seeds of such a result in the opinions joined or written by Justice Thomas over the past few years. If a Justice who believes that the states are unencumbered by the Establishment Clause also believes that the Free Exercise Clause constrains the state (or its subdivisions) from adopting an explicitly and narrowly Christian (or otherwise sectarian) identity, it may be the case that disincorporation of the Establishment Clause would not produce results nearly so radical as some may fear. Moreover, Justice Thomas’s insistence that compulsory taxation to support a church likewise offends general norms of religious liberty,<sup>370</sup> and not merely norms of nonestablishment, similarly suggests the possibility of a surprisingly circumscribed set of consequences for the disincorporation project. In the hands of Justice Thomas, disincorporation may thus do little more than complete the pre-existing Scalia-Thomas project of narrowing Establishment Clause principles.

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<sup>369</sup> *Cf. County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring in part and dissenting in part). Justice Kennedy defended the constitutionality of a government-supported display of a Christmas crèche and a Chanukah menorah, but added that “the Clause forbids a city to permit the permanent erection of a large Latin cross on the roof of city hall.” *Id.* at 661.

<sup>370</sup> *Newdow*, 542 U.S. at 52–53 (Thomas, J., concurring).

We recognize fully that in the hands of others, full disincorporation might lead to a recognition that states or localities may take on a sharply religious identity, Christian or otherwise. But because the scope of change worked by disincorporation will always turn on a Justice's perception of the scope of the Free Exercise Clause, disincorporation alone is not a move that can effectively dictate a complete set of answers about the potential for a state to manifest and enforce a religious identity.

### *3. McCreary County and the Establishment Clause Core.*

This portion of our analysis is inevitably the most speculative. However, if one accepts our view of the core of the Establishment Clause,<sup>371</sup> the outcome may be surprisingly predictable. As we articulated the proposition at the beginning of Part IV, the core meaning of the Clause is that government may not purposely promote a particular conception of theological truth. When cities display Christmas crèches or Chanukah menorahs as seasonal acknowledgments of holidays celebrated among their residents, there is fair room for argument that the government is not advancing the truth of propositions about the divinity of Jesus or the divine miracle of the Chanukah lights. Rather, it is acknowledging important dates in the local and national culture, akin to Martin Luther King, Jr.'s Birthday, Memorial Day, Labor Day, or Independence Day.

By contrast, our hypothetical display in McCreary County has all of the marks of a core violation. It is permanent, not seasonal. It is an official statement by the political community, declared by its agents to represent religious truth, and it cannot be attributed only to the personal views of a government officer. Its content is textual, rather than symbolic, and its text

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<sup>371</sup> See *supra* pp. 76–77.



proclaims a set of laws and commands that public officials have claimed flow directly from God. Moreover, those commands are not limited to norms designed to cover legal and ethical obligations among persons, such as prohibitions on killing, stealing, or lying, typical of secular moral codes. Rather, the obligations include commitments to recognize a monotheistic God; to reject additional and rival deities; to honor and sanctify the Sabbath as a day of worship; and to use the name of God only in particular and respectful ways. The latter commands are all matters of purely theological obligation.

When a government body proclaims the religious truth of such a document, its claim of religious identity is not just a vague reference to Providence or the concept of monotheism. Instead, its claim is to a highly particularistic conception of divine law, not shared in its entirety by many Jews, Christians, or Muslims, and rejected in its monotheistic particulars by many others. We think such a proclamation offends the core purposes of nonestablishment as they would have been understood as applying to the nation in 1791, and even more certainly as they would have been understood as applying to the states in 1868 and thereafter.<sup>372</sup>

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<sup>372</sup> Chief Justice Rehnquist, and Justices Scalia, Thomas, and Kennedy did not perceive the *McCreary County* display as a matter of sectarian and religiously-partial commitment. But even they conceded that the “Establishment Clause would prohibit . . . governmental endorsement of a particular version of the Decalogue as authoritative.” *McCreary*, 125 S. Ct. at 2753 n.4 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Kennedy, J.). So they too saw the core of the Establishment Clause as encompassing a constitutional prohibition on an indisputably sectarian pronouncement by government. In large part, the disagreement between

Of course, in the cases that may arise under such a core principle, the public officials are not likely to declare their religious concerns so openly and blatantly. The officials in the real *McCreary County* did not do so, and the next group will be advised accordingly. But that just means that the mode of adjudication employed in the *McCreary County* opinion—distinguishing true purpose from pretext or sham, in light of all the relevant evidence—would continue to be relevant to adjudication under an Establishment Clause stripped to its core.<sup>373</sup>

Over time, a core-periphery distinction in Establishment Clause adjudication would take on doctrinal turns of its own, and such developments are impossible to predict. We can imagine the *School Prayer Cases*<sup>374</sup> being overruled under a core-periphery distinction, on the

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dissent and majority in *McCreary County* is whether the ecumenical version of the Commandments posted in the courthouse should properly be characterized as sectarian.

<sup>373</sup> This analysis suggests that cases arising from the incorporation of religion-based theories of the origin of the human species—most recently reincarnated as Intelligent Design—into public school curriculums would probably come out the same way even if the states only had to obey the core of the Establishment Clause. *See Edwards v. Aguillard*, 482 U.S. 578 (1987) (legislation requiring balanced treatment of Darwinian evolution and Creation Science held unconstitutional on grounds of impermissible religious purpose; *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D.P.A. 2005) (holding the mention of Intelligent Design as an alternative theory to Darwinism impermissible as a religiously-motivated expression violating the Establishment Clause).

<sup>374</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

theory that the Free Exercise Clause requires only opt-out rights, rather than a prohibition on state sponsorship of generic, monotheistic prayer. We can also foresee, however, the possibility that the principle of those cases might survive with respect to school-sponsored prayer that manifest a highly sectarian character.<sup>375</sup> As with the Ten Commandments, the line between the generically permissible and the impermissibly sectarian will be hard to draw. Moving the general locus of constitutional boundaries does necessarily make them any easier to locate in the close cases.

But a core-periphery distinction would make some cases no longer close. As our final problem—the California Missions—reveals, such a distinction might produce considerably more clarity than current Establishment Clause norms with respect to matters of government expenditure, as distinguished from government religious expression. Sacrificing a bit of Establishment Clause control over the states—not the nation—for an increase in constitutional predictability, consistency, and national understanding of the central meaning of the Religion Clauses may turn down the din in at least one forum of our culture wars, and represents an exchange worth considering.<sup>376</sup>

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<sup>375</sup> *Cf. Hinrichs v. Bosma*, 400 F. Supp. 2d 1103 (S.D. Ind. 2005) (enjoining the use of explicitly Christian prayers to open sessions of the State House of Representatives). *Hinrichs* was decided against the backdrop of *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer, in the Judeo-Christian tradition, by a chaplain paid by the state).

<sup>376</sup> The ongoing controversy over the prominent cross included in the Mt. Soledad National War Memorial in San Diego presents intriguing variations on the themes of this article. After lengthy litigation, a federal district court ordered the removal of the cross based

*C. State Financial Support for Religious Institutions.*

Our third scenario involves state expenditure for cultural and historic preservation, in a context that generates significant incidental benefits for the enterprise of religious worship. The State of California wants to preserve its Spanish heritage, represented in part by religious missions.<sup>377</sup> No private party is able and willing to maintain these missions. The State

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on the California State Constitution. *Paulson v. City of San Diego*, 294 F.3d 1124 (9<sup>th</sup> Cir. 2002). The U.S. Supreme Court stayed the district court's injunction, in part because Congress was then contemplating an enactment that would transfer the monument's title to the United States. *San Diegans for the Mt. Soledad Nat'l War Mem. V. Paulson*, 2006 U.S. LEXIS 5241 (July 7, 2006). In early August, 2006, President Bush signed H.R. 5683, which took the Memorial by eminent domain and transferred title to it to the United States.

The statute moots the state constitutional question presented in the case, but leaves open the federal Establishment Clause issue of federal ownership and maintenance of the Memorial. The Mt. Soledad controversy thus had some aspects of *Locke v. Davey*, because the relevant state constitutional law was more Separationist than federal law, but it now presents a pure *McCreary* question. In a world of partial disincorporation, a state – unlike California – with a weak Separationist tradition would have greater authority than the U.S. to display such a monument.

<sup>377</sup> See generally California Missions Foundation, <http://www.missionsofcalifornia.org/index.html> (non-religious entity that raises and administers funds for the preservation of missions).

proposes to do so, operating the missions as active houses of worship as well as tourist attractions. In what follows, we describe such a program in detail, and analyze it under current law, as well as under a regime of both full and partial disincorporation of the Establishment Clause.

*1. The Program*

Under the plan,<sup>379</sup> the state's parks department is entering into long-term leaseholds with each of the missions.<sup>380</sup> Each mission is home to an actively worshipping Roman Catholic

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<sup>379</sup> The plan to publicly finance the historic preservation of the California missions is not purely hypothetical. *See* California Missions Preservation Act, Pub. L. No. 108-420, 118 Stat. 2372 (2004). This Federal Act provided \$10 million to the California Missions Foundation for preservation work, contingent on the Foundation matching the federal funds. Immediately upon enactment, Americans United for the Separation of Church and State ("Americans United") filed suit in federal district court to block the expenditure of public funds for the missions. *See* *Doe v. Norton*, No. 1:04CV02089 RJL (D.D.C.). Americans United voluntarily dismissed the suit in mid-2005 because no funds had yet been appropriated. *See* Americans United, [http://www.au.org/site/PageServer?pagename=legal\\_litigation](http://www.au.org/site/PageServer?pagename=legal_litigation).

<sup>380</sup> Our choice of California as the setting for this hypothetical case matches its architectural and religious history, but is in deep tension with California's constitutional law, which equals that of Washington State in its consistent Separationism. Indeed, in February of 2006, the Attorney General of California issued an opinion letter on the use of public funds for historic preservation of "buildings with religious affiliation." *See supra* note 303. Citing the "no aid" and "no religious preference" provisions of the California Constitution, the opinion letter strongly suggests that any state financing of buildings owned and used by "pervasively sectarian organizations" will be deemed unconstitutional. The opinion offers the following conclusion: "it would appear difficult to find that a grant would not have a direct effect of advancing religion if the proposed project concerns a building that is owned by a religious organization or has a current religious affiliation." Memorandum from Matthew Rodriguez,

congregation.<sup>381</sup> The leases provide that the state will take possession of the church properties, restore them following standard practices for historic preservation, and maintain them during the leasehold term. The state's preservation work encompasses both the exterior and interior of the missions. All architecturally significant—and religiously significant—features of the worship space will be restored, including altarpieces, baptismal fonts, and several elaborately carved crucifixes. The congregations will be forbidden to make any changes to the interior or exterior of the missions during the leasehold term.

The state has leased for each congregation a building that the congregation will use for its administrative offices, religious school classrooms, and fellowship hall. Other than when the renovation work occurs, the congregation will continue to hold its worship services in the mission church. The missions will be open to the general public except during times of scheduled worship. At times of worship, the park service will post a sign that notifies visitors that a worship service is in progress, and says that visitors are welcome to attend the service, but should maintain respectful silence. Tours of the missions will be conducted by state park employees.

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Office of the Attorney General of California, to Diane Matsuda, California Cultural and Historical Endowment (Feb. 23, 2006) (on file with the authors).

<sup>381</sup> The lease arrangement detailed here is based on the agreement between the National Park Service and Ebenezer Baptist Church of Atlanta, Georgia. Rev. Martin Luther King, Jr. was co-pastor of Ebenezer Baptist during his leadership of the Civil Rights Movement. We describe that agreement in Lupu & Tuttle, *Historic Preservation Grants*, *supra* note 176, at 1164–65 (2002).

## 2. *Current Law*

In the spring of 2003, the National Park Service (NPS) announced a major shift in the federal government’s policies for the historic preservation of religious properties.<sup>382</sup> Before that time—and contrary to specific language in the statute that authorized the historic preservation program<sup>383</sup>—NPS had consistently declined to fund “historic properties and collections associated with an active religious organization (for example, restoration of an historic church that is still actively used as a church).”<sup>384</sup> NPS based this position on several

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<sup>382</sup> News Release, Dept. of the Interior, Nat’l Park Serv., Old North Foundation Awarded \$317,000 Grant Under Save America's Treasures Program (May 27, 2003), *available at* <http://www.doi.gov/news/030529.htm>.

<sup>383</sup> Since at least the early 1980s, the Department of the Interior had consistently declined to provide funding for the preservation of historic properties in active religious use. *See* Lupu & Tuttle, *Historic Preservation Grants*, *supra* note 176, at 1160–61. Congress amended the National Historic Preservation Act in 1992 to authorize preservation grants to religious properties: “Grants may be made under this subsection for the preservation, stabilization, restoration, or rehabilitation of religious properties listed in the National Register of Historic Places, provided that the purpose of the grant is secular, does not promote religion, and seeks to protect those qualities that are historically significant.” 16 U.S.C. § 470(e)(4) (2005).

<sup>384</sup> Save America’s Treasures, FY 2002 Historic Preservation Fund Grant Application Form (on file with authors). *See also* Letter from Robert Stanton, Director, National Park Service, to Senator Slade Gorton (Feb. 4, 2000) (explaining that because of the Justice



legal opinions from the Department of Justice, Office of Legal Counsel (OLC). Prior to 2003, the most recent opinion concluded that the Supreme Court’s Establishment Clause jurisprudence, despite significant changes since the 1970s, would continue to forbid direct government aid for houses of worship.<sup>385</sup>

The earlier OLC opinion relied on two Supreme Court decisions, *Tilton v. Richardson*<sup>386</sup> and *Committee for Public Education and Religious Liberty v. Nyquist*.<sup>387</sup> In *Tilton*, the Court affirmed a program that provided public aid for construction of buildings owned by religiously-affiliated colleges, subject to a prohibition on use of the government-financed structures for worship or religious instruction.<sup>388</sup> The *Tilton* Court, however, invalidated a provision in the program that removed the secular use restriction after twenty years. Such a restriction, the Court said, must extend for the full useful life of the structure;

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Department’s interpretation of the Establishment Clause, the Park Service cannot spend the \$151,000 earmarked in Public Law 106-113, under the Save America’s Treasures program, for the historic preservation of St. Nicholas Greek Orthodox Cathedral in Tarpon Springs, Florida) (on file with the authors).

<sup>385</sup> Memorandum for John Leshy, Solicitor, United States Department of Interior, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice (Oct. 31, 1995), *available at* <http://www.usdoj.gov/olc/doi.24.htm> (hereinafter cited as “1995 OLC Opinion”).

<sup>386</sup> 403 U.S. 672 (1971).

<sup>387</sup> 413 U.S. 756 (1973).

<sup>388</sup> *Tilton*, 403 U.S. at 679–82.

failure to do so would provide an impermissible benefit to religion.<sup>389</sup> In *Nyquist*, the Court struck down a program of “maintenance and repair” grants for religious schools.<sup>390</sup> Both cases stand for the stark proposition that the government may not directly subsidize religious activities. Although a different part of the *Nyquist* decision was significantly limited in *Zelman v. Simmons-Harris*,<sup>391</sup> the Court has never repudiated *Tilton* or the part of *Nyquist* that bears on government support for the physical structures in which religious activities take place.

In April 2003, however, the OLC issued a new opinion letter that reversed the federal government’s position and explicitly authorized historic preservation grants to houses of worship.<sup>392</sup> The 2003 letter makes several arguments to support this change in federal policy.

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<sup>389</sup> *Id.* at 682–84.

<sup>390</sup> *Nyquist*, 413 U.S. at 774–80.

<sup>391</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639, 661–63 (2002).

<sup>392</sup> Memorandum from M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel, to the Solicitor, Department of the Interior (Apr. 30, 2003), available at <http://www.usdoj.gov/olc/OldNorthChurch.htm> (hereinafter cited as “2003 OLC opinion”). We analyze the 2003 OLC opinion in Ira C. Lupu & Robert Tuttle, *New Federal Policies on Grants for Disaster Relief or Historic Preservation at Houses of Worship and Places of Religious Instruction*, ROUNDTABLE ON RELIGION AND SOC. WELFARE POL’Y (2003), [http://www.religionandsocialpolicy.org/legal/legal\\_update.cfm?id=16](http://www.religionandsocialpolicy.org/legal/legal_update.cfm?id=16). See also Christen Sproule, *Federal Funding for the Preservation of Religious Historic Places: Old North Church and the New Establishment Clause*, 3 GEO. J.L. & PUB. POL’Y 151 (2005).

First, it argues that government grants for historic preservation are available to a broad class of beneficiaries, and are awarded based on religion-neutral criteria. Only properties that have been recognized by historic preservation experts as historically, architecturally, or culturally significant are eligible to receive public funding. Thus, aid is not intended to support religious instruction or worship, even if such support could be a side effect of public aid for the historic structure. This feature of the historic preservation program contrasts sharply with the “maintenance and repair” grants held unconstitutional in *Nyquist*. In *Nyquist*, religious schools were the intended beneficiaries of the public aid program, and the vast majority of aid would be used to support the schools’ intertwined religious and educational mission.<sup>393</sup>

Second, the OLC opinion emphasizes that secular and technical criteria govern all decisions within the process, from the decision on eligible properties to the decision on the standards for restoration and preservation. If granted preservation funds, the owners of religious properties have no discretion on how the funding is used. Such decisions are vested with the funding authority, acting under religion-neutral rules. Moreover, the funding authority imposes strict accounting rules on the grant, offering significant protection against diversion of funds from the preservation project.<sup>394</sup>

Finally, the OLC opinion questions whether *Tilton* and *Nyquist* remain good law, given shifts in the Court’s Establishment Clause jurisprudence over the past decade.<sup>395</sup> Citing the “no endorsement” principle, adopted in a very different context by the Court in *County of*

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<sup>393</sup> *Nyquist*, 413 U.S. at 773–74.

<sup>394</sup> 2003 OLC opinion, *supra* note 388, at Part II.E.

<sup>395</sup> *Id.* at Part III.

*Allegheny v. American Civil Liberties Union*,<sup>396</sup> the OLC opinion argues that no reasonable observer would attribute to the government the religious worship conducted in a church restored, for credible reasons of historic preservation, with government aid.<sup>397</sup> Moreover, the opinion argues, the National Park Service’s exclusion of religious entities from the historic preservation program is vulnerable to challenge under the Speech Clause.<sup>398</sup> Discussing *Rosenberger* and its predecessors, the opinion suggests that the exclusion rule impermissibly discriminates against religious entities.<sup>399</sup> In short, according to the OLC, the First Amendment may require, not just permit, the government to allow religious institutions to participate in historic preservation programs and to do so on terms equal to non-religious institutions.<sup>400</sup>

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<sup>396</sup> 492 U.S. 573 (1989).

<sup>397</sup> 2003 OLC Opinion, *supra* note 388, at Part II.D.

<sup>398</sup> *Id.* at Part III. The 2003 OLC opinion reasons that “insofar as the basis for treating a structure owned by a religious institution differently than a structure owned by a nonreligious institution is the religious *instruction* that takes place within its four walls—its *speech* and *viewpoint*—such discrimination directly implicates the Free Speech Clause.” *Id.* (citing *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828–31 (1995)) (emphasis in original).

<sup>399</sup> *Id.*

<sup>400</sup> 2003 OLC Opinion, *supra* note 388, at Part III. In 2002, the OLC issued an opinion letter approving the use of Federal Emergency Management Agency funds for rebuilding of religious structures after disaster. This opinion also placed significant emphasis on the

The OLC opinion adopts a reading of the Establishment Clause that, in its strongest form, is held by only two of the justices sitting during the 2004-2005 Term.<sup>401</sup> Only Justices Scalia and Thomas would accept all three arguments for the constitutionality of historic preservation grants to houses of worship.<sup>402</sup>

As an analysis of current Establishment Clause law, the 2003 OLC opinion has two important weaknesses. First, in the wake of *Locke v. Davey*, the opinion relies on an interpretation of *Rosenberger* that is no longer tenable. *Locke*, as we discussed above, limits the reach of *Rosenberger* and its predecessors to state-created fora designed for expressive purposes and open to all speakers.<sup>403</sup> On its facts, *Locke* might have been a close case, but public funding for historic preservation has none of the marks of such a forum.

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government's obligation not to discriminate against religious entities in funding decisions. *See* Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, Memorandum from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel, For the General Counsel, Federal Emergency Management Agency, Sept. 25, 2002, available at <http://www.usdoj.gov/olc/FEMAAssistance.htm>.

<sup>401</sup> We cannot predict how Chief Justice Roberts or Justice Alito would view the questions addressed in the OLC opinion.

<sup>402</sup> Only Justices Scalia and Thomas dissented in *Locke v. Davey*, in which the Court rejected the expansive interpretation of the *Rosenberger* decision. *Locke v. Davey*, 540 U.S. 712, 726 (2004) (Scalia, J., dissenting).

<sup>403</sup> *See supra* notes 278–81 and accompanying text.

Second, the OLC opinion fails to address Justice O'Connor's concurring opinion in *Mitchell v. Helms*, which represents the controlling Establishment Clause law for programs of direct aid to religion.<sup>404</sup> The plurality opinion in *Mitchell* focused on the same two elements stressed by the OLC opinion: the secular purpose advanced by the funding program and the religion-neutral criteria necessary for participation in the program.<sup>405</sup> Justice O'Connor's concurrence, however, adds a third requirement. Under that opinion, government aid may not be diverted for religious use, so a constitutionally valid program must have appropriate safeguards to prevent such diversion.<sup>406</sup>

The prohibition on the use of public funds for religious activities is a crucial element of current law, especially with respect to the preservation of religious structures.<sup>407</sup> If a state pays for the restoration of a house of worship, the benefit directly conferred on the worship life of that community can hardly be questioned. In *Mitchell*, Justice O'Connor placed great emphasis on the challenged program's requirement that government-funded benefits must be

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<sup>404</sup> *Mitchell v. Helms*, 530 U.S. 793, 840–41 (2000) (O'Connor, J., concurring). We provide a detailed analysis of Justice O'Connor's *Mitchell* concurrence in Lupu & Tuttle, *Faith-Based Initiative*, *supra* note 176, at 75–102.

<sup>405</sup> *Mitchell*, 530 U.S. at 809–10 (plurality opinion).

<sup>406</sup> *Id.* at 839–41, 857–60 (O'Connor, J., concurring) (discussing prohibition on diversion of public funds for religious use).

<sup>407</sup> See generally Lupu & Tuttle, *Historic Preservation Grants*, *supra* note 176.

used only for secular activities.<sup>408</sup> In a public program that finances the restoration of houses of worship, the segregation of secular and religious activities is difficult to envision, and is likely to be even more difficult to implement. Moreover, a set of stringent procedures for segregating the religious and secular benefits, necessary to provide adequate safeguards against diversion, might well result in excessive entanglement of government officials and the religious community.<sup>409</sup> Although the entanglement prong of *Lemon*<sup>410</sup> seems to have receded in significance, the public exercise of control over worship space is precisely the kind of interaction that the concept was intended to address.<sup>411</sup>

Our hypothetical California missions program would be very unlikely to survive scrutiny under the Establishment Clause standard set forth in Justice O'Connor's *Mitchell*

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<sup>408</sup> *Mitchell*, 530 U.S. at 838–840. Justice O'Connor wrote: “[a]t least two of the decisions at the heart of today's case demonstrate that we have long been concerned that secular government aid not be diverted to the advancement of religion.” *Id.* at 840 (rejecting plurality's claim that diversion of public aid for religious uses does not violate the Establishment Clause).

<sup>409</sup> Lupu & Tuttle, *The State of the Law 2003*, *supra* note 289, at 32–36 (discussing entanglement problems with public financing of religious structures).

<sup>410</sup> *Lemon v. Kurtzman*, 411 U.S. 192 (1973).

<sup>411</sup> *Agostini v. Felton*, 521 U.S. 203, 232–34 (1997) (discussing narrowed understanding of “excessive entanglement” in Establishment Clause jurisprudence). *See also Mitchell*, 530 U.S. at 807–08 (plurality opinion) (stating that entanglement analysis is not an independent factor in Establishment Clause analysis, but one aspect of the “effects” analysis).

concurrence, and might not survive even under the 2003 OLC opinion’s interpretation of the law. With respect to the OLC opinion’s interpretation, the missions project could be vulnerable if the type of benefit extended to the missions is not also available to non-religious historical sites. Government financing of historic preservation is different than ordinary programs that extend general benefits to a broad public because eligibility for preservation aid depends on the particularized features of each site.<sup>412</sup> Under the federal preservation program, the eligibility criteria are religion-neutral, although the practice of congressional “earmarks” for specific historic properties may raise grant-specific concerns about preferential aid for

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<sup>412</sup> 1995 OLC opinion, *supra* note 381, at Section 2. The 1995 OLC opinion compares historic preservation grants with programs of general benefit (such as school tuition, tax exemptions, or access to public fora):

Historic preservation grants . . . do not appear to be generally available in the same sense. Properties, including religious properties, qualify for initial listing on the Historic Register only if they meet subjective criteria pertaining to architectural and artistic distinction and historical importance. Once listed, properties are eligible to compete for grants based on additional measures of “project worthiness” established by the states. Participation by pervasively sectarian institutions in this kind of competitive grant program raises special concerns, absent in cases like *Rosenberger*, *Pinette*, and *Mergens*, that application of necessarily subjective criteria may require or reflect governmental judgments about the relative value of religious enterprises.

*Id.* (citations omitted).



religious entities.<sup>413</sup> In our hypothetical, it is possible that California’s overarching mechanism for financing historic preservation might benefit a broad array of historic properties, both religious and secular, in which case the standards of the OLC opinion would be met. If, however, the mechanism does not offer the same type or extent of aid to non-religious sites and to similarly significant religious structures used by other faith communities, then the state’s aid for the missions would have little chance of surviving constitutional challenge.

From the perspective of the *Mitchell* concurrence, the missions program has two additional and significant constitutional defects. First, the missions program directly supports the religious activities of the affected parishes. This support takes two forms. First, the public is funding the restoration and preservation of the congregations’ worship space, but the congregations retain the reversionary right at the end of the state’s leasehold, when they will

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<sup>413</sup> Roughly half of the annual congressional appropriation for the “Save America’s Treasures” program (the primary federal funding mechanism for preservation) comes in the form of earmarks—that is, designation of funds by a member of Congress for a specific project. *See* Memorandum from Wilmer, Cutler, & Pickering to The National Trust for Historic Preservation and Partners for Sacred Places (Nov. 20, 2002) (available in ALI-ABA Course of Study Materials: Historic Preservation Law 879 (course SJ053, 2004)) (describing earmark funding and constraints on use of earmarked funds). *See also* Preservation Action, <http://www.preservationaction.org/06lobbying/sat.htm> (discussing structure of funding).

resume full and exclusive ownership of the space and furnishings restored with state aid.<sup>414</sup> Second, the congregations continue to use the mission churches during the state’s leasehold. Such use confers a direct and distinct benefit on the congregations and their worship life. Because the state is paying for the improvement of the churches, defenders of the program cannot possibly claim that it segregates the secular from the religious uses and pays only for the former. Without such segregation, public funding of religious entities necessarily falls short of the standard set by the *Mitchell* concurrence.

The second constitutional defect relates to public perception. A reasonable observer would likely conclude from the missions program that the state has endorsed the religious beliefs and practices of the mission congregations. The “endorsement” standard does not ordinarily provide a useful means for addressing programs of public financial aid for religion.<sup>415</sup> In comparison to typical public benefit programs, however, the missions

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<sup>414</sup> Under the Court’s rule in *Tilton v. Richardson*, the restrictions on religious use of property must continue for the useful life of the government-financed structure. 403 U.S. 672, 682–83 (1971).

<sup>415</sup> Justice O’Connor integrated the “endorsement” standard into her Establishment Clause analysis of programs that involve religious messages by government as well as those that involve government funding of religion. *Agostini v. Felton*, 521 U.S. 203, 234–35 (1997) (endorsement test as component of test for assessing whether government is reasonably deemed responsible for proclamation of a particular religious message). *See also Mitchell v. Helms*, 530 U.S. 793, 842–43 (2000) (O’Connor, J., concurring). The endorsement analysis focuses on the message that a reasonable observer would think that the government is sending;

restoration project involves a much closer relationship between the state and a religious community. The missions program permits the congregations to continue to hold regular worship services in the churches while simultaneously presenting the missions as public sites through guided tours and other symbols of state sponsorship. This commingling of public interest in the facility's historic character and the religious practice of worship might well lead a reasonable observer—even one familiar with the history of the missions—to conclude that the government endorses the religious messages that are conveyed through and in the mission churches.<sup>416</sup>

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as such, the standard fits perfectly where the constitutional issue involves communicative acts by the government (such as prayer in public schools or the display of religious symbols on public property). The analysis does not normally offer helpful insight when public financing is at issue. In the missions case, however, the public financing is inextricably bound up with the government's daily operation of the religious sites, and so a reasonable observer's understanding of that operation is constitutionally relevant.

<sup>416</sup> We recognize, but do not address here, the interesting question of whether the state could avoid or mitigate the Establishment Clause violation by the posting of a disclaimer, to the effect that the state supports the facility only for the purpose of historic preservation, and does not support or promote the particular worship practices that take place in the facility. *See* *Capitol Square Review Bd. v. Pipette*, 515 U.S. 753, 817–18 (1995) (Ginsburg, J., dissenting) (questioning whether a disclaimer of public sponsorship of a private religious message on public property could solve an Establishment Clause problem of impermissible endorsement).

Given these two defects, the California missions program would stand very little chance of surviving the constitutional scrutiny that is required by the *Mitchell* concurrence. Of course, Justice O'Connor has retired from the Court, and it is far from clear that either of the two new members of the Court, Chief Justice Roberts and Justice Alito, would share her concerns about the segregation of religious and secular benefits or the message of endorsement perceived by a reasonable observer. Until the Roberts Court decides a case involving direct aid to religion, however, the *Mitchell* concurrence remains a relevant source for the controlling Establishment Clause standard. And unless the Court lays to rest the principles announced in *Tilton* and *Nyquist*, any government program that supports the physical structures used in worship or religious instruction is constitutionally barred.

### *3. The Establishment Clause Disincorporated*

The California missions project differs in one crucial respect from the hypothetical Ten Commandments display discussed above.<sup>417</sup> Unlike the Ten Commandments display, the missions cannot plausibly be described as “nondenominational.” Except as part of a scheme in which all relevantly similar houses of worship are eligible for assistance, public aid for the missions singles out one faith, Roman Catholicism, for special benefit. We thus confront the question left open in our discussion of the Ten Commandments display: does the disincorporation of the Establishment Clause free states to embrace and promote a particular religious identity and the particular forms of worship associated with that faith?

Because of his vigorous conception of Free Exercise rights, Justice Thomas’s vision of disincorporation appears to constrain —perhaps quite significantly— the freedom of states to

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<sup>417</sup> See *supra* notes 369-73 and accompanying text.

adopt particular religious identities.<sup>418</sup> Justice Thomas joined Justice Scalia’s dissent in *Locke v. Davey*, which suggests that he would treat any religion-based denial of equal access to public aid as a violation of the Free Exercise Clause.<sup>419</sup> One would expect that under that view, a program that supports only historic Roman Catholic parishes, and not those of other traditions, would be no more constitutional than a program that funds only non-religious sites. Moreover, Justice Thomas seems to hold that compulsory taxation for the support of a church violates the Free Exercise rights of taxpayers.<sup>420</sup> Taken together, these two Free Exercise constraints eliminate the central mark of an established religion: government financial support for a specific religion.

To think through a more potent version of disincorporation, we start with the most basic legal question. At the adoption of both the First and the Fourteenth Amendments, did the states retain the authority to promote religion—or to promote a particular faith—based on a political decision to embrace that faith as the community’s official version of religious truth?

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<sup>418</sup> See *infra* notes 416-18 and accompanying text (discussing Justice Thomas’s understanding of Free Exercise constraints on government sponsorship of religion).

<sup>419</sup> *Locke v. Davey*, 540 U.S. 712, 726–27 (2004) (Scalia, J., dissenting). Justice Scalia wrote: “when the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax.” *Id.*

<sup>420</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 52 (2004) (Thomas, J., concurring) (discussing coercive taxation for the support of religion).

If the states retained that authority, then we proceed to an analysis that is different in kind from current Religion Clause jurisprudence. If much of that authority has been surrendered over time, then our analysis will be different only in degree from current law and will comport with the core purposes of nonestablishment identified above.<sup>421</sup>

Begin with the more extreme view that states retained full, complete, and truth-declaring jurisdiction over religion at the time of adoption of both Amendments. Such jurisdiction would include, at minimum, the power of states to recognize one faith as the political community's preferred religion.<sup>422</sup> Official recognition would likely offer to a preferred faith a significant set of privileges, including public funding of ministries and houses of worship, the right to place religious displays in public buildings, the right to appoint chaplains for public institutions, observation of the tradition's religious holidays, and exclusive reference to that tradition's religious beliefs in public proclamations.

Under this assumption, constraints on these privileges would arise only from the Free Exercise Clause and take shape in two distinct kinds of claims. The first—and strongest—claim involves the state's duty of religious toleration. Government may not coerce anyone to adopt or abandon religious beliefs, so all aspects of the religious preference require scrutiny to ensure that they do not impose undue religious pressure on anyone. Note that the standard is

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<sup>421</sup> *See supra* pp. 76–77.

<sup>422</sup> Justice Thomas, in his opinion in *Elk Grove v. Newdow*, provides a list of attributes of a religious establishment. 542 U.S. at 52–53 (Thomas, J., concurring).

“undue pressure”;<sup>423</sup> a state with an established church will inevitably impose subtle pressures on citizens to join the preferred faith. A requirement of elimination of all such pressure would erase all, or nearly all, of the privileges enjoyed by the established faith, and undo the assumption on which the radical version of disincorporation is based.

The duty of religious toleration precludes the state from directing citizens to attend worship, accept the doctrines of the preferred faith, or participate in any religious activity that might occur in a public setting. The duty requires the state to provide dissenters and their children the opportunity to opt out of religious lessons and worship in public schools, although it does not preclude the state from incorporating religious instruction into the public school

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<sup>423</sup> The test of undue burdens arising from the Court’s abortion decisions provides a useful analogy. The abortion right does not require government neutrality about the practice. Instead, the government is free to advance its own preferred policy of opposition to abortion, and implementation of that policy certainly brings pressure to bear on women who might be contemplating an abortion. The right to an abortion entails only that the government is forbidden to impose significant obstacles to the exercise of the underlying right. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 877 (1992) (opinion of Justices O’Connor, Kennedy, and Souter) (state may not impose on abortion choice an undue burden, defined as “substantial obstacle” to exercise of the right); *Bellotti v. Baird*, 428 U.S. 132, 147 (1976). Professor Laycock provides a very useful analysis of the standard of undue burden in abortion law, in comparison with the law of free exercise. Laycock, *supra* note 263, at 176–77. *See also Newdow*, 542 U.S. at 48–49 (Thomas, J., concurring) (criticizing as overly protective the Court’s definition of coercion in Establishment Clause cases).

curriculum. The duty of toleration also forbids the state to condition delivery of public benefits and services—from food stamps to zoning approval—on membership in the preferred faith.

Under a regime in which the Establishment Clause was disincorporated, while the Free Exercise Clause's restrictions were maintained, the California missions project would easily survive judicial scrutiny. Without the constraints of the Establishment Clause, California would be free to prefer one, several, or many religions in its funding decisions. Likewise, disincorporation would remove any concerns about official endorsement of Catholicism through the shared operation of the missions. Indeed, the state could choose to subsidize the entire operating costs of the churches' ministries. The only constraints on the mission project would derive from the Free Exercise rights of potential visitors to the missions. Regardless of its endorsement of the faith worshiped in the missions, the state probably could not require visitors to participate in religious activities as a condition of viewing the historic sites. Under full disincorporation, because the state could finance ordinary, non-historical, parishes, unconditional public access would not be a necessary feature of that aid. Nevertheless, a requirement of participation in worship as a condition of entering other sites, such as a state capitol building or museum that is publicly financed and historically or culturally significant, would violate the Free Exercise Clause.

It deserves significant emphasis that no sitting justice would accept this robust account of disincorporation. The consequences are jarring and reveal the extent to which at least central principles of nonestablishment reach deep into our political culture. We return now to a vision of moderate disestablishment in which those central principles remain.



#### 4. *The Missions and the Establishment Clause Core*

As we explained at the beginning of Part IV and in the previous hypothetical, the Establishment Clause, at its core, forbids government to act with the purpose of promoting a particular vision of religious truth.<sup>425</sup> The question here is whether the missions project reflects such a governmental purpose. At first glance, this case appears much easier to resolve than the display of the Ten Commandments. Although the mission churches are certainly denominational, the government's objective for the project seems to be the preservation of these historically and culturally significant sites.<sup>426</sup> Seen in that light, any support for the religious community comes as an incidental and indirect benefit generated by the government's primary—and secular—intention.

This first glance does not exhaust the core Establishment Clause analysis, however, because the state may always cloak impermissible purposes in the language of secular goals. Protection of the core nonestablishment values requires an inquiry into the *bona fides* of the stated public objectives. This inquiry is not aimed at discerning the subjective intentions of the officials who support or administer a particular program. We are agnostic about whether such

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<sup>425</sup> See *supra* pp. 76–77 .

<sup>426</sup> The California Missions Preservation Act provides an explicit statement of secular purpose: “consistent with section 101(e)(4) of the National Historic Preservation Act (16 U.S.C. 470a(e)(4)), the Secretary shall ensure that the purpose of any grant or other financial assistance provided by the Secretary to the Foundation under this Act—(A) is secular; (B) does not promote religion; and (C) seeks to protect those qualities that are historically significant.” Pub. L. No. 108-420, 118 Stat. 2372 (2004).

subjective intentions can be known and the extent to which they should be relevant.<sup>427</sup> Instead, under an approach that preserves the core of the Establishment Clause, the appropriate question is whether the California missions program can be seen as sufficiently divorced from the religious activity it helps to house.

One crucial set of considerations attaches to the question of the religion-neutrality of the overall program of historic preservation. If the program is not religion-neutral, or even denomination-neutral—that is, if the state truly has singled out Roman Catholic missions and no other historical site for preservation—the religious preference reflected in such a policy would give rise to a deep suspicion that the state is seeking to subsidize the practice of Roman Catholic worship, or at least the version of that worship associated with the Hispanic tradition in the Catholic Church.<sup>428</sup> Just as sect-specific, coercive regulation suggests impermissible

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<sup>427</sup> We thus associate ourselves with the objective approach to unconstitutional purposes reflected in Justice Stevens' concurring opinion in *Washington v. Davis*, 426 U.S. 229, 253 (1976) (“Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor . . . [a] law conscripting clerics should not be invalidated because an atheist voted for it.”).

<sup>428</sup> The entire Court in *Mitchell* treated religion-neutrality as a necessary requirement for the constitutionality of any aid program that materially benefits religion. *Mitchell v. Helms*, 530 U.S. 793, 809–14 (2000) (plurality); *id.* at 837–39 (O’Connor, J., concurring); *id.* at 877–80 (Souter, J., dissenting).

animus toward the sect rather than the secular consequences of its practices,<sup>429</sup> sect-specific aid similarly gives rise to an inference—perhaps irrebuttable—that the state is seeking to promote and advance the sect’s religious practice. Maintenance of core Establishment Clause values would forbid any such preference.<sup>430</sup>

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<sup>429</sup> *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 532–36 (1993) (noting that the disputed ordinance specifically targeted Santerian religious practice).

<sup>430</sup> In *Wallace v. Jaffree*, even Justice Rehnquist, who dissented, accepts the prohibition on preferential aid for a particular religion as a core component of nonestablishment. He wrote: “it would seem from this evidence that the Establishment Clause of the First Amendment had acquired a well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations.” 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting). This strenuous constitutional principle against sectarian preference, which we expect would remain a core principle of nonestablishment, would leave intact the Court’s decision in *Bd. of Educ. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994), which invalidated the New York State legislature’s creation of a special public school district in the Village of Kiryas Joel. The Village was occupied entirely by members of the Satmar Hasidic sect of Orthodox Jews. The sect—and Orthodox Jews generally—is a distinct minority in New York State, and no one contended or believed that the state was endorsing Orthodox Judaism as an official state religion. Nevertheless, other minority sects were extremely unlikely to receive this sort of solicitous treatment from the state government. Thus, the Supreme Court quite appropriately held that the Establishment Clause forbade any sort of sectarian favoritism, whether the grounds for such favoritism were religious or political. We

What if the aid to the California Missions were indeed part of a religion-neutral historic preservation scheme? This would not save it under *Tilton* or *Nyquist*, but we doubt that those holdings, even if they survive against the federal government, would remain part of the core of the Establishment Clause, applicable to the states. Conditions of formal neutrality would go a long way toward showing that the California missions project satisfies the standard of facial secularity. The state supports the program in order to preserve its own history, in which religion played a significant role. On this state-favoring assumption, such support is not materially different from the aid provided to secular sites of equal historic significance, and the sites are selected through a process that does not intentionally privilege religious properties over the non-religious, or Roman Catholic churches over those of other faiths.

Even on this structural assumption of religion-neutrality in the program, however, the California Missions program reveals one lingering set of questions. The operation of the Missions project coincides fully with the religious goal of preserving the churches while maintaining their vitality as worshiping communities. So the question might still be asked whether the state has gone beyond its concerns for historic preservation and made extra (and arguably unconstitutional) efforts to prop up an impoverished worship community.

One could reasonably ask, for example, why the congregations retained the privilege of regularly worshiping in the mission once the churches were leased to the state. If the state did so because the missions made such access a condition of the leasehold, then the state might

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do not believe that partial incorporation of the Establishment Clause would alter the outcome in *Kiryas Joel*. For defense of the Court's decision, see Ira C. Lupu, *Uncovering the Village of Kiryas Joel*, 96 COLUM. L. REV. 104 (1996).

well have chosen a constitutionally reasonable means. If, however, the state affirmatively encourages the congregations' continued use of the facilities, promotes the congregations' continued use of the churches as an integral part of the sites' attraction for visitors, and thereby incurs material costs (perhaps for security or cleaning of the church), then the arguable overbreadth of the state's policy is open to further scrutiny. Overbreadth—creating considerably more support for worship activity than the state's historic preservation purposes can readily justify—suggests that the state has crossed the boundary between the core and the periphery of the Establishment Clause, and may have to pull back to the boundary line.

We most certainly do not mean to suggest that the state has a constitutional obligation to be inhospitable to the mission congregations. Nor do we mean to suggest that the state is required to exclude the congregations altogether from the state-financed space, solely because any material cost to the state—and material benefit to the congregation—advances religion. Those who might challenge the Mission project would be required to show that the state had done *significantly* more in the advancement of the faith than the state's historical purpose required. So long as the religious use permitted by the state seems to involve a small proportion of the week, leaving the missions fully accessible to the public for the balance, the state remains free to include the missions in a religion-neutral program of historic preservation.

We hasten to add that carrying the burden of proving this sort of overbreadth—in which the claim is that the state has done so much more than is necessary to accomplish its secular purposes that it appears to have crossed over into supporting religious activities for their own sake—would ordinarily be very difficult. It would make no sense to liberate the states from the periphery of the Establishment Clause and then set up doctrines that would require them to

justify every move into that periphery. By placing this burden on those who might challenge a government program, this approach to separating the core from the periphery of the Establishment Clause would, we believe, add considerably to predictability in most cases involving government aid to religion. Rather than searching for the hypothetical (and non-existent) “reasonable observer,” or assessing the adequacy of program safeguards against diversion to religious use in cases (like California missions) in which religious use and secular purpose are inextricably intertwined, this suggested methodology for preserving the Establishment Clause core provides the state with ample room to include religious grantees in the state’s religion-neutral programs. The preferred approach requires only that the state not support religious entities in ways that significantly outrun the legitimate state purposes that justify the support.<sup>431</sup>

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<sup>431</sup> For example, a substance-abuse treatment facility, directly funded by the government, would not be prohibited from engaging in the intensely religious personal transformation of its beneficiaries, so long as the beneficiaries’ participation was voluntary, and the government included secular providers of substance abuse treatment in the program as a whole. Establishment Clause scrutiny would only focus on the government’s selection and monitoring of the program. In terms of program selection, the government would be vulnerable if it ignored altogether non-religious options for substance-abuse treatment or consistently preferred less-effective religious options over their more effective secular counterparts. In terms of monitoring, the government would be constitutionally vulnerable if it ignored evidence that the funded provider was failing to serve the secular purpose of the grant.

## **Conclusion**

As we hope we have demonstrated in this piece, the story of federalism and faith turns out to be immensely rich and complex. Of course, one can re-simplify it by insisting upon a return to the jurisprudence of Justice Brennan and its dominance on the Court in the 1970s. On that constitutional narrative, liberal constitutional and political theory reign triumphant. The Separationist norms of the Establishment Clause and the religion-privileging standards of the Free Exercise Clause maintain their potency. Within that theory and its vision of the secular state, no gap can possibly exist between the version of those norms that applies to the states and the version that limits the national government. The question of the relationship between faith and federalism is not a question at all.

This article has attempted to unpack, however, a more-than-plausible counter-story. It begins with America's English colonies, each of which had a relatively distinct religious identity. As each of those colonies became a state, some version of that religious identity remained intact. Mindful of that identity and their concern to protect it against federal interference, these states may have extracted some promise in the First Amendment that the new federal government—which was declaring in the Establishment Clause that it would not have a religious identity of its own, to rival those of the states—would respect the religion policies of the states in the Union. Without question, parts of that story evolved through the first two-thirds of the nineteenth century, and the Fourteenth Amendment expanded and consolidated some hard-to-specify degree of federal control over state religion policy. Whether that control should encompass the concept of full symmetry of federal constitutional

restrictions on the nation and states is a question that judges and scholars have now quite intriguingly reopened.

We hope that our consideration of the three problems discussed in this Part IV has shed some light on that reopened question. Even if Justice Thomas, Professor Amar, and others are right about the non-application of the Establishment Clause to the states, we (and they) strongly believe that the rest of the Constitution—with its concern for interstate mobility, equal protection, freedom of speech, and freedom from religious coercion, among other constitutional values—continues to apply to the states with full force. A constitutional revision of the relationship between faith and federalism does not mean states are free to do just whatever they want on the subject of religion policy. But if concerns of federalism are to drive Religion Clause principles, perhaps they should do so directly, rather than indirectly by the engine of dilution of First Amendment principles as applied to the nation and states alike. Here, as elsewhere, the tail(s) should not be permitted to wag the dog.<sup>432</sup>

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<sup>432</sup> In a different context, Justice Harlan warned about this in *Williams v. Florida*, 399 U.S. 117 (1970) (Harlan, J., concurring). In characterizing the Court’s willingness to approve, as consistent with the Sixth and Fourteenth Amendments, a six-person jury in a criminal case in state court, Justice Harlan complained about the dilution of the federal jury-trial guarantee that the decision created. *Id.* He asked whether we might “expect repeat performances when this Court is called upon to give definition and meaning to other federal guarantees that have been ‘incorporated.’” *Id.* at 130.