

NOTES

Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism

RUPAL M. DOSHI*

“[A] page of history is worth a volume of logic.”
—Justice Holmes¹

TABLE OF CONTENTS

INTRODUCTION	460
A NOTE ON “PLURALISM”	464
I. THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE	465
A. FRAMERS OF THE FIRST AMENDMENT	465
B. FRAMERS OF THE FOURTEENTH AMENDMENT	468
II. CREATING AND PERPETUATING THE ESTABLISHMENT CLAUSE MYTH ..	470
A. THE BIRTH OF STRICT SEPARATIONISM	470
B. FOSTERING A “RELIGION OF SECULARISM”	472
C. A FAILED ATTEMPT TO RECONCILE THE JURISPRUDENCE	475
III. NONINCORPORATION AS A SOLUTION TO THE ANTIESTABLISHMENT “MESS”	480
A. JUSTICE THOMAS’S CALL FOR NONINCORPORATION	480
B. NONINCORPORATION IN THEORY	482
1. Free Exercise	483
2. Equal Protection	485

* Georgetown Law, J.D. 2009; George Washington University, B.A. 2005. © 2010, Rupal M. Doshi. I would like to thank Professor Michael Seidman for his insights and feedback and for giving me the opportunity to explore new constitutional theories in Seminar. I am deeply indebted to Professor Jeffrey Shulman, whose invaluable advice and encouragement made this Note possible. I would also like to thank the editorial staff of *The Georgetown Law Journal*, especially Shirin Hakimzadeh, for their time and efforts in improving this Note. Finally, as always, thank you to my family for their continued love and support.

1. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

3. Free Speech	488
4. State Constitutions	489
C. NONINCORPORATION IN ACTION	491
1. Public Religious Displays	491
2. Religion in Education	494
3. Public Prayer	495
4. Tax Exemptions and Subsidies for Religious Uses	498
CONCLUSION	502

INTRODUCTION

The ten words that make up what is known as the “Establishment Clause” of the First Amendment have led to the application of no fewer than ten—often contradictory—standards.² The results are no more consistent than the tests. The Supreme Court of the United States recently prohibited the display of the Ten Commandments on a courthouse wall in Kentucky;³ on the same day, the Court upheld the placement of a Ten Commandments monument on the Texas State Capitol grounds.⁴ The Court also weighed in on the constitutionality of school vouchers. In *Zelman v. Simmons-Harris*, the Court held a state program providing tuition aid for students in financial need and in attendance at religious schools did not violate antiestablishment principles.⁵ But the denial of state aid for students pursuing post-secondary education in theology was upheld in *Locke v. Davey*.⁶ The Court decided taxpayer monies may contribute to the transportation of students to religious schools,⁷ but the state may not pay for transportation to field trips from the religious school.⁸ In *Mueller v. Allen*, the Court

2. Justices on the Court have embraced at least the following standards to resolving establishment disputes: (1) three-pronged *Lemon* test, *Lemon v. Kurtzman*, 403 U.S. 602 (1971); (2) Justice O’Connor’s endorsement test, *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring); (3) Justice Kennedy’s broad coercion test, *Lee v. Weisman*, 505 U.S. 577 (1992); (4) Justice Scalia’s narrow coercion analysis, *id.* at 640 (Scalia, J., dissenting); (5) formal neutrality with respect to religion, *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002); (6) substantive neutrality with respect to sectarian goals, *Mitchell v. Helms*, 530 U.S. 793, 837–40 (2000) (O’Connor, J., concurring in the judgment); (7) Justice Thomas’s disincorporation theory, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50–51 (2004) (Thomas, J., concurring in the judgment); (8) Chief Justice Rehnquist’s nonpreferentialism, *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, C.J., dissenting); (9) historical practice test, *Marsh v. Chambers*, 463 U.S. 783, 801–02 (1983) (Brennan, J., dissenting); (10) equality approach, *Fowler v. Rhode Island*, 345 U.S. 67 (1953).

3. *See* *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844 (2005).

4. *See* *Van Orden v. Perry*, 545 U.S. 677 (2005).

5. *See* 536 U.S. 639 (2002).

6. *See* 540 U.S. 712 (2004).

7. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

8. *See* *Wolman v. Walter*, 433 U.S. 229 (1977), *rev’d on other grounds*, *Mitchell v. Helms*, 530 U.S. 793 (2000).

upheld a state statute permitting taxpayers to deduct from their tax bill a portion of expenses incurred in educating their children in private schools.⁹ Just ten years earlier, the Court in *Community for Public Education and Religious Liberty v. Nyquist* struck down a state statute that provided for tuition tax “credits.”¹⁰ And four years after ruling that a public school is prohibited from giving religious instruction,¹¹ the Court decided that a public school may release students during the day for religious instruction elsewhere.¹²

The application of the Establishment Clause tests has created widespread confusion among lower courts¹³ and produced a great deal of legal scholarship.¹⁴ In short, as one scholar neatly put it, the Establishment Clause doctrine “is a mess.”¹⁵ All of this confusion is both caused by, and obscures, the Court’s most basic Establishment Clause mistake: making the restriction applicable to the states.¹⁶ The Clause prohibits the *United States Congress* from making any law “respecting an establishment of religion.”¹⁷ Why, then, do all of the cases above concern state action? The original purpose of the Clause was to protect state religious establishments from federal interference.¹⁸ By restricting state power over dealing with religion at a state and local level, the Supreme Court has worked an inversion of the framework created by our Founders.

The addition of Chief Justice John Roberts, Justice Samuel Alito, and Justice Sonia Sotomayor to the Supreme Court bench is likely to result in a paradigm shift in First Amendment Establishment Clause doctrine. The Roberts Court’s first major establishment decision, *Hein v. Freedom from Religion Foundation, Inc.*, denied taxpayer standing to challenge the Executive Branch’s spending on “faith-based initiatives.”¹⁹ *Hein* indicates the Court is willing to make changes

9. See 463 U.S. 388 (1983).

10. See 413 U.S. 756 (1973).

11. See Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

12. See *Zorach v. Clauson*, 343 U.S. 306 (1952).

13. See, e.g., *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (applying a modified version of the *Lemon*, coercion, and endorsement tests to strike down the hosting of a daily supper prayer at a state-operated military college); *ACLU of Ohio v. Capitol Square Review & Advisory Bd.*, 243 F.3d 289, 306 (6th Cir. 2001) (upholding a state motto invoking “God” under three different establishment tests—the *Lemon*, endorsement, and *Marsh* tests—because it was unclear which test the Supreme Court would apply).

14. See *infra* note 36 and accompanying text.

15. Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992). The Court’s Religion Clause jurisprudence has also been prominently characterized, by scholars and jurists alike, as “unprincipled, incoherent, and unworkable.” See, e.g., Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 (1991); see also *Wallace v. Jaffree*, 472 U.S. 38, 106 (Rehnquist, J., dissenting) (“[I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified.”).

16. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (incorporating the Establishment Clause via the Fourteenth Amendment).

17. U.S. CONST. amend. I.

18. See *infra* section I.A. For a brief discussion of the original intent of the Framers, see Kurt T. Lash, *Power and the Subject of Religion*, 59 OHIO ST. L.J. 1069, 1099–1100 (1998).

19. 551 U.S. 587 (2007).

in this convoluted area of constitutional law.²⁰ The Court's decision narrowed the ability of plaintiffs to challenge federal spending as a violation of the Establishment Clause. Considering the shift in personnel on the Supreme Court and the absence of a reliable method to resolve issues, a rethinking of the doctrine is both inevitable and necessary. This Note suggests a method of reinventing the Establishment Clause-jurisprudence wheel.

When Justice Hugo Black announced the holding of the Court in *Everson v. Board of Education*, he also assumed the Establishment Clause applied to the states with the same force that it does against the powers of Congress.²¹ This move by the Court has been questioned ever since because only liberties guaranteed by the federal Constitution were made applicable to the states through the Fourteenth Amendment; yet the Establishment Clause guaranteed no right to, or protection of, individual liberties. In addition to the scores of commentaries and books written on the subject,²² a sitting Supreme Court Justice—Justice Clarence Thomas—recently suggested that the Establishment Clause never intended to confer an individual right to be free from government establishment of religion, concluding the application of it to the states was baseless.²³

In order to understand why the incorporation of the Establishment Clause was a mistake, it is critical to understand its meaning at the time of the founding. Accordingly, this Note proceeds on the assumption that the originalist mode of analysis is most appropriate to deconstruct the Establishment Clause.²⁴ The Supreme Court has recognized the most appropriate way to understand what is an “establishment” and how it functioned in the constitutional scheme set up by

20. See *id.* Justice Alito issued the judgment of the Court; the case produced no majority opinion. It has been suggested that the Court's approach to taxpayer standing in *Hein* may be extended to other areas of Establishment jurisprudence, such as challenges to government religious speech (for example, religious displays) where the plaintiff's injury rests entirely on his “observer” status. The consequence of such an extension would be to leave more to local politics and less for the federal courts to decide. See Ira C. Lupu & Robert W. Tuttle, *Ball on a Needle: Hein v. Freedom from Religion Foundation, Inc. and the Future of Establishment Clause Adjudication*, 2008 BYU L. REV. 115, 158. For an example of a Court of Appeals applying the *Hein* analysis to deny a plaintiff standing in a school-sponsored prayer case, see *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007).

21. *Everson*, 330 U.S. at 15 (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a *state* nor the Federal Government can set up a church.” (emphasis added)).

22. For two leading works espousing the view that the Establishment Clause was never intended to create strict separation between religion and government, nor was it intended to apply to the states, see ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 15 (1982) and MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 23–27 (1965).

23. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

24. For a compelling defense of the originalist analysis, see Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). See also Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1413–15 (1990), for a defense of originalism as it relates to the Religion Clauses. Judge McConnell explains that “[e]ven opponents of originalism agree that the historical understanding is relevant, even if not dispositive,” to correct misconceptions. *Id.* at 1415.

the Framers is fundamental.²⁵ Further, because the principle was incorporated, the original meaning of the Clause should be construed from not only the views of the Framers of the First Amendment, but also from those who adopted the Fourteenth Amendment. That the Establishment Clause was originally intended as a federalist constraint on the authority of the national government is widely accepted.²⁶ Historical analysis also reveals—almost conclusively—that the drafters of the Fourteenth Amendment did not anticipate the Clause would be applicable to the states, particularly not as a fundamental right.²⁷

This leaves the current state of the law in a peculiar quandary. Returning to the original intent of the Framers of the First and Fourteenth Amendments, at first glance, might mean overturning more than sixty Supreme Court decisions and sixty years of practice, not to mention rethinking this country's approach to religious liberties. Not quite: as this Note will demonstrate, it is possible to restore fidelity to the original intent of the Framers and to be pragmatic. The two considerations intersect if disincorporation is taken seriously to create decentralization of religious freedoms and equality.²⁸ In this way, other clauses of the Constitution—the Equal Protection Clause, for instance—that are applicable to the states will likely do the work that the Establishment Clause has done since the *Everson* decision. In fact, it is possible that a movement in this direction would actually expand religious liberties in this pluralistic society, resulting in the protection of both minority and majority religious groups.

This Note will begin by describing the origins of the First Amendment and its meaning to the Framers who drafted it. Part I will also briefly describe the history surrounding the ratification of the Fourteenth Amendment in order to shed light on the principles of the First Amendment that were later incorporated in the twentieth century. Part II will narrate the evolution of modern Establishment Clause law since incorporation and will describe some of the approaches that have been applied to resolve establishment disputes and their respective

25. See, e.g., *Van Orden v. Perry*, 545 U.S. 677, 685 (2005) (recognizing the Establishment Clause analysis applied was “driven . . . by our Nation’s history”); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (regarding the interpretation of the Establishment Clause by the First Congress in 1789 with “special significance” and with the “greatest weight”); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (“[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.”). The historical analyses are not limited to the conservative Justices on the Court, either. Even Justice Souter, in a concurring opinion in *Lee v. Weisman*, was inclined to analyze the framing of the First Amendment to support his conclusion that “the Framers meant the Establishment Clause’s prohibition to encompass nonpreferential aid to religion.” 505 U.S. 577, 613–14 (1992) (Souter, J., concurring).

26. See discussion *infra* section I.A.

27. See discussion *infra* section I.B.

28. Decentralization of the Establishment Clause means devolving political power to local authorities to determine the extent of permissible government action or inaction. Spreading political authority over religious issues appropriately allows church-state relations to be determined on a local scale, which is generally where disputes over religious freedoms, such as the recitation of public prayer or display of religious symbols, arise. See Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1815 (2004).

shortcomings. Part III will begin by describing Justice Clarence Thomas's view of the Establishment Clause and its proper position in the Court's jurisprudence. Part III will also attempt to imagine what a state without an Establishment Clause restriction would look like by applying the nonincorporation principle to different categories of establishment cases. This Note will conclude by arguing that disincorporation is not a far-fetched ideal. In fact, not only is it possible, it is desirable. The suggested approach to evaluating Establishment Clause cases—disincorporating the Establishment Clause and applying other constitutional principles in its place to resolve states' establishment issues—will lead to consistent, predictable, and rational results that further the ends of pluralism.

A NOTE ON "PLURALISM"

There are two conceptions of pluralism that attempt to accommodate religious diversity in democracies. To work, both models assume that the United States is a liberal democracy with a rich cultural and religious diversity. The first is called the nondiscrimination principle, which protects religious groups against prejudice and discrimination by fostering government neutrality through the state's separation from religion.²⁹ A neutral public sphere is created and individual religious rights are privatized.³⁰ This is the notion of pluralism advanced by Justice Black and his colleagues in the *Everson* decision, and it is the same concept of a "religion of secularism" that Justice Stewart berated.³¹ Today, society seeks to achieve a pluralistic society that maintains neutrality through a commitment to protecting individual rights.³² But the concept of neutrality is a twofold myth: on the one hand, it prefers a "religion of secularism," and on the other, when the state takes exception from this preference, the concept of neutrality often masks the state's actual preference for majoritarian Christian principles.³³ Thus, the inability of this model to protect collective

29. See Peter G. Danchin, *Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law*, 33 *YALE J. INT'L L.* 1, 14–15 (2008).

30. *Id.*

31. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting); *infra* section II.B.

32. See Will Kymlicka, *Introduction*, in *THE RIGHTS OF MINORITY CULTURES* 1, 11 (Will Kymlicka ed., Oxford Univ. Press 1995) ("[T]he United States has firmly adopted the [nondiscrimination approach] as its goal, and indeed it has had enormous success in integrating people of many different races and religions into its common culture."). This Note does not dispute that the nondiscrimination model has integrated religious groups, but this Note does dispute that this approach is the most desirable to achieve true pluralism after taking into consideration the minority religious groups the Framers also intended to protect. See David E. Steinberg, *God Versus Caesar: Belief, Worship, and Proselytizing Under the First Amendment*, 16 *J.L. & RELIGION* 265, 265 (2001) (book review) (explaining that the "framers adopted the religion clauses primarily to end the persecution faced by eighteenth-century religious minorities, such as the Catholics, Baptists, and Quakers"). For historical evidence that the Framers adopted the Religion Clauses in part to protect nontraditional religious denominations, see McConnell, *supra* note 24, at 1440.

33. Consider the recent Supreme Court opinion upholding the display of the Ten Commandments on the grounds of a state capitol because it did not violate the Establishment Clause. See *Van Orden v.*

minority rights is reason to turn to a second conception of pluralism, which more adequately will achieve the ideal we purport to already champion.³⁴

The second pluralism model is similarly focused on eliminating discrimination amongst religious groups, but unlike the nondiscrimination approach, it achieves this ideal by rejecting neutrality and embracing the use of the public sphere to promote and protect the religious practices of majority and minority groups. Proponents of this approach argue that it is more protective of minority rights because it forces the state to provide the same rights, privileges, and protections to minorities that the majority takes for granted.³⁵ So long as no one's religious liberty is impinged upon—by religious assessments, for example—this view of pluralism is consistent with that of the Framers.³⁶ This Note espouses adopting this approach to pluralism and offers a framework for how to achieve it.

I. THE ORIGINAL MEANING OF THE ESTABLISHMENT CLAUSE

A. FRAMERS OF THE FIRST AMENDMENT

The original meaning of the First Amendment's establishment provision has been explicated in many volumes. Constitutional scholarship explains the Establishment Clause was a federalist constraint on the powers of Congress to restrain the federal government from establishing a national religion and to protect state establishments that existed at the time of the founding.³⁷

Perry, 545 U.S. 677 (2005); *see also* Danchin, *supra* note 29, at 34 (explaining conception of “liberal nationalism,” in which state neutrality actually requires accommodation for the religion of the majority in public life). In *Van Orden*, the Court upheld the display under a historical approach to the Establishment Clause. 545 U.S. at 681. The plurality reasoned that although the Ten Commandments have religious significance, the symbol also has an “undeniable historical meaning,” grounded in this country's Judeo-Christian traditions. *Id.* at 690. But this argument is circular: it is not as religious as other public acts *because* it is historic, but it has historic meaning *because* of this country's traditions. When approaching an Establishment Clause issue in this way, the solution will inevitably lie in the default position: majoritarian religious traditions.

34. *See* Danchin, *supra* note 29, at 36–37 (arguing that pluralism in the United States is based on individual rights, rather than collective rights).

35. *See id.* at 15.

36. For example, James Madison famously argued against state-supported religion in his *Memorial and Remonstrance*, which he drafted in opposition to a bill that would have levied a general assessment in support of religious teachers. Madison declared: “A just Government . . . will be best supported by protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another.” JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reprinted in* JAMES MADISON: WRITINGS 29, 33 (Jack N. Rakove ed., 1999). Michael McConnell, a leading constitutional law scholar in the area of religion, argues that the original purpose of the Religion Clauses was to protect individual religious life from needless government intrusion in order to “foster a regime of religious pluralism, as distinguished from both majoritarianism and secularism.” *See* McConnell, *supra* note 15, at 117. McConnell argues this is consistent with what Madison referred to as the “full and equal rights” of religious groups. *Id.* (quoting James Madison (speech of Jun. 8, 1789), in 1 ANNALS OF CONG. 451 (Joseph Gales ed., 1834)).

37. *See* AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 34 (1988) (explaining that the Establishment Clause was a “pro-states’ right” and “simply calls for the issue to be decided

During the First Congress, Senator James Madison proposed an amendment that would have been applicable to the states that guaranteed citizens the “equal rights of conscience” (then an alternative formulation of “free exercise of religion”), as well as the freedom of speech and of the press, but significantly, he introduced no similar proposal that restricted states from respecting establishments. Though this proposal was later defeated in the Senate, likely in deference to states’ rights, it is notable that freedom from public establishment was not considered an unalienable right like the rest of the First Amendment.³⁸

In Federalist No. 51, Publius (either Hamilton or Madison) considered the role of the religious minority in the new society:

Whilst all authority [in the federal republic] will be derived from and dependent on the society, the society itself will be broken into so many parts, interests, and classes of citizens, that the rights of individuals, or of the minority, will be in little danger from interested combinations of the majority. In a free government the security for civil rights must be the same as that for religious rights.³⁹

Publius believed the security of the minority depended on the diversity of society. Every sect would be free to believe and practice according to its religious tenets because the society would not have a dominating majority. This would, of course, be impossible if Congress established a national religion or even preferred one religion to another. And because it was understood that authority over religious matters was devolved to local authorities, the Federalists did not fear a tyranny of the majority.⁴⁰ This ideal has not been played out

locally”); CORD, *supra* note 22; PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 3–6 (2002) (providing a historical analysis as to the original meaning of the Establishment Clause); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18 (1995) (“The religion clauses, as understood by those who drafted, proposed, and ratified them, were an exercise of federalism.”); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1157 (1991) (“[T]he Establishment Clause limited only Congress and not the states.”); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1089–92 (1995) (stating that the Establishment Clause was a federalism principle, intended only to prevent the federal government from interfering with state-established churches); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1191 (1990) (explaining that the Establishment Clause created a “framework of federalism” that left states to their own devices regarding religion); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006) (assessing original meaning of Establishment Clause as adopted in the First Amendment and concluding the federalist conception of the clause is accurate). *But see* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 407–08 (2002) (arguing against the Federalist interpretation of the Establishment Clause due to the lack of historical support in the debates).

38. See McConnell, *supra* note 24, at 1484.

39. THE FEDERALIST No. 51 (Alexander Hamilton or James Madison).

40. *But see* STORY’S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, Vol 2., 630–32 (Melville M. Bigelow ed., Boston, Little, Brown, and Co. 1891) (1833). Joseph Story, a Supreme Court Justice and Harvard law professor, published one of the most comprehensive treatises on the United

in today's pluralistic American society, however, because of the application of the Establishment Clause to the states.

The most telling evidence of how the Framers and ratifiers originally understood the Establishment Clause is states' maintenance of state-sanctioned religious establishments for more than fifty years following the framing of the Constitution.⁴¹ The anti-incorporation argument, therefore, is that the Establishment Clause was enacted as a specific protection of states' rights to preserve their autonomy over matters of religious practice by restricting national power.⁴² As Professor Amar explains: "The nature of the states' establishment-clause right against federal disestablishment makes it quite awkward to mechanically 'incorporate' the Clause against the states via the Fourteenth Amendment."⁴³ The right of states was preserved because Congress could neither establish a national religion nor disestablish state religions.⁴⁴

Notably, without any direction from the U.S. Supreme Court, official state religions wholly disappeared in America by 1833 when Massachusetts amended its constitution to disestablish the Congregationalist Church.⁴⁵ States evidently exercised their authority and decided to eliminate any last vestiges of official religion. It was not until the disappearance of all state-sponsored religions that John Marshall, as Chief Justice of the United States, affirmed that the restriction

States Constitution, and certainly the most extensive treatise at the time. In his discussion of the meaning of the Establishment Clause, Story said:

Probably at the time of the adoption of the Constitution, and of the [First Amendment] . . . , the general if not the universal sentiment in America was, that Christianity ought to receive encouragement from the state so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.

Id.

41. See, e.g., MASS. CONST. of 1780, pt. 1, art. III. (providing for the right of citizens "to invest their legislature with power to authorize and require . . . the several towns . . . or religious societies to make suitable provision at their own expence . . . for the support and maintenance of public protestant teachers of piety, religion and morality"). The Constitution also provided all sects equal protection under the laws: "[E]very denomination of Christians . . . shall be equally under the protection of the law: and no subordination of any one sect or denomination to another shall ever be established by law." *Id.* Massachusetts, which disestablished by 1833, was the last state in the Union to have such a provision in its constitution. See Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1458 (defining religious establishment as the authority to assess taxes for church support). Other states to maintain congregational establishments following the Revolution included several states in New England as well as Maryland, South Carolina, and Georgia. See McConnell, *supra* note 24, at 1437.

42. See Lietzau, *supra* note 37, at 1200 (observing that the only thing the Framers could agree upon was that matters of religion were properly left to the decisionmakers in state and local bodies).

43. AMAR, *supra* note 37, at 33. Professor Amar makes the point that the same "structural reasons that counsel caution in attempting to incorporate the Tenth Amendment against the states seem valid here, too." *Id.* at 34.

44. See *id.* at 41.

45. CORD, *supra* note 22, at 4.

against official religious establishments limited only the federal government.⁴⁶ During this early period, there was a “spectacular growth of diversity of religions and faiths,” evidenced by the religious movements and experiments that “sprang up throughout the country.”⁴⁷ However, even if the purpose of the Clause was clear in late-eighteenth century America, it is possible the adoption of the Fourteenth Amendment changed the nature of that understanding.⁴⁸

B. FRAMERS OF THE FOURTEENTH AMENDMENT

An originalist approach to understanding the incorporated Establishment Clause must, at a minimum, consider the intentions of those who drafted the Fourteenth Amendment because the Due Process Clause of the Fourteenth Amendment forms the basis for the application of the antiestablishment principle against the states. Although it is virtually undisputed that the original Establishment Clause worked to restrain only the federal government, it is possible that the Fourteenth Amendment drafters thought they were adopting an amendment to the Constitution that applied all or part of the Bill of Rights to the states.⁴⁹ If this is the case, then the authoritative view—at least with respect to the states—should be that of the drafters in 1866, such that what they thought they were incorporating becomes the relevant inquiry from an originalist perspective.⁵⁰

There is an ongoing debate about the intent of the Framers of the Fourteenth Amendment to incorporate any part of the Bill of Rights, let alone the Establishment Clause.⁵¹ Setting this longstanding controversy aside, and even assuming that there was discussion around the period of adoption with regard to incorporating some or all individual rights enumerated in the first ten amendments, there is still no compelling evidence to suggest that the Framers intended to apply the Establishment Clause against the states, either as a restraint on state governments or as a guarantee of an individual right to be free from public establish-

46. See *Barron v. Baltimore*, 32 U.S. 243 (1833) (holding the Bill of Rights inapplicable to state and local governments). In *Barron*, the issue was the applicability of the Fifth Amendment’s Takings Clause to state government. The Court affirmatively held that “[the first ten Amendments] demanded security against the apprehended encroachments of the general government—not against those of the local government.” *Id.* at 250.

47. See STEVEN D. SMITH, *GETTING OVER EQUALITY: A CRITICAL DIAGNOSIS OF RELIGIOUS FREEDOM IN AMERICA* 21 (2001).

48. See Steven G. Gey, *Reconciling the Supreme Court’s Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 757 (2006).

49. This question is beyond the scope of this Note. This section will discuss the Framers’ intentions with regard to the Establishment Clause only.

50. See Lash, *supra* note 37, at 1143–44 (discussing the intentions of the architects of the Fourteenth Amendment); Muñoz, *supra* note 37, at 633 (suggesting the relevant inquiry should consider the intentions of the drafters of the Fourteenth Amendment, not the Founding Fathers).

51. See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?*, 2 STAN. L. REV. 5, 81–126 (1949) (assessing whether the Fourteenth Amendment was intended to apply the Bill of Rights to the states).

ments.⁵² For a provision of the Bill of Rights to be applied against the states, it must protect some substantive individual right.⁵³ Thus, to be incorporated like the other “liberties” protected in the Due Process Clause of the Fourteenth Amendment, the Establishment Clause must be construed as an *individual right* to be free from state establishments. This is not how it was conceived, however, at the time of the framing of the First or the Fourteenth Amendments. The Framers adopting the First Amendment construed the Clause to create a right for states, not individuals.⁵⁴

Any substantial discussion among the Fourteenth Amendment Framers to include the personal rights listed in the Bill of Rights was under the “Privileges or Immunities” Clause.⁵⁵ The author of Section One of the Fourteenth Amendment, John Bingham, stated three years after the amendment’s adoption “that no State shall abridge the privileges and immunities of citizens of the United States, which are defined in the eight articles of amendment”⁵⁶ This is an oft-cited passage from the Reconstruction Amendments debates to support the proposition that the Establishment Clause was, in fact, considered applicable to the states with the same force as the rest of the first eight amendments.⁵⁷ However, this does not present a complete picture of the debates because it ignores the many statements made by congressmen in the same period that mention the free exercise of religion but disregard the nonestablishment component of the same clause. For example, Senator Bingham himself goes on, in the same speech, to make explicit references to the rights guaranteed in the First Amendment, but omits any similar reference to the Establishment Clause.⁵⁸

52. See LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE* 148 (2d ed. 1994) (“The preponderance of evidence suggests that the framers of the Fourteenth Amendment intended its provisions neither to incorporate any part of the Bill of Rights [including the Establishment Clause] nor to impose on the states the same limitations previously imposed on the United States only.”); Muñoz, *supra* note 37, at 634 (explaining that the Framers of the Fourteenth Amendment did not address an individual “nonestablishment” right, but rather, only discussed the personal rights of “free exercise” or of “freedom of conscience”). *But see* Lash, *supra* note 37, at 1143–44 (arguing that the Framers of the Fourteenth Amendment did, in fact, intend to incorporate the first eight amendments, including the Establishment Clause, under the “privileges or immunities” provision).

53. *Palko v. Connecticut* set forth the “incorporation” doctrine, holding that the “liberty” protected in the Due Process Clause of the Fourteenth Amendment guards “fundamental” rights that are “implicit in the concept of ordered liberty.” 302 U.S. 319, 324–25 (1937). For example, the free exercise right of the First Amendment was incorporated by the Supreme Court in *Cantwell v. Connecticut*. 310 U.S. 296, 303 (1939).

54. See discussion *infra* section II.A.

55. The Clause reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States” U.S. CONST. amend. XIV, § 1.

56. CONG. GLOBE, 42d Cong., 1st Sess. (1871), *reprinted in* RECONSTRUCTION AMENDMENTS’ DEBATES, THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS 510 (1967).

57. See, e.g., Lash, *supra* note 37, at 1146 n.297.

58. See CONG. GLOBE, 39th Cong., 1st Sess. (1871), *reprinted in* RECONSTRUCTION AMENDMENTS’ DEBATES, THE LEGISLATIVE HISTORY AND CONTEMPORARY DEBATES IN CONGRESS ON THE 13TH, 14TH, AND 15TH AMENDMENTS, *supra* note 56, at 511 (listing the injustices states have inflicted upon their citizens and stating, for example, “[t]hey restricted the rights of conscience, and he had no remedy”); see also

If the statements made by Reconstruction congressmen are unconvincing, Senator Blaine's proposed constitutional amendment in 1875 should cast off any doubt remaining as to the intent of the Fourteenth Amendment Framers. Less than ten years after the adoption of the Reconstruction Amendments, Congress considered and rejected the Blaine Amendment, which mirrored the First Amendment's Religion Clauses and would have prohibited state establishment of religion.⁵⁹ If the Fourteenth Amendment were understood to have included the First Amendment, the Blaine Amendment would have been meaningless. Many of the drafters and ratifiers of the Fourteenth Amendment were serving in the Congress that considered the proposal in 1875.⁶⁰ This suggests that, at a minimum, some members, particularly those who were present for consideration of both amendments, agreed the Fourteenth Amendment did not anticipate the application of the nonestablishment principle to the states. That the amendment passed in the House also supports the contemporary understanding of the Fourteenth Amendment; it would not have passed if representatives believed the Reconstruction Amendments had already achieved the same purpose as the proposed Blaine Amendment.⁶¹

II. CREATING AND PERPETUATING THE ESTABLISHMENT CLAUSE MYTH

A. THE BIRTH OF STRICT SEPARATIONISM

For more than 150 years after the founding, the Religion Clauses of the Constitution functioned in harmony. Indeed, prior to incorporation, the Supreme Court had heard only three cases concerning establishment of religion.⁶² The origins of modern Religion Clause jurisprudence can be traced to the Supreme

id. at 475–76 (remarks of Henry Dawes) (listing the “rights, privileges, and immunities” secured to all citizens by cataloging all of the rights protected in the first eight Amendments but leaving the Establishment Clause off of the list).

59. For an extensive analysis of the Blaine Amendment, see F. William O'Brien, *The Blaine Amendment 1875–1876*, 41 U. DET. L.J. 137, 195–205 (1963). The Blaine Amendment states in full:

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

H.R. Res. 1, 44th Cong. (1875).

60. See Muñoz, *supra* note 37, at 635 (stating that “[t]he Congress that debated [the Blaine Amendment] included twenty-three members of the Congress that had approved the Fourteenth Amendment, two members who had been on the committee that drafted the Fourteenth Amendment, and more than fifty members who had served in the legislatures of the states that considered the Fourteenth Amendment in 1867 and 1868”); see also Lietzau, *supra* note 37, at 1209.

61. See Muñoz, *supra* note 37, at 634.

62. See *Cochran v. La. Bd. of Educ.*, 281 U.S. 370, 375 (1930) (upholding state purchase of nonreligious school books for students in parochial schools); *Quick Bear v. Leupp*, 210 U.S. 50, 82 (1908) (upholding payments to a Roman Catholic school on an Indian reservation); *Bradfield v. Roberts*, 175 U.S. 291, 299–300 (1899) (upholding congressional payments to benefit the poor at a religious District of Columbia hospital).

Court's decision in *Everson*.⁶³ *Everson* set the clause on a different path when a majority of the Court decided that the Establishment Clause would apply against the states.⁶⁴ Armed with an understanding of the original meaning of the Establishment Clause and the intention of the Framers of the Fourteenth Amendment with respect to the Bill of Rights, it becomes apparent that the current law on state establishments is without basis, as far as integrity to the constitutional text and the Framers' original intent goes. Also troubling is that the Supreme Court has been producing inconsistent, unpredictable, and even contradictory results since the incorporation of the Establishment Clause. This section will discuss the origins of the Court's modern establishment doctrine and the failed attempts by the Court since the *Everson* decision to articulate a workable standard.

Justice Black in *Everson* boldly announced:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.⁶⁵

He continued: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"⁶⁶ Never before had the Court interpreted the Establishment Clause so rigidly. In fact, even Justice Black did not go as far as his sweeping words would suggest. The dispute in *Everson* concerned the constitutionality of a state practice of reimbursing parents for the costs of transporting their children on public buses to and from parochial schools.⁶⁷ The Court upheld the validity of the reimbursement program by analogizing it to other general state services provided to church schools, such as police and fire department protection.⁶⁸

63. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

64. *Id.* at 15–16.

65. *Id.*

66. *Id.* at 16 (citations omitted). Thomas Jefferson coined the phrase in a letter to the Danbury Baptists. See Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802), reprinted in JEFFERSON: WRITINGS 510 (M. Peterson, ed., 1984). At the time of writing, Jefferson was serving as a minister to France during the First Congress and did not directly participate in the drafting of the Bill of Rights. *Reynolds v. United States*, 98 U.S. 145, 163 (1879). The letter did not purport to explain the meaning of the Establishment Clause; rather, it was "a simple note of courtesy written fourteen years after Congress passed the Bill of Rights." James E. M. Craig, "In God We Trust," *Unless We Are A Public Elementary School: Making A Case For Extending Equal Access to Elementary Education*, 36 IDAHO L. REV. 529, 532 (2000).

67. *Everson*, 330 U.S. at 3–4.

68. *Id.* at 16–18 ("[C]utting off church schools from these services . . . would make it far more difficult for the schools to operate. . . . [The First Amendment] requires the state to be a [sic] neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.")

Notably, Justice Black recognized that the Court's holding would not result in a complete separation of Church and state; he recognized that some students may be enrolled in parochial schools that may not have otherwise attended if they were responsible for their own transportation costs.⁶⁹

Until the *Everson* decision, the Establishment Clause had never been applied to the states. Without further explanation, Justice Black stated:

The broad meaning given the [First] Amendment . . . has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause.⁷⁰

Commentators and jurists alike have since criticized Justice Black's ahistorical analysis of the establishment principle in the First Amendment. Neither his introduction of the "wall" metaphor into modern Religion Clause jurisprudence as the appropriate test for establishment cases nor the treatment of this new standard against the states is characteristic of the original intent of the Framers.⁷¹ Decades later, when the *Everson* decision continued to wreak havoc on establishment law, then-Justice Rehnquist examined the historical record and summarized his findings in a dissenting opinion.⁷² Justice Rehnquist observed that Madison viewed the First Amendment as prohibiting a national establishment.⁷³ However, Madison did not see a provision "requiring neutrality on the part of government between religion and irreligion."⁷⁴ To explain Justice Black's discussion of the history of the Religion Clause and the assumption that it should apply to the states, Professor Amar suggests that it was Justice Black's commitment to "total incorporation" of the Bill of Rights through the Fourteenth Amendment that drove him to "gloss over the special difficulties in applying the Establishment Clause against the states."⁷⁵

B. FOSTERING A "RELIGION OF SECULARISM"

Despite the Court's unwillingness to apply its separationist principles in

69. *Id.* at 17 (acknowledging the possibility that some parents, if required to cover the transportation costs themselves, would not send their children to the church school).

70. *Id.* at 15.

71. See, e.g., HAMBURGER, *supra* note 37, at 3 (explaining the *Everson* Court created a myth by its use of Jefferson's letter to the Danbury Baptists).

72. See *Wallace v. Jaffree*, 472 U.S. 38, 92–114 (1985) (Rehnquist, C.J., dissenting).

73. *Id.* at 95. During the House debates over the proposed language, Madison said "he apprehended the meaning of the words to be, that *Congress* should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.* (citing 1 ANNALS OF CONGRESS 424 (Joseph Gales ed., 1834) (emphasis added)).

74. *Id.* at 98 ("[Madison] saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects.").

75. Amar, *supra* note 37, at 1160.

Everson, it did establish the broad scope of the Establishment Clause, and as the Court demonstrated in the years to follow, it was prepared to implement its expansive position. In *McCollum v. Board of Education*, the first establishment case reviewed after *Everson*, Justice Black, again writing for the Court, struck down a program that allowed private religious teachers to instruct consenting students in a public school on a weekly basis.⁷⁶ Students not participating in the religious instruction were required to leave the classroom to pursue their secular studies elsewhere, but they were not allowed to leave the school building.⁷⁷ This was an easy case for Justice Black. He stated:

This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*.⁷⁸

Any doubt that the Court had incorporated the Establishment Clause after *Everson* was quickly dispelled after *McCollum*.

The Court continued on its path of strict separationism in *Engel v. Vitale* by striking down the voluntary recitation of a brief, nondenominational prayer in a New York State public school at the beginning of the school day as a violation of the First Amendment.⁷⁹ The majority opinion is not particularly remarkable, but the readiness of newcomer Justice Potter Stewart to depart from the then-accepted doctrine is. Justice Stewart struggled to “see how an ‘official religion’ is established by letting those who want to say a prayer say it.”⁸⁰ He did not buy into the Court’s reasoning that an establishment violation had occurred; instead, he suggested the Court’s decision led to tension with the freedom of religion: “To deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual

76. Ill. *ex rel.* *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211–12 (1948).

77. *Id.* at 209.

78. *Id.* at 210 (citation omitted).

79. 370 U.S. 421, 433 (1962). Recognizing that the prayer did not approve of any one religion over another and that it was so brief as to not impinge on anyone’s freedom of religion, the Court nonetheless justified its holding on antiestablishment grounds. The Court quoted James Madison to explain: “It is proper to take alarm at the first experiment on our liberties. Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects?” *Id.* at 436. Justice Douglas’s concurring opinion is the only one to address the nonbeliever. He explained the government’s neutrality is one that applies among religions, not against religions. He declared: “The philosophy is that the atheist or agnostic—the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force.” *Id.* at 443 (Douglas, J., concurring).

80. *See id.* at 445 (Stewart, J., dissenting).

heritage of our Nation.”⁸¹ Justice Stewart was critical of the Court’s “wall” metaphor, “a phrase nowhere to be found in the Constitution.”⁸²

The following year, the Court again heard argument on the Establishment Clause in two companion cases where parents challenged the constitutionality of daily Bible readings in two public schools.⁸³ The Court was not satisfied with the voluntary nature of either school’s practice even though a parent could excuse the child upon request or the child could elect not to participate.⁸⁴ Although sounding in free exercise language,⁸⁵ the Court struck down the nondenominational prayer as an impermissible use of the state’s machinery to practice the majority’s beliefs.⁸⁶ Again the lone dissenter, Justice Stewart criticized the Court for its mechanical approach to deciding establishment cases.⁸⁷ He was concerned with the Court’s sweeping decision to take religion completely outside of the compulsory state education system. Because schooling is such a significant part of a child’s life, he stated that the Court’s rule places religion “at an artificial and state-created disadvantage” to nonreligion, and that the Court’s claim of state neutrality is illusory because secularism prevailed in the battle between religion and nonreligion.⁸⁸ For Justice Stewart, the “liberty” protected in the Fourteenth Amendment was crucial to understanding the free exercise of religion guarantee.⁸⁹ He was concerned about the free exercise rights of those parents who wished to expose their children to Bible readings at school.⁹⁰ Because the Court decided against those parents and their liberties, Justice Stewart accused the Court of realizing a “religion of secularism.”⁹¹ He argued that absent any form of coercion inflicted on pupils who do not wish to participate, the Establishment Clause does not bar the activity.⁹²

When the Court was not busy establishing nonreligion in the public sphere, it supported the majority religion for “secular” reasons. *McGowan v. Maryland* is an example of the Court masking its preference for Christianity in claims of

81. *Id.* He continued: “[W]e deal here not with the establishment of a state church, which would, of course, be constitutionally impermissible, but with whether school children who want to begin their day by joining in prayer must be prohibited from doing so.” *Id.*

82. *Id.* at 445–46.

83. *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 205 (1963).

84. *Id.* at 207–08.

85. The religious exercises were struck down as impermissibly violating the rights of the challengers. *Id.* at 224 (“The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners.”).

86. *Id.* at 226.

87. *Id.* at 310 (Stewart, J., dissenting) (“I cannot agree with what seems to me the insensitive definition of the Establishment Clause contained in the Court’s opinion, nor with the different but, I think, equally mechanistic definitions contained in the separate opinions which have been filed.”).

88. *Id.* at 313. Justice Stewart believed the choice between non-coercive religious exercise and no religious exercise “is one for each local community, and its school board, and not for [the Supreme] Court.” *Id.* at 317.

89. *Id.* at 312.

90. *Id.*

91. *Id.* at 313.

92. *See id.* at 316.

secularism.⁹³ There the Court upheld the constitutionality of Sunday closing laws over objections by religious minorities whose weekly day of rest fell on a day other than Sunday.⁹⁴ Although the Court acknowledged that the laws were originally religious in nature, it nonetheless upheld the laws because they served the secular purpose of creating a uniform day of rest for all persons.⁹⁵ In the name of a secular purpose, the Court affirmed a tradition that was of particular significance to the dominant Christian majority “at the expense of the norms of the minority.”⁹⁶ The Court later struck down a state law that allowed Sabbath observers the right to a day off on the Sabbath because it violated the neutrality principle.⁹⁷ Individuals can still take the Sabbath day off, so long as it is not designated beforehand, while non-Christian observers are forced to take off on Sunday, the traditional Christian Sabbath.⁹⁸ The “majoritarian religious bias” is similarly apparent in *Lynch v. Donnelly*, where the Supreme Court upheld the public display of a crèche or nativity scene of Jesus during Christmas season because there were “legitimate secular purposes” behind the display.⁹⁹

As evidenced by these cases, neutrality will not produce neutral results given that this country’s history and traditions stem from Christianity. Thus, what is termed “neutral” in actuality is often a majoritarianism that has injected itself into mainstream practices and institutions. Similarly, the failure to accommodate is justified where the law is neutral and generally applicable,¹⁰⁰ but that neutrality is *not* neutral in actuality because it often serves to reinforce the practices of the most popular religions and marginalize (and burden) religious minorities.¹⁰¹

C. A FAILED ATTEMPT TO RECONCILE THE JURISPRUDENCE

In the twenty-five years following *Everson*, the Court heard a significant number of establishment cases but failed to articulate an approach to resolving the issues. The Supreme Court attempted to mend the jurisprudence through the three-part test articulated in *Lemon v. Kurtzman*.¹⁰² However, this test, too, has

93. 366 U.S. 420 (1961).

94. *Id.* at 452.

95. *Id.* at 449. In a dissenting opinion, Justice Douglas noted the advancement of majoritarianism by the Court. He stated: “No matter what is said, the parentage of [the Sunday closing] laws is the Fourth Commandment; . . . they serve and satisfy the religious predispositions of our Christian communities.” *Id.* at 572–73 (Douglas, J., dissenting).

96. See Ratna Kapur, *The Right to Freedom of Religion and Secularism in the Indian Constitution*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 199, 204 (Mark Tushnet and Vicki C. Jackson, eds., 2002).

97. *Thornton v. Caldor*, 472 U.S. 703, 710–11 (1985).

98. See Kapur, *supra* note 96, at 204.

99. *Lynch v. Donnelly*, 465 U.S. 668, 681, 687 (1984) (“The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.”).

100. See *infra* notes 160–69 and accompanying text.

101. See Kapur, *supra* note 96, at 205 (explaining “state neutrality” has created the problem of majoritarianism in the United States, which reinforces majority practices and defines the norm).

102. 403 U.S. 602, 612–13 (1971).

proved unworkable, resulting in several (different) modifications, if applied at all, to cases.¹⁰³ Chief Justice Burger, writing for the Court in *Lemon*, backed away from the “wall” metaphor that had plagued the Court for so many years and had been difficult to apply. He recognized the Court’s “prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense.”¹⁰⁴ He replaced the unreachable ideal of complete separation with a three-prong test that upholds state action only if it (1) has a secular purpose, (2) has a primary effect that does not advance or inhibit religion, and (3) does not result in “excessive governmental entanglement with religion.”¹⁰⁵ Chief Justice Burger’s discontent with the state of establishment law did not drive him to reexamine or question the shaky foundations of the modern law. In a separate opinion, Justice White noted that the Court’s new separationist approach would still result in the coincidence of free exercise and establishment considerations because there would be instances where the Establishment Clause denies individuals privileges that aid in their free exercise of religion.¹⁰⁶ The Court has taken steps since the introduction of the *Lemon* test to smooth over the standard’s shortfalls, including its run-in with the Free Exercise Clause and its malleability in application. Still, these efforts have only resulted in more confusion.

Despite its seeming coherence, the *Lemon* test has been subject to many modifications since its introduction, and in some cases the Court has been reluctant to apply it at all.¹⁰⁷ Justice Brennan’s opinion in *Aguilar v. Felton*¹⁰⁸ may have signaled *Lemon*’s downfall as *the* coherent test to resolve all establishment issues. The Court, by a narrow five-to-four margin, struck down a state law providing federal funds to special programs designed to assist economically disadvantaged pupils in low-income families, including those studying at parochial schools. In a short opinion, Justice Brennan flagged the program as “constitutionally flawed” because the federal aid required extensive state supervision of the religious schools.¹⁰⁹ After perfunctorily describing the program and the required cooperation of the state, Justice Brennan concluded the program violated the Establishment Clause principle “that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally

103. Justice Rehnquist, in his *Wallace v. Jaffree* dissent, criticized the *Lemon* test as resting on a “historically faulty doctrine.” 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting). The test, he said, “has simply not provided adequate standards for deciding Establishment Clause cases . . .” *Id.*

104. *Lemon*, 403 U.S. at 614.

105. *Id.* at 612–13.

106. *Id.* at 665 (White, J., concurring in the judgment in part, dissenting in part) (“Where a state program seeks to ensure the proper education of its young . . . free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.”).

107. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 662–63 (2002) (upholding a school voucher program without applying the *Lemon* test).

108. 473 U.S. 402 (1985), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997).

109. *Id.* at 412–14 (“[T]he scope and duration of . . . [the] program would require a permanent and pervasive state presence in the sectarian schools receiving aid.”).

through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.”¹¹⁰

Even Chief Justice Burger, the author of the majority opinion in *Lemon*, criticized the Court’s “obsession” with the *Lemon* test because it resulted in decisions that are contrary to the best interests of the country.¹¹¹ Failing to see how the denial of public services to students in need is a “neutral act to protect us from an Established Church,” the Chief Justice disparaged the Court for “exhibit[ing] nothing less than hostility toward religion and the children who attend church-sponsored schools.”¹¹² Then-Justice Rehnquist accused the Court of exploiting the “‘Catch-22’ paradox” it created by requiring that the aid be supervised to ensure there is no entanglement with religion but, at the same time, holding that the supervision is itself an impermissible entanglement.¹¹³ Justice O’Connor, after describing the federal program in more detail than the majority and illustrating that there had been no evidence of any religious advancement or indoctrination,¹¹⁴ expressed her doubts about the entanglement prong of the *Lemon* test.¹¹⁵ She concluded with a consideration of the practical consequences of the Court’s holding: public-school pupils will continue to receive the benefits of the program, as will religious-school students who can access public schools, but impoverished children attending religious schools “in cities where it is not economically and logistically feasible to provide public facilities for remedial education adjacent to the parochial school” will be denied the same benefits.¹¹⁶

The Rehnquist Court can be credited with slowly taking to task the *Lemon* test,¹¹⁷ but the Court failed to garner a majority for the adoption of a consistent alternative. The Court diverged from the *Lemon* test entirely in *Marsh v. Chambers* and instead applied a historical analysis.¹¹⁸ The Court upheld a state legislature’s historical practice of opening sessions with prayers because it has “become part of the fabric of our society” and “it is simply a tolerable acknowledgment of beliefs widely held among the people of this country.”¹¹⁹ Despite the analysis in this case, the historical test does not provide a reliable method of analyzing Establishment Clause cases, particularly because its application is limited to cases presenting issues with a historical background and it will likely render an outcome consistent with this country’s historical Judeo-Christian traditions. In other words, the historical test is likely to produce

110. *Id.* at 414.

111. *See id.* at 419 (Burger, C.J., dissenting). Chief Justice Burger also described the Court’s formulaic application of the *Lemon* criteria as “border[ing] on paranoia.” *See id.*

112. *Id.* at 420.

113. *See id.* at 420–21 (Rehnquist, J., dissenting).

114. *See id.* at 423–25 (O’Connor, J., dissenting).

115. *Id.* at 429.

116. *Id.* at 430–31.

117. *See* McConnell, *supra* note 15, at 140.

118. 463 U.S. 783, 786–91 (1983).

119. *Id.* at 792.

arbitrary results that are only consistent with majoritarian values. The difficulty of line drawing (for example, what makes a public display sufficiently “historical”?) makes the historical test no more internally consistent than the other antiestablishment tests put forth in the pages of the U.S. Reports.

Another difficult area of line drawing is symbolic establishment cases. To distinguish its holding in *Lynch v. Donnelly*, upholding a crèche display,¹²⁰ from its ruling in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, prohibiting the display of a nativity scene in a local courthouse,¹²¹ the Court adopted an objective endorsement test. This test, first introduced by Justice O’Connor in her concurring opinion in *Lynch*, considers whether the government’s religious display “has the effect of endorsing religion.”¹²² The effect is determined by asking “what viewers may fairly understand to be the purpose of the display.”¹²³ When a display appears to endorse a particular religion, it violates the Establishment Clause because the display “sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”¹²⁴ The endorsement test is a modification of the effects prong of the *Lemon* test, but it, too, has been criticized. One of the main limitations of the test is that it applies to only some challenges, such as symbolic action and parochial school cases.¹²⁵ Justice Kennedy criticized the endorsement test in an opinion in *Allegheny* because the approach finds violations when one feels excluded, without consideration of our nation’s history.¹²⁶ The test, then, will often reach results that are inconsistent with traditional practice in our society.¹²⁷ Justice Kennedy was troubled by the notion that the endorsement test would strike down actions that have historical roots, such as the President’s Thanksgiving Proclamation, because they would make some people feel like “outsiders.”¹²⁸

The neutrality test, which was applied in the early days of modern Establishment Clause jurisprudence, reemerged in several recent cases.¹²⁹ The neutrality approach considers whether state action favors a particular religion over other

120. 465 U.S. 668, 687 (1984).

121. 492 U.S. 573, 621 (1989).

122. *Id.* at 595.

123. *Id.* (citation omitted).

124. *See Lynch*, 465 U.S. at 688 (O’Connor, J., concurring).

125. *See McConnell*, *supra* note 15, at 165.

126. *See Allegheny*, 492 U.S. at 670 (Kennedy, J., concurring in judgment in part and dissenting in part).

127. *Id.*

128. *Id.* at 670–72. Justice Kennedy thought it was unacceptable that either the endorsement test would invalidate many traditional religious practices or that the test would have to be “twisted and stretched to avoid inconsistency with practices we know to have been permitted in the past, while condemning similar practices with no greater endorsement effect simply by reason of their lack of historical antecedent.” *Id.* at 674.

129. *See, e.g., Zelman v. Simmons-Harris*, 536 U.S. 639, 652–53 (2002) (applying neutrality test); *Mitchell v. Helms*, 530 U.S. 793, 794–95 (2000) (same); *Rosenberger v. Rector*, 515 U.S. 819, 845–46 (1995) (same).

religious or nonreligious activities. It resembles the purpose and effects prong of the *Lemon* test, while the entanglement query is effectively disregarded.¹³⁰ There have been many critiques of the entanglement prong by commentators.¹³¹ Some members of the Court also proposed dispensing with the entanglement prong completely, but they are no longer sitting on the bench. Chief Justice Rehnquist and Justice O'Connor attacked the prong for overturning otherwise valid statutes involving an allocation of public funds because the law could not eschew state involvement.¹³² In a dissenting opinion, Justice Scalia pointed out there have been many instances of the Court ignoring the neutrality principle,¹³³ and the only explanation he could come up with for this divergence was the Court's "instinct for self-preservation."¹³⁴ He attributed it to the fact that the Court has no enforcement power so that

[it] cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches.¹³⁵

Whether or not Justice Scalia's suggestion has merit, it is certainly an affirmation of establishment law's state of discord. In an attempt to give his view bite—to reconcile both "historical fact" and "current practice"—the next Part introduces a new way of thinking about the Establishment Clause that may

130. See Marcia S. Alembik, Note, *The Future of the Lemon Test: A Sweeter Alternative for Establishment Clause Analysis*, 40 GA. L. REV. 1171, 1186 (2006).

131. See, e.g., Robert L. Kilroy, Note, *A Lost Opportunity to Sweeten the Lemon of Establishment Clause Jurisprudence: An Analysis of Rosenberger v. Rector & Visitors of the University of Virginia*, 6 CORNELL J.L. & PUB. POL'Y 701, 711 (1997) (arguing the effort to avoid entanglement resulted in "state avoidance of and/or discrimination against the religious component of our society" (citing STEVEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 111–23 (1993))).

132. *Aguilar v. Felton*, 473 U.S. 402, 429–30 (1985) (O'Connor, J., joined by Rehnquist, J., dissenting); see also *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 768 (1976) (White, J., concurring) (referring to the entanglement test as "superfluous" and without "constitutional foundation"); *Lemon v. Kurtzman*, 403 U.S. 602, 661–71 (1971) (White, J., dissenting) (ridiculing the entanglement prong as "curious and mystifying").

133. See *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 891–92 (2005) (Scalia, J., dissenting) (listing cases in which the Court dispensed with the neutrality principle and the decision benefited a religious practice or group).

134. *Id.* at 892.

135. *Id.* at 892–93. Justice Scalia does not believe constitutional violations occur when the state prefers one religion over either nonreligion or other religions. See *id.* at 894 (Scalia, J., dissenting) (arguing that "[p]ublicly honoring the Ten Commandments . . . cannot be reasonably understood as a government endorsement of a particular religious viewpoint" because 97.7% of this country's religious observers recognize its divine symbolism); see also Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 NW. U. L. REV. 1097, 1098 (2006) (suggesting that Justice Scalia's dissent in *McCreary County* may have instigated "a wholesale rethinking of the constitutional relationship between church and state").

resolve some of the problems that enforcement of it has presented in the last sixty years, at least insofar as it is applied to the states.

III. NONINCORPORATION AS A SOLUTION TO THE ANTIESTABLISHMENT “MESS”

A. JUSTICE THOMAS’S CALL FOR NONINCORPORATION

Commentators have been challenging the validity of the incorporation of the Establishment Clause through the Fourteenth Amendment since the *Everson* decision;¹³⁶ the critique that the original meaning of the establishment principle was to protect states and their citizens from federal intrusion is neither new nor particularly remarkable.¹³⁷ Supreme Court Justices have also argued that the original purpose of the Establishment Clause was contrary to what Justice Black articulated in *Everson*.¹³⁸ It is noteworthy, however, that a Justice on the bench advocated for disincorporating the Clause—making it inapplicable to the states. Justice Thomas, in two concurring opinions, recently suggested that because the Establishment Clause was drafted as a federalist constraint on Congress’s powers—not on states’—to establish a church and interfere with state churches, it is not a viable candidate for incorporation.¹³⁹ This section will describe Justice Thomas’s call for nonincorporation.

Justice Thomas argued that the Establishment Clause should be understood as a “federalism provision” with the purpose of restricting Congress from interfering with state establishments.¹⁴⁰ Because it only intended to protect state religions, it did not protect an individual right, he argued.¹⁴¹ The 2004 *Newdow* case considered whether the daily recital of the Pledge of Allegiance in a public high school violated the Establishment Clause.¹⁴² The Supreme Court reversed the Ninth Circuit opinion finding a violation because the plaintiff lacked standing to bring the suit.¹⁴³ Justice Thomas believed the Pledge did not violate any constitutional principles,¹⁴⁴ but he acknowledged that under the Court’s current jurisprudence, the Ninth Circuit reached the correct outcome.¹⁴⁵ How-

136. See *supra* Part II.

137. See *supra* Part I.

138. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 641 (1992) (Scalia, J., dissenting) (“The Establishment Clause was adopted to prohibit . . . an establishment of religion at the federal level (and to protect state establishments of religion from federal interference.)”); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting) (“[I]t is not without irony that a constitutional provision evidently designed to leave the states free to go their own way should now have become a restriction upon their autonomy.”).

139. *Van Orden v. Perry*, 545 U.S. 677, 693 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring).

140. See *Newdow*, 542 U.S. at 49 (Thomas, J., concurring).

141. *Id.* at 50. Justice Thomas noted that the only right protected by the Clause is the right against federal establishments. *Id.* at 50–51.

142. *Id.* at 10 (majority opinion).

143. *Id.* at 17–18.

144. *Id.* at 49 (Thomas, J., concurring).

145. *Id.*

ever, this was antithetical to the text, history, traditions, and even current beliefs of our society.¹⁴⁶ “It would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion.”¹⁴⁷ In an establishment case permitting the display of the Ten Commandments on the grounds of the Texas State Capitol, Justice Thomas wrote a concurring opinion where he reiterated his position that the text and history of the Clause “resis[t] incorporation.”¹⁴⁸

It is true that Justice Thomas’s suggestion is a radical one. Disincorporating the Establishment Clause may have drastic consequences on the conception of religious freedom in this country; the most extreme position, of course, is that states may once again establish official religions. Justice Thomas cushioned his position with the idea that other protected liberty interests, specifically the Free Exercise Clause, would continue to protect individual rights.¹⁴⁹ Some commentators who have considered this position have dismissed it as “impossible.”¹⁵⁰ Nevertheless, disincorporation of the antiestablishment principle may be the key for a clear, articulable establishment approach. Because most establishment issues arise on a state or local level, the disincorporation of the Clause would mean fewer decisions left to the Supreme Court and more to local decision making bodies.

The remaining sections undertake an inquiry into the result if the Establishment Clause was, in fact, made inapplicable to the states. Section III.B analyzes the various protections that would take hold in the case of inapplicability of the Establishment Clause to the states. Section III.C considers, under this new approach, specific situations in which establishment challenges frequently arise and with which the Court has grappled in the past. The analysis makes apparent that disincorporation will have the effect of rationalizing Establishment Clause jurisprudence by bringing about greater consistency and coherence.

146. For example, when the court of appeals held “under God” in the Pledge of Allegiance unconstitutional, Congress almost unanimously adopted an act stating that the Pledge is constitutional. An Act To Reaffirm the Reference to One Nation Under God in the Pledge of Allegiance, Pub. L. No. 107-293, 116 Stat. 2057 (2002).

147. *Newdow*, 542 U.S. at 51 (Thomas, J., concurring). Despite his call for nonincorporation, Justice Thomas still went on to outline the criteria he would use to determine whether a particular state action constitutes an “establishment of religion” in the (likely) case that the Clause would continue to apply to the states. Under his approach, actual legal coercion of religious activity, which includes imbuing a religious group with governmental authority or expressing governmental preferences for a particular religion, would violate the principle against establishments. *See id.* at 52. He suggested it is possible that something that would violate the Establishment Clause would also violate the Free Exercise Clause, “further calling into doubt the utility of incorporating the Establishment Clause.” *Id.* at 53 n.4.

148. *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring) (alteration in original); *see also id.* (“This case would be easy if the Court were willing to abandon the inconsistent guideposts it has adopted for addressing Establishment Clause challenges, and return to the original meaning of the Clause.” (citation omitted)).

149. *Newdow*, 542 U.S. at 50 (Thomas, J., concurring).

150. *See, e.g., Muñoz, supra* note 37, at 635–36. *But see Lietzau, supra* note 37, at 1215 (suggesting nonincorporation is, in fact, plausible).

B. NONINCORPORATION IN THEORY

The most radical change that could take place if the Establishment Clause ceased to limit state and local governments is the construction of exactly what no one contests has been prohibited for the last sixty years: official state religions. One scholar suggests that state religion is “presumed to impair an individual’s freedom to worship as he or she chooses.”¹⁵¹ However, he concedes that a “liberal and tolerant” establishment may not actually impinge anyone’s free exercise rights.¹⁵² One can imagine a state declaring it is officially a Mormon state, for example, but accepting that this declaration would have no actual legal effect in terms of benefits to religious groups, symbolism in public arenas, practices in public schools, and so forth. In 1947, this was not something with which states cared to flirt, but that is not necessarily the case today. With the resurgence of a religious right that has sought to displace state neutrality and increase its presence in all aspects of the public sphere,¹⁵³ it is possible that the same movement may sweep into local and state legislatures to encourage laws officially supporting the majority religion.¹⁵⁴ At the opposing end of the spectrum is the possibility that nothing would change; other individual liberties protected by the Constitution and individual state constitutions would prohibit states from taking the same actions that they cannot under current antiestablishment law. Even if states would no longer be burdened with the restriction against establishing religions, states would still be restricted by the federal protections of the Free Speech¹⁵⁵ and Free Exercise Clauses,¹⁵⁶ incorporated through the Fourteenth Amendment,¹⁵⁷ and the Equal Protection Clause of the

151. See Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 341 (1986).

152. *Id.* at 341 n.130.

153. I refer here to attempts by Christian groups to influence the public sphere on issues such as homosexual sex, gay marriage, medical research, the Pledge of Allegiance, and home schooling.

154. In Missouri, for example, state legislators considered a bill naming Christianity the official “majority” religion of the state. H.C.R. 13, 93d Gen. Assem., 2d Sess. (Mo. 2006) (protecting the “majority’s right to express their religious beliefs while showing respect for those who object”); see also John Mills, *State Bill Proposes Christianity Be Missouri’s Official Religion*, KMOV.COM, Mar. 4, 2006, <http://www.kmov.com/topstories/stories/030206ccklrKmovreligionbill.7d361c3f.html> (last visited July 15, 2009). The representative who introduced the legislation called upon Missourians to “stand with the majority” to recognize the “positive role that Christianity has played” in this country, but objectors criticized the bill “as coming dangerously close to endorsing an official state religion.” Tim Hoover, *Missouri Statehouse: Even the Pope Has a Say on HCR 13*, KAN. CITY STAR, Mar. 12, 2006, at B1. The bill was dropped from the calendar soon after its introduction. See LegAlert (NETSCAN iPublishing, Inc. April 1, 2006), available on Westlaw at 4/1/06 LegAlert, 2006 WLNR 5482721.

155. “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

156. “Congress shall make no law . . . prohibiting the free exercise [of religion].” *Id.*

157. The Supreme Court incorporated the individual’s freedom of speech in *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Free Exercise Clause was incorporated in the 1939 *Cantwell v. Connecticut* decision. 310 U.S. 296, 303 (1939). There is little opposition to the incorporation of free exercise rights amongst those who support the incorporation of the Bill of Rights in general. See, e.g., Amar, *supra* note 37, at 1159.

Fourteenth Amendment.¹⁵⁸ This Note predicts the latter would be the more likely result.

1. Free Exercise

Because most government action burdening religion is only subject to rational basis review under the *Smith* standard,¹⁵⁹ the Free Exercise Clause is not likely to strike down most laws that would have been violative of the Establishment Clause. In the landmark free exercise case *Employment Division v. Smith*, the Court held that a neutral law of general applicability was valid even if it burdened an individual's religious belief.¹⁶⁰ The Court held that a free exercise right burdened in conjunction with another constitutionally protected right—a so-called “hybrid right”—would be subject to heightened review.¹⁶¹ The *Smith* Court cited as an example of this limitation *Wisconsin v. Yoder*,¹⁶² a case where the claim involved the right of parents to direct the education of their children combined with their right to free exercise of religion.¹⁶³ In *Sherbert v. Verner*, the Warren Court set forth a higher standard for impinging on religious activity—a “compelling state interest” test—than the flexible balancing approach used since the 1940s.¹⁶⁴ To reconcile *Smith* with the holding in *Sherbert*, Justice Scalia also subjected “individualized assessments” to heightened review, such as the employment compensation board's decision to deny benefits to the church member.¹⁶⁵ Additionally, in a free exercise case argued before the Court soon after the *Smith* decision, the Supreme Court affirmed that a law neutral on its

158. “No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

159. See *Employment Div. v. Smith*, 494 U.S. 872 (1990), *superseded by statute*, Religious Freedom Restoration Act (RFRA) of 1993, Pub. L. No. 103-141, 1993 U.S.C.C.A.N. (107 Stat.) 1488, *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

160. *Id.* at 879.

161. *Id.* at 881.

162. 406 U.S. 205 (1972). The *Yoder* Court exempted an Amish family from a general state law mandating all students attend public or private school until the age of sixteen by noting that the Amish community rejected public education based on their religious beliefs and their alternative vocational education was designed to train the Amish children to integrate into the Amish way of life. *Id.*

163. 494 U.S. at 881.

164. 374 U.S. 398, 403 (1963). The new, rigorous test was applied to require the state to provide unemployment benefits to a Seventh-day Adventist Church member despite her refusal to work on Saturdays because she observed the Sabbath then. *Id.* at 400–01, 406, 410. The State Employment Security Commission had determined she was ineligible for benefits because of the restriction on her availability. *Id.* at 401. The Court decided otherwise because the denial of benefits effectively required appellant to violate a principle of her religion, prohibiting the free exercise of her religious liberties. *Id.* at 404. The state did not put forth an interest significantly substantial to justify the infringement on her constitutional rights. *Id.* at 406, 408. After so deciding, Justice Brennan reasoned that extending the unemployment benefits to the complainant did not constitute establishment of a religion because “it [reflected] nothing more than the governmental obligation of neutrality in the face of religious differences, and [did] not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.” *Id.* at 409.

165. 494 U.S. at 884.

face but not generally applicable would be subject to heightened review.¹⁶⁶

Current First Amendment jurisprudence has settled on at least one legal principle that is applied consistently: “Government may not compel affirmation of religious *belief*.”¹⁶⁷ An example of unconstitutional compulsion under the Free Exercise Clause is the Maryland state law that was struck down in *Torcaso v. Watkins*. There, the Court with no hesitation declared the state’s religious test, which denied public office to individuals who refused to declare their belief in God, unconstitutional.¹⁶⁸ This is a useful framework for approaching certain establishment cases that involve elements of pressure because the Free Exercise Clause may provide some of the same protections against coercion.

All persons have free exercise rights, including atheists and agnostics. The First Amendment protects an individual’s refusal to perform religious acts as well as the performance of religious acts.¹⁶⁹ However, the same protections that extend to religious sects would not extend to atheists and agnostics under an Equal Protection mode of analysis unless atheism is considered a religion. If atheism *is* considered a religion, then atheist groups would have to be treated like religious groups. Professor Greenawalt argues that “[i]f the government cannot make positive assertions about religious truth [under the Religion Clauses], it would be unfair to allow it to make negative assertions,” such as nonreligious, atheist teachings.¹⁷⁰ He argues that teaching atheism is unconstitutional under an “equality” approach based on the original understanding of the Religion Clauses together, or the Equal Protection Clause, or both.¹⁷¹ The remainder of this Note will consider atheism and agnosticism as “nonreligions.” Consistent with Professor Greenawalt’s observation, it will become clear that enforcing the practices of nonbelievers or majoritarian values masked in secular language is impermissible because it discriminates against religious denominations in of-

166. See *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 545, 547 (1993) (invalidating city ordinances that targeted Santeria practice of animal sacrifice because city imposed no similar rule on state’s secular practice of killing animals for food).

167. *Smith*, 494 U.S. at 877 (emphasis added) (citing *Torcaso v. Watkins*, 367 U.S. 488 (1961)). In *Torcaso v. Watkins*, Justice Black stated:

[N]either a State nor the Federal Government can constitutionally force a person to “profess a belief or disbelief in any religion.” Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.

367 U.S. at 495 (internal citation omitted).

This is an idea carried over from the founding. See MADISON, *supra* note 36, at 33 (stating that compelling support for religious establishments violates “free exercise of Religion”).

168. *Torcaso*, 367 U.S. at 490–91.

169. Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1461 (1999) (suggesting that a state could not coerce all persons to participate in church services for at least one hour each week because that would offend the Free Exercise and Establishment Clauses).

170. *Id.* at 1463.

171. *Id.* (“Every government sponsorship of the truth of atheism, like every sponsorship of positive religious views, can be treated as forbidden.”).

fense of the Equal Protection Clause.¹⁷²

2. Equal Protection

It appears, then, that the Fourteenth Amendment's Equal Protection Clause is an appropriate place to turn to for protections against state establishments.¹⁷³ Instead of contending with the awkwardness of describing state violations of the nonestablishment principle as deprivations of liberty despite a requisite showing of coercion, the equality principle may work as a more relevant vehicle for incorporating the antiestablishment norms we have come to expect against the states.¹⁷⁴ Justice Harlan recognized this and suggested applying an "equal protection mode of analysis" in at least two establishment cases.¹⁷⁵ By this he meant that the government should be neutral among religions, so as to prevent "religious gerrymanders."¹⁷⁶ He also asserted that the Establishment Clause is violated by drawing a line between religious and nonreligious actions.¹⁷⁷ His opinion in *Welsh* sounded more in equal protection principles than it did in the Establishment Clause jurisprudence of the day. Justice Harlan stated: "To conform with the requirements of the First Amendment's religious clauses as reflected in the mainstream of American history, legislation must, at the very least, be neutral."¹⁷⁸ Neutrality under the Establishment Clause for Justice Harlan meant that the government could either exempt no one from a general statute drafting males into military service, or it could draw no line between theistic and secular beliefs compelling individuals' objections to war.¹⁷⁹ The Court settled on construing "religion" in the statute broadly enough to encompass all "sincere objectors," including those who object on nonreligious grounds, because a narrower construction would be unconstitutional.¹⁸⁰

Turning to the Equal Protection Clause itself, one must first consider its modern origins. In the famous *Carolene Products*' footnote four, the Supreme

172. See discussion *infra* section III.B.

173. See Andrew Koppelman, Commentary, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393, 399–401 (1999) (arguing that the equality principles of the Equal Protection Clause of the Fourteenth Amendment are not offended by state establishments).

174. See Laurence H. Tribe, Comment, *Saenz Sans Prophecy: Does the Privileges or Immunities Revival Portend the Future—or Reveal the Structure of the Present?*, 113 HARV. L. REV. 110, 197 n.364 (1999) (suggesting that "treating any state establishment of religion as a denial of equal protection of the laws rather than as a deprivation of some nebulous sort of liberty" may be a more sensible approach than the current antiestablishment doctrine applied against the states).

175. *Welsh v. United States*, 398 U.S. 333, 357 (1970) (Harlan, J., concurring in the judgment); *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring).

176. *Welsh*, 398 U.S. at 357. The issue in this case was whether an individual who objected to the draft based on intense ethical and moral convictions was entitled to a "conscientious objector" exemption to the general statute requiring military service. The Court decided in the affirmative even though the exemption required a belief in a "*Supreme Being* involving duties superior to those arising from any human relation." *Id.* at 336, 343 (majority opinion) (emphasis added).

177. *Id.* at 356 (Harlan, J., concurring in the judgment).

178. *Id.* at 361.

179. *Id.* at 356.

180. *Id.* at 343–44 (majority opinion).

Court recognized certain religious groups as “discrete and insular minorities . . . which may call for a correspondingly more searching judicial inquiry.”¹⁸¹ Certain classifications are inherently “suspect”¹⁸² and can be justified only if there is a compelling government interest at stake and the action is the least restrictive means of fulfilling that interest.¹⁸³ In addition to mentioning religious groups in *Carolene Products*, the Court has stated in dicta that religious groups are such a group, a “suspect class.”¹⁸⁴ The Framers of the Fourteenth Amendment also grouped “religion” with “race” as examples of classifications the Equal Protection Clause would protect.¹⁸⁵ If religion is, in fact, accepted as a “suspect classification” by the Court,¹⁸⁶ then anytime a state law on its face is

181. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

182. *See, e.g., Korematsu v. United States*, 323 U.S. 214, 216 (1944) (first noting “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect”).

183. *See, e.g., Regents of Univ. of Ca. v. Bakke*, 438 U.S. 265, 266 (1978).

184. *See, e.g., Burlington N. R.R. Co. v. Ford*, 504 U.S. 648, 651 (1992) (holding that because the state venue rules did not “classify along suspect lines like race or religion,” there was no equal protection violation); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (“Unless a classification . . . is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations . . .”); *Soberal-Perez v. Heckler*, 717 F.2d 36, 41 (2d Cir. 1983) (denying Equal Protection Clause claim because refusal to provide Spanish-language forms not based a suspect class such as “race, religion or national origin”). Scholars have similarly suggested religion is a suspect classification. *See, e.g., Alan E. Brownstein, Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 135 (1990) (asserting that religious groups are protected under Equal Protection Clause); Michael J. Mannheimer, *Equal Protection Principles and the Establishment Clause: Equal Participation in the Community as the Central Link*, 69 TEMP. L. REV. 95, 127 (1996) (asserting that strict scrutiny should apply to state action that “stigmatizes members of the community based on their religious status or belief by endorsing or disapproving of religion”); Paulsen, *supra* note 151, at 341 (suggesting that religion is a “suspect classification” because state establishments presumptively infringe on free exercise liberties).

185. *See* 3 CONG. REC. 1866 (1875) (characterizing discrimination based on race, creed, and nationality as violations of an individual’s right “to stand equal with his fellow-citizens”). The Court has affirmatively held race and nationality are “suspect classes.” *See, e.g., Loving v. Virginia*, 388 U.S. 1, 11 (1967) (subjecting state anti-miscegenation law to strict scrutiny because it classified based on race); *Korematsu*, 323 U.S. at 216 (noting that because the state action affected the rights of a group based on national origin, the order was inherently suspect and rigid scrutiny was applied).

186. The remainder of this Note will assume that religion is a suspect classification and anytime a law on its face is based on religion, strict scrutiny applies. However, even if the Court did not accept religious groups as a suspect class, rational basis review (perhaps “with bite”) is available for all other laws under the Equal Protection Clause. The rational basis test assesses whether the state action at issue is a rational means to an end that may be legitimately pursued by the state. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). When a law is reviewed under the rational basis test, it almost always means the Court will defer to the government’s judgment to uphold the state action. However, the Supreme Court has appeared to give the rational basis test “bite” in particular cases where a certain class is involved and the interest in preventing discrimination is strong. *See, e.g., Romer v. Evans*, 517 U.S. 620, 631–32 (1996) (striking down under rational basis review an amendment to the Colorado state constitution that would have prevented all municipal bodies in the state from taking any action to protect homosexual citizens from discrimination on the basis of their sexual orientation); *Cleburne*, 473 U.S. at 450 (applying rational basis review to strike down a zoning ordinance as applied to a group home for the mentally retarded because their status was the basis on which the city denied the group a permit to build their home). In the same way the Supreme Court protected homosexuals and the mentally ill from arbitrary state discrimination, it is foreseeable that the Court would protect

based on the suspect classification of religion, the state has the heightened burden to prove it has a compelling interest at stake and has narrowly tailored its means. When the law is not facially based on religion as a classification, it is still possible to make out an equal protection claim: the complainant must be able to show a discriminatory intent on the part of the lawmaker and a discriminatory impact on the religious or nonreligious group.¹⁸⁷ By analogy to the race context—the paradigmatic “suspect class” under equal protection analysis—any law that appears to favor any religion would be subject to heightened review, as would any law that intentionally stigmatizes religionists or nonreligionists based on their religious (or nonreligious) status.¹⁸⁸

A legitimate state interest sufficiently compelling to withstand strict scrutiny could be the protection of individual exercise rights. One form of permissible accommodation that classifies based on religion is to “benefit” a particular religion by removing an impediment or providing an exemption from a neutral law, so long as the benefit is conferred by a narrowly tailored mechanism related to the interest. However, note that the Free Exercise Clause in a post-*Smith* world would not constitutionally compel such an accommodation from an otherwise neutral and generally applicable law. The Establishment Clause has limited the reach of permissible religious accommodations under the Free Exercise Clause, but without its application, perhaps the Equal Protection Clause would provide the same or similar protections, particularly from unequal treatment.

The only Supreme Court establishment case to be decided under strict scrutiny analysis dealt with discrimination among religious sects.¹⁸⁹ In *Larson v. Valente*, the Court struck down a state law that imposed greater administrative burdens on religious groups that depended heavily on receipt of funds from nonmembers.¹⁹⁰ The effect of the statute was the unequal treatment of some religious groups as compared to others.¹⁹¹ Because the state was unable to show a compelling interest for the “fifty percent rule” at issue, the Court found it violated the Establishment Clause.¹⁹² Justice Brennan stated: “The clearest command of the Establishment Clause is that one religious denomination cannot

religious groups—particularly minority religious groups—from laws that have no basis other than overt discrimination by the majority.

187. See *McCleskey v. Kemp*, 481 U.S. 279, 292, 298 (1987) (denying petitioner’s equal protection claim of racial discrimination in death penalty sentencing because he failed to show the state acted with “discriminatory purpose” in *his* case).

188. Affirmative action programs that benefit racial minorities have been subject to strict scrutiny because the laws draw lines based on a suspect classification, See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–98 (1989) (plurality opinion) (subjecting race-conscious affirmative action program to strict scrutiny review even though classifications conferred a benefit). The same reasoning would apply if a law benefited religion over nonreligion. See *Mannheimer*, *supra* note 184, at 129.

189. *Larson v. Valente*, 456 U.S. 228 (1982).

190. *Id.* at 255.

191. *Id.* at 253.

192. *Id.* at 253–55.

be officially preferred over another.”¹⁹³ In a case where the law grants a “denominational preference,” he said, “our precedents demand that we treat the law as suspect and that we apply strict scrutiny in adjudging its constitutionality.”¹⁹⁴ The Court also found the statute’s inherent preference for some religions to others as “inextricably” linked to the protections of the Free Exercise Clause.¹⁹⁵ The assurance of equality of free exercise was critical to the Court’s holding in *Larson*, which embraced a Madisonian approach to equality of religious liberty. The Court noted that free exercise “can be guaranteed only when legislators . . . are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations.”¹⁹⁶ Because the Establishment Clause functions much like the Equal Protection Clause,¹⁹⁷ the Court has not had occasion to decide whether strict scrutiny analysis would apply to an Equal Protection claim absent an Establishment Clause challenge. Although the Court’s holding in *Larson* focused on the unconstitutionality of the statute under the Establishment Clause, the free exercise and equal protection language supports the proposition that the Court may be willing to find that strict scrutiny applies to similar challenges absent the Establishment Clause’s protections. As the Court explained, free exercise of religion cannot be guaranteed in a state where unequal treatment of certain religious groups is permissible.¹⁹⁸

3. Free Speech

Another potential source of restriction on the state is the Free Speech Clause of the First Amendment. Without the establishment restriction, it is possible that government will have increased control over its own expression, even if it is religious. The Supreme Court has consistently held that private religious speech is fully protected under the Free Speech Clause as “secular private expression.”¹⁹⁹ If government property has been designated as a public forum, then

193. *Id.* at 244.

194. *Id.* at 246.

195. *Id.* at 245.

196. *Id.*

197. See Paulsen, *supra* note 151, at 340–41; see also Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court’s Analysis*, 110 W. VA. L. REV. 359, 387 (2007) (“The safeguard for minority or unpopular religions is that the Establishment Clause operates much like the Equal Protection Clause does for racial and ethnic minorities.”).

198. *Larson*, 456 U.S. at 245; see also *Fowler v. Rhode Island*, 345 U.S. 67, 69–70 (1953) (holding park regulation permitting church services in park but not Jehovah’s Witness meetings unconstitutional under the First Amendment because State was preferring some religious groups over others); *Niemotko v. Maryland*, 340 U.S. 268, 284 (1951) (holding denial of use of city park for Jehovah’s Witness gatherings based on City Council’s dislike for Witnesses’ views, although park permits were issued to other religious organizations, unconstitutional). In *Fowler*, Justice Frankfurter concurred, finding that the Equal Protection Clause rendered the ordinance unconstitutional. 345 U.S. at 70 (Frankfurter, J., concurring).

199. *E.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

the state may regulate expressive activity in content-neutral terms of the time, place, and manner of expression, and it may circumscribe expressive *content* only if necessary to further a compelling state interest and the restriction is narrowly drawn.²⁰⁰ The Court has held that compliance with the Establishment Clause is not a sufficiently compelling state interest to justify content-based restrictions on free speech in a public forum.²⁰¹ Because the Establishment Clause has never stood as a bar to free speech challenges against government regulation, the absence of the clause should have no effect on the doctrine of free speech in a public forum.

As for government speech, the law remains that the government must be neutral between religion and nonreligion in its speech.²⁰² Government speech endorsing religion in public schools, for example, has been sharply restricted due to the Establishment Clause. Government speech in symbolic cases has also been restricted when it gives the appearance of “endorsing” a particular religion.²⁰³

4. State Constitutions

State constitutional provisions comparable to the First Amendment’s Religion Clauses provide another source for perpetuating the separation of church and state in the absence of the federal restriction. State law may provide greater restrictions on the government than the federal Constitution provides, so long as no other liberty is impinged upon, but no less. If the federal Establishment Clause were to be disincorporated, it is possible that state constitutional provisions and their interpretive case law would do the work of the federal Establish-

200. See *Pinette*, 515 U.S. at 761.

201. See, e.g., *Lamb’s Chapel*, 508 U.S. at 394–95 (holding that Establishment Clause is not a bar to school district allowing church to show religious film on school premises made available for use by other groups); *Widmar v. Vincent*, 454 U.S. 263, 273–74 (1981) (holding Establishment Clause is not a bar to state university extending benefits available to other student groups to Bible study group).

202. See *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (stating “[t]he touchstone for our analysis is the principle that the ‘First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))); see also Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 69–70 (2007) (arguing the law on government speech is currently one of “substantial restrictions on government speech endorsing or attacking religion”). But see *Van Orden v. Perry*, 545 U.S. 677, 698–705 (2005) (Breyer, J., concurring) (reasoning that Ten Commandments display on state capitol grounds conveys a secular message because of its long-term, uncontroversial presence that dominates the religious symbolism); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (finding that a nativity scene accompanied by Santa Claus, reindeer, candy-striped poles, and more did not endorse Christianity); *Marsh v. Chambers*, 463 U.S. 783, 786–95 (1983) (upholding state legislative chaplain’s opening daily sessions with prayer because of historical roots in the First Congress).

203. See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 306–08 (2000) (holding that coach-led prayer prior to high school football game unconstitutionally endorses religion); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592–94, 598–602 (1989) (holding that nativity scene in courthouse unconstitutional because it endorsed religion); *Wallace v. Jaffree*, 472 U.S. 38, 56–61 (1985) (holding that moment-of-silence law unconstitutionally endorsed religion because it was clearly motivated to inject official prayer into public schools).

ment Clause in its absence.²⁰⁴ Many state constitutions have been read as keeping the government out of the religious sphere because they provide explicitly for antidiscrimination,²⁰⁵ antiestablishment,²⁰⁶ or nonpreferentialism.²⁰⁷ Other state constitutions have been read by the state courts to guarantee equal or greater separation than the First Amendment, despite their wording.²⁰⁸ Although it is possible that those states with no bar on state establishments would amend their constitutions to no longer restrict state establishments,²⁰⁹ it is also likely that other states with their own restrictions would be unaffected by a change in U.S. Supreme Court jurisprudence. That many states have more detailed and more restrictive constitutional provisions than their federal counterpart may indicate that they would be unwilling to repeal their establishment prohibitions, even if the constitutional prohibition against government establishments is removed.²¹⁰

204. One commentator believes that disestablishment is possible in contemporary society in part because the Court's involvement in this area is not necessary when one considers that state religious establishments were eliminated, and that prohibitions on blasphemy, heresy, and witchcraft ended without the Court's participation in the early part of the eighteenth century. See Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497, 503 (1996).

205. For example, the New York State Constitution provides, in relevant part: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind." N.Y. CONST. art. I, § 3. It also incorporates a non-discrimination principle that is similar in kind to what the Court would presumably find in the Due Process Clause of the Fourteenth Amendment of the federal Constitution. This section provides: "No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." *Id.* § 11.

206. See, e.g., ALA. CONST. art. I, § 3 ("That no religion shall be established by law; that no preference shall be given by law to any religious sect . . . that no one shall be compelled by law to attend any place of worship; nor to pay any . . . taxes, or other rate for [maintaining religious institutions] . . .").

207. See, e.g., N.J. CONST. art. I, § 4 (prohibiting in part "establishment of one religious sect in preference to another").

208. See, e.g., *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 263 S.E.2d 726, 730 n.1 (N.C. 1980) (finding state constitutional provisions to provide equivalent guarantees of the First Amendment). The North Carolina constitution does not have an explicit antiestablishment provision, but the North Carolina Supreme Court construed the "rights of conscious," N.C. CONST. art. I, § 13, and non-discrimination provisions, N.C. CONST. art. I, § 19, together to "coalesce into a 'firmly established principle of separation of church and state.'" *Heritage Vill. Church*, 263 S.E.2d at 730 (quoting *Braswell v. Purser*, 193 S.E.2d 90, 93 (N.C. 1972)).

209. For one author's view on the direction state courts will take if the federal Establishment provision no longer restricted them, see Kathryn Elizabeth Komp, Note, *Unincorporated, Unprotected: Religion in an Established State*, 58 VAND. L. REV. 301, 320–21 (2005). Komp argues that state constitutions are not a reliable source for preserving religious freedom less the federal Establishment Clause. She reasons that because some state courts indicate they will separate church and state no more than the Bill of Rights requires, they will seek to restrict state establishments if there is no federal bar on the same. She asserts that some states aim to achieve "the maximum amount of church-state interaction allowed at the federal level." *Id.* at 320. Komp fails to account for her presumption (or logical fallacy) that state courts will automatically read in the minimum restrictions on church-state interactions possible just because they have read the restrictions in their state constitutions "identical to those of the First Amendment." *Id.* It is also plausible that states are satisfied with the current level of church-state interaction imposed by Supreme Court jurisprudence and will change little to nothing in their own jurisprudence.

210. See, e.g., *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 820 (Cal. 1991) (plurality opinion) (explaining the state's religion provisions are "more protective of the principle of separation

C. NONINCORPORATION IN ACTION

The first consideration in achieving religious pluralism should be whether there is any identifiable relationship between “establishment of religion” and the religious liberty of minority religions. The pro-incorporationists will argue there is such a relationship, and for that reason, strict separation is the ideal means to maximize religious liberties for all individuals, regardless of their faith.²¹¹ One scholar’s analytic framework for the interaction between separation of church and state and religious pluralism suggests otherwise.²¹² Professor Durham’s comparative study reveals that at certain points on the spectrum illustrating the relationship between church and state, the same level of religious liberties exists regardless of whether the two are moderately tied or are separated.²¹³ Presuming Professor Durham’s analysis has merit, nonincorporation may actually be desirable, despite what strict separationists contend. This section will proceed by assessing various circumstances under a disincorporated Establishment Clause to illustrate that the current conception of religion’s place in the public sphere would not shift dramatically. Instead, disincorporation would provide the added benefit of coherence to the jurisprudence.

1. Public Religious Displays

Symbolic establishment issues present a challenge to the Court, evidenced by the consistent struggle to resolve them. Unlike in *Lynch*, where the Court upheld a crèche display because it had a secular purpose,²¹⁴ the Court in *Allegheny* held that there was no similar secular purpose in the religious display in question.²¹⁵ The constitutionality of both displays turned on the context in which they were placed and the purposes they communicated to onlookers. Chief Justice Rehnquist contorted the meaning of the crèche display upheld in *Lynch* in order to

than the federal guarantee” although both provisions are worded the same); *E. Bay Asian Local Dev. Corp. v. State*, 81 Cal. Rptr. 2d 908, 919 (Cal. Ct. App. 3d. 1999)(same); *Ams. United, Inc. v. Indep. Sch. Dist. No. 622*, 179 N.W.2d 146, 155 (Minn. 1970) (asserting the “limitations contained in the Minnesota Constitution are substantially more restrictive” than those of the First Amendment of the U.S. Constitution); *Witters v. Wash. Comm’n for the Blind*, 771 P.2d 1119, 1123 (Wash. 1989) (holding that the Washington State Constitution prohibited payments to a religious school that the U.S. Supreme Court unanimously permitted under the federal Constitution).

211. See Mannheimer, *supra* note 184, at 104 (explaining that in *Everson* the Court focused on Jefferson’s and Madison’s writings to understand their vision of church/state relations, which led the Court to mistakenly believe that the Establishment Clause “was concerned solely with protecting the rights of religious minorities”).

212. See W. Cole Durham, *Perspectives on Religious Liberty: A Comparative Framework*, in *COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 96, at 1378, 1386 fig.4 (mapping the degree of separation of church and state against religious freedom to illustrate that, to some extent, religious liberty is independent of the separation of church and state).

213. *Id.*

214. *Lynch v. Donnelly*, 465 U.S. 668, 686–87 (1984).

215. *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 601–02 (1989); see also *supra* notes 121–28 and accompanying text.

justify its “secular” nature.²¹⁶ However, to anyone who is not Christian, a display of Jesus’ nativity scene is likely imbued with significant religious symbolism. Without the restriction on state “endorsement” of a religion, however, symbolic establishment cases would be upheld if they neither communicate a message of disapproval to non-observers nor abridge their religious liberties.²¹⁷ The display of symbols in *Lynch* and *Allegheny* do not abridge the free exercise rights of nonadherents through compulsion or inducement. Mere irritation is not sufficient to make out a successful free exercise challenge.²¹⁸ It is possible that the government could be held accountable under the Equal Protection Clause, however, if the state denied the same privilege to other groups based on their religious or nonreligious status. Assume a state has allowed a symbolic Christian display in a public space. If a private group donated another symbolic religious display, and the state refused to display the donation, the state’s refusal could be discriminatory against non-Christians. The state would violate the Equal Protection Clause unless it could demonstrate a sufficiently compelling reason for refusing to display the other donation. Thus, it would have to either remove the existing religious symbols or permit the display of the rest of the donated symbols on public grounds. A nonestablishment approach would render more consistent results in the area of religious displays. The validity of a display need not turn on the context of a display; instead, one should assess whether the state has violated principles of inherent equality by displaying one religion’s symbol but refusing to display another religion’s symbol. Indeed, with the facts presented, the displays in *Lynch* and *Allegheny* would be upheld under a framework that does not apply the Establishment Clause to the states.

The recent Ten Commandment cases are another example of the contradictory outcomes that result from the application of different approaches to resolve Establishment Clause issues.²¹⁹ The issue in both of these cases arose on state property.²²⁰ If the Establishment Clause did not restrict the states because of disincorporation, then one must look to the protections of the Free Exercise and Equal Protection Clauses. The complainants in *Van Orden* and *McCreary* did not claim their free exercise rights were infringed, and appropriately so, because

216. *Lynch*, 465 U.S. at 680 (“The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday.”).

217. See Paulsen, *supra* note 151, at 353 (“An individual’s subjective sense of personal affront or ‘psychic injury’ alone is insufficient to invalidate such symbolic accommodations of religion.”).

218. Judge McConnell, for example, argues that neither the Free Exercise nor the Equal Protection Clause will protect individuals whose only injury from government action is that they are offended or irritated. He explains that plaintiffs who only suffer “‘psychological consequences presumably produced by observation of conduct with which one disagrees’” do not have standing to challenge the action. See McConnell, *supra* note 15, at 165 (quoting *Valley Forge Coll. v. Amns. United*, 454 U.S. 464, 485 (1982)).

219. Compare *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 874 (2005) (striking down Ten Commandments display under the secular purpose prong of the *Lemon* test), with *Van Orden v. Perry*, 545 U.S. 677, 691–92 (2005) (upholding Ten Commandments display under a historical test).

220. See *McCreary*, 545 U.S. at 850; *Van Orden*, 545 U.S. at 681.

one cannot assert impingement upon freedom of religion by witnessing a religious display on a visit to the state capitol grounds or the county courthouse.²²¹ It is easy to see that both displays were based on religious classifications.²²² However, without the constraint of the Establishment Clause, there is nothing unconstitutional about placing a religious symbol on state grounds; the state is free to display any symbol—religious or secular—so long as it does not deny the same right of display to others. Unless the complainant proves that the state acted unequally towards other religious, atheist, or agnostic groups, the Ten Commandments display in both cases would be permitted.

The U.S. Supreme Court recently decided a case that involves the issue of government speech in a public forum.²²³ Pioneer Park, located in the city of Pleasant Grove, is a public park that contains various monuments and memorials, including a Ten Commandments Monument, an artifact from a Mormon Temple, and a 9/11 Monument—all donated by local civic groups.²²⁴ When the Sumnum church requested to donate and erect a monument that contained the “Seven Aphorisms of Sumnum,” the City denied the petition. The City conceded its restrictions were content-based and argued it had a compelling interest in promoting its history, as well as aesthetic and safety concerns.²²⁵ The Tenth Circuit did not assess the merits of the City’s alleged interests, however, holding that the City failed to prove that its speech restrictions were narrowly tailored to achieve its stated interests.²²⁶ The court remanded the case to the district court with instructions to grant Sumnum’s motion for a preliminary injunction.²²⁷ Notably, neither party raised any challenges under the Religion Clauses of the First Amendment,²²⁸ but the presence of an Establishment Clause issue re-

221. See *supra* note 218 and accompanying text.

222. Although the majority in *Van Orden* found a valid secular purpose for the display: to reduce juvenile delinquency, 545 U.S. at 691–92, under an equal protection mode of analysis, this would still qualify as intentional discrimination because the Ten Commandments are an inherently religious symbol that distinguish between religion and nonreligion as well as among religious sects (monotheistic believers of the Ten Commandments versus all other religions).

223. *Pleasant Grove City v. Sumnum*, 483 F.3d 1044 (10th Cir. 2007), *rev’d*, 129 S. Ct. 1125 (2009). The Tenth Circuit held the issue presented in this case must be analyzed under the category of “traditional public forum.” *Pleasant Grove City*, 483 F.3d at 1050. This is relevant because the type of forum in which the issue arises is determinative of the level of regulation the government can impose on speech in that forum. Content-based restrictions are presumptively invalid in a public forum. *Id.* at 1052 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)). Therefore, the state has the burden to show that it survives strict scrutiny. *Id.* at 1052 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

224. See Petition for Writ of Certiorari at *4–5, *Pleasant Grove City v. Sumnum*, 129 S. Ct. 1125 (2009) (No. 07-665).

225. See *Pleasant Grove City*, 483 F.3d at 1053–54.

226. *Id.* at 1054. The court granted Sumnum’s motion for a preliminary injunction to permit the display of its monument in Pioneer Park, *id.* at 1057, but the order was stayed pending petition to the U.S. Supreme Court. See Petition for Writ of Certiorari, *supra* note 224, at *16.

227. *Pleasant Grove City*, 483 F.3d at 1057.

228. Even the City’s Petition for Certiorari grounded the Questions Presented solely on free speech grounds: whether donated monuments remain the private speech of the donor and whether the municipal park is a public forum. Petition for Writ of Certiorari, *supra* note 224, at *1.

mained in the shadow throughout the litigation.²²⁹ In a unanimous holding, the Court reversed the Tenth Circuit and ruled that the City of Pleasant Grove was conveying a government message and thus exercising government speech.²³⁰ When the City decided to erect one religion's monument but not another group's monument, the Free Speech Clause was not implicated.²³¹ Thus, the outcome turned on the Court's characterization of the placement of the monuments in a public park as a form of government speech instead of private speech, taking it out of the realm of government regulation altogether.²³²

If this case arose in a state with an unincorporated Establishment Clause, the Free Speech and Equal Protection Clauses would serve as the only constraints on the City's actions. Because the First Amendment's Free Speech Clause does not provide any guidance when the speech at issue is that of the government, rather than the speech of private parties, the only remaining place to turn would be the Equal Protection Clause. Because the City likely denied a permit to Summum, specifically for reasons that are not neutral, the action would be subject to strict scrutiny review, regardless of whether the speech is government speech or private speech in a public forum. Interestingly, the City's Petition for Writ of Certiorari characterizes the lower court's ruling as providing a "right of 'equal access' for the erection of permanent monuments."²³³ An Equal Protection mode of analysis would provide precisely this: equal access to groups that want to donate and erect monuments in the City's parks. If one civic group has successfully displayed a religious symbol—the Eagles and a Ten Commandments monument, for example—then the government would have to provide a compelling reason for why it is not allowing the display of any other religious symbols in the same forum. In this way, religious pluralism and the religious liberties of minority religions are actually enhanced rather than inhibited by the Supreme Court's current Establishment Clause jurisprudence.

2. Religion in Education

Religion in education has had a pervasive presence in the courts. Drawing the line between constitutionally compelled accommodations and impermissible accommodations has not been an easy task. If the establishment prohibition were taken out of the equation, the state need not concern itself with the

229. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Scalia, J., concurring).

230. *Id.* at 1138.

231. *Id.* Justice Alito, in the majority opinion, reminded us that the First Amendment's Free Speech Clause only limits government regulation of *private* speech; it does not restrict the government's speech. *Id.* at 1131 (majority opinion).

232. *Id.* at 1129. Nonetheless, the decision of what goes in the park is constrained by the Establishment Clause. *Id.* at 1132; *see also* Brief of Appellees at *16 n.3, *Pleasant Grove City v. Summum*, 483 F.3d 1044 (10th Cir. 2007) (No. 06-4057) (arguing that the Ten Commandments monument, like the other statues in the park, is a form of government speech, and that its display does not violate the Establishment Clause in light of the Supreme Court's holding in *Van Orden v. Perry*, 545 U.S. 677, 691 (2005)).

233. *See* Petition for Writ of Certiorari, *supra* note 224, at *27.

threshold between necessary accommodations for some and impingement of the free exercise rights of others. For example, in *Epperson v. Arkansas*, the Court invalidated a state law that barred teaching Darwin's theory of evolution because it was clear the law was enacted to further a religious end and thus was not neutral.²³⁴ Under a nonestablishment, equal protection analysis, the Supreme Court would still be inclined to strike down such a regulation. Strict scrutiny would apply to the law because it promotes a particular religious belief.²³⁵ The rejection of the theory of evolution is not a universally held belief; in fact, not all religious adherents praise this view, let alone those who do not believe in any Supreme Being. Nevertheless, the Supreme Court would *still* be inclined to strike down such a law under the Equal Protection Clause because it denies equality among adherents and non-adherents in religion—those who either believe in the theory of evolution or advocate exposure to diverse viewpoints.

On the other hand, one can imagine a law that permits the teaching of religious doctrine in a public school. Such a law may be permissible if it allows for instruction on many different religions, as well as atheism and agnosticism, and not just the majority religion.

3. Public Prayer

Another category of religion in the public sphere that often creates establishment issues is that of government-endorsed activity, such as the observance of prayer in public schools or state legislatures. Not surprisingly, the Court has failed to treat public prayer evenhandedly.²³⁶ Observance of prayers in public schools has been held unconstitutional because of the inherent pressure to participate.²³⁷ The issue in *Wallace v. Jaffree* was the constitutionality of the observance of a moment of silence for “meditation or voluntary prayer” in a public school.²³⁸ The Court, in an opinion written by Justice Stevens, held the period of silence violated the Establishment Clause because it failed the secular purpose prong of the *Lemon* test.²³⁹ In a footnote, Justice Stevens responded to the Free Exercise claim raised by the appellants that the statute allowing prayer

234. 393 U.S. 97, 109 (1968) (“The law’s effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the . . . Constitution.”).

235. *See id.* at 107–08.

236. *See, e.g.,* *Engel v. Vitale*, 370 U.S. 421, 433 (1962).

237. *See id.* at 430.

238. 472 U.S. 38, 41–42 (1985). The state statute at issue provided a public school teacher may announce at the beginning of each day “that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer . . .” ALA. CODE § 16-1-20.1 (Supp. 1984), *repealed by* 1998 Ala. Laws 716.

239. *Wallace*, 472 U.S. at 61. This case is also interesting because the district court below found that two additional statutes not considered by the Supreme Court violated the Establishment Clause, but still held they were constitutional because the Establishment Clause did not apply to the states. In response, Justice Stevens took great pains to explain the error in that decision. He was appalled, considering “how firmly embedded in our constitutional jurisprudence is the proposition that the several States have

represented an accommodation of religious beliefs. He rejected the claim because there was no requirement to “accommodate” the religious observers or to exempt them from any general government rule; there was no state action preventing students from silently praying for a moment during the school day at their leisure.²⁴⁰ Even if the state was no longer restricted from “respecting” a religious establishment because the Establishment Clause had been disincorporated, the state would still be limited in what it could and could not endorse with regard to public prayer by the Equal Protection Clause. On its face, the statute does not trigger strict scrutiny because it is not making a classification *based* on one’s status as an adherent or nonadherent of a particular religion. However, because the legislative record was replete with evidence that the law intended to promote voluntary prayer,²⁴¹ the discriminatory intent of the lawmakers may nonetheless trigger heightened review. Yet, because the state would no longer be restricted from endorsing religion, it could advance a legitimate state interest in encouraging individuals to be devoted to their personal beliefs, regardless of whether their convictions are atheist, agnostic, or religious. The statute at issue was generally applicable; it did not single out any particular religion. Also, under the Free Exercise Clause, the state is permitted to accommodate religion over nonreligion. For these reasons, the prayer at issue could also withstand a Free Exercise Clause challenge.

In *Lee v. Weisman*, the Court struck down a nonsectarian prayer at a graduation ceremony as an unconstitutional accommodation of religion.²⁴² Justice Kennedy applied a flexible coercion standard to strike down the school policy because, he observed, the dissenters’ only feasible option of standing in silence during the prayer would still signify approval of the prayer or participation in it.²⁴³ It was critical to Justice Kennedy that the prayer took place in a public school, which carries “a particular risk of indirect coercion.”²⁴⁴ The school’s pupils did not have a sufficiently persuasive free exercise argument to uphold the prayer against the force of the seeming establishment of religion: one is not “burdened” by the absence of a prayer during the graduation ceremony.²⁴⁵ Just

no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.” *Id.* at 48–49.

240. *Id.* at 57 n.45.

241. *See id.* at 56–57 (noting that the Senator who sponsored the bill “inserted into the legislative record—apparently without dissent—a statement indicating that the legislation was an ‘effort to return voluntary prayer’ to the public schools”).

242. 505 U.S. 577, 599 (1992).

243. *See id.* at 593.

244. *Id.* at 592. Justice Kennedy explained that “[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Id.*

245. Of course, it is possible that in the absence of Establishment Clause constraints, the Supreme Court would embrace a more robust interpretation of the Free Exercise Clause. This analysis will proceed on the assumption that the free exercise of religion jurisprudence will remain unchanged. So long as the Supreme Court does not set the floor lower than *Smith*, the analysis here would remain

as the *absence* of a prayer does not burden one's religious practice, neither does the occasion of a non-preferential religious prayer for nonadherents. As long as the prayer does not *actually* coerce any student to participate, regardless of the symbolism in one's action, the freedom to *exercise* one's religion is not burdened, and no free exercise challenge will prevail. Whereas the Establishment Clause has a string of precedents striking down laws where the government favored religion over nonreligion,²⁴⁶ there would be no such constraint in the absence of the Clause's control over the states. Further, the school-sponsored prayer struck down in *Lee* would likely be upheld under an equal protection approach, as well. Atheists might argue the public school prayer disadvantages them, but note that if a court decided accordingly, then it would be affirmatively favoring nonreligion, which denies non-atheists equality. The only neutral, equal approach under the Equal Protection Clause would be to permit the graduation prayer and to allow students the choice to opt out if they do not want to participate or to follow along with thoughts of their own religious beliefs or secular convictions.

The only Supreme Court case to have upheld public prayer is *Marsh v. Chambers*, which used a historical test to hold a daily opening prayer in a state legislature constitutional.²⁴⁷ Instead of justifying the state action by virtue of our nation's history as the Court did,²⁴⁸ it would be more honest to uphold the prayer simply because the majority of the state favors it. Further, if there are minority religious sects that are not adherents of the chaplain's denomination, then the state should be required to shift to accommodate their religions, as well, so as not to violate equality principles. Perhaps this could be achieved by hosting a nondenominational prayer that does not profess a belief in any particular God. Or if there is an atheist objector, then the state may only permit a prayer that professes a belief in some higher moral or religious consciousness shared by all in a personal way, one that strays from belief in a particular being. In the same way that eliminating the public prayer entirely in a public school

valid. In the same vein, if a state adopted a Religious Freedom Restoration statute more protective of religious freedoms than *Smith*, then the foregoing analysis may change in that particular state.

246. See, e.g., *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (striking down a state tax exemption granted for only religious periodicals because the preference for religion over nonreligion "effectively endorses religious belief"); *Wallace v. Jaffree*, 472 U.S. 38, 52–54 (1985) (holding unconstitutional a moment of silence held in public schools because "the political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain"); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) ("The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."); *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (holding public schools may not host daily prayers, even if they are "denominationally neutral").

247. 463 U.S. 783, 792 (1983); see *supra* note 119 and accompanying text.

248. This is not a desirable approach because so many of this country's traditions are undeniably imbued with Judeo-Christian roots. The historical practice test can thus be used to uphold various historical religious traditions to the exclusion of minority religions. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 451–52 (1961) (upholding Sunday closing laws); see also *supra* notes 93–98 and accompanying text.

context would treat religious adherents unequally, it would also be unequal in this context. Therefore, the only way to treat equally all religious denominations and those that believe in no religion would be to uphold the constitutionality of the prayer and to ensure it is not mandatory to participate. This prayer may either be denominational or nondenominational, depending on the religious composition of the legislature.²⁴⁹

4. Tax Exemptions and Subsidies for Religious Uses

The Establishment Clause, as the Court in *Everson* read it in 1947, forbade state practices that “aid[ed] one religion . . . or prefer[ed] one religion over another.”²⁵⁰ Even if this understanding is not applicable to the states in a hypothetical world, states may still not be able to aid certain religious sects over other sects or nonreligion because of the protections of the Equal Protection Clause. In *Texas Monthly, Inc. v. Bullock*, the Court struck down a state tax exemption benefiting only religious periodicals even though the statute in question did not discriminate between religions.²⁵¹ The Court found the statute’s preference for religious publications “effectively endorse[d] religious belief.”²⁵² If reconsidered without the Establishment Clause as a limitation on the state, the tax exemption would still not be upheld on equal protection or free exercise grounds. Although the issue was the *favoring* of religious groups—the suspect classification—this inherently meant that the law directly disfavored nonreligious groups. Strict scrutiny would apply because the classification is religion-based; it is evident the law was intended to apply discriminatorily in favor of religious publications. Thus, the state would have to articulate a compelling reason for the religious gerrymandering of the law. This law may also be subject to a separate free exercise challenge. A secular publication could try to prove the law burdens religious or nonreligious exercise because the publication feels coerced to profess a belief in a faith to obtain the same benefit. Because this law is not neutral or generally applicable to publications, the Court would apply strict scrutiny. The law may be upheld only if (1) the state could articulate a compelling reason for the exemption which justifies the burden to secular publications, (2) the reason explains the line drawn between religion and nonreligion, and (3) the reason is the narrowest means by which to achieve those interests. Such an interest is difficult to imagine, however, so it is likely that the law would be invalidated, consistent with the Supreme Court’s holding in *Texas Monthly*.

249. For instance, if the state legislature is made up of adherents of one religious sect, then there would be no need to accommodate other religions. On the other hand, if there are several different denominations represented, then the prayer would have to be neutral among religious groups.

250. *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15 (1947).

251. 489 U.S. 1, 25 (1989) (plurality opinion).

252. *Id.* at 17. “A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable.” *Id.* at 28 (Blackmun, J., concurring in judgment).

The Free Exercise and Establishment Clauses clashed in *Walz v. Tax Commission*.²⁵³ A New York property owner challenged a general state law, which provided tax exemptions for certain property uses, including exclusively for religious purposes, because it indirectly required him to contribute to religious entities in violation of the Establishment Clause.²⁵⁴ In upholding the property tax exemption, the Court reasoned the state granted the exemption because it determined that religious groups were among those entities that serve the public interest.²⁵⁵ The purpose of the exemption was not to establish or support a religion; it was to spare the burden of taxation for groups that provide beneficial services to the community.²⁵⁶ The Court acknowledged the potential for the clauses to clash but settled on a general principle of neutrality without resolving the tension.²⁵⁷ Chief Justice Burger, writing for the Court, stated: “We will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.”²⁵⁸ The Chief Justice distinguished between state sponsorship of religion by directly funding it and merely abstaining from demanding that the church support the state via taxation.²⁵⁹ In fact, a 200-year history of granting tax exemptions for religious groups in this country has never suggested the state is establishing a church. “[O]n the contrary,” Chief Justice Burger wrote, “it has operated affirmatively to help guarantee the free exercise of all forms of religious belief.”²⁶⁰ The Court’s decision in *Walz* recognized that the state could accommodate religion for institutions and associations, not just for individuals.²⁶¹ Although the Court upheld the statute at issue on Establishment Clause grounds, the law should have been held valid regardless of incorporation. Because the statute at issue was neutral on its face and as applied to various civic groups, it should pose no free exercise or equal protection problems. That it incidentally benefits a church does not mean nonadherents are treated unequally or coercively. The equality approach is more desirable than an antiestablishment test, however, because the Court tried to draw an arbitrary line between exempting a religious group from taxation and subsidizing them. The distinction should not be between the forms of the benefit to the religious group; it is more properly decided on grounds of equal treatment among religions and between religion and nonreligion.

253. 397 U.S. 664 (1970).

254. *Id.* at 666–67.

255. *Id.* at 672–73.

256. *Id.*

257. *Id.* at 676.

258. *Id.* at 669.

259. *Id.* at 675.

260. *Id.* at 678.

261. See Glendon & Yanes, *supra* note 15, at 501.

Another recurring issue in establishment law is state funding of religious activities, either through tax credits, subsidies, or direct contribution. The state cannot classify groups based on their religion to impose burdens or to extend benefits.²⁶² In *Board of Education v. Grumet*, the Court held that the state's creation of a school district providing services for handicapped children of a particular religious minority—the creation of a religious enclave, essentially—was an unconstitutional state establishment because it failed the neutrality test.²⁶³ But notably, Justice O'Connor, in a concurring opinion, stated:

[T]he Religion Clauses—the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion—all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits.²⁶⁴

If the Establishment Clause did not apply to New York State in this case, there would be no antiestablishment restriction on the state from supporting the creation of a religious enclave. However, under Justice O'Connor's analysis, it is unclear whether this unusual state law delegating political authority to the religious group, the Satmars, would be upheld as a matter of equal protection or free exercise because the benefit conferred by the statute was based *only* on the group's religion.²⁶⁵ Thus, there is a valid claim for discriminatory treatment of religion over nonreligion. However, consider that just because the state confers a benefit or accommodation to a religious group does not make it unconstitutional, particularly when the free exercise rights of the group are also at play. The state has the opportunity to show both a compelling interest against a claim of free exercise violation because the law is not neutral or generally applicable, and a compelling interest against a claim of equal protection violation because the law treats the Satmars differently from other religious and nonreligious groups. The state's interest in promoting education, even if it is religious education, may be sufficient to withstand strict scrutiny in this case. It is also possible that the denial of this state-conferred benefit may burden the Satmars' right of religious exercise,²⁶⁶ which would constitutionally command an accommodation that is no longer limited by the Establishment Clause's neutrality principle.

In another case regarding benefits to religion, *Mueller v. Allen*, the Court upheld a state tax scheme that allowed taxpayers to deduct expenses related to

262. See Esbeck, *supra* note 197, at 388.

263. 512 U.S. 687, 702–03, 705 (1994) (plurality opinion).

264. *Id.* at 715 (O'Connor, J., concurring in part and concurring in the judgment).

265. See *id.* at 716.

266. See *Wisconsin v. Yoder*, 406 U.S. 205, 219 (1972) (exempting Amish citizens from a state compulsory education law because of parents' right to raise children as they see fit and enforcement of the law "would gravely endanger if not destroy the free exercise of respondents' religious beliefs").

educating their children in primary and secondary parochial schools.²⁶⁷ The Court, by a narrow margin, distinguished *Mueller* from a case decided ten years earlier that struck down a state tax credit plan for similar expenses.²⁶⁸ These decisions cannot be explained other than as “valiant (and successful) attempt[s] at judicial coalition-building.”²⁶⁹ In Justice Thomas’s nonincorporation state, it is unlikely that either tax scheme would be struck down under a free exercise analysis. Because such decisions are left to majoritarian forces in the local and state governments, this is a classic example of a law that would be upheld if the Establishment Clause did not apply to the states. It is true that the power to tax was a central concern of the Framers, but it is also true that they felt their liberties were secured by protecting the right to free exercise of religion.²⁷⁰ The Court in *Thomas v. Review Board* reaffirmed this view, with only one dissenter, by holding that

[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.²⁷¹

So long as the state is accommodating *all* religious beliefs, rather than taxing in a discriminatory way that penalizes certain beliefs (so it is no longer “neutral” or “generally applicable”), the Free Exercise Clause is not implicated. Further, the nonbeliever would not feel any pressure to “modify his behavior” because he is already privileged to the free secular education made available by the state.

Approaching the same issue from the Equal Protection Clause viewpoint, the tax programs would also likely withstand scrutiny. Neither tax program prefers one religion to another, nor do they prefer parochial schools to public schools because the deduction/credit was designed to assist parents who are required to pay taxes for a public school system that their children do not attend. The state is doing no more than remedying the financial inequality parents confront when choosing between state-run and religious education. Of course, the secular side can argue that government funding (or crediting) of certain religious programs offends the Equal Protection Clause because the government is supporting discrimination.²⁷² But even if the state law is subjected to strict scrutiny, the

267. 463 U.S. 388, 403–04 (1983).

268. *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973).

269. *See* Paulsen, *supra* note 151, at 357.

270. *See* MADISON, *supra* note 36, at 31.

271. *Thomas v. Review Bd.*, 450 U.S. 707, 717–18 (1981).

272. *E.g.*, WORKING GROUP ON HUMAN NEEDS AND FAITH-BASED AND COMMUNITY INITIATIVES, AGREED STATEMENT OF CURRENT LAW ON EMPLOYMENT PRACTICES, FAITH-BASED ORGANIZATIONS, AND GOVERNMENT

government would be able to demonstrate a compelling state goal and a narrow tailoring of the means to achieve that goal. The programs then would pass muster under both the Free Exercise and Equal Protection Clauses, as long as the state policy “does not impermissibly tilt the financial scales involved in making the decision of whether or not to attend a religious school.”²⁷³

As this Part illustrates, Justice Thomas’s vision for state establishment restrictions, or lack thereof, would create a relationship between state and religion not that dissimilar to the one that exists today. So long as the liberties guaranteed by the Free Exercise and Equal Protection Clauses are fully protected, there is little that a state would be able to do that it cannot already under current Establishment Clause jurisprudence. Any differences in result would be attributed to the majority’s will in a particular locality. The primary difference between a nonincorporation approach and the current doctrine would be that the former would produce unswerving results that are not dependent on nuances, such as context or subjective impressions. Because this drastic change in doctrine would not produce the dramatic results one might expect, the disincorporation of the Establishment Clause as applied against the states is not only feasible, but is also an attractive option to resolving establishment issues.

CONCLUSION

Justice Thomas is correct in raising doubts about the incorporation of the Establishment Clause and in recognizing that the Clause was originally a constraint on the federal government functioning to protect state establishments. Given our pluralistic society, equality in access to public fora may be desirable, instead of being constrained by a federal Establishment Clause. The Supreme Court’s previous attempt to create a “religion of secularism” is as unacceptable as the Court’s attempt to create a regime guided by majoritarian values. Neither adequately fulfills the Framers’ intent of creating a pluralistic society in which freedom of conscience, religious belief, and speech abound. Even more, the Supreme Court’s ad hoc approach to Establishment Clause jurisprudence allows for the injection of Justices’ personal values to reach desired ends more so in this area than in others, often in contravention to the majority’s desires. The inconsistency, unpredictability, and inherent confusion in the Court’s current doctrine require resolution with a workable standard or standards.

This Note does not purport to undertake the awesome task of articulating that standard, but rather it suggests that disincorporation of the First Amendment’s Establishment Clause will assist in the search for coherence. Because the majority of establishment challenges arise in the states, taking those cases out of the purview of the Supreme Court would minimize the confusion surrounding the meaning and purpose of the federal antiestablishment principle and perhaps

FUNDING 3 (2003), available at http://www.religionandsocialpolicy.org/docs/legal/statement_of_current_law.pdf.

273. See Paulsen, *supra* note 151, at 358.

allow the Court to add some clarity to this convoluted area of the law. This Note illustrates several advantages to devolving authority over religious matters once again to state and local authorities, not the least of which is greater fidelity to the original understanding of the Establishment Clause as a protector of states' rights. Because the inquiry will shift from "what is an establishment" (which to this day, nobody knows) to "are groups being treated equally," states would see an increase in equality among religious groups and between religion and nonreligion.

Also, maintaining the protections of the incorporated Free Exercise Clause would guarantee that no individual's free exercise rights are impinged upon and, in fact, may allow for an increase in accommodations for minority religious groups because the Establishment Clause would no longer rise to challenge them. Additionally, those states that want to maintain more stringent state constitutions would be at liberty to do so, but those that do not would be allowed to devolve the power over religion in the public sphere to local authorities. Thus, this approach would assist in papering over the inconsistencies existing in the current antiestablishment doctrine in a way that appropriately fulfills the vision of our country's Founding Fathers.