

FEDERALISM AND FAITH REDUX

IRA C. LUPU*

One key structural feature of American government that may facilitate ordered liberty is federalism. In this Essay, I discuss one way that religious liberty relates to American federalism, and how conceptions of religious liberty might be revised in light of federalism. That relationship currently unfolds in many ways, including the difference between the level of state constitutional protection of the free exercise of religion and the level of federal protection. My focus in this piece, however, is the way the religion clauses of the First Amendment apply to the states. The application of these clauses to the states, of course, determines the precise content of federal constitutional control over the explicit religion-based and religion-influencing policies of state and local governments.

What consequences for the states, and for the climate of religious liberty, would follow from relaxing that control? There are two possible forms that relaxing federal control could take. First, the Supreme Court could just shrink the ambit of the religion clauses as applied to all levels of government. The consequence of such a move would be to lessen the force of the clauses with respect to the federal government as well as to state and local governments. This relaxation would be a substantive path to change, and the Supreme Court has, as of late, traveled it to some extent.¹ Second, and more radically, the Su-

* F. Elwood & Eleanor Davis Professor of Law, The George Washington University. This Essay is derived from remarks made at a panel on Religious Liberty and the Limits of Government Power at the Annual Lawyers' Convention of the Federalist Society, Nov. 13, 2009, in Washington, D.C. The title and themes of the Essay are an outgrowth of earlier work. See Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006).

1. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (upholding school voucher scheme against Establishment Clause challenge); *Employment Div. v. Smith*, 494 U.S. 872 (1990) (reducing the ambit of the Free Exercise Clause with respect to religion-neutral rules that have an incidentally burdensome impact on religion).

preme Court might disincorporate—that is, hold that the states are no longer bound by—one or both of the religion clauses.

Disincorporation is not likely to happen, but it is far from a crazy idea. Indeed, disincorporating the Establishment Clause is quite plausible as a matter of text and history. The First Amendment begins “Congress shall make no law respecting an establishment of religion,”² and that language is at least consistent with a dual policy of prohibiting the creation of any national church and protecting against federal interference with the state establishments that existed as of 1791.³ From the bench, Justice Thomas has recently and explicitly advanced the notion that the Framers intended the Establishment Clause to leave the states with discretion about how best to promote religion, and that the Clause should not, therefore, limit the states.⁴ From the academic side, Justice Thomas finds support in the work of Professor Akhil Reed Amar, who has advanced this two-directional—simultaneously state-protecting and nation-limiting—view of the original meaning of the Establishment Clause.⁵

There are, of course, quite serious arguments from history,⁶ text,⁷ and precedent as to why disincorporation would be a

2. U.S. CONST. amend. I.

3. See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1437–38 (1990).

4. *Cutter v. Wilkinson*, 544 U.S. 709, 726–31 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in the judgment) (“[T]he Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right.”).

5. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 32–42 (1998). Justice Thomas cites Professor Amar’s work in *Newdow*, 542 U.S. at 50. See also Richard F. Duncan, *Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously*, 20 REGENT U. L. REV. (2007).

6. See, e.g., AMAR, *supra* note 5, at 246–54 (suggesting that, by the time of Reconstruction, religious liberty required religious equality of all sects); Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 767 (2005) (taking issue with the “federalism interpretation of the Establishment Clause”); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1087–88 (1995) (arguing “there is no less reason to incorporate the Establishment Clause than any other provision in the First Amendment”).

7. The Clause makes no explicit mention of the states. The key phrase, “respecting the establishment of religion,” on which much weight is put in the argument that the Clause protects states and simultaneously blocks the establishment of a national church or religion, was added in a House-Senate Conference on the lan-

deeply wrong-headed move. Nevertheless, an honest account would have to acknowledge that the Supreme Court has never really addressed the question in the full detail it deserves. Without serious discussion, the Court simply asserted in *Everson* that the Establishment Clause applied to the states because the rest of the First Amendment so applied.⁸

The focus of this Essay, however, is not the issues of textual interpretation or history on which Justice Thomas bases his dissent from the long-prevailing view on this question. Instead, I will explore the consequences that might follow from taking Justice Thomas's views on disincorporating the Establishment Clause seriously. Would such a move advance or impede the cause of religious liberty?

Before we can even start to answer that question, we should note that virtually every state has its own constitutional provision that replicates at least some Establishment Clause functions.⁹ Some are anti-funding provisions, placed in many state constitutions in the nineteenth century and aimed primarily at state funding of religious schools.¹⁰ Others, like the Virginia Constitution, forbid compelling anyone to support or attend any religious ministry.¹¹ Those limitations, as construed by state

guage of the Bill of Rights. The drafting history is set out in MICHAEL W. MCCONNELL, JOHN H. GARVEY & THOMAS C. BERG, *RELIGION AND THE CONSTITUTION* 56–61 (2d ed. 2006). Nowhere in that history does anyone offer a draft or make an argument focused on then-existing state establishments. Moreover, there appears to be no surviving evidence whatsoever of the drafters' intent in choosing the words "respecting an establishment," which could be taken as applying to pre-existing state establishments. *See id.* at 60–61. A policy of clear statement about the effect of the Federal Constitution on state power, however, would lead to the inference that the Clause has nothing to do with state policy on the subject. *See* *Baron v. Baltimore*, 32 U.S. (7 Pet.) 243, 248–49 (1833) (stating that limitations on government power in the Constitution, including the Bill of Rights, should be taken to pertain to the states only if such an intent is clearly stated).

8. *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947). Years later, concurring in *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), Justice Brennan made an effort to explain why the Establishment Clause limited the states rather than protecting them from federal interference. *Id.* at 253–58 (Brennan, J., concurring).

9. The state provisions are collected in IRA C. LUPU & ROBERT W. TUTTLE, *ROUNDTABLE ON RELIGION & SOC. WELFARE POLICY, GOVERNMENT PARTNERSHIPS WITH FAITH-BASED SERVICE PROVIDERS: THE STATE OF THE LAW* 77–129 (2002).

10. *See, e.g.*, IDAHO CONST. art. IX, § 5; ILL. CONST. art. X, § 3.

11. VA. CONST. art. I, § 16. The full version of the original statute that is the source of this provision, including its famous opening declaration that "Almighty God hath created the mind free," is printed in MCCONNELL ET AL., *supra* note 7, at 54–55.

courts and attorneys general, will continue to exist regardless of whether the federal Establishment Clause applies to the states.

Moreover, the cultural and political clock cannot be turned backwards, even if the legal clock can be. The experience of sixty years of Supreme Court decisions, applying an incorporated Establishment Clause to the states, has produced constitutional norms that would be very difficult to erase from our culture even if the Establishment Clause were disincorporated tomorrow. State courts might forbid school-sponsored prayer under state constitutions, for example, even if the First Amendment no longer required such a prohibition.

Nevertheless, it is worth exploring the consequences of disincorporation through the prism of Justice Thomas's explicit analytical framework. He believes that the Free Exercise Clause should continue to apply to the states, but that the Establishment Clause should not.¹² What would remain within the ambit of the Free Exercise Clause after disincorporating the Establishment Clause remains a bit murky, but Justice Thomas's opinion in *Newdow* suggests that he believes the Free Exercise Clause forbids state compulsion of worship,¹³ state compulsion of financial support through taxation for the enterprise of worship,¹⁴ and coercive sectarian preferences.¹⁵ In the absence of any such coercion, however, the Free Exercise Clause would leave the states wide room to formulate policies recognizing, promoting, acknowledging, or advancing religion.

How would religious liberty fare if Justice Thomas's vision took hold? Let us examine three questions, beginning with the issue of state financial support for religious entities. With the Establishment Clause removed as an impediment, states could, where permitted by their own constitutions, financially support social services that religious charities offered or educational services provided in schools that religious organizations run.¹⁶ Un-

12. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–54 (2004) (Thomas, J., concurring in the judgment).

13. *Id.* at 53 n.4.

14. *Id.* at 52–53.

15. *Id.* at 53–54.

16. That is, they could advance the kind of policies associated with the faith-based initiative that President George W. Bush began. See generally Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1 (2005).

der Justice Thomas's views, the only constitutional limit on such policies would be a bar on denominational preference.¹⁷

This outcome is quite different from the current federal constitutional law, under which government may support religious entities, without denominational preference, but may not directly fund any specifically religious activities or religious experience.¹⁸ Many people would say that this move to allow full and equal funding of religious organizations for the delivery of educational or other charitable social services is salutary, because it expands the availability of useful and compassionate social services, ends the discrimination against religious entities built into current Establishment Clause doctrine, enhances the freedom of religious organizations to participate in our common life, and expands the choices—including religious ones—available to the beneficiaries of such services. Others might suggest that allowing direct government funding of transformative religious experience would permit “the Civil Magistrate [to] employ Religion as an engine of Civil policy [and thereby engage in] an unhallowed perversion of the means of salvation.”¹⁹

Within Justice Thomas's vision, the prohibition on denominational preference in such a funding scheme would have some real force, especially if applied to state-created benefits as well as state-imposed burdens. For example, under such a preference-restricting view, California could not finance the historic preservation of its Hispanic Catholic missions unless the funding scheme was part of a more general, sect-neutral program of historic preservation.

Second, in a world in which the Establishment Clause no longer applied to the states, state and local governments would have a very wide scope of discretion to lift burdens on religious freedom as a way to accommodate the exercise of religion.²⁰ Here, too, however, a prohibition on sectarian preference might

17. *Mitchell v. Helms*, 530 U.S. 793, 809–10 (2000) (Thomas, J., plurality opinion).

18. *Id.* at 840 (O'Connor, J., concurring). The *Mitchell* concurrence is the narrowest opinion in support of the result, and hence represents the controlling law. See *Marks v. United States*, 430 U.S. 188, 193 (1977).

19. *Everson v. Bd. of Educ.*, 330 U.S. 1, 67 (1947) (Rutledge, J., dissenting) (quoting James Madison's *Memorial and Remonstrance against Religious Assessments*).

20. See Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1. For a different view, see Ira C. Lupu, *The Trouble with Accommodation*, 60 GEO. WASH. L. REV. 743 (1992).

have significant force. For example, a law that required employers to accommodate the religious practices only of Sabbatharians, but not those employees who observe other religious holidays, might be constitutionally unacceptable.²¹

The third and most significant category of what would follow from disincorporation of the Establishment Clause relates to state or local governmental sponsorship of religious messages or symbols. The list of relevant issues is long and culturally sensitive: the display by government of Christmas crèches,²² Hanukkah menorahs,²³ and other symbols of popular religious holidays; Ten Commandments monuments and other displays erected by public officials—sometimes for openly religious reasons—on public grounds;²⁴ school-sponsored prayer at public high school graduations²⁵ or athletic contests;²⁶ officially sponsored prayer—perhaps highly sectarian, perhaps not—at city council and school board meetings;²⁷ and public sponsorship of crosses as war memorials, not only out in the Mojave Desert,²⁸ but also in other widely viewed places in urban areas.²⁹ Cases and disputes based on the Establishment Clause about these kinds of symbols and messages have been a staple of the federal judicial docket for years. This litigation has been a source of serious division for the Supreme Court and other courts, and a source of considerable social and political discontent.

If Justice Thomas were to extend his free exercise-based concern for denominational preference to this set of issues, the

21. See *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

22. See *Allegheny County v. ACLU*, 492 U.S. 573 (1989); *Lynch v. Donnelly*, 465 U.S. 668 (1984).

23. See *Allegheny County*, 492 U.S. 573.

24. Compare *McCreary County v. ACLU of Ky.*, 545 U.S. 844 (2005) (prohibiting the display of the Ten Commandments on the walls of two county courthouses), with *Van Orden v. Perry*, 545 U.S. 677 (2005) (allowing the display of a Ten Commandments monument outside the state capitol).

25. See *Lee v. Weisman*, 505 U.S. 577 (1992).

26. See *Santa Fe Indep. Sch. Dist v. Doe*, 530 U.S. 290 (2000).

27. See *Marsh v. Chambers*, 463 U.S. 783 (1983). For an analysis of the explosion of lower court decisions on this topic, see Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 Minn. L. Rev. (forthcoming 2010).

28. See *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), cert. granted sub nom. *Salazar v. Buono*, 77 U.S.L.W. 3243 (U.S. Feb. 23, 2009) (No. 08-472).

29. There has been twenty years of litigation, still not concluded, over the legal status of the Latin Cross atop Mount Soledad in La Jolla, California. For a colorful description of the Mount Soledad Cross saga, see PETER IRONS, *GOD ON TRIAL: DISPATCHES FROM AMERICA'S RELIGIOUS BATTLEFIELDS* 83–117 (2007).

problems would remain quite difficult. These messages and symbols are always exclusive to some degree,³⁰ and we all have a sense that some faiths—those in the minority and unpopular in particular communities—rarely will be included in this kind of governmental sponsorship. But the jurisprudence of Justice Thomas shows every indication that his solicitude for the free exercise of religion and his concern for government preference of some faiths over others do not extend to state sponsorship or promotion of religious symbols or exercises.³¹

Thus, if we ever reach the point where the Establishment Clause has been disincorporated and no free exercise-based limitation exists on this kind of communication by state or local government, Justice Thomas's vision of the Fourteenth Amendment's impact on state policies toward religion would be quite significant indeed. This kind of symbolic support and government-sponsored worship, both inside and outside of schools, could go forward so long as no one was officially coerced to participate in a religious exercise.³²

Would that change in the law be good or bad for religious liberty? Everyone would remain equally free to worship privately as he chose, but some faiths—depending on their numbers, political power, and religiously aggressive tendencies—would receive the benefits of official reinforcement among the young, symbolic approval in the community, and periodic promotional advertising from the government. The effects of such a change in the law on the climate of religious liberty can perhaps best be understood as a matter of social theory and

30. See 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, 1118 (2006).

31. See *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 894 (2005) (Scalia, J., dissenting) (arguing that the Constitution permits government to promote and venerate the monotheistic faiths of Judaism, Christianity, and Islam). Chief Justice Rehnquist and Justice Thomas joined in this portion of the *McCreary* dissent. Justice Kennedy did not join this part of the dissent.

32. See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 53 n.4 (2004) (Thomas, J., concurring in the judgment). Justice Thomas joined the dissenting opinion of Justice Scalia in *Lee v. Weisman*, 505 U.S. 577 (1992), in which Justice Scalia emphasized that “[t]he coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support by force of law and threat of penalty.” *Id.* at 640. Under this view, permitting students to opt out of school-sponsored prayer would solve any constitutional problems of unlawful coercion of religious experience.

human practice. In some communities, the atmosphere of mutual respect and religious equality might be altered only in trivial ways; in other places, the atmospheric changes over time might be both substantial and oppressive.³³

We all have equal capacity to ponder these questions of social dynamics and human experience, but an anecdote may shed some light on them. I have heard Professor Alan Brownstein say that the school prayer cases³⁴ made it safe for him to leave the Bronx and move with his family to Davis, California to teach at the state university there.³⁵ Because of those decisions, which Justice Thomas's views would throw into doubt, Professor Brownstein did not have to worry that his children would be under pressure to recite prayers that were alien to the faith his family practiced. There is good reason to doubt the wisdom and utility of a constitutional policy that would geographically immobilize someone who has been a distinguished scholar, and an asset to the California legal community, for many years. Disincorporation of the Establishment Clause would indeed promote values of federalism, but the costs to overall human flourishing might considerably outweigh any liberty-promoting benefits associated with such a constitutional move.

33. The persistent privileging of majority faith and denigration of minority faiths is well illustrated by the litigation history described by the Fifth Circuit Court of Appeals in *Doe v. Santa Fe Independent School District*, 168 F.3d 806, 809–14 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000) (public school may not sponsor a student-led invocation at a public high school football game).

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

35. See Douglas Laycock, *Voting With Your Feet Is No Substitute For Constitutional Rights*, 32 HARV. J.L. & PUB. POL'Y 29, 35–36 (2009) (recounting the anecdote).