The Disincorporation Proclamation: Emancipating the Establishment Clause from the Fourteenth Amendment

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THE DISINCORPORATION PROCLAMATION:
EMANCIPATING THE ESTABLISHMENT CLAUSE
FROM THE FOURTEENTH AMENDMENT

I. INTRODUCTION

Although the Establishment Clause states: “Congress shall make no law respecting an
establishment of religion . . . .,”¹ the Supreme Court in 1947 read the Establishment Clause into
the Due Process Clause of the Fourteenth Amendment, and began enforcing it against the states.²
As a result every city council, school board, county and state government in the nation became
liable to suit for perceived instances of prayer,³ Bible reading,⁴ Ten Commandments displays,⁵ or
any other whiff of religion⁶ that might offend militant unbelievers such as the ACLU and the
Freedom from Religion Foundation. State expenditures on education that might aid religious
schools received particularly close scrutiny,⁷ as did annual holiday displays.⁸ The Court

¹ U.S. CONST. amend. I (emphasis added).
  prayer).
⁵ Pleasant Grove City v. Summum, 555 U.S. 460 (2009) (public park); McCree County v. ACLU of
⁶ Salazar v. Buono, 559 U.S. 700 (2010) (veteran’s memorial cross on federal land); Elk Grove Unified
  religious publications); Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987) (religious exemption
  from employment discrimination law); Edwards v. Aguillard, 482 U.S. 578 (1987) (teaching both
  evolution and creation); Gillette v. United States, 401 U.S. 437 (1971) (religious exemption from military
  service); Walz v. Tax Comm’n, 397 U.S. 664 (1970) (property tax exemption); Epperson v. Ark., 393
  (1961) (Sunday closing).
  Dept. of Servs. for Blind, 474 U.S. 481 (1986) (scholarship aid for handicapped students); Sch. Dist. of
facilitated the filing of Establishment Clause complaints by loosening standing requirements to permit any taxpayer to bring suit alleging a legislative appropriation to aid religion. In some cases government officials, fearful of Establishment Clause litigation, preemptively excluded religious groups from forums open to other members of the public.

Whether decided under strict or loose standing requirements, or under the *Lemon* test, endorsement test, or coercion test, the larger question is whether the Supreme Court legitimately possesses authority to hear Establishment Clause challenges to state law. If the answer is no, states will be free to emphasize religion as they choose, pro or con, subject to the restrictions of the Free Exercise Clause and their own state constitutions, without the inhibiting

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oversight of the federal judiciary. In the process, the lucrative fees for civil rights attorneys who prosecute these cases will also vanish.\textsuperscript{14}

\textbf{II. HISTORY}

The Bill of Rights, designed by the Founders to limit the federal government, originally did not apply to the states. “These amendments,” wrote Chief Justice John Marshall, “demanded security against the apprehended encroachments of the general government—not against those of the local governments.”\textsuperscript{15} Noting that the Constitution had a specific section listing restraints on the States,\textsuperscript{16} and that the first eight amendments had no similar designation, Marshall concluded: “These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.”\textsuperscript{17} The Civil War Amendments\textsuperscript{18} changed this situation. The Fourteenth Amendment, in particular, subjected the states to its commands.

\begin{quote}
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{19}
\end{quote}


\textsuperscript{15} \textit{Barron v. Baltimore}, 32 U.S. 243, 250 (1833).

\textsuperscript{16} U.S. CONST. art. I, § 10. “No state shall . . . .”

\textsuperscript{17} \textit{Barron}, 32 U.S. at 250. \textit{See also} \textit{Permoli v. First Municipality}, 44 U.S. (3 How.) 589, 609 (1845) (“The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states.”).

\textsuperscript{18} U.S. CONST. amend. XIII, XIV, & XV.

\textsuperscript{19} \textit{Id.} amend. XIV, § 1.
Rep. John Bingham, author of this language, explained that he adopted the “no state shall” phrase directly from Article I, § 10 to meet Marshall’s objection that “the existing amendments are not applicable to and do not bind the states.”

In reexamining that case of Barron, . . . I noted and apprehended as I never did before, certain words in that opinion of Marshall. Referring to the first eight articles of amendments to the Constitution of the United States, the Chief Justice said: “Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention.”

Acting upon this suggestion I did imitate the framers of the original Constitution. As they had said “no State shall emit bills of credit, pass any bill of attainder, ex post facto law, or law impairing the obligations of contracts;” imitating their example and imitating it to the letter, I prepared the provision of the first section of the fourteenth amendment as it stands in the Constitution . . . .

Bingham also explained that the privileges and immunities of the Fourteenth Amendment “are chiefly defined in the first eight amendments to the Constitution of the United States.”

Senator Jacob Howard, introducing the Fourteenth Amendment in the Senate, reiterated that the first eight amendments did not operate “in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . .” To remedy this situation, “[t]he great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees.”

In the view of the sponsors of the Fourteenth Amendment, the purpose of the Privileges or Immunities Clause was to make the first eight amendments to the Bill of Rights applicable to

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20 CONG. GLOBE, 39TH CONG., 1ST SESS. 1089-90 (1866).
21 CONG. GLOBE, 42ND CONG., SPEC. SESS. App. 84 (1871) (citation omitted).
22 Id.
23 CONG. GLOBE, 39TH CONG., 1ST SESS. 2765 (1866).
24 Id. at 2766.
the states. Does that mean that the Establishment Clause of the First Amendment is now enforceable against the states?

III. THE FIRST AMENDMENT: GRAMMATICAL DISTINCTIONS

The Establishment Clause, so-called, is part of the Religion Clause, itself a section of the First Amendment. The First Amendment limits the legislative power, the power to make laws, by specifically forbidding three types of laws: those (1) “respecting an establishment of religion, or prohibiting the free exercise thereof,” (2) “abridging the freedom of speech, or of the press” or (3) [abridging] “the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” Although the First Amendment curtails the power of Congress in three general areas—religion, free speech, and assembly—the adjectival phrases modifying the lawmaking power use three different participles: respecting, prohibiting, and abridging. These all have different meanings, and thus set different subject-matter specific limits on the legislative power. “Prohibiting” is the narrowest of the three, allowing laws about free exercise of religion short of absolute prohibitions. Thus, according to the text, Congress may pass laws encouraging, promoting, or even limiting the free exercise of religion, as long as such laws do not “prohibit.” “Abridging” is a broader concept than “prohibiting.” One may abridge...

25 The Supreme Court has accomplished the same result through serial incorporation of the individual amendments into the Due Process Clause. The history of this development and the subsequent downgrading of the Privileges or Immunities Clause is beyond the scope of this paper.
26 See Christopher A. Boyko, A New Originalism: Adoption of a Grammatical Interpretive Approach to Establishment Clause Jurisprudence after District of Columbia v. Heller, 57 CLEV. ST. L. REV. 703, 709 (2009) (pointing out that grammatically the “Establishment Clause” is really a phrase within the larger religion clause).
27 U.S. CONST. amend. I.
28 For a sentence diagram of the First Amendment, see http://www.german-latin-english.com/diagramamend1.htm.
30 The modifier “free” is important. A law that allows the exercise of religion may still prohibit “the free exercise thereof.” “Free” operates like “curtilage” in Fourth Amendment cases, putting a buffer zone around the core right. See Oliver v. United States, 466 U.S. 170, 180 (1984) (“[T]he land immediately..."
an activity even though not prohibiting it. Thus, Congress has broader power to legislate in the area of free exercise than in the areas of speech and assembly. As long as free exercise is not prohibited, Congress may pass laws affecting it, but for speech and assembly, anything that even abridges the right, while not prohibiting it, is disallowed.  

Finally, “Congress shall make no law respecting an establishment of religion . . . .” The word “respecting” is far broader than “abridging.” Congress may not pass laws relating in any way to an establishment of religion. The entire subject matter is off limits. Unlike free exercise, or speech and assembly, where Congress may legislate short of prohibiting or abridging, no legislation contemplating an establishment of religion—whether favorable, neutral, or unfavorable—is allowed. Because the Constitution does not limit the power of the states in this

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31 “Abridge” means to lessen or diminish. WEBSTER’S DICT., supra note 29.

32 A counterargument is that the First Amendment merely illustrates powers denied to Congress. Because the Constitution ceded enumerated powers only, and said nothing about power over speech, press, religion, or assembly, Congress has no authority in these areas at all. A contrary claim would, as Madison argued, “wrongly turn the amendment into a grant of power instead of a declaration of right.” Report on the Virginia Resolutions (Jan. 18, 1800), available at http://constitutioalboe.com/virginia-resolutions. See also THE FEDERALIST NO. 84 (Alexander Hamilton) (“For why declare that things shall not be done when there is no power to do?”).


34 “Nor is there anything in the First Amendment that limits congressional power to promote speech, press, petition, and assembly against state repression.” Akhil Reed Amar, THE BILL OF RIGHTS: CREATION & RECONSTRUCTION 41 (1998).

35 The Supreme Court considers the word “respecting” to enlarge the zone of prohibition. “A law may be one ‘respecting’ the forbidden objective while falling short of its total realization . . . in the sense of being a step that lead to such establishment and hence offend the First Amendment. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). Justice Stevens suggests, somewhat implausibly, that the Framers also meant to prohibit laws that show respect to religion ‘But it also means with respect — that is, ‘reverence,’ ‘good will,’ ‘regard’ — to. Taking into account this richer meaning, the Establishment Clause, in banning laws that concern religion, especially prohibits those that pay homage to religion.” Allegheny County, 492 U.S. at 649 (Stevens, J., concurring in part and dissenting in part). James Madison at one time stated: “The Constitution of the U.S. forbids everything like an establishment of a national religion.” Elizabeth Fleet, Madison’s “Detached Memoranda,” 3 WM. & MARY Q. 534, 558 (1946).
area, the entire subject of establishments is left to them.\textsuperscript{36} Congress may not touch it.\textsuperscript{37} At least before the Fourteenth Amendment.

**IV. THE LOGICAL IMPOSSIBILITY OF APPLYING THE ESTABLISHMENT CLAUSE TO THE STATES**

Many commentators see an analogy between the Establishment Clause and the Tenth Amendment.\textsuperscript{38} Both function as structural restraints on the federal government, making explicit what is implicit in the concept of a government of enumerated powers. Thus, the Tenth Amendment has been called a “truism” or a “tautology.”\textsuperscript{39} Obviously, what is not delegated is retained.\textsuperscript{40} Yet in an era of expanding federal government power, this acknowledgement is very important in delineating the limits of federal authority. Likewise, the Establishment Clause does not ascribe personal rights to the individual, but instead restrains the federal government from acting. An establishment of religion, funded from general tax revenues, does not impinge upon

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\textsuperscript{36} “[I]n the early republic . . . the Establishment Clause acted to bar the federal government from interfering with how the states dealt with the prickly matter of religion.” Carl H. Esbeck, \textit{Dissent and Disestablishment: The Church-State Settlement in the Early American Republic}, 2004 B.Y.U.L. Rev. 1385, 1590 [hereinafter \textit{Dissent}].

\textsuperscript{37} The Religion Clause does not prohibit legislation about religion \textit{per se}, but only laws about an establishment of religion or that go so far as to prohibit free exercise. See Cutter v. Wilkinson, 544 U.S. 709, 728 (2005) (Thomas, J., concurring) (“The Clause prohibits Congress from enacting legislation respecting an establishment of religion; it does not prohibit Congress from enacting legislation respecting religion or taking cognizance of religion.”) (internal quotation marks and citation omitted). \textit{See also} PHILIP HAMBURGER, \textit{SEPARATION OF CHURCH AND STATE} 107 (2004) (The Establishment Clause “did not forbid all legislation respecting religion.”). Absent a positive enumerated power, however, Congress could not touch the subject at all. Fear that the Necessary and Proper Clause might be read to permit such a power contributed to the demand for a Bill of Rights. \textit{See} 1 ANNALS OF CONG. 758 (1789) (James Madison).

\textsuperscript{38} “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.


\textsuperscript{40} “Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities.” 3 JOSEPH STORY, \textit{COMMENTS ON THE CONSTITUTION OF THE UNITED STATES} 752 (1833), \textit{quoted in} New York v. United States, 505 U.S. at 156.
anyone’s personal rights as long as the free exercise of religion is unimpeded. For that reason, an otherwise uninjured taxpayer may lack federal standing to pursue an Establishment Clause claim. See Ariz. Christian Sch. Tuition Org. v. Winn, 131 S.Ct. 1436 (2011).

Yet the Constitution independently prohibits it apart from any personal detriment.

Contrary to the current enforcement practices of the Supreme Court, the Establishment Clause did not originally devolve upon the federal government a duty to sniff out religiously-flavored government actions wherever they might be detected. Instead, it prohibited the national authority from doing anything with respect to religion, favorable or unfavorable. The Clause operated as a particular application of the Tenth Amendment, expressly reserving to the states plenary power over the question of religious establishments. As Michael McConnell explains: “Contrary to popular myth, the First Amendment did not disestablish anything. It prevented the newly formed federal government from establishing religion or from interfering in the religious establishments of the states.” Political scientist Vincent Munoz adds: “Because the original meaning only recognizes a jurisdictional boundary that protects state authority, it cannot


42 A leading religion clause scholar, surveying English and early American history, describes an establishment of religion as follows: The government determines doctrine, appoints ministers, provides financial support, requires mandatory attendance, prohibits attendance elsewhere, and limits political participation to members of the state church. Michael W. McConnell, Establishment and Disestablishment at the Founding, Part I: Establishment of Religion, 44 WM. & MARY L. REV. 2105 (2003). The first four characteristics also describe public education, an almost universally-accepted establishment. See AMAR, supra note 34, at 44 (“From one perspective, the twentieth-century state school is designed to serve a function very similar to that of the eighteenth-century church[.]”). Private schools and home schooling are a form of educational “free exercise” that coexist with the predominant state establishment.

43 See Arthur E. Sutherland, Jr., Establishment According to Engel, 76 HARV L. REV. 25, 35 (1962) (noting the Court’s sensitivity to “a chemical trace of religious content” in a school prayer case).

44 McConnell, supra note 42, at 2109. See also Abington Sch. Dist. v. Schempp, 374 U. S. 203, 309-310 (1963) (Stewart, J., dissenting) (“[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.”).
be logically incorporated to apply against state governments.”  

As a result, the Establishment Clause “did not constitutionalize a personal right of ‘non establishment.’”

Any right created by the Establishment Clause is a sovereign right of the states to be free from federal control, not a personal right of individuals. Thomas Jefferson cited the intersection of the Establishment Clause with the Tenth Amendment as the reason why he did not as President declare a national day “of fasting & prayer.”

I consider the government of the US. as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the states the powers not delegated to the U. S. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government. It must then rest with the states . . . .

The states, therefore, have plenary power, and the federal government none. Failure to recognize this distinction had led federal officials wrongly to imitate state religious customs. Jefferson explains: “I have ever believed that the example of state executives led to the assumption of that authority by the general government, without due examination, which would have discovered that what might be a right in a state government, was a violation of that right when assumed by another.”

Even Justice William Brennan, a staunch advocate of employing the Establishment

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46 Id. The incorporation doctrine pulls many rabbits of “fundamental rights” out of the “liberty” hat—a single word in the Due Process Clause of the Fourteenth Amendment. These personal rights are those “implicit in the concept of ordered liberty.” Palko v. Connecticut, 302 U.S. 319, 325 (1937). Although the Free Exercise Clause arguably protects personal rights, the Establishment Clause merely marks a jurisdictional boundary between federal and state power.
48 Id. at 8. While Governor of Virginia, Jefferson issued a prayer proclamation and authored a law declaring public days of fasting and thanksgiving. As a founder of the University of Virginia, a state institution, he encouraged religious instruction “within, or adjacent to, the precincts of the university.” David Barton, The Image and the Reality: Thomas Jefferson and the First Amendment, 17 NOTRE DAME J.L. ETHICS & PUB. POL’Y 399, 407-10 (2003).
Clause to cleanse the states of public expressions of religion, admitted the peculiar federalist

nature of the provision:

Most of the provisions of the Bill of Rights, even if they are not generally

enforceable in the absence of state action, nevertheless arise out of moral

intuitions applicable to individuals as well as governments. The Establishment

Clause, however, is quite different. It is, to its core, nothing less and nothing more

than a statement about the proper role of government in the society that we have

shaped for ourselves in this land.49

Because incorporating the Tenth Amendment against the States is nonsensical,50 so is

incorporating the Establishment Clause.51 Applying states’ rights against the states is illogical.52

Justice Clarence Thomas in 2002 acknowledged that application of the Establishment Clause to

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49 Marsh v. Chambers, 463 U.S. 783, 802 (Brennan, J., dissenting) (contending that the Establishment
Clause prohibits legislative prayer). Compare Carl H. Esbeck, The Establishment Clause as a Structural
Restraint on Governmental Power, 84 IOWA L. REV. 1, 103 n.443 (1998) [hereinafter Structural
Restraint] (“The Free Exercise Clause, as well as the four expressional Clauses in the First Amendment
(speech, press, petition, and assembly) . . . protect individual rights. They work only indirectly to limit the
power of the sovereign state.”).
50 “As a clause expressly protecting states’ rights, incorporating the Tenth against the states is logically
impossible.” Kurt T. Lash, The Lost Jurisprudence of the Ninth Amendment, 85 TEX. L. REV. 597, 646
(2005).
51 As “a specific protection of state authority . . . the establishment clause most closely resembled the
tenth amendment.” William K. Lietzau, Rediscovering the Establishment Clause: Federalism and the
Rollback of Incorporation, 39 DEPAUL L. REV. 1191, 1201 (1990). See id. at 1206 (terming
Establishment Clause incorporation “nonsensical” and “illogical”). “By what magical metamorphosis
does a clause which, under the First Amendment is expressly a reservation of power to the states, become
a denial of that very power by virtue of the Fourteenth Amendment?” Joseph M. Snee, Religious
Disestablishment and the Fourteenth Amendment, 1 CATH. LAWYER 301, 308 (1955). See also Daniel O.
‘incorporate’ this policy of states’ rights against the states would be utter nonsense . . . akin to an
incorporation of the Tenth Amendment for application against the States.”); Note, Rethinking the
extent the Establishment Clause is similar to the Tenth Amendment, its incorporation is similarly
incoherent.”).
52 “[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.” Abington Sch. Dist, 374 U.S.
at 310 (Stewart, J., dissenting). “Congress had no more authority in the states to disestablish than to
establish . . . . As a more pure federalism provision, then, the establishment clause seems considerably
more difficult to incorporate against the states.” AMAR, supra note 34, at 41. “To get the establishment
clause incorporated into [the Fourteenth Amendment] is quite a constructional wrench.” Sutherland, supra
note 43, at 41.
the states through the Fourteenth Amendment is a “difficult question.” Two years later, stating that “the Establishment Clause is a federalism provision, which, for this reason, resists incorporation,” he elaborated:

The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus, unlike the Free Exercise Clause, which does protect an individual right, it makes little sense to incorporate the Establishment Clause.

Moreover, incorporation of this putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect — state establishments of religion. . . . At the very least, the burden of persuasion rests with anyone who claims that the term took on a different meaning upon incorporation.

Acknowledging Justice Thomas’ argument that the Establishment Clause has “its own unique history,” Justice Stevens a year later offered a practical objection: “But even if the decision to incorporate the Establishment Clause was misguided, it is at this point unwise to reverse course given the weight of precedent that would have to be cast aside . . . .”

53 Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) (observing that incorporated rights “should advance, not constrain, individual liberty”). He was the first Justice since Everson to consider disincorporation. See Lee v. Weisman, 505 U.S. 577, 620 n.4 (1992) (Souter, J., concurring) (“Since [Everson], not one Member of this Court has proposed disincorporating the [Establishment] Clause.”).


55 Id. at 49, 51. See also Utah Highway Patrol Ass’n v. Am. Atheists, Inc., 132 S. Ct. 12, 21 (2011) (Thomas, J., dissenting from denial of certiorari) (noting “my view that the Establishment Clause restrains only the Federal Government”); Cutter v. Wilkinson, 544 U.S. 709, 728 n.3 (2005) (Thomas, J., concurring) (“The text and history of the Clause may well support the view that the Clause is not incorporated against the States precisely because the Clause shielded state establishments from congressional interference.”); Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring) (“If the Establishment Clause does not restrain the States, then it has no application . . . where only state action is at issue.”); For a scholarly article contending that the Establishment Clause had taken on “a different meaning upon incorporation,” see Kurt T. Lash, The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle, 27 ARIZ. ST. L. J. 1085 (1995) (arguing that by 1868 the Establishment Clause was understood as a mere annex to the Free Exercise Clause, and thus reasonably construed as an individual right). See similarly AMAR, supra note 34, at 252-54; Frederick Mark Gedicks, Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account, 88 Ind. L.J. 669 (2013).

56 Van Orden, 545 U.S. at 730 n.32 (Stevens, J., dissenting).
constitutional cases, however, *stare decisis* carries less weight. Justice Rehnquist explained:

“*Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision. This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible.”

Especially when governing decisions “are unworkable or are badly reasoned, this Court has never felt constrained to follow precedent.”

V. THE ESTABLISHMENT CLAUSE AND THE FOURTEENTH AMENDMENT

If textually and logically, the Establishment Clause is not applicable to the States, and *stare decisis* does not prohibit reconsideration of incorporation, what does Reconstruction Era history disclose? Evidence of intent to incorporate free exercise rights is substantial, and logical. Evidence that the Framers of the Fourteenth Amendment intended to control all state discretion in matters of religion is scant and, as stated previously, illogical. The voluntary

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57 *Stare decisis* means “To abide by, or adhere to, decided cases.” BLACK’S LAW DICTIONARY (rev. 4th ed.).


60 See Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 17-29 (1998) (quoting many Reconstruction-Era Congressmen for the proposition that the Privileges or Immunities Clause included personal free exercise rights). See also Abington Sch. Dist. v. Schempp, 374 U. S. 203, 257 (1963) (Brennan, J., concurring) (“[T]he Fourteenth Amendment’s protection of the free exercise of religion can hardly be questioned[.]”). Arguing that “the State Governments are as liable to attack the invaluable privileges as the General Government is,” James Madison proposed to amend the Constitution to provide that “no State shall violate the equal right of conscience, freedom of the press, or trial by jury in criminal cases.” 1 ANNALS OF CONG. 452 (1789). These “invaluable privileges,” as Madison termed them, did not include a proposed ban on state establishments. Id. at 458. Like the 39th Congress, seventy-five years later, Madison did not consider a ban on state establishments to be a personal right of citizens.


62 Only one Congressman has been cited on this point. See CONG. GLOBE, 43RD CONG., 1ST SESS. 242 (1874) (Sen. Norwood) (stating that the Fourteenth Amendment prevented the states from establishing a
elimination of all remaining formal state establishments within a generation of the ratification of
the Bill of Rights indicates that suppressing state establishments was not a pressing concern for
the Reconstruction Congress. That the states ratifying the Fourteenth Amendment to provide
equal rights of citizenship for former slaves also intended as an afterthought to deprive
themselves of their own autonomy to regulate church-state relations is implausible. The
incorporation of the Establishment Clause by diktat in 1947, without any supporting reasoning, is
further confirmation that neither history nor logic supported the act. The shield that had
protected the states from federal interference in their religious affairs became a spear aimed at
that autonomy. In Everson, the Court razed the true wall of separation between the federal
government and the states.

The last establishment disappeared in 1833 when Massachusetts amended its constitution to
disestablish the Congregationalist Church. See generally John D. Cushing, Notes on Disestablishment in

Justice Black, referring to incorporation of the Free Exercise Clause, stated: “There is every reason to
give the same application and broad interpretation to the ‘establishment of religion’ clause.” Everson v.
Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947). But the reasons were never given. Converting a hands-off
states’ rights clause into plenary national oversight of all government-tinged religious practices was “a
novation, simultaneously aggressive and bold.” Esbeck, Dissent, supra note 36, at 1592. “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.” Ira C. Lupu, Federalism and Faith Redux, 33 HARV.
J.L. & PUB. POL’Y 935, 937 (2010). See also Mary Ann Glendon & Raul F. Yanes, Structural Free
Exercise, 90 MICH L. REV. 477, 481 (1991) (noting “how little intellectual curiosity the Members of the
Court demonstrated in the challenge presented by the task of adapting for application to the states,
language that had long served to protect the states against the federal government”); Esbeck, Structural
Restraint, supra note 49 at 25 (noting that the Court incorporated the Establishment Clause “without
debate or even seeming appreciation of what it was doing”); Philip B. Kurland, The Irrelevance of the
Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 VILL. L. REV. 3, 10 (1979) (“The transmogrification occurred solely at the whim of the Court. . . . without argument—
certainly without cogent argument . . . .”). Neither party had raised the First Amendment issue in its
briefs. See Everson, 330 U.S. at 29 n.3 (Rutledge, J., dissenting) (“The briefs did not raise the First
Amendment issue.”).

(2011) (“The framers enacted the Establishment Clause as a shield, to protect state religious regulation
VI. FURTHER EVIDENCE: THE BLAINE AMENDMENT

In 1875, only seven years after ratification of the Fourteenth Amendment, Senator James G. Blaine proposed an amendment to the Constitution incorporating the Religion Clause in its entirety against the states, and also prohibiting state aid to religious schools. The amendment passed the house, but narrowly failed in the Senate. Proffered to attract nativist support for his campaign for the 1876 Republican presidential nomination, Blaine’s amendment (and other similar proposals), writes a leading religion scholar, “clearly assumed that the Fourteenth Amendment had not already applied the First Amendment to the states.” In 1874, the secularist National Liberal League had proposed adding a provision to the Constitution “prohibiting the several states from establishing a State religion.” The revised First Amendment, the League explained, “would be the death-warrant of all attempts to pervert the Constitution to the service of Roman Catholicism or any other form of Christianity.” One sympathizer explained that certain clauses in the Constitution “might be tortured into a construction prohibitory of state establishment of religion,” but felt that the Privileges or Immunities Clause could not be applied from federal interference. However the Supreme Court has transformed the Establishment Clause into a sword, which gives federal judges the power to meddle in areas traditionally reserved to the states.”

67 “Jefferson’s ‘wall,’ like the First Amendment, affirmed the policy of federalism . . . that all governmental authority over religious matters was allocated to the states.” DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 69 (2002).

68 “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 . . . [shall] be divided between religious sects or denominations.” 4 CONG. REC. 205 (1875).

69 4 CONG. REC. 5191 (1876).

70 4 CONG. REC. 5595 (1876).


72 Philip Hamburger, Privileges or Immunities, 105 NW. U. L. REV. 61, 142 (2011). The First Amendment, Blaine wrote to a supporter, left the states free pursuant to the Tenth Amendment to “do as they pleased in regard to an ‘establishment of religion.’” Establishments had lingered “long after the adoption of the Federal Constitution, and, although there may be no positive danger of its revival in the future, the possibility of it should not be permitted.” Letter of James G. Blaine (Oct. 20, 1875), in JAMES P. BOYD, LIFE AND PUBLIC SERVICES OF HON. JAMES G. BLAINE 352-53 (1893).

73 Hamburger, supra note 72, at 139.

74 Id.
to this purpose. Writing in 1870, he assumed that the Constitution “as it stands” placed no restrictions on state legislation about religion. Proposing a Blaine-type amendment, he stated: “It is better that a Constitution should speak plainly than hint its meaning.”

These proposals, and Congressional consideration of the Blaine Amendment, indicate that political opinion on incorporation of the Establishment Clause (and perhaps the Bill of Rights in general) was somewhat inchoate in the years immediately after ratification of the Fourteenth Amendment. Thus, the bold incorporation by the Everson Court, without visiting any Reconstruction-Era history, seems not only potentially flawed, but also improvident. The failure of the Blaine Amendment, though not dispositive of the incorporation issue, provides added cause for skepticism. When, given the opportunity, Congress did not send this overt language to the states for ratification, one may reasonably question the unreflective assumption that the Fourteenth Amendment had incorporated the Establishment Clause back in 1868.

VII. AFTER DISINCORPORATION

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75 Id. at 138.
76 Id.
77 One scholar notes “a curious silence regarding the Fourteenth Amendment during the Blaine Amendment debates.” Bryan H. Wildenthal, The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment, 61 OHIO ST. L.J. 1051, 1129 (2000). Another speculates that the proposal to incorporate the entire Religion Clause indicates that the Establishment Clause had become assimilated to the Free Exercise Clause—transformed into a personal right. Lash, supra note 55, at 1145-50. Others hypothesize that the judicial undermining of the Privileges or Immunities Clause made an attempt at reinvigoration necessary. The Blaine Amendment, on this theory, was an attempt to restore the original 1868 meaning through express language. See AMAR, supra note 34, at 254 n.*. Senator Oliver Morton, making the only reference to the Fourteenth Amendment in the Blaine Amendment debate, stated: “The fourteenth and fifteenth amendments . . . have, I fear, been very much impaired by construction.” 4 CONG. REC. 5585 (1876).
78 Post-hoc legislative history is not favored. “The views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.” United States v. Price, 361 US 304, 313 (1960). See also Green, supra note 71, at 64. (observing that “the practice of deriving the legislative intent behind one enactment from a later legislative action or inaction is faulty at best”).
79 Frederick Frelinghuysen, the Senate sponsor of the Blaine Amendment, stated that it “prohibits the States, for the first time, from the establishment of religion.” 4 CONG. REC. 5561 (1876).
Assuming disincorporation of the Establishment Clause would accord with plain meaning, logic, and history, what would the consequences be?

**A. THE ESTABLISHMENT CLAUSE WOULD STILL APPLY TO THE FEDERAL GOVERNMENT.**

Disincorporation of the Establishment Clause would not limit its application to the federal government. With the Fourteenth Amendment removed from the picture, the original meaning would remain: “Congress shall make no law . . . .” Thus, the Court would still police federal legislation for Establishment Clause violations. Only the states would be freed from the Court’s oversight.

**B. THE COURT WOULD STILL ENFORCE THE FREE EXERCISE CLAUSE AGAINST THE STATES.**

Were the Establishment Clause unincorporated, the Free Exercise Clause (properly applied through the Privileges or Immunities Clause) would remain as a protection for individual rights. Justice Thomas, though doubting the validity of Establishment Clause incorporation, accepts incorporation of the Free Exercise Clause. Emblems of a traditional establishment, such as assessments or compulsory attendance, would rise to the level of “coercive government

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80 See Van Orden, 545 U.S. 677, 729 (2005) (Stevens, J., dissenting) (noting that an unincorporated Establishment Clause “limits only the federal establishment of a national religion.”) (internal quotation marks and citation omitted).


82 The majority of religion cases heard by the Court represent challenges to state actions. From 1970 to 2005, the Supreme Court decided seventy-five religion clause cases. Twenty-one (28%) involved federal law. For the complete list of cases, see Appendix 1 to Mark David Hall, Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases, 85 OR. L. REV. 563 (2006) (selecting “cases in which at least four Justices considered the Free Exercise or Establishment Clauses (or both) to raise substantial issues”). Appendix 1 (“Federal Religion Clause Cases”) lists the twenty-one federal cases. These would be unaffected by disincorporation of the Establishment Clause.


84 “I accept that the Free Exercise Clause, which clearly protects an individual right, applies against the States through the Fourteenth Amendment.” Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment).
preferences," thus implicating the Free Exercise Clause.\textsuperscript{85} Although the Free Exercise Clause no longer applies to "neutral, generally applicable law,"\textsuperscript{86} hybrid cases involving free exercise coupled to free speech or parental rights may still be heard\textsuperscript{87} as well as cases that involve individualized exemptions\textsuperscript{88} or discriminatory targeting of religion.\textsuperscript{89} Federal free exercise jurisdiction over state laws would thus be undisturbed.\textsuperscript{90} In fact, states Justice Thomas, "it may well be the case that anything that would violate the incorporated Establishment Clause would actually violate the Free Exercise Clause, further calling into doubt the utility of incorporating the Establishment Clause."\textsuperscript{91}

\begin{itemize}
\item \textbf{C. State Constitutions would take up the slack.}
\end{itemize}

Were the Establishment Clause disincorporated, the religion clauses in state constitutions would be the first line of protection for religious freedom. Every state Constitution has a Free Exercise Clause.\textsuperscript{92} Eight are identical to the federal provision,\textsuperscript{93} and one is similar, but stronger.\textsuperscript{94}

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\item \textsuperscript{85} Id. at 54 n.5.
\item \textsuperscript{86} Emp’t Div. v. Smith, 494 U.S. 872, 881 (1990).
\item \textsuperscript{87} Id. at 881-82. For a survey of lower court attempts to define "hybrid rights," see Note, \textit{The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions}, 123 HARV. L. REV. 1494, 1498-1508 (2010).
\item \textsuperscript{88} Id. at 884.
\item \textsuperscript{89} See, e.g., Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) ("[T]he principle of general applicability was violated because the secular ends asserted in defense of the laws were pursued only with respect to conduct motivated by religious beliefs."); Axson-Flynn v. Johnson, 356 F. 3d 1277 (10th Cir. 2004) (remanding for fact-finding on issue of whether "script adherence" requirement to utter blasphemy and vulgarities in college acting program was discriminatorily applied to religious conduct).
\item \textsuperscript{90} To the twenty-one federal religion clause cases, \textit{supra} note 82, one must add sixteen state law free exercise cases. See Appendix 2 ("Non-Federal Free Exercise Cases"). In total, 49\% of the religion clause cases heard from 1970 to 2005 would be unaffected by disincorporation.
\item \textsuperscript{91} Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 n.4 (2004) (Thomas, J., concurring in the judgment). See also Cutter v. Wilkinson, 544 U.S. 709, 728 n.3 (2005) (Thomas, J., concurring) ("A state law that would violate the incorporated Establishment Clause might also violate the Free Exercise Clause.").
\item \textsuperscript{92} Alabama and Arizona are the only possible exceptions. See Appendix 3 ("State Free Exercise Clauses").
\item \textsuperscript{93} Alaska, Hawaii, Iowa, Louisiana, Massachusetts, Montana, South Carolina, and Utah.
\item \textsuperscript{94} "There shall be no law . . . prohibiting \textit{or penalizing} the free exercise [of religion]." FlA. CONST. art. I, § 3 (emphasis added).
\end{itemize}
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The other forty-two are redolent of former times when religious freedom was highly exalted. In the wake of Emp’t Div. v. Smith, enervating the federal Free Exercise Clause, some states found in their own constitutions stronger protection for free exercise of religion than the Supreme court had discerned in the First Amendment. Noting that the state constitutional language “is of a distinctively stronger character than the federal counterpart,” the Minnesota Supreme Court concluded that government action satisfying the First Amendment might “nonetheless infringe on or interfere with” religious practice protected by the Minnesota Constitution. Similarly, the Washington Supreme Court post-Smith held that the religious freedom language of its state constitution was “significantly different and stronger than the federal constitution.” Noting that Smith “departs from a long history of established law and adopts a test that places free exercise in a subordinate, instead of preferred position,” the Court turned to the robust language of the Washington Constitution to remedy the defect. Other states

95 See, e.g., ARK. CONST. art. II, § 24 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences[,]”); MASS. CONST. art. II (“It is the right as well as the duty of all men in society, publicly, and at stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe.”); MISS. CONST. art. III, § 18 (“[T]he free enjoyment of all religious sentiments and the different modes of worship shall be held sacred.”); N.J. CONST. art. I (“No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience[,]”); NORTH DAKOTA CONST. art. I, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state[,]”); WASH. CONST. art. I, § 11 (“Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual[,]”).
97 State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990). See also State by Cooper v. French, 460 N.W.2d 2, 8-9 (Minn. 1990) (plurality opinion) (analyzing free exercise claim under Minnesota Constitution in light of “unforeseeable changes in established first amendment law set forth in recent decisions of the United States Supreme Court”); MINN. CONST. art. I, § 16 (“The right of every man to worship God according to the dictates of his own conscience shall never be infringed .”).
99 Id. at 187.
have done the same, relying on state constitutional provisions to restore strict scrutiny to free exercise claims.\textsuperscript{100}

Almost every state constitution has an establishment clause.\textsuperscript{101} Nine copy the federal “respecting” language.\textsuperscript{102} The others are far more specific,\textsuperscript{103} reminiscent of an early Senate version of the Establishment Clause that read: “Congress shall make no law establishing articles of faith or a mode of worship . . . .”\textsuperscript{104} Five states expressly ban mandatory tithing.\textsuperscript{105} Twenty-seven prohibit compelled attendance or support of any place of worship.\textsuperscript{106} Twenty-seven also

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\textsuperscript{100}See, e.g., Swanner v. Anchorage Equal Rights Comm’n, 874 P.2d 274, 280-81 (Alaska 1994) (“[W]e are not required to adopt and apply the Smith test to religious exemption cases involving the Alaska Constitution”); Attorney General v. Desilets, 636 N.E.2d 233, 236 (Mass. 1994) (adhering to the standards of pre-Smith First Amendment jurisprudence); State v. Miller, 549 N.W.2d 235 (Wis. 1996) (retaining “compelling state interest/least restrictive alternative test” for free exercise under Wisconsin Constitution).


\textsuperscript{102}Alaska, California, Florida, Hawaii, Iowa, Louisiana, Montana, South Carolina, and Utah. Accord Mechthild Fritz, Religion in a Federal System: Diversity Versus Uniformity, 38 U. KAN. L. REV. 39, 43 & n.24 (1989) Iowa also adds: “ . . . nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.” IOWA CONSTIT. art. I, § 3.

\textsuperscript{103}See Rethinking Incorporation, supra note 51, at 1717 (“Moreover, the state provisions governing church-state relations tend to be more detailed and specific than the First Amendment.”); Fritz, supra, at 42 (“In addition to the terse language of the federal religion clauses, state provisions are often more substantial and sometimes verbose.”).

\textsuperscript{104}S. JOURNAL, 1ST CONG., 1ST SESS., at 72 (Sept. 7, 1789). See, e.g., IDAHO CONST. art. I, § 4 (“No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.”).

\textsuperscript{105}ALA. CONST. art. I, § 3 (“nor to pay any tithes”); IDAHO CONST. art. I, § 4 (“or pay tithes”); IOWA CONST. art. I, § 3 (“nor shall any person be compelled . . . to pay tithes”); MICH. CONST. art. I, § 4 (“No person shall be compelled to . . . pay tithes”); N.J. CONST. art. I (“nor shall any person be obliged to pay tithes”).

\textsuperscript{106}Those banning both required attendance and support are: Alabama, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont,
forbid giving preference by law to any particular religious society or mode of worship.107

Twenty-one prohibit appropriation of public funds for the benefit of any religious
organization.108

About forty state constitutions have specific provisions outlawing use of public funds for
support of religious (“sectarian”) schools.109 These “Baby Blaine” amendments arose before and
after the Civil War to accomplish state-by-state what the Blaine Amendment sought to do
nationally.110 Thus, the state constitutions are well-armored to protect against any sudden post-
disincorporation lurch into theocracy. Indeed, a large majority have more stringent express
limitations on state support of religion than does the bare language of the federal constitution.

In *Locke v. Davey*, the Supreme court recognized that state antiestablishment provisions
may draw “a more stringent line” than the Federal Constitution without necessarily bumping into
the Free Exercise Clause.111 Thus, state constitutions may provide stricter protection against

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Virginia, West Virginia, Wisconsin. Connecticut bans required membership or support; Montana
attendance. New Hampshire forbids compulsory support of religious schools. See Appendix 4.
107 Alabama, Arkansas, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Kansas, Kentucky,
Maine, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New
Mexico, Ohio, Pennsylvania, South Dakota, Tennessee, Texas, Virginia, West Virginia, Wisconsin. Utah
has unique language: “nor shall any church dominate the State”. **UTAH CONST.** art. I, § 4. For specific
phraseology, see Appendix 4.
108 Arizona, Florida, Georgia, Idaho, Illinois, Massachusetts, Michigan, Minnesota, Missouri, Montana,
Nevada, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, Wisconsin,
Wyoming.
109 I count forty-one. See Appendix 5 (“State Sectarian Education Clauses”). A specialist on the subject
Overview and Evaluation of State Blaine Amendments: Origins, Scope, and First Amendment Concerns*,
110 Some provisions were also mandated by federal law. The Enabling Act of 1889, 25 Stat. 676,
authorizing admission to the Union of North Dakota, South Dakota, Montana, and Washington, required
each state constitution to include a provision “for the establishment and maintenance of systems of public
schools, which shall be . . . free from sectarian control.” *Locke v. Davey*, 540 U.S. 712, 723 n.7 (2004).
111 540 U.S. 712, 722 (2004). See id. at 724 n.8 (“Washington has also been solicitous in ensuring that its
constitution is not hostile toward religion”). See also *Witters v. Washington Dept. of Servs. for Blind*, 474
U.S. 481 (1986) (finding no Establishment Clause violation in vocational rehabilitation aid to student at
establishments, exceeding the federal minimum. A Florida appellate court, relying on Locke, applied the no-sectarian-appropriation provision of its state constitution to strike a scholarship voucher program that would otherwise pass muster under the Federal Constitution. Similarly, relying on its own Blaine Amendment, the Kentucky Supreme Court struck a $10 million appropriation for a pharmacy building at a Baptist university. In light of the numerous state constitutional provisions prohibiting sectarian aid, even separationists should have nothing to fear from disincorporation.

VIII. CONCLUSION

Why have one Supreme Court for the entire nation in the delicate area of religious freedom, when each state already has such protection for its own people? Will not fifty


See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (A state may “adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution.”); Cooper v. California, 386 U.S. 58, 62 (1967) (states may impose “higher standards” than required by the Federal Constitution). See also FRANK J. SORAUF, THE WALL OF SEPARATION: THE CONSTITUTIONAL POLITICS OF CHURCH AND STATE 26 (1976) (“The states may, if they wish, erect a higher wall of separation between church and state, but they are prevented by the U.S. Constitution from setting a lower one.”).


“[R]ights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand[.]” 1 ANNALS OF CONG. 757 (1789) (Rep. Daniel Carroll).
separate courts, each with its own jurisdiction and knowledgeable of local circumstances, better adjudicate these thorny issues?\textsuperscript{118} How did the Religion Clause arise but from the demand of the states that the federal government not intrude into this sovereign realm?\textsuperscript{119} Was the Civil War fought to give the federal government an arbitrary hand in local issues of church-state relations? Surely not. To employ a phrase coined by Justice Stevens, the Supreme Court should turn around and “cross back over the incorporation bridge.”\textsuperscript{120}

\textsuperscript{117} See Snee, supra note 51, at 319 (“The religious freedom of American citizens has been more than adequately safeguarded by state constitutions.”).

\textsuperscript{118} “I believe that freedom is safer in the hands of the legislatures and judges of forty-eight states than at the mercy of varying interpretations by nine men sitting in Washington.” \textit{Id.; see also} Michael W. McConnell, \textit{Federalism: Evaluating the Founders’ Design}, 54 U. Chi. L. Rev. 1484, 1506 (1987) (“[T]he framers of the Constitution and Bill of Rights believed that state governments were, in some vital respects, safer repositories of power over individual liberties than the federal government.”). A criminal justice scholar makes a similar point. See Barry Latzer, \textit{Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation}, 87 J. Crim. L. & Criminology 63, 128 (1996) (“The state constitutional renaissance, in which the state courts established the same or broader-than-federal rights, demolishes any lingering notions that the state bench is insensitive to rights.”).

\textsuperscript{119} James Madison, speaking at the Virginia ratifying convention in 1787, stated: “There is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation.” 3 \textsc{Jonathan Elliott}, \textit{Debates in the Several State Conventions on the Adoption of the Federal Constitution} 330 (2d ed., 1836) [hereinafter \textsc{Elliott’s Debates}]. At the North Carolina convention, James Iredell, later appointed to the Supreme Court by George Washington, stated: “They [Congress] certainly have no authority to interfere in the establishment of any religion whatsoever[.]” 4 \textsc{Elliott’s Debates} 194. When a delegate asked why the Constitution guaranteed a republican form of government, but not religious freedom, Iredell responded: “Had Congress undertaken to guaranty religious freedom . . . they would then have had a pretence to interfere in a subject they have nothing to do with. Each state . . . must be left to the operation of its own principles.” \textit{Id.} at 195.

\textsuperscript{120} Van Orden v. Perry, 545 U.S. 677, 730 (2005) (Stevens, J., dissenting).
APPENDIX 1


APPENDIX 2


APPENDIX 3

State Free Exercise Clauses

Ala. Const. art. I, § 3 (‘the civil rights, privileges, and capacities of any citizen shall not be in any manner affected by his religious principles”).

Alaska. Const. art. I, § 1.4 (‘No law shall be made . . . prohibiting the free exercise [of religion].”).

Ariz. Const. art. II, § 12 (‘The liberty of conscience secured by the provisions of this constitution shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace and safety of the state.”).

Ark. Const. art. II, § 24 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; . . . No human authority can, in any case or manner whatsoever, control or interfere with the right of conscience[].”).

Cal. Const. art. I, § 4 (“Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State.”).

Colo. Const. art. II, § 4 (“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever hereafter be guaranteed; and no person shall be denied any civil or political right, privilege or capacity, on account of his opinions concerning religion; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness or justify practices inconsistent with the good order, peace or safety of the state.”).

Conn. Const. art. I, § 3 (“The exercise and enjoyment of religious profession and worship, without discrimination, shall forever be free to all persons in the state; provided, that the right hereby declared and established, shall not be so construed as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of the state.”).

Del. Const. art. I, § 1 (“[N]o power shall or ought to be vested in or assumed by any magistrate that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.”).

Fla. Const. art. I, § 3 (“There shall be no law . . . prohibiting or penalizing the free exercise [of religion]. Religious freedom shall not justify practices inconsistent with public morals, peace or safety.”).

Ga. Const. art. I, § 1, ¶ 3 (“Each person has the natural and inalienable right to worship God, each according to the dictates of that person’s own conscience; and no human authority should, in any case, control or interfere with such right of conscience.”); id. art. I, § 1, ¶ 3 (“No inhabitant of this state shall be molested in person or property . . . on account of religious
opinions; but the right of freedom of religion shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.”).

Haw. Const. art. I, § 4 (“No law shall be enacted . . . prohibiting the free exercise [of religion].”).

Idaho Const. art. I, § 4 (“The exercise and enjoyment of religious faith and worship shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, or excuse acts of licentiousness or justify polygamous or other pernicious practices, inconsistent with morality or the peace or safety of the state; nor to permit any person, organization, or association to directly or indirectly aid or abet, counsel or advise any person to commit the crime of bigamy or polygamy, or any other crime.”).

Ill. Const. art. I, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed, and no person shall be denied any civil or political right, privilege or capacity, on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State.”).

Ind. Const. art. I, §§ 2-3 (“All people shall be secured in the natural right to worship ALMIGHTY GOD, according to the dictates of their own consciences. No law shall, in any case whatever, control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience.”).

Iowa Const. art. I, § 3 (“The general assembly shall make no law . . . prohibiting the free exercise [of religion] . . . .”).

Kan. Const. art. I, § 7 (“The right to worship God according to the dictates of conscience shall never be infringed; . . . nor shall any control of or interference with the rights of conscience be permitted . . . .”).

Ky. Const. Bill of Rights § 1 (“All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: . . . Second: The right of worshiping Almighty God according to the dictates of their consciences.”); id. § 5 (“. . . and the civil rights, privileges or capacities of no person shall be taken away, or in any way diminished or enlarged, on account of his belief or disbelief of any religious tenet, dogma or teaching. No human authority shall, in any case whatever, control or interfere with the rights of conscience.”).

La. Const. art. I, § 8 (“No law shall be enacted . . . prohibiting the free exercise [of religion].”).

Mass. Const. amend. XVIII, § 1 (“No law shall be passed prohibiting the free exercise of religion.”).

Me. Const. art. I, § 3 (“All individuals have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences, and no person shall be hurt, molested or restrained in that person’s liberty or estate for worshipping God in the manner and season most
agreeable to the dictates of that person’s own conscience, nor for that person’s religious
professions or sentiments, provided that that person does not disturb the public peace, nor
obstruct others in their religious worship[.]”).

Md. Const. art. 36 (“That as it is the duty of every man to worship God in such manner as he
thinks most acceptable to Him, all persons are equally entitled to protection in their religious
liberty; wherefore, no person ought by any law to be molested in his person or estate, on account
of his religious persuasion, or profession, or for his religious practice, unless, under the color of
religion, he shall disturb the good order, peace or safety of the State, or shall infringe the laws of
morality, or injure others in their natural, civil or religious rights[.]”).

Mass. Const. art. II (“It is the right as well as the duty of all men in society, publicly, and at
stated seasons to worship the Supreme Being, the great Creator and Preserver of the universe.
And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for
worshiping God in the manner and season most agreeable to the dictates of his own conscience;
or for his religious profession or sentiments; provided he doth not disturb the public peace, or
obstruct others in their religious worship.”).

Mich. Const. art. I, § 4 (“Every person shall be at liberty to worship God according to the
dictates of his own conscience. . . . The civil and political rights, privileges and capacities of no
person shall be diminished or enlarged on account of his religious belief.”).

Minn. Const. art. I, § 16 (“The right of every man to worship God according to the
dictates of his own conscience shall never be infringed . . . but the liberty of conscience hereby secured shall
not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the
peace or safety of the state . . . .”).

Miss. Const. art. III, § 18 (“[T]he free enjoyment of all religious sentiments and the different
modes of worship shall be held sacred. The rights hereby secured shall not be construed to justify
acts of licentiousness injurious to morals or dangerous to the peace and safety of the state. . . .”).

Mo. Const. art. I, § 5 (“That all men have a natural and indefeasible right to worship Almighty
God according to the dictates of their own consciences; that no human authority can control or
interfere with the rights of conscience . . . but this section shall not be construed to excuse acts of licentiousness, nor to justify practices inconsistent with the good order, peace or safety of the
state, or with the rights of others.”).

Mont. Const. art. II, § 5 (“The state shall make no law . . . prohibiting the free exercise [of
religion].”).

Neb. Const. art. I, § 4 (“All persons have a natural and indefeasible right to worship Almighty
God according to the dictates of their own consciences. . . . nor shall any interference with the
rights of conscience be permitted.”).

Nev. Const. art. I, § 4. (“The free exercise and enjoyment of religious profession and worship
without discrimination or preference shall forever be allowed in this State, . . . but the liberty of
[conscience] hereby secured, shall not be so construed, as to excuse acts of licentiousness or justify practices inconsistent with the peace, or safety of this State.

N.H. Const. part first, art. V (“Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshiping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession, sentiments, or persuasion; provided he doth not disturb the public peace or disturb others in their religious worship.”).

N.J. Const. art. I (“No person shall be deprived of the inestimable privilege of worshiping Almighty God in a manner agreeable to the dictates of his own conscience[.]”)

N.M. Const. art. II, § 11 (“Every man shall be free to worship God according to the dictates of his own conscience, and no person shall ever be molested or denied any civil or political right or privilege on account of his religious opinion or mode of religious worship.”).

New York Const. art. I, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.”).

North Carolina Const. art. I, § 13 (“All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own consciences, and no human authority shall, in any case whatever, control or interfere with the rights of conscience.”).

North Dakota Const. art. I, § 3 (“The free exercise and enjoyment of religious profession and worship, without discrimination or preference shall be forever guaranteed in this state . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.”).

Ohio Const. art. I, § 7 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. . . . nor shall any interference with the rights of conscience be permitted.”).

Okla. Const. art. I, § 2 (“Perfect toleration of religious sentiment shall be secured, and no inhabitant of the State shall ever be molested in person or property on account of his or her mode of religious worship; and no religious test shall be required for the exercise of civil or political rights. Polygamous or plural marriages are forever prohibited.”).

Or. Const. art. I, § 2 (“All men shall be secure in the Natural right, to worship Almighty God according to the dictates of their own consciences.”); id. art. I, § 3 (“No law shall in any case whatever control the free exercise, and enjoyment of religious (sic) opinions, or interfere with the rights of conscience.”).
Pa. Const. art. I, § 3 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; . . . no human authority can, in any case whatever, control or interfere with the rights of conscience . . . .”).

R.I. Const. art. I, § 3 (“[N]o person shall be . . . enforced, restrained, molested, or burdened in body or goods; nor disqualified from holding any office; nor otherwise suffer on account of such person’s religious belief; and that every person shall be free to worship God according to the dictates of such person’s conscience, and to profess and by argument to maintain such person’s opinion in matters of religion; and that the same shall in no wise diminish, enlarge, or affect the civil capacity of any person.”).

S.C. Const. art. I, § 2 (“The General Assembly shall make no law . . . prohibiting the free exercise [of religion].”)

S.D. Const. art. VI, § 3 (“The right to worship God according to the dictates of conscience shall never be infringed. No person shall be denied any civil or political right, privilege, or position on account of his religious opinions; but the liberty of conscience hereby secured shall not be so construed as to excuse licentiousness, the invasion of the rights of others, or justify practices inconsistent with the peace or safety of the state.”).

Tenn. Const. art. I, § 3 (“That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience; . . . that no human authority can, in any case whatever, control or interfere with the rights of conscience . . . .”).

Tex. Const. art. I, § 6 (“All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. . . . No human authority ought, in any case whatever, to control or interfere with the rights of conscience in matters of religion . . . .”).

Utah Const. art. I, § 4 (“The rights of conscience shall never be infringed. . . . The state shall make no law . . . prohibiting the free exercise [of religion].”); id. art. III. (“Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.”).

Vt. Const. ch. I, art. 3 (“That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God . . . . nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculiar[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship.”).

Va. Const. art. I, § 16 (“That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and
charity towards each other. No man shall be . . . burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion, and the same shall in nowise diminish, enlarge, or affect their civil capacities.”).

Wash. Const. art. I, § 11 (“Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state.”).

W.Va. Const. art. III, § 15 (“No man . . . shall any man be enforced, restrained, molested or burthened, in his body or goods, or otherwise suffer, on account of his religious opinions or belief, but all men shall be free to profess and by argument, to maintain their opinions in matters of religion; and the same shall, in nowise, affect, diminish or enlarge their civil capacities.”).

Wis. Const. art. I, § 18 (“The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; . . . nor shall any control of, or interference with, the rights of conscience be permitted . . . .”).

Wy. Const. art. I, § 18 (“The free exercise and enjoyment of religious profession and worship without discrimination or preference shall be forever guaranteed in this state, and no person shall be rendered incompetent to hold any office of trust or profit, . . . but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.”).
APPENDIX 4

State Establishment Clauses

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, society, denomination, or mode of worship; that no one shall be compelled by law to attend any place of worship; nor to pay any tithes, taxes, or other rate for building or repairing any place of worship, or for maintaining any minister or ministry . . . .”).

Alaska. Const. art. I, § 1.4 (“No law shall be made respecting an establishment of religion . . . .”).

Ariz. Const. art. II, § 12 (“No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the support of any religious establishment . . . .”); id. art. IX, § 10 (“No tax shall be laid or appropriation of public money made in aid of any church . . . .”).

Ark. Const. art. II, § 24 (“No man can, of right, be compelled to attend, erect or support any place of worship; or to maintain any ministry against his consent . . . . and no preference shall ever be given, by law, to any religious establishment, denomination or mode of worship above any other.”).

Cal. Const. art. I, § 4 (“The Legislature shall make no law respecting an establishment of religion.”).

Colo. Const. art. 2, § 4 (“No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent. Nor shall any preference be given by law to any religious denomination or mode of worship.”).

Conn. Const. art. VII (“No person shall by law be compelled to join or support, nor be classed or associated with, any congregation, church or religious association. No preference shall be given by law to any religious society or denomination in the state.”).

Del. Const. art. I, § 1. (“No person shall or ought to be compelled to attend any religious worship, to contribute to the erection or support of any place of worship, or to the maintenance of any ministry, against his or her own free will and consent; . . . nor a preference given by law to any religious societies, denominations, or modes of worship.”).

Fla. Const. art. I, § 3 (“There shall be no law respecting the establishment of religion . . . . No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.”).

Ga. Const. art. I, § 2, ¶ 7 (“No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, cult, or religious denomination or of any sectarian institution.”)
Haw. Const. art. I, § 4 (“No law shall be enacted respecting an establishment of religion . . . .”).

Idaho Const. art. I, § 4 (“No person shall be required to attend or support any ministry or place of worship, religious sect or denomination, or pay tithes against his consent; nor shall any preference be given by law to any religious denomination or mode of worship.”); id. art. X, § 5 (“Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian or religious society, or for any sectarian or religious purpose, . . .; nor shall any grant or donation of land, money or other personal property ever be made by the state, or any such public corporation, to any church or for any sectarian or religious purpose; . . .”).

Ill. Const. art. I, § 3 (“No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship.”); id. art. X, § 3 (“Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, . . . nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.”).

Ind. Const. art. I, § 4 (“No preference shall be given, by law, to any creed, religious society, or mode of worship; and no person shall be compelled to attend, erect, or support, any place of worship, or to maintain any ministry, against his consent.”).

Iowa Const. art. I, § 3 (“The general assembly shall make no law respecting an establishment of religion . . .; nor shall any person be compelled to attend any place of worship, pay tithes, taxes, or other rates for building or repairing places of worship, or the maintenance of any minister, or ministry.”).

Kan. Const. art. I, § 7 (“. . . nor shall any person be compelled to attend or support any form of worship; . . . nor any preference be given by law to any religious establishment or mode of worship.”)

Ky. Const. Bill of Rights § 5 (“No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion . . .”).

La. Const. art. I, § 8 (“No law shall be enacted respecting an establishment of religion . . . .”).

Me. Const. art. I, § 3 (“[N]o subordination nor preference of any one sect or denomination to another shall ever be established by law . . . .”).

Md. Const. art. 36 (“. . . nor ought any person to be compelled to frequent, or maintain, or contribute, unless on contract, to maintain, any place of worship, or any ministry[.]”).
Mass. Const. art. XI (“[N]o subordination of any one sect or denomination to another shall ever be established by law.”); id. amend. XVIII, § 2 (“[N]o grant, appropriation or use of public money or property or loan of public credit shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination or society.”).

Mich. Const. art. I, § 4 (“No person shall be compelled to attend, or, against his consent, to contribute to the erection or support of any place of religious worship, or to pay tithes, taxes or other rates for the support of any minister of the gospel or teacher of religion. No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or society, theological or religious seminary; nor shall property belonging to the state be appropriated for any such purpose.”).

Minn. Const. art. I, § 16 (“...nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; ... or any preference be given by law to any religious establishment or mode of worship ... nor shall any money be drawn from the treasury for the benefit of any religious societies ...”).

Miss. Const. art. III, § 18 (“[N]o preference shall be given by law to any religious sect or mode of worship[.]”).

Mo. Const. art. I, § 6 (“That no person can be compelled to erect, support or attend any place or system of worship, or to maintain or support any priest, minister, preacher or teacher of any sect, church, creed or denomination of religion[.]”); id. art. I, § 7 (“That no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such; and that no preference shall be given to nor any discrimination made against any church, sect or creed of religion, or any form of religious faith or worship.”); id. art. IX, § 8 (“Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything in aid of any religious creed, church or sectarian purpose, ... nor shall any grant or donation of personal property or real estate ever be made by the state, or any county, city, town, or other municipal corporation, for any religious creed, church, or sectarian purpose whatever.”).

Mont. Const. art. II, § 5 (“The state shall make no law respecting an establishment of religion ...”); id. art. X, § 6(1) (“The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose ...”); id. art. X, § 7 (“Attendance shall not be required at any religious service.”).

Neb. Const. art. I, § 4 (“No person shall be compelled to attend, erect or support any place of worship against his consent, and no preference shall be given by law to any religious society, ...”).

Nev. Const. art. XI, § 10 (“No public funds of any kind or character whatever, State, County or Municipal, shall be used for sectarian purpose.”).
N.H. Const. part first, art. VI (“And every person, denomination or sect shall be equally under the protection of the law; and no subordination of any one sect, denomination or persuasion to another shall ever be established.”).

N.J. Const. art. I. (“No person shall . . . under any pretense whatever be compelled to attend any place of worship contrary to his faith and judgment; nor shall any person be obliged to pay tithes, taxes, or other rates for building or repairing any church or churches, place or places of worship, or for the maintenance of any minister or ministry, contrary to what he believes to be right or has deliberately and voluntarily engaged to perform. There shall be no establishment of one religious sect in preference to another[.]”)

N.M. Const. art. II, § 11 (“No person shall be required to attend any place of worship or support any religious sect or denomination; nor shall any preference be given by law to any religious denomination or mode of worship.”); id. art. XXI, § 1 (same).

New York (none).

North Carolina (none).

North Dakota (none).

Ohio Const. art. I, § 7 (“No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent; and no preference shall be given, by law, to any religious society[.]”)

Okla. Const. art. II, § 5 (“No public money or property shall ever be appropriated, applied, donated, or used, directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit, or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such.”).

Or. Const. art. II, § 5 (“No money shall be drawn from the Treasury for the benefit of any religious (sic), or theological institution, nor shall any money be appropriated for the payment of any religious (sic) services in either house of the Legislative Assembly.”).

Pa. Const. art. I, § 3 (“[N]o man can of right be compelled to attend, erect or support any place of worship or to maintain any ministry against his consent; . . . and no preference shall ever be given by law to any religious establishments or modes of worship.”); id. art. III, § 29 (“No appropriation shall be made for charitable, educational or benevolent purposes to . . . any denominational and sectarian institution, corporation or association[.]”)

R.I. Const. art. I, § 3 (“[N]o person shall be compelled to frequent or to support any religious worship, place, or ministry whatever, except in fulfillment of such person’s voluntary contract[.]”)
S.C. Const. art. I, § 2 (“The General Assembly shall make no law respecting an establishment of religion . . . .”).

S.D. Const. art. VI, § 3 (“No person shall be compelled to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious establishment or mode of worship. No money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution.”).

Tenn. Const. art. I, § 3. (“[N]o man can of right be compelled to attend, erect, or support any place of worship, or to maintain any minister against his consent; . . . and that no preference shall ever be given, by law, to any religious establishment or mode of worship.”).

Tex. Const. art. I, § 6 (“No man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent. . . . and no preference shall ever be given by law to any religious society or mode of worship. . . . “); id. art. I, § 7 (“No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.”).

Utah Const. art. I, § 4 (“The State shall make no law respecting an establishment of religion . . . . There shall be no union of Church and State, nor shall any church dominate the State or interfere with its functions. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or for the support of any ecclesiastical establishment.”).

Vt. Const. ch. I, art. 3. (“[N]o person ought to, or of right can be compelled to attend any religious worship, or erect or support any place of worship, or maintain any minister, contrary to the dictates of conscience . . . .”).

Va. Const. art. I, § 16 (“No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . . And the General Assembly shall not . . . confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry[]”); id. art. IV, § 16 (“The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth . . . . ”).

Wash. Const. art. I, § 11 (“No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment[]”).

W.Va. Const. art. III, § 15 (“No man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . . and the Legislature shall not . . . confer any peculiar
privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this state, to levy on themselves, or others, any tax for the erection or repair of any house for public worship, or for the support of any church or ministry[.]

Wis. Const. art. I, § 18 (“. . . nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall . . . any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.”).

Wy. Const. art. I, § 19 (“No money of the state shall ever be given or appropriated to any sectarian or religious society or institution.”).
APPENDIX 5

State Sectarian Education Clauses

Ala. Const. art. XIV, § 263 (“No money raised for the support of the public schools shall be appropriated to or used for the support of any sectarian or denominational school.”).

Alaska. Const. art. VII, § 1 (“The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.”).

Ariz. Const. art. XI, § 7 (“No sectarian instruction shall be imparted in any school or state educational institution that may be established under this Constitution . . . .”); id. art. IX, § 10 No tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school . . . .”); id. art. XX, § 7 (“Provisions shall be made by law for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and be free from sectarian control . . . .”).

Ark. Const. art. XIV, § 2 (“No money or property belonging to the public school fund, or to this State for the benefit of schools or universities, shall ever be used for any other than for the respective purposes to which it belongs.”).

Cal. Const. art. IX, § 8 (“No public money shall ever be appropriated for the support of any sectarian or denominational school . . . nor shall any sectarian or denominational doctrine be taught, or instruction thereon be permitted, directly or indirectly, in any of the common schools of this State.” [See similarly id. XVI, § 5]; id. art. IX, § 9(f) (“The [University of California] shall be entirely independent of all political or sectarian influence and kept free therefrom in the appointment of its regents and in the administration of its affairs . . . .”).

Colo. Const. art. IX, § 7 (“Neither the general assembly, nor any county, city, town, township, school district or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything in aid of any church or sectarian society, or for any sectarian purpose, or to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church or sectarian denomination whatsoever; nor shall any grant or donation of land, money or other personal property, ever be made by the state, or any such public corporation to any church, or for any sectarian purpose.”); id. art. IX, § 8 “[N]o teacher or student of any [public educational] institution shall ever be required to attend or participate in any religious service whatsoever. No sectarian tenets or doctrines shall ever be taught in the public school . . . .”).

Conn. Const. art. VIII, § 4 (“[N]o law shall ever be made, authorizing [the school] fund to be diverted to any other use than the encouragement and support of public schools, among the several school societies, as justice and equity shall require.”).
Del. Const. art. X, § 3 ("[N]o portion of any fund now existing, or which may hereafter be appropriated, or raised by tax, for educational purposes, shall be appropriated to, or used by, or in aid of any sectarian, church or denominational school . . . .").

Fla. Const. art. IX, § 6 ("The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.").

Ga. (none).

Haw. Const. art. X, § 1 ("The State shall provide for the establishment, support and control of a statewide system of public schools free from sectarian control . . . . nor shall public funds be appropriated for the support or benefit of any sectarian or private educational institution.").

Idaho Const. art. IX, § 5 ("Neither the legislature nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation, or pay from any public fund or moneys whatever, anything . . . to help support or sustain any school, academy, seminary, college, university or other literary or scientific institution, controlled by any church, sectarian or religious denomination whatsoever . . . ."); id. art. IX, § 6 ("[N]o teacher or student of any [public educational] institution shall ever be required to attend or participate in any religious service whatever. No sectarian or religious tenets or doctrines shall ever be taught in the public schools, . . . . No books, papers, tracts or documents of a political, sectarian or denominational character shall be used or introduced in any schools established under the provisions of this article, nor shall any teacher or any district receive any of the public school moneys in which the schools have not been taught in accordance with the provisions of this article.").

Ill. Const. art. X, § 3 ("Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything . . . to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.").

Ind. Const. art. I, § 6 ("No money shall be drawn from the treasury, for the benefit of any religious or theological institution."); id. art. VIII, § 3 ("the income [of the Common School fund] shall be inviolably appropriated to the support of Common Schools, and to no other purpose whatever.").

Iowa (none).

Kan. Const. art. VI, § 6(c) ("No religious sect or sects shall control any part of the public educational funds.").
Ky. Const. Bill of Rights § 5 (“... nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed”); id. Education, § 189 (“No portion of any fund or tax now existing, or that may hereafter be raised or levied for educational purposes, shall be appropriated to, or used by, or in aid of, any church, sectarian or denominational school.”).

La. (none).

Me. (none).

Md. (none).

Mass. Const. amend. XVIII, § 2 (“No grant, appropriation or use of public money or property or loan of credit shall be made or authorized by the commonwealth or any political subdivision thereof for the purpose of founding, maintaining or aiding any infirmary, hospital, institution, primary or secondary school, or charitable or religious undertaking which is not publicly owned and under the exclusive control, order and supervision of public officers or public agents authorized by the commonwealth or federal authority or both ...”).

Mich. Const. art. VIII, § 1 (“Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”); id. art. VIII, § 2 (“No public monies or property shall be appropriated or paid or any public credit utilized, by the legislature or any other political subdivision or agency of the state directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school. No payment, credit, tax benefit, exemption or deductions, tuition voucher, subsidy, grant or loan of public monies or property shall be provided, directly or indirectly, to support the attendance of any student or the employment of any person at any such nonpublic school or at any location or institution where instruction is offered in whole or in part to such nonpublic school students. The legislature may provide for the transportation of students to and from any school.”).

Minn. Const. art. I, § 16 (“... nor shall any money be drawn from the treasury for the benefit of any ... religious or theological seminaries”); id. art. XIII, § 2 (“In no case shall any public money or property be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught.”).

Miss. Const. art. VIII, § 208 (“[No religious or other sect or sects shall ever control any part of the school or other educational funds of this state; nor shall any funds be appropriated toward the support of any sectarian school, ...”).

Mo. Const. art. IX, § 8 (“Neither the general assembly, nor any county, city, town, township, school district or other municipal corporation, shall ever make an appropriation or pay from any public fund whatever, anything ... to help to support or sustain any private or public school, academy, seminary, college, university, or other institution of learning controlled by any religious creed, church or sectarian denomination whatever ...”).
Mont. Const. art. X, § 6 (“(1) The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property . . . to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination. (2) This section shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education.”); id. art. X, § 7 (“No sectarian tenets shall be advocated in any public educational institution of the state.”)

Neb. Const. art. VII, § 11 (“Notwithstanding any other provision in the Constitution, appropriation of public funds shall not be made to any school or institution of learning not owned or exclusively controlled by the state or a political subdivision thereof; PROVIDED, that the Legislature may provide that the state or any political subdivision thereof may contract with institutions not wholly owned or controlled by the state or any political subdivision to provide for educational or other services for the benefit of children under the age of twenty-one years who are handicapped, as that term is from time to time defined by the Legislature, if such services are nonsectarian in nature. All public schools shall be free of sectarian instruction. The state shall not accept money or property to be used for sectarian purposes; PROVIDED, that the Legislature may provide that the state may receive money from the federal government and distribute it in accordance with the terms of any such federal grants, but no public funds of the state, any political subdivision, or any public corporation may be added thereto.”).

Nev. Const. art. XI, § 2 (“The legislature shall provide for a uniform system of common schools, . . . and any school district which shall allow instruction of a sectarian character therein may be deprived of its proportion of the interest of the public school fund during such neglect or infraction . . . .”); id. art. XI, § 9. (“No sectarian instruction shall be imparted or tolerated in any school or University that may be established under this Constitution.”).

N.H. Const. pt. 1, art. 6 (“[N]o person shall ever be compelled to pay towards the support of the schools of any sect or denomination.”); pt. 2, art. 83 (“[N]o money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination.”).

N.J. (none).

N.M. Const. XII, § 3 (“The schools, colleges, universities and other educational institutions provided for by this constitution shall forever remain under the exclusive control of the state, and no part of the proceeds arising from the sale or disposal of any lands granted to the state by congress, or any other funds appropriated, levied or collected for educational purposes, shall be used for the support of any sectarian, denominational or private school, college or university.”); id. art. XII, § 9 (“[N]o teacher or student of [a public] school or [educational] institution shall ever be required to attend or participate in any religious service whatsoever.”); id. art. XXI, § 4 (“Provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all the children of the state and free from sectarian control . . . .”).
New York Const. art. XI, § 3 (“Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning.”).

North Carolina Const. art. IX, § 1 (“Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged.”).

North Dakota Const. art. VIII, § 1 (“The legislative assembly shall make provision for the establishment and maintenance of a system of public schools which shall be open to all children of the state of North Dakota and free from sectarian control.”); id. art. VIII, § 5 (“All colleges, universities, and other educational institutions, for the support of which lands have been granted to this state, or which are supported by a public tax, shall remain under the absolute and exclusive control of the state. No money raised for the support of the public schools of the state shall be appropriated to or used for the support of any sectarian school.”).

Ohio Const. art. VI, § 2 (“No religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state.”).

Okla. Const. art. I, § 5 (“Provisions shall be made for the establishment and maintenance of a system of public schools, which shall be open to all the children of the state and free from sectarian control . . . .”); art. XI, § 5 (“No part of the proceeds arising from the sale or disposal of any lands granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college, or university . . . .”).

Or. Const. art. I, § 5 (“No money shall be drawn from the Treasury for the benefit of any religious (sic), or theological institution . . . .”).

Pa. Const. art. III, § 15 (“No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school.”); id. art. III, § 29 (“All appropriations may be made . . . in the form of scholarship grants or loans for higher educational purposes to residents of the Commonwealth enrolled in institutions of higher learning except that no scholarship, grants or loans for higher educational purposes shall be given to persons enrolled in a theological seminary or school of theology.”).

R.I. (none).

S.C. Const. art. XI, § 4 (“No money shall be paid from public funds nor shall the credit of the State or any of its political subdivisions be used for the direct benefit of any religious or other private educational institution.”).

S.D. Const. art. VIII, § 16 (“No appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the state, or any county or municipality within the
state, nor shall the state or any county or municipality within the state accept any grant, conveyance, gift, or bequest of lands, money, or other property to be used for sectarian purposes, and no sectarian instruction shall be allowed in any school or institution aided or supported by the state.”); id. art. VIII, § 20 (“Notwithstanding the provisions of section 3, Article VI and section 16, Article VIII, the Legislature may authorize the loaning of nonsectarian textbooks to all children of school age.”); art. XXII, § 4 (“[P]rovision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.”).

Tenn. (none)

Tex. Const. art. VII, § 5(c) (“The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school.”).

Utah Const. art. III, § 4 (“The Legislature shall make laws for the establishment and maintenance of a system of public schools, which shall be open to all the children of the State and be free from sectarian control.”); id. art. X, § 1 (same); id., art. X, § 9 (“Neither the state of Utah nor its political subdivisions may make any appropriation for the direct support of any school or educational institution controlled by any religious organization.”).

Vt. (none).

Va. Const. art. VIII, § 10 (“No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof [with exceptions for “nonsectarian” schools].”); id. art. VIII, § 11 (“The General Assembly may provide for loans to, and grants to or on behalf of, students attending nonprofit institutions of higher education in the Commonwealth whose primary purpose is to provide collegiate or graduate education and not to provide religious training or theological education.”).

Wash. Const. art. IX, § 4 (“All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.”); id. art. XXVI, § 4 (“Provision shall be made for the establishment and maintenance of systems of public schools free from sectarian control which shall be open to all the children of said state.”).

W.Va. Const. art. III, § 15(a) (“Public schools shall provide a designated brief time at the beginning of each school day for any student desiring to exercise their right to personal and private contemplation, meditation or prayer. No student of a public school may be denied the right to personal and private contemplation, meditation or prayer nor shall any student be required or encouraged to engage in any given contemplation, meditation or prayer as a part of the school curriculum.”).

Wis. Const. art. I, § 23 (“Nothing in this constitution shall prohibit the legislature from providing for the safety and welfare of children by providing for the transportation of children to and from any parochial or private school or institution of learning.”); id. art. I, § 24 (“Nothing in this constitution shall prohibit the legislature from authorizing, by law, the use of public school
buildings by civic, religious or charitable organizations during nonschool hours upon payment by the organization to the school district of reasonable compensation for such use.”); id. art. X, § 3 (“The legislature shall provide by law for the establishment of district schools . . . and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours.”); id. art. X, § 6 (“Provision shall be made by law for the establishment of a state university, . . . and no sectarian instruction shall be allowed in such university.”).

Wy. Const. art. III, § 36 (“No appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state, nor to any denominational or sectarian institution or association.”); id. art. VII, § 8 (“. . . nor shall any portion of any public school fund ever be used to support or assist . . . any school, academy, seminary, college or other institution of learning controlled by any church or sectarian organization or religious denomination whatsoever.”); id. art. VII, § 12 (“No sectarian instruction, qualifications or tests shall be imparted, exacted, applied or in any manner tolerated in the schools of any grade or character controlled by the state, nor shall attendance be required at any religious service therein, nor shall any sectarian tenets or doctrines be taught or favored in any public school or institution that may be established under this constitution.”); id. art. XXI, § 28 (“The legislature shall make laws for the establishment and maintenance of systems of public schools which shall be open to all the children of the state and free from sectarian control.”).