

RELIGION CLAUSE FEDERALISM: STATE FLEXIBILITY OVER RELIGIOUS MATTERS AND THE “ONE-WAY RATCHET”

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Professors Lupu and Tuttle’s article provides insightful commentary about the renewed interest in a federalism approach to the religion clauses. As their article accurately demonstrates, the federalism argument is more than a debate about how best to read the constitutional text or historical record. It is also a normative debate about the virtues of decentralizing authority and providing flexibility to states and locales to recognize, regulate, and collaborate with religion.¹ This important discussion is not taking place in a vacuum; currently, through the Faith-Based Initiative, we are witnessing an expansion of church-state collaborations at the state and local levels that deviate from a unitary, “one-size fits all” model.² The fragmentation of constitutional standards is occurring alongside the most significant decentralization of government authority and services in modern times, represented in the Court’s revival of federalism through the Commerce Clause³ and Eleventh Amendment⁴ and the movement toward greater privatization of essential government functions and services, which was at the heart of welfare reform.⁵ Church-state federalism is not an academic issue.

It is tempting to reflexively oppose this renewed federalism impulse. The substance of fundamental rights, particularly those identified in the First

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¹ Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19 (2006).

² See generally Steven K. Green, “A Legacy of Discrimination”? *The Rhetoric and Reality of the Faith-Based Initiative: Oregon as a Case Study*, 84 OR. L. REV. 725, 751–52, 772–77 (2005); Ira C. Lupu & Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DEPAUL L. REV. 1, 5–11 (2005).

³ See *United States v. Morrison*, 529 U.S. 598, 608, 617–18 (2000); *United States v. Lopez*, 514 U.S. 549, 557, 567–68 (1995).

⁴ See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363–65 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 72–74 (2000).

⁵ See 42 U.S.C. § 604a (2000); see also Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1230 (2003) (“The new versions of privatization potentially jeopardize public purposes by pressing for market-style competition, by sidestepping norms that apply to public programs, and by eradicating the public identity of social efforts to meet human needs.”); Martha Minow, *Partners, Not Rivals?: Redrawing the Lines Between Public and Private, Non-Profit and Profit, and Secular and Religious*, 80 B.U. L. REV. 1061, 1080–82 (2000).

Amendment, should not vary depending on whether one lives in Portland, Oregon or Portland, Maine. However, the decentralization of constitutional authority can have its advantages. It allows for greater flexibility to address local concerns while providing an impetus for innovation and experimentation. Importantly, decentralization also acknowledges the separate sovereignty of states and the competency of local officials and judges to participate in the governing process. I support greater flexibility of states to interpret their own, often more explicit, constitutional provisions more expansively, as occurred in *Locke v. Davey*.⁶ Usually, this means that state courts will provide greater protection of individual rights.⁷ Thus, in Oregon, not only does the State provide for medically assisted suicide,⁸ but the interpretation of the state equivalent of the First Amendment affords greater protection for certain expressive activity, such as obscenity.⁹ But a federalism approach to the religion clauses may not always result in the enhancement of individual rights. The decentralization of constitutional authority may allow for increased burdens on religious practice, while it will likely invite states and locales to support, acknowledge, and collaborate with religion in ways that deviate from core nonestablishment values. Thus, we should approach with caution (and skepticism) this renewed call for a federalism approach to the religion clauses.¹⁰

I. THE TEXTUAL ARGUMENT FOR FEDERALISM

As Professors Lupu and Tuttle discuss, the federalism critique is based in part on a textual and historical interpretation of the Establishment Clause.¹¹ This approach argues that the language of the Establishment Clause, prohibiting the federal government from enacting laws “respecting” an establishment of religion—or “touching” a religious establishment, as was initially proposed¹²—must be interpreted in light of the fact that several states in 1789 maintained religious establishments.¹³ Considering this language in conjunction with the various state practices indicates that “an important

⁶ 540 U.S. 712, 721–25 (2004).

⁷ See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

⁸ See *Gonzales v. Oregon*, 126 S. Ct. 904, 911 (2006).

⁹ See *State v. Spencer*, 611 P.2d 1147 (Or. 1980).

¹⁰ See Steven K. Green, “Bad History:” *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. (forthcoming 2006).

¹¹ Lupu & Tuttle, *supra* note 1, at 38–42.

¹² 1 ANNALS OF CONG. 757–59 (Joseph Gales ed., 1789).

¹³ See *infra* note 44 and accompanying text.

function of the Clause was to ‘make clear that Congress could not interfere with [existing] state establishments.’”¹⁴

Recently, Justice Thomas has been the most ardent spokesperson for this impulse, arguing for disincorporation of the Establishment Clause. In several concurring opinions, Justice Thomas has resurrected the argument that “the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.”¹⁵ As he explained in *Cutter v. Wilkinson*, “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.”¹⁶ Under this approach:

[I]t may well be that state action [in the Establishment Clause context] should be evaluated on different terms than similar action by the Federal Government. . . . Thus, while the Federal Government may “make no law respecting an establishment of religion,” the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest.¹⁷

Justice Thomas’s call for a federalism constraint on the application of the Establishment Clause is not new; almost immediately following the incorporation of the Clause in 1947,¹⁸ critics attacked the Court for imposing a uniform, national approach to the ordering of church-state relationships—one that did not consider local traditions and conditions.¹⁹ As one critic wrote in 1954, “[S]tate activity which does not in any way infringe the religious freedom of the individual, should not be forbidden to the states simply because it happens to fit the Supreme Court’s idea of a ‘law respecting an establishment of religion.’”²⁰ These early critics argued that the First Amendment was “not

¹⁴ *Cutter v. Wilkinson*, 544 U.S. 709, 727 (2005) (Thomas, J., concurring).

¹⁵ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

¹⁶ *Cutter*, 544 U.S. at 728 n.3; *see also Newdow*, 542 U.S. at 49 (arguing that 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 [of religion]”).

¹⁷ *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–79 (2002) (Thomas, J., concurring).

¹⁸ *See Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947).

¹⁹ *See* MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 19–20 (1965); WILBER G. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 9 (1964); JAMES M. O’NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* 193–96 (1949); Edward S. Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROBS.* 3, 19 (1949); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 *WASH. U. L.Q.* 371, 406–07.

²⁰ Snee, *supra* note 19, at 406–07.

only an express guarantee of personal religious freedom against the threat of federal action, but also an application of the principle of federalism. . . . The two [religion] clauses together were intended to remove the subject of religion completely from the federal competence.”²¹

Although incorporation of the Establishment Clause quickly became accepted legal canon, the federalism critique never died, particularly among more conservative scholars. In 1978, Michael Malbin of the American Enterprise Institute wrote that the language of the Establishment Clause was designed to prohibit Congress “from passing any law that would affect the [then] religious establishments in the states.”²² More recently, Professors Akhil Amar, Gerard Bradley, Daniel Conkle, and Steven Smith have offered federalism critiques of the Clause, all of which attack the *Everson* interpretation that the Clause erected “a wall of separation between church and State.”²³ Professor Amar writes:

[A]s originally written, [the Establishment Clause] stood as a pure federalism provision. . . . [T]he clause was utterly agnostic on the substantive issue of establishment; it simply mandated that the issue be decided state by state and that Congress keep its hands off, that Congress make no law “respecting” the vexed question.²⁴

²¹ *Id.* at 389.

[The Framers] feared, not only federal interference with individual religious freedom, but also federal interference with state establishments or quasi-establishments then existing. To them, there was a danger of such interference with state sovereignty by affirmative federal action to establish a national religion, or by negative action disestablishing state establishments.

Id. at 406.

²² See MICHAEL J. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 15 (1978) (arguing that the chosen language “prohibits Congress from passing laws ‘with respect to’ an establishment of religion,” and was “designed to satisfy people from states, such as Massachusetts, that did have established churches”).

²³ *Everson*, 330 U.S. at 16; see AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 246 (1998); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 92–97 (1987); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 30 (1995); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1133–34 (1988); see also DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 61 (2002); James J. Knicely, “*First Principles*” and the *Misplacement of the “Wall of Separation”*: *Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171, 174 (2004); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1089–92 (1995); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1198–201 (1990).

²⁴ AMAR, *supra* note 23, at 246.

While most scholars—including myself—acknowledge a federalism component to the Establishment Clause that left the issue of state establishments to each state,²⁵ a few critics, like Justice Thomas, have argued that rather than intending the Clause simply to be “agnostic” about religious matters, the Framers *consciously* designed the clause to *protect* and *preserve* the then-existing state religious establishments.²⁶ As Professor Bradley argues, the final language of the religion clauses “tracked the federalist view that Congress had no enumerated authority over religion in the first place, as well as the basic antifederalist endeavor to preserve existing state constitutional regimes from intermeddling federal legislation.”²⁷

A final component of the renewed federalism critique is represented in the arguments of Professors Amar, Smith, and Conkle, who claim that federalism concerns represented the sole or overriding consideration of those who drafted the Clause.²⁸ According to this critique, the only point of consensus among the various factions during drafting and ratification was one of federalism: to exclude federal authority over all religious matters, leaving all regulation, pro and con, to the states.²⁹ Furthermore, this critique continues, because there was no consensus on the meaning of the Establishment Clause, it lacks a substantive quality—rather, it is primarily, if not solely, a jurisdictional device.³⁰ As Professor Smith has written, “The religion clauses were understood as a federalist measure, not as the enactment of any substantive principle of religious freedom.”³¹

²⁵ See Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 773–74 (2005); see also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-3, at 1161 (2d ed. 1988); Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 416 (1986); William Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson’s Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 773.

²⁶ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 51 (2004) (Thomas, J., concurring) (“[T]he Establishment Clause was intended to protect . . . state establishments of religion.”); see also BRADLEY, *supra* note 23, at 92; accord Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1703 (1992) [hereinafter *Rethinking the Incorporation*] (“[T]he Establishment Clause was intended to prevent Congress from interfering with the established state churches.”).

²⁷ BRADLEY, *supra* note 23, at 92.

²⁸ AMAR, *supra* note 23, at 246; SMITH, *supra* note 23, at 30; Conkle, *supra* note 23, at 1133–34.

²⁹ Conkle, *supra* note 23, at 1133–35.

³⁰ *Id.*; SMITH, *supra* note 23, at 30.

³¹ SMITH, *supra* note 23, at 30. “[T]he religion clauses were purely jurisdictional in nature; they did not adopt any substantive right or principle of religious freedom.” *Id.* at 17; accord AMAR, *supra* note 23, at 246; see also DREISBACH, *supra* note 23, at 61; Knicely, *supra* note 23, at 174; Lash, *supra* note 23, at 1089–92; Lietzau, *supra* note 23, at 1198–201.

There are several implications to this federalism critique. If there is no substantive meaning to the Establishment Clause, then the last sixty years of church-state jurisprudence that has relied on the Jeffersonian-Madisonian interpretation of the Clause lacks legitimacy. Equally significant, the federalism critique argues that incorporation of the Establishment Clause should be reversed, along with many of the Court's decisions restricting state practices supporting religion.³² "[A]bandoning [incorporation] would certainly give the states far more latitude to acknowledge, accommodate, and promote religion than current doctrine allows."³³ Potentially, "If the Establishment Clause were *not* applied to the states, states would ostensibly be free to establish a state church or to give aid or preference to a particular religion."³⁴ There would be no federal bar to official acknowledgments of religion, noncoercive school prayer, or many forms of financial aid to religion, provided such actions withstood free exercise, free speech, and equal protection challenges.³⁵ In essence, "If the Establishment Clause does not restrain the States, then it has no application . . . where only state action is at issue."³⁶

To be sure, not all federalism advocates call for disincorporation; however, most argue that the Framers believed the states should have flexibility in their own church-state relationships, such that rights could take on different meanings at the state and local levels.³⁷ Like Justice Thomas, they insist that states should be able to fashion funding and other supportive relationships with religious institutions, constrained only by their own constitutional provisions.³⁸ States and locales would be able to design laws and policies to satisfy the religious preferences of the prevailing majorities while allowing for greater experimentation in education and public benefits programs.³⁹ As one advocate has argued, federalism "would enable a greater number of people to enact laws which accord with their own religious convictions. Discrimination problems

³² See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring) ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation."); Knicely, *supra* note 23, at 225; Lietzau, *supra* note 23, at 1193; *Rethinking the Incorporation*, *supra* note 26, at 1714–19.

³³ *Rethinking the Incorporation*, *supra* note 26, at 1715.

³⁴ Knicely, *supra* note 23, at 220. According to Justice Thomas, "Congress presumably could not require a State to establish a religion any more than it could preclude a State from establishing a religion." *Cutter v. Wilkinson*, 544 U.S. 709, 731 (2005) (Thomas, J., concurring).

³⁵ See *Newdow*, 542 U.S. at 53–54 nn. 4–5.

³⁶ *Van Orden v. Perry*, 125 S. Ct. 2854, 2865 (2005) (Thomas, J., concurring).

³⁷ *E.g.*, Snee, *supra* note 19, at 380.

³⁸ *Newdow*, 542 U.S. at 49–50 (Thomas, J., concurring); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring).

³⁹ *Rethinking the Incorporation*, *supra* note 26, at 1715.

are properly resolved through free exercise protection, establishment problems through democratic government.”⁴⁰

I have previously argued that the historical basis for a federalism interpretation of the Establishment Clause is grossly overstated.⁴¹ The argument takes an issue of undeniable importance to the drafters and ratifiers of the Bill of Rights and gives it meaning that the Framers likely did not intend. That the drafters of the First Amendment were interested in limiting federal power is hardly profound; the overarching purpose of the Bill of Rights was to limit potential federal authority in relation to individual and states’ rights.⁴² That consensus on limiting federal power does not lead, however, to the conclusion that the Framers thought the Establishment Clause had no independent, substantive meaning other than federalism or that they intended the Clause to *protect* and *preserve* the existing state establishments, rather than have them die on their own accord.⁴³

Central to the federalism argument is the fact that seven states maintained religious establishments at the time of the ratification of the Constitution and the drafting of the First Amendment.⁴⁴ Members of the First Congress from those states would not have agreed to any provision that could have been used to dismantle those existing church-state arrangements.⁴⁵

The problem with this interpretation is that it equates all of the various state arrangements with modern conceptions of “establishments” while failing to acknowledge the dynamic change that was underway at the time.⁴⁶ Although four of the states—Georgia, Maryland, South Carolina, and Vermont—wrote

⁴⁰ Lietzau, *supra* note 23, at 1227. “Assuming the inevitability of some subtle state espousal of a religious view, most would agree that this design is preferable to allowing ‘nonreligious’ minority views to prevail over the popular will.” *Id.* at 1225–26.

⁴¹ See Green, *supra* note 25, at 774–80.

⁴² See KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 411 (14th ed. 2001).

⁴³ See *Newdow*, 542 U.S. at 51 (Thomas, J., concurring) (“[I]ncorporation . . . would prohibit precisely what the Establishment Clause was intended to protect—state establishments of religion.”).

⁴⁴ BRADLEY, *supra* note 23, at 89–90; Conkle, *supra* note 23, at 1133–34. Reputedly, these states were Connecticut, Georgia, Maryland, Massachusetts, New Hampshire, South Carolina, and Vermont. Green, *supra* note 25, at 779–80.

⁴⁵ See Green, *supra* note 25, at 774–80.

⁴⁶ Two excellent accounts of the period are THOMAS J. CURRY, THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT 134–222 (1986) and DEREK H. DAVIS, RELIGION AND THE CONTINENTAL CONGRESS, 1774–1789: CONTRIBUTIONS TO ORIGINAL INTENT (2000); see also LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 25–74 (1986); Douglas Laycock, “*Nonpreferential*” Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 894–902 (1986).

provisions in their initial constitutions that provided official recognition of or financial support for Christian or Protestant churches, those arrangements had either been abandoned or become moribund by 1789.⁴⁷ For example, South Carolina's Constitution of 1778 declared a general establishment of Protestantism, limiting church incorporation and public office holding to Protestants, but then prohibited the state from compelling the support of any religious body.⁴⁸ South Carolina's "establishment" thus amounted only to "a method of incorporating churches, and no church received public tax support."⁴⁹ As also happened in Virginia with the adoption of Jefferson's Bill for Religious Freedom in 1786, the period between the Revolution and First Congress was one of dynamic change in attitudes and legal arrangements in the states. Thus, by the time of the drafting of the First Amendment, four of the states that allowed for religious assessments had abandoned the idea, while church taxes "were not working well in the [three] New England states that still tried to collect them."⁵⁰ Because disestablishment was the clear trend among the states, there was little reason for the drafters to secure state establishments through the First Amendment (or to waste political capital on the issue of state establishments).

Even in those remaining states with existing establishments, the idea of a religious establishment was not particularly popular. Opposition to tax assessments and religious preferences was strong and growing.⁵¹ Increasingly, officials in Massachusetts, Connecticut, and New Hampshire were reticent to admit to having an establishment due to the negative connotation the term carried with its association to hated European establishments.⁵² As Chief Justice Jedediah Smith of New Hampshire declared in an 1803 decision:

[A] religious establishment is where the State prescribes a formulary of faith and worship for the rule and government of all the subjects. Here the State do [sic] neither. It is left to each town and parish, not to prescribe rules of faith or doctrine for the members of the corporation but barely to elect a teacher of religion and morality for the society, who is to be maintained at the expense of the whole. The

⁴⁷ See CURRY, *supra* note 46, at 134–58, 188–89; LEVY, *supra* note 46, at 46–51.

⁴⁸ CURRY, *supra* note 46, at 150; LEVY, *supra* note 46, at 50–51.

⁴⁹ CURRY, *supra* note 46, at 150.

⁵⁰ Laycock, *supra* note 46, at 917.

⁵¹ CURRY, *supra* note 46, at 162–92; WILLIAM G. MCLOUGHLIN, 2 NEW ENGLAND DISSENT, 1630–1833, at 610–11 (1971).

⁵² Laycock, *supra* note 46, at 906.

privilege is extended to all denominations. There is no one in this respect superior or inferior to another.⁵³

As a result, officials from states with active assessment systems generally claimed that their states did not maintain religious establishments because: (1) they were not exclusive and nonpreferential; (2) public support of religion was for the benefit of civil society, not religion; and (3) their assessment systems did not violate rights of conscience.⁵⁴ But their arguments were becoming more untenable. While the New England representatives may have had reasons to maintain their existing systems against the rising tide, they would have been satisfied with the view that the Federal Establishment Clause simply took no position on the issue of state establishments—leaving matters to the states—and not as expressing a national commitment to protect and preserve existing state establishments. With the growing identification of establishments as anathema to rights of conscience, no one—in New England or elsewhere—would have been so bold as to have argued that a primary purpose of the Establishment Clause was to preserve those crumbling institutions.

Finally, the federalism-jurisdictional argument is further undermined when one examines the various state and private petitions for a religious amendment to the Constitution. The vast majority of calls for amendment during ratification centered on protecting rights of conscience and ensuring sect equality, not on securing existing state religious establishments.⁵⁵ Only Pennsylvania, a state *without* a religious assessment, called for an amendment to deprive the federal government of authority to “alter, abrogate, or infringe any part of the constitutions of the several states, which provide for the preservation of liberty in matters of religion”—hardly a ringing endorsement of existing religious establishments.⁵⁶ This suggests a *substantive* concern was at the heart of the desire for a provision barring religious establishments.

⁵³ *Muzzy v. Wilkins*, 1 N.H. (1 Smith) 9 (1803).

⁵⁴ CURRY, *supra* note 46, at 174–75, 184; MCLOUGHLIN, *supra* note 51, at 610–11. As Connecticut jurist Zephaniah Swift wrote in the 1790s, “Every Christian may believe, worship, and support in such manner as he thinks right, and if he does not feel disposed to join public worship he may stay at home as he pleases without any inconvenience but the payment of his taxes to support public worship in the located society where he lives.” 1 ZEPHANIAH SWIFT, SYSTEM OF THE LAWS IN CONNECTICUT 146 (1791).

⁵⁵ See Green, *supra* note 25, at 783–85.

⁵⁶ THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 12 (Neil H. Cogan ed., 1997). New Hampshire, one of the three states with active establishments, offered a vague proposal that “Congress shall make no Laws touching Religion, or to infringe the rights of Conscience,” language similar to that offered by Samuel Livingston during the House debate. *Id.* at 12–13. Massachusetts and Connecticut ratified the Constitution without making any calls for an amendment to protect their establishments. *Id.*

All of these factors indicate that when the First Congress convened in 1789 to consider proposed amendments to the Constitution, there was little reason for the representatives to be concerned about *preserving* state religious “establishments” against federal intermeddling. This is particularly true since most observers acknowledged the inconsistency between establishments and liberty and believed that religious establishments would soon vanish from the American scene.⁵⁷ Accordingly, the Framers’ federalism concerns were limited to disabling the national government from involvement in religious affairs, not with preserving state establishments, as Justice Thomas maintains.

Federalism *was* an issue in the drafting of the Establishment Clause, but primarily in the sense that all of the proposed amendments reflected a shared desire to limit the powers of the federal government vis-à-vis the states. But an amendment to restrict federal power by prohibiting federal involvement in religious matters is not the same thing as an amendment *designed to preserve state establishments*.⁵⁸

II. DECENTRALIZING CONSTITUTIONAL STANDARDS

Even if one accepts my historical interpretation that the drafters envisioned a substantive element to the Establishment Clause and that federalism (in the sense of *protecting* existing state establishments) was of secondary importance, the federalism critique cannot be easily dismissed. The recent federalism impulse is more than textually driven. Additional historical and normative arguments may support a regime of fragmentation of authority and increased flexibility in state and local ordering of religion. Those of us who support the outcome in *Locke v. Davey*,⁵⁹ the legitimacy of stricter state no-funding provisions (“Baby-Blaine Amendments”),⁶⁰ and the ability of states to afford

⁵⁷ See DAVIS, *supra* note 46, at 26 (noting that the remaining states ultimately disestablished).

In this regard, Steven Smith’s argument—that the Framers of the Constitution offered no substantive principle of religious liberty, leaving to the states complete authority over religion—breaks down. There were substantive principles enunciated in the religion clauses, disestablishment being the primary one, and so compelling was its merits that the states eventually, without exception, adopted it.

Id.

⁵⁸ Accord John Witte, Jr., *Facts and Fictions About the History of Separation of Church and State*, 48 J. CHURCH & STATE 15, 33 (2006) (remarking that the evidence supporting the federalism interpretation of the Establishment Clause is a “very thin” reading).

⁵⁹ 540 U.S. 712 (2004).

⁶⁰ See generally Lupu & Tuttle, *supra* note 1, at 46–47.

greater protection of individual rights of expression, privacy, reproductive freedom, and sexual orientation must reconcile our disdain for the new federalism critique.

One argument for an enhanced federalism approach to nonestablishment is historical (although not textual). It recognizes that several states have varying, if not unique, religious origins and traditions. To use Professors Lupu and Tuttle's typology, states have been more likely than the federal government (at least until recently with the Faith-Based Initiative) to have "religion policies" that are either historically based—as in Massachusetts (Puritans) or Utah (Mormons)—or represent informal cultural regimes—as with Protestant evangelicalism in the "Bible Belt."⁶¹ In these locales, "official" religious practices and policies have frequently differed from federal policy or interpretations of the Establishment Clause (e.g., polygamy and school prayer).⁶² As someone who attended Texas public schools during the 1970s, I can personally attest to the prevalence of official school-sponsored prayer and Bible reading ten years after the Court's decisions striking such practices.⁶³ A quick perusal of the published school prayer decisions following *School District of Abington Township v. Schempp* reveals an overrepresentation of cases from a particular geographical region (i.e., Texas and other southern states), indicating a pervasive cultural regime that differed from the national policy.⁶⁴

Some observers have argued that local preferences or practices should be taken into account when considering permissible state-religion arrangements, particularly in those legal areas where there is some "play in the joints" between the two religion clauses.⁶⁵ A variation of this argument is that religion clause conflicts and infringements are likely to be less intense or invasive of religious liberty at the local levels where there is an enhanced value in local communitarian interests.⁶⁶ Recently, Professor Richard C. Schragger has made a strong argument on behalf of the positive aspect of decentralization

⁶¹ *Id.* at 52.

⁶² *See id.* at 42–45.

⁶³ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

⁶⁴ *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (Texas); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Alabama); *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) (Florida); *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) (Alabama); *Herdahl v. Pontotoc County Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996).

⁶⁵ *See Walz v. Tax Comm'n of New York*, 397 U.S. 664, 669 (1970).

⁶⁶ *See* Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1813 (2004).

of authority over religious matters and for judicial standards that take into account “the role of the local in the doctrine and discourse of religious liberty.”⁶⁷ This argument has several components: first, that the dangers of religious factionalism are reduced on a smaller scale and, concomitantly, that local governmental structures are likely more responsive to religious liberty and diversity interests; second, that greater consensus over church-state relationships exists at the local level with a greater potential for resolving conflicts through extra-legal means; and third, that local religious endorsements or enforced conformity are somehow less injurious to religious minorities.⁶⁸ Upon close examination, each of these rationales fails.

Initially, it must be acknowledged that greater decentralization of authority has the potential to be rights enhancing. Religious pluralism may grow in the absence of national models and regulations and in the freedom of local conditions. Additionally, local authorities are often more aware of and more sensitive to the needs of religious minorities than their federal counterparts. These factors do not necessarily mean, however, that religious factionalism will be lessened when it occurs on a local level.

The Framers did not view the dangers of religiously spawned factionalism as being unique to the national government. Although Madison’s initial drafts of the First Amendment spoke of prohibiting a “national church,”⁶⁹ there was little chance of such a prospect. Madison’s own experience was with infringements at the local and state levels.⁷⁰ Nothing in Madison’s discussion about the dangers of factions in Federalist Nos. 10 and 51—and the corresponding infringements on rights of conscience—is limited to factions at the national level. In fact, Madison believed the opposite—that the “zeal for different opinions concerning religion” was a leading cause of factionalism and that a “multiplicity of sects” was one of its chief preventatives.⁷¹ The larger republic was less likely to be controlled by a majority or combination of factions than a smaller political state. “A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of [the nation] must secure the national councils against

⁶⁷ *Id.*

⁶⁸ *Id.* at 1880–82.

⁶⁹ LEVY, *supra* note 46, at 123.

⁷⁰ *See generally* JAMES MADISON ON RELIGIOUS LIBERTY (Robert S. Alley ed., 1985) (providing an analysis on Madison’s contribution to religious freedom in America).

⁷¹ THE FEDERALIST NO. 10, at 79 (James Madison) (Clinton Rossiter ed., 1961).

any danger from that source.”⁷² That Madison may have been writing about the effects of factionalism on the larger scale, as it might impact the national government, does not mean that he minimized its effect at the local level. States and locales, with their more uniform traditions and religious homogeneity, are less likely to have a diversity of interests that can check the overreaching of majorities.⁷³ Also, disputes at the local level can often be more intense as religious minorities feel more insular, and as a religious majority is less responsive to minority needs.⁷⁴ Thus Federalist Nos. 10 and 51 reveal an acute consciousness that the multiplicity of interests and sects that are necessary to secure civil and religious freedom are less likely to exist on a smaller scale.

To be sure, because greater religious homogeneity often exists on a smaller scale, consensus about religious and moral values may be more likely at the local level. People also expect their local communities to be more reflective of their personal values than the larger polity.⁷⁵ That need for community confirmation, however, can often confuse the absence of visible dissent with consensus. Pressures to conform to the prevailing ethos, or at least not to resist, are often greater at the local level where people must coexist on a daily, personal level. My own experience as a litigator was that the degree of local consensus on religious issues was usually overstated as was the willingness of local officials to tolerate dissenting views on church-state matters. The likelihood of finding a common ground over religious disputes is often less when a misperceived consensus already “exists.”

The third normative argument for decentralizing standards at the state and local levels is that official actions supporting or endorsing religion are somehow less injurious to religious minorities. As Professor Schragger has written, “Religious expression [by the government] in these localities is simply unlikely to generate a dangerous religious faction in the whole.”⁷⁶ The apparent argument is that local religious minorities will understand the historical and cultural bases for the closer integration of religion into public affairs and dismiss the significance of such government affirmations. Religious polarization, Schragger insists, comes chiefly from the imposition of

⁷² *Id.* at 84.

⁷³ *Id.* at 83.

⁷⁴ *Id.*

⁷⁵ For a discussion of how consensus can be consistent with liberal values, see John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. OF LEGAL STUD. 1, 11–12 (1987).

⁷⁶ Schragger, *supra* note 66, at 1881.

national standards on issues like school prayer and public religious displays.⁷⁷ But the opposite reaction is just as likely, because religious minorities in a more religiously homogenous locale are equally likely to feel marginalized politically; the local government's embrace of the dominant religious ethos will remind them of their second-class status, furthering feelings of political isolation.⁷⁸ This is why Justice Breyer's concurring opinion in *Van Orden v. Perry* emphasizing the lack of early opposition to the Texas Ten Commandments monument is simply wrong-headed.⁷⁹ The absence of vocal dissent does not equal consensus, nor does it accurately reflect public perceptions of government endorsement of religion.

Thus, the normative reasons for greater flexibility for government favoritism of religion at the local level are actually weaker than they are compelling. On the local level, there is usually less religious pluralism with a greater likelihood of a dominant religious group or ethos (e.g., Mormons in Utah and Southern Baptists in Texas). Reduced pluralism at the local level often means that those "religious dissenters" are more marginalized politically, coming close to being a true discrete and insular minority. Finally, with a prevailing religious ethos, there is a greater likelihood of a blurring of social and official conventions about religion, and officials will have more leeway to endorse religion. All of this argues against the lessening of constitutional standards for religious conflicts that occur at the state and local levels.

III. *LOCKE V. DAVEY* AND THE "ONE-WAY RATCHET"

Critics of Justice Thomas's federalism approach must still recognize the positive aspects of a jurisprudence that allows states to independently interpret their respective constitutional provisions in ways that provide greater protection of religious freedoms. Following the 1990 decision in *Employment Division v. Smith* rejecting heightened scrutiny as the First Amendment standard for judging neutral government burdens on religious practice,⁸⁰ religious liberty advocates rediscovered state constitutional provisions as the

⁷⁷ *Id.*

⁷⁸ See *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring) (arguing that a primary function of the Establishment Clause is to prevent government messages that religious minorities are "outsiders, not full members of the political community").

⁷⁹ See 125 S. Ct. 2854, 2871 (2005) (Breyer, J., concurring).

⁸⁰ 494 U.S. 872, 881–82 (1990).

new safeguards of religious free exercise.⁸¹ Few would question the constitutional or even normative value in allowing states to provide greater protection for state infringements on religious practice. The Supreme Court has indicated that the federal standards serve as the floor, and not the ceiling, for protections of constitutional rights.⁸² Even Justice Thomas has acknowledged that his federalism approach to the First Amendment is limited to the Establishment Clause, such that states cannot offer less protection than the Free Exercise Clause guarantees and, potentially, they can offer more.⁸³

Similar values support a “one-way ratchet” approach for nonestablishment as well.⁸⁴ The reasons for not allowing states to provide *less* protection against government favoritism or support of religion are similar to those that would apply in the free exercise context. There is a simple explanation for the fact that most Establishment Clause violations are committed by state and local governments (beyond mere numbers): states and their political subdivisions are frequently more religiously homogenous than the nation as a whole and are generally more susceptible to pressures from religious majorities. While single religions rarely dominate a state anymore—Utah being the possible exception—religiously majoritarian norms are not uncommon in many locales. An evangelical ethos is prominent in many parts of the South, while smaller enclaves of religious minority-majorities exist throughout the nation.⁸⁵ The likelihood of local officials favoring or endorsing a particular faith or religion is generally greater in more religiously homogeneous communities. At a minimum, a blurring of social and official conventions and norms is more likely on a smaller scale. Religious minorities, potentially isolated from their brethren living in other parts of the nation, are often more discrete and insular at the local level, thus calling for at least as much protection against establishing tendencies as provided by the national standard.

Admittedly, the arguments for not permitting states to *lower* the nonestablishment norm to conform to local religious customs and preferences do not address why states should be able to enforce *stricter* regimes of

⁸¹ See, e.g., *First Covenant Church of Seattle v. City of Seattle*, 840 P.2d 174, 189 (Wash. 1992) (“Article 1, section 11, of our state constitution, which absolutely protects the free exercise of religion, extends broader protection than the First Amendment to the federal constitution . . .”).

⁸² See *Locke v. Davey*, 540 U.S. 712, 725 n.8 (2004); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 81 (1980).

⁸³ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49 (2004) (Thomas, J., concurring).

⁸⁴ See *Katzenbach v. Morgan*, 384 U.S. 641, 654–56 (1966).

⁸⁵ See generally Edwin S. Gaustad, *Religious Demography of the South*, in *RELIGION AND THE SOLID SOUTH* 143 (Samuel S. Hill, Jr. ed., 1972).

nonestablishment. In essence, if the normative arguments for allowing states greater flexibility to reorder church-state relationships in a more “religion-friendly” way are wanting, how can the opposite approach be valid? To put the issue in practical terms, thirty-five state constitutions contain provisions prohibiting public expenditures for religious or sectarian purposes or to religious institutions or schools.⁸⁶ Many of these provisions have been interpreted by state supreme courts to be more restrictive of public funding of religion than is required under the First Amendment, particularly following *Zelman v. Simmons-Harris*.⁸⁷ Relying on historical contexts or rationales to justify these differences is clearly unsatisfactory as, again, a particular religious heritage is not grounds to justify state favoritism of that religion.

That said, there are normative reasons for supporting the holding in *Locke v. Davey* and a one-way ratchet approach to Establishment Clause federalism. Turning again to Madison’s concerns about religious factionalism, government disassociation from a prevailing religious ethos is less likely to produce feelings of exclusion from the democratic process than the opposite action. Heightened enforcement of the nonestablishment norm does not implicate the same dangers of religious tribalism as a permissive approach; under a stricter separationist regime, government will not be aligning itself with the prevailing religious ethos or expropriating religion for its own uses. People should and generally do understand that their governments act in secular ways.⁸⁸ The mere fact that the government speaks with a secular voice (as it should) does not create the same feelings of isolation and exclusion as when the government speaks religiously. Heightened separationist regimes can also be more protective of religious institutions and respectful of their autonomy by lessening opportunities for government regulation of and interaction with religion.⁸⁹

As for enhanced funding prohibitions as in *Locke*, a state could rationally determine that an even stricter regime, such as demonstrated in the North

⁸⁶ See generally STEVEN K. GREEN, *STARS IN THE CONSTITUTIONAL CONSTELLATION: FEDERAL AND STATE CONSTITUTIONAL PROVISIONS ON CHURCH AND STATE* (1993); see also Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 EDUC. LAW REP. 1 (Oct. 1997) (distinguishing various state constitution funding provisions).

⁸⁷ 536 U.S. 639 (2002); see *Witters v. State Comm’n for the Blind*, 771 P.2d 1119, 1112 (Wash. 1989).

⁸⁸ See JOHN RAWLS, *POLITICAL LIBERALISM* 457–58 (expanded ed. 2005); Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 199 (1992).

⁸⁹ See *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94, 116 (1952) (relying on separationist principles to protect the autonomy of religious institutions).

Carolina scholarship program discussed by Professors Lupu and Tuttle,⁹⁰ was necessary to reduce both entanglement (by not having to differentiate divinity degree programs from less religious majors) and prevent religious factionalism that may flow from funding more secular church-related colleges (e.g., Duke University) but not their more sectarian counterparts (e.g., Southeastern Baptist Theological Seminary). In a related way, the free exercise claims of those nonreligious majors at the church-related colleges would be no stronger than those of Mr. Davey, and probably weaker.

A final reason for supporting the *Locke* holding is it recognizes the inherent limitations of constitutional rules, which are fundamentally prohibitory. Free exercise and nonestablishment set the excluded zones, but they do not (and cannot) define the substance of government behavior between those boundaries. That there is a zone of permissible government accommodation and regulation of religion is fundamental to any notion of a popularly responsive government.⁹¹ Yet while state and local governments must be afforded flexibility to fashion policies and relationships that exist between the two prohibitions of the religion clauses, any notion of “play in the joints” requires external boundaries within which states may act. The problem with Justice Thomas’s federalism approach to the Establishment Clause is that it removes one of those boundaries. Provided the states do not contravene free exercise or free speech interests—rights of which Justice Thomas has not been particularly jealous—states may establish whatever lower boundary they desire (or none at all). One of the anchors for the joints is missing.

Justice Thomas also fails to appreciate that the two religion clauses work in tandem to protect religious freedom generally. The nonestablishment norm not only protects religious institutions from government entanglement in religious matters;⁹² it also ensures religious equality in a way that a mere reference to free exercise cannot. The Establishment Clause is thus the “co-guarantor, with the Free Exercise clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone.”⁹³ Disincorporating the Establishment Clause while seeking to retain the Free Exercise Clause as a check on the actions of state and local governments will result in less protection of religious liberty.

⁹⁰ Lupu & Tuttle, *supra* note 1, at 65–67.

⁹¹ See *Cutter v. Wilkinson*, 544 U.S. 709, 719–20 (2005).

⁹² See *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709 (1976).

⁹³ *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 256 (1963) (Brennan, J., concurring).

Thus, the ability of states to enforce more separationist regimes—provided those actions do not contravene free exercise, free speech and equal protection values—is consistent with federalism values that seek to enhance individual rights and freedom. States should be able to provide greater protection for free exercise and nonestablishment because they are rights enhancing and consistent with core religion clause values. Justice Thomas's call for disincorporation of the Establishment Clause, however, would produce the opposite result: the impoverishment of religious freedom.