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Restoring the Establishment Clause to the states; Restoring Religious tolerance

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In recent years, the Supreme Court has recognized the downturn of consistent and reliable Establishment Clause jurisprudence. The inconsistency of opinions and the often hostile outcomes have left the Establishment Clause in "shambles (https://www.supremecourt.gov/opinions/11pdf/10-1276.pdf)". Justices have commented that there is no other area of law in more desperate need of repair than the Establishment Clause. One reason posited for the current state of confusion is that the Establishment Clause was never intended to be incorporated. Because of this, even the Supreme Court cannot agree (https://www.supremecourt.gov/opinions/11pdf/10-1276.pdf) on a single test or even consistently apply the many tests it currently employs.

Before 1947 when the Establishment Clause was incorporated, none of the very few Establishment Clause cases decided constituted a constitutional violation. However, all things changed in Establishment Clause jurisprudence when the court announced in *Everson v. Board of Education* (https://supreme.justia.com/cases/federal/us/330/1/#tab-opinion-1939031) that the Establishment Clause had been incorporated against the states under the Fourteenth Amendment. *Everson* is devoid of any analysis justifying the incorporation of the Establishment Clause but states that because the Free Exercise Clause had already been incorporated in *Cantwell v. Connecticut* (https://supreme.justia.com/cases/federal/us/310/296/#tab-opinion-1936773), "there is every reason to give the same application and broad interpretation to the establishment of religion clause."

The difference between the Free Exercise Clause and the Establishment Clause is that the Free exercise Clause protects individuals against congressional interference with the exercise of their religion. Because this clause protects an individual right, it can be incorporated under the liberty provision of the

Fourteenth Amendment. The Establishment Clause on the other hand does not purport to protect individual rights, but puts a structural limit upon federal power and reserves authority to the states.

The Establishment Clause states " Congress shall make no law respecting an establishment of religion (https://www.whitehouse.gov/about-the-white-house/the-constitution/)." On one level, the entire Bill of Rights was adopted to assuage the fear of centralized power in a national government and none of its provisions originally applied to the states. Upon closer analysis, structural differences between the various rights may be discerned. Although most of its provisions are meant to protect individual rights, such as the right to free speech, the Establishment Clause does not. The framers intended the Establishment Clause to embody a principle of federalism, that is, to prevent Congress from interfering with church-state relations and allowing states to preserve their sovereignty with respect to religion.

The Establishment Clause is a structural limitation, akin to the powers of Congress to regulate interstate commerce and to declare war. Structural limitations do not create a fundamental liberty interest but rather protects state power against the federal government by defining and limiting the powers of the federal government. Structural limitations defy incorporation and when incorporated achieve the opposite result- the elimination of such state authority. Incorporating the Establishment Clause is therefore analogous to trying to incorporate the Tenth Amendment. The Tenth Amendment reaffirms that the states possess all power not delegated to the federal government. Incorporation alters the meaning and would require that the states be stripped of all powers not specifically delegated to them, thereby inverting the Amendment's purpose (https://heinonline.org/HOL/LandingPage?handle=hein.journals/hlr105&div=9&id=&page=). As outrageous as this outcome would be, the same shocking result has occurred by the incorporation of the Establishment Clause. Over seventy years of inconsistent and confused Supreme Court decisions have demonstrated just how problematic the outcome really is.

After the decision to incorporate in 1947, states were stripped (https://supreme.justia.com/cases/federal/us/545/844/) of their power to recognize religion as a part of public culture and make determinations about religion based on local values and desires. Symbols that have been woven into our history and culture have, in recent years, been deemed by the court to be violative of the Establishment Clause. For example, two Kentucky counties (https://supreme.justia.com/cases/federal/us/545/844/) were prohibited from displaying the Ten Commandments in their courthouses as part of their "Foundations of American Law and Government Display." In addition to the Ten Commandments, the display contained eight other documents that played a significant role in the foundation of our system of law and government. This case illustrates precisely how incorporation has robbed the states of their autonomy and how hostility toward religion has seeped into Establishment Clause jurisprudence, further separating our people from their history.

Another reason the incorporation of the Establishment Clause is improper is because the expansion of liberty that is triggered through the incorporation of other amendments is not similarly triggered with the incorporation of the Establishment Clause. Speaking of incorporation generally, Justice Clarence Thomas said, "[w]hen rights (https://www.oyez.org/cases/2001/00-1751) are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, the individual liberty." Incorporation of the Establishment Clause has restrained religious liberty by taking away a right from the people, who reserved that power unto themselves, or to their state governments, and giving it to the federal government. From the Nation's founding until 1947, states had the power to respect the needs and traditions of its citizens, allowing accommodation but never coercion of religion. Today,

accommodation, acknowledgment and promotion of religion are stifled by the three-prong test outlined in *Lemon v. Kurtzman* (https://www.oyez.org/cases/1970/89), or in the not so rare occasions when *Lemon* is not followed, to the inclinations of the majority.

Understanding the Establishment Clause as a federalism provision accords with the range of church-state arrangements (https://www.supremecourt.gov/opinions/13pdf/12-696_bpm1.pdf) that existed at the time of the formation of the Bill of Rights. At least six states had established churches including Massachusetts, Connecticut, and New Hampshire. In the South, states such as Maryland, South Carolina, and Georgia permitted taxation in support of all Christian churches. Other states that had no history of formal religious establishments at all, maintained religious tests for office. In 1833, Massachusetts was the last state to disestablish. This decision, and all previous decisions to establish or disestablish religion, were reserved to the states.

Although the Founders were men of different religious backgrounds, they were virtually unanimous in their belief that the republic could not survive without religion's moral influence. In Washington's farewell address, he counseled the people for the last time, writing "of all the dispositions and habits which lead to political prosperity, religion (http://avalon.law.yale.edu/18th_century/washing.asp) and morality are indispensable supports." The separation of religion from the public square has greater implications than just the displeasure of citizens who treasure religious history. We are warned by those who wrote the Constitution that if later generations did not value and safeguard religion, the free republic, as we know it, would crumble.

By reviewing the textual and historical facts concerning the creation of the Establishment Clause, it is not difficult to arrive at the conclusion that it was the founder's intent to limit the federal government and give power to the states when it came to religious matters. Even for those who understand this, it is difficult to conceive of the United States as a place which allows individual states to establish a state religion. It is important to remember that at the time the Establishment Clause was incorporated in *Everson*, there were no established religions and there had not been for over one hundred years. Each

state that at one time had an established religion, voluntarily disestablished in the early nineteenth century. Therefore, there is no reason to believe that the fifty states would rush to adopt religious establishments.

The abandonment of *Everson* would return the power to the states to determine government involvement with religion. Returning this power will not only secure religious liberty, but will allow it to flourish as citizens of each state voice their desires with local and state leaders. Currently there are states that have already written into their constitution a clause that prohibits an establishment of religion. Other states may do the same and each will be free to set the limits of their involvement.

The Free Exercise Clause will continue to be a potent defense of religious liberty as it restricts state and local government from compelling citizens to attend or worship in church services. It also forbids the punishment or penalization of individuals because of their religious beliefs. The Free Exercise Clause would continue to allow any citizen to opt out of any state-sponsored activities such as a prayer at a school graduation or viewing a creche at Christmastime but at the same time, allow those who want to participate to do so.

Even if the Supreme Court could find a fair and consistent test, the states would still be without the powers given them by the founding fathers. Government involvement with religion would continue to be evaluated on a federal level and likely with the same confusion and inconsistency as we see today. Just as with our Founders, religion's importance and influence continues to be a defining characteristic of the citizens of the United States. We deserve to not only be free from punishment and restraint when practicing our religion, but more, we should be free to join with our government in acknowledging and giving thanks to God for the great blessing which is this Nation.

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