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Unincorporated, Unprotected: Religion in an Established State

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Unincorporated, Unprotected: Religion in an Established State

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I. INTRODUCTION

In the summer of 2004, the group American Veterans Standing for God and Country (“American Veterans”) began a cross-country pilgrimage to carry a 5,200-pound statue of the Ten Commandments to Washington D.C.¹ The infamous statue cost Roy Moore his job as

1. Monte Reel, *Artifact of the Culture Wars En Route From Alabama*, WASH. POST, July 25, 2004, at C4.

Chief Justice of the Alabama Supreme Court when he refused to remove it from the lobby of the state courthouse in 2002.² American Veterans took up Moore's cause, however, and in October they brought the Commandments statue to a Christian rally in Washington, D.C.³ The group then planned to ask Congress to display the statue permanently in the Capitol Building.⁴ The president of American Veterans also joined Moore in a campaign to enact legislation that would prohibit the Supreme Court from reviewing cases involving any government official's "acknowledgement of God as the sovereign source of law, liberty, or government."⁵ As Moore explained in his recent book, "elected and appointed government officials have the right and obligation to acknowledge God as the foundation of American government."⁶

At least one observer has likened the campaign of American Veterans to that of the biblical David, who planned to establish a theocracy and use the religious law of Israel to unify his nation.⁷ concerns. For example, the superintendent of a Missouri school district was put "on leave" for refusing to remove a plaque of the Ten Commandments from a local public school and a cross and a Bible from his office.⁸ Roy Moore supported the superintendent, claiming that "God gives [him] [the] right" to display such items.⁹

Former-Justice Moore and his affiliates are not alone in suggesting that local governments and government officials should be allowed to display religious symbols in an official context or to make religion an official part of public life. Some jurists have suggested similar changes in church-state relations as they currently stand. For example, Chief District Judge Brevard Hand ruled in a 1983 decision that the Establishment Clause was not intended to apply to state governments and did not prohibit public school teachers from offering prayers in school.¹⁰

2. *Id.*

3. Mary Orndorff, *Atheists Jeer as Monument Hits D.C.*, BIRMINGHAM NEWS, Oct. 23, 2004, available at LEXIS, News Library, Birmingham News.

4. Reel, *supra* note 1, at C4. As Moore explained, "[t]his monument needs to be in this building." *Id.*

5. *Id.*

6. *Fall 2004 Hardcover*, PUBLISHERS WKLY., Aug. 9, 2004, at 138, 184.

7. Steve Gushee, *Commandments Heading Down a Dangerous Path*, PALM BEACH POST, Aug. 20, 2004.

8. Andrew Tangel, *Humansville School Chief Out of a Job*, SPRINGFIELD NEWS-LEADER, Aug. 20, 2004, available at 2004 WLNR 16256895.

9. *Id.*

10. *Jaffree v. Bd. of Sch. Comm'rs*, 554 F. Supp. 1104, 1128 (S.D. Ala. 1983), *stay granted*, 459 U.S. 1314 (1983).

More recently, in *Zelman v. Simmons-Harris*, Justice Thomas suggested in his concurrence that the Court should treat the federal and state governments differently when faced with Establishment Clause challenges.¹¹ He reasoned: "On its face, [the Establishment Clause] places no limit on the States with regard to religion. The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government."¹² Thus, Justice Thomas asserted: "[A]s a matter of first principles, I question whether . . . [the Court's current Establishment Clause] test should be applied to the States . . . [I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government."¹³

Justice Thomas's proposal, if adopted, would represent a dramatic shift in the Court's Establishment Clause jurisprudence as it presently stands. Since 1947, the Establishment Clause has been incorporated against state action through the Fourteenth Amendment,¹⁴ and the Court has used the Clause to invalidate numerous state laws and acts as unconstitutional.¹⁵

Although a number of judges and scholars have proposed that the Establishment Clause be unincorporated,¹⁶ it remains unclear how the change would affect state action. Some commentators have predicted that state judges would be able to commence jury sessions with prayer,¹⁷ school boards would be allowed to institute formal prayer in schools,¹⁸ and public school students could lead prayers at

11. 536 U.S. 639, 677-78 (2002) (Thomas, J., concurring).

12. *Id.* at 678.

13. *Id.* at 677-78.

14. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (upholding the Board of Education's policy to reimburse bus fares for parochial and public school students against an Establishment Clause challenge).

15. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (invalidating state reimbursement of religious schools for salaries of teachers who instructed secular subjects); *Comm. for Pub. Educ. and Religious Liberty v. Nyquist*, 413 U.S. 756, 798 (1973) (invalidating a New York program that offered partial reimbursement of tuition costs to low income families and a per-pupil tax credit to parents who sent their children to private schools); *County of Allegheny v. ACLU*, 492 U.S. 573, 601-02 (1989) (enjoining a county from placing a crèche in its courthouse).

16. See, e.g., *Jaffree v. Bd. of Sch. Comm'rs*, 554 F. Supp. 1104, 1113-18 (S.D. Ala. 1983), *stay granted*, 459 U.S. 1314 (1983); William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 510-511 (1998).

17. Gray, *supra* note 16, at 510.

18. *Id.* at 546; Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700, 1717-18 (1992).

high school football games¹⁹ and graduation ceremonies.²⁰ Other commentators maintain that unincorporation would have little effect on state action, which necessarily will be limited by the presence of a variety of faiths,²¹ state constitutional provisions protecting religion,²² and the federal Free Exercise and Due Process Clauses.²³ These protections, they argue, would guarantee religious freedom without the Establishment Clause bar.

Part II of this Note will examine the historical context of the arguments for and against unincorporation. It will begin by examining the history of the First Amendment and the state of religion at the founding, when churches played a large role in the states. Next, it will focus on the revolution that took place around the time of the Civil War, when the nation's ideas of freedom changed dramatically, and the Fourteenth Amendment was adopted. Finally, Part II will examine the Court's current Establishment Clause jurisprudence and consider the wide scope of activities it prohibits.

The argument this Note makes is twofold. Part III of this Note will demonstrate that, contrary to arguments suggesting that unincorporation will have little impact on state action, proposed alternative safeguards are insufficient to guarantee the religious liberty currently protected by the Establishment Clause. The existence of religious majorities at the local level, the ability to amend state constitutions, and the standing problems associated with religious claims will make it difficult to protect against state establishment with any real force should the Establishment Clause be unincorporated.

Second, this Note will argue that widespread state establishment is inconsistent with the vision of religious freedom and democratic government put forth in the federal Constitution. To do so, Part IV will examine the phenomenon of government speech: the government's insertion of its own preferences and values into the marketplace of ideas. This Note argues that recognized problems of general government expression are particularly troubling in the context of religion. In light of these concerns, the Establishment Clause is properly applied to state action and should remain incorporated.

19. See Gray, *supra* note 16, at 515 (concluding that the First Amendment does not apply to the states).

20. *Id.*; see also Note, *supra* note 18, at 1718-19 (arguing that the Supreme Court should overturn *Everson* and find that the First Amendment does not apply to the states).

21. Note, *supra* note 18, at 1718.

22. See *infra* Part III.B.

23. See *infra* Part III.C.

II: A BRIEF HISTORY OF THE ESTABLISHMENT CLAUSE

A. Religious "Freedom" in the Eighteenth Century

Although some individuals may think the United States has been a bastion of religious freedom since its founding, recent scholarly work reveals religious establishment in the eighteenth century that would be quite shocking to citizens today.²⁴ During the founding era, it was common for states to promote particular religions. In 1789, at least six of the original thirteen states supported churches with government funds.²⁵ Four of the remaining seven had constitutional provisions that barred non-Protestants or non-Christians from holding office.²⁶ As now-Judge Michael McConnell explains, "No small number of the 'freedom-loving colonials' considered official sanction for religion natural and essential."²⁷ The web of laws protecting against establishment at the time of the founding was, at best, "ad hoc and unsystematic."²⁸

Based on the states' established churches and religious requirements for office, some commentators have suggested that the First Amendment was intended to prohibit not only the establishment of religion but the *disestablishment* as well.²⁹ They note that the Establishment Clause prohibits Congress from legislating with "respect" to establishment, thus preventing Congress from establishing its own church and from removing those state churches already in place. Professor Akhil Amar explains: "Congress had no more authority in the states to disestablish than to establish. Both actions were equally beyond Congress's delegated powers; and the unfettered choice between establishment and dis- was given to the states."³⁰

Other evidence, however, suggests that many Framers were concerned with religious establishment at the *state* level. One of the proposed amendments prepared by James Madison prevented state

24. See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998); Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2108 (2003).

25. AMAR, *supra* note 24, at 32-33.

26. *Id.* at 33.

27. McConnell, *supra* note 24, at 2108.

28. *Id.* at 2131.

29. AMAR, *supra* note 24, at 32 (citing William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1, 7-8 (1965)).

30. *Id.* at 41.

interference with "equal rights of conscience."³¹ Madison himself called this "the most valuable amendment in the whole list,"³² explaining that "[i]f there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments."³³ Madison expressed similar concerns in *The Federalist 10*, where he drew the now-famous contrast between the strength of factions in the nation as a whole and those in the state of Rhode Island.³⁴ He concluded that factions were much more likely to take hold of and trample minority rights in the tiny state than they were in the federal government.³⁵ Madison's amendment, however, did not prevail. It passed in the House, only to die in the Senate.³⁶ Thus, the Bill of Rights in its original form limited only federal establishment of religion.

B. Reconstruction: The Second Revolution

Certainly, the history of the First Amendment offers some insight into the original intent behind the Establishment Clause and the federalist concerns that may have motivated it. Yet alone, that history cannot offer a full understanding of the Establishment Clause today. As Amar explains: "In the end, of course, the incorporation question will ultimately depend on a careful examination of the Fourteenth Amendment itself; regardless of [the Establishment Clause's] status in 1789."³⁷ The Civil War significantly altered both the constitutional structure generally and the meaning of the Establishment Clause in particular. The "very concept" of the Bill of Rights was reshaped by the Fourteenth Amendment,³⁸ which provides: "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."³⁹ In order to understand whether the Establishment Clause, or any other right, is properly incorporated against state

31. *Id.* at 22.

32. *Id.*

33. *Id.*

34. See THE FEDERALIST NO. 10, at 77, 83-84 (James Madison) (Clinton Rossiter ed., 1961).

35. *Id.*

36. AMAR, *supra* note 24, at 22.

37. *Id.* at 41.

38. *Id.* at xv.

39. U.S. CONST. amend. XIV, § 1.

action, one must understand the meaning and purpose of the Fourteenth Amendment.

Divining that meaning is no easy task. Although most commentators recognize the amendment's significant impact on the constitutional structure, judges and scholars have offered very different interpretations of "privileges and immunities" and "due process."⁴⁰ The 1968 opinion *Duncan v. Louisiana*⁴¹ is illustrative of the wide range of opinions in the incorporation debate. In *Duncan*, the Court considered whether the Sixth Amendment, as applied to the states via the Fourteenth Amendment, guaranteed a jury trial in criminal prosecutions involving two-year sentences.⁴³ The Court held that the Fourteenth Amendment provided such a right, although the Justices disagreed upon how it did so.⁴⁴ Justice White, writing for the majority, framed the test for incorporation as "whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'"⁴⁵ The majority found that a jury trial was such a protected right, properly incorporated against the states.⁴⁶

Justice Black, joined by Justice Douglas, concurred in the majority's result but questioned its process.⁴⁷ As explained in his concurrence, Justice Black believed that the Fourteenth Amendment's Privileges and Immunities Clause incorporated the Bill of Rights in its entirety: "[The Privileges and Immunities clause] seem[s] to me an eminently reasonable way of expressing the idea that henceforth the Bill of Rights shall apply to the States. . . . [A]ny [other] reading . . . renders the words of this section of the [Fourteenth] Amendment meaningless."⁴⁸ Thus, Justice Black rejected a fundamental fairness test in favor of what often is called a "total incorporation" approach.⁴⁹ Under this approach, the Fourteenth Amendment would incorporate the Establishment Clause,⁵⁰ as well as the rest of the Bill of Rights, against state action.

40. *Id.*

41. 391 U.S. 145 (1968).

43. *Id.* at 146.

44. *Id.* at 149-150.

45. *Id.* at 148 (citing *Powell v. Alabama*, 287 U.S. 45, 67 (1932)).

46. *Id.* at 149-150.

47. *Id.* at 162-63 (Black, J., concurring).

48. *Id.* at 166 (Black, J., concurring).

49. AMAR, *supra* note 24, at 139.

50. See *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947). Justice Black wrote the majority opinion in *Everson*, which incorporated the Establishment Clause against state action. *Id.*

C. The Incorporation of the Establishment Clause

The Supreme Court first applied the Establishment Clause to state action in the 1947 case *Everson v. Board of Education*.⁵¹ In *Everson*, the Court examined the constitutionality of a New Jersey statute that used public funds to transport students to parochial schools.⁵² The majority explained that the challenge in such cases was to distinguish between legislation “which provides funds for the welfare of the general public and that which is designed to support institutions that teach religion.”⁵³ Ultimately, the Court upheld the state law, reasoning that it was “neutral” in its treatment of religion and nonreligion.⁵⁴

Contrary to the claims of some critics,⁵⁵ the *Everson* Court offered several reasons for incorporating the Establishment Clause against state action. First, the Court recognized that past decisions had given “broad meaning” and scope to an individual’s religious freedom under the Free Exercise Clause.⁵⁶ It found “every reason to give the same application and broad interpretation” to the Establishment Clause as well.⁵⁷ This application was appropriate, the Court next reasoned, because the two religion clauses are “complementary.”⁵⁸ In order to preserve civil liberty, government institutions must be “rescued” from religious interference, and religious institutions must be protected from “invasion of the civil authority.”⁵⁹ Thus, the *Everson* Court recognized that the religious liberty promised by the First Amendment could not be guaranteed without protection against state, as well as national, establishment.⁶⁰

51. 330 U.S. 1 (1947).

52. *Id.* at 3.

53. *Id.* at 14.

54. *Id.* at 18.

55. See, e.g., Note, *supra* note 18, at 1702 (“Significantly, *Everson* is devoid of any analysis justifying the incorporation of the Establishment Clause under *Palko*’s selective incorporation test.”).

56. *Everson*, 330 U.S. at 15.

57. *Id.* at 15.

58. *Id.*

59. *Id.* at 15-16 (“The ‘establishment of religion’ clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. . . . [T]he clause against establishment of religion by law was intended to erect a wall of separation between Church and State.”).

60. *Id.*

D. A Modern Approach

More recently, Professor Amar has offered another approach to incorporation in his book *The Bill of Rights: Creation and Reconstruction*. Under what he calls “refined incorporation,” Amar suggests that courts cannot mechanically apply provisions of the Bill of Rights against the states.⁶¹ Instead, he explains, “[t]he best reading of the [Fourteenth] [A]mendment suggests that it incorporates the Bill of Rights in a far more subtle way than Black admitted, including both more and less than the first eight amendments.”⁶² Amar notes the argument that courts should distinguish between provisions in the Bill of Rights that provide individual rights and those that are designed to limit federal government power with regard to the states.⁶³ The former may be incorporated against state action.⁶⁴ Those provisions designed to limit the federal government, however, “may need to undergo refinement and filtration before their citizen-rights elements can be absorbed by the Fourteenth Amendment.”⁶⁵

Amar argues that the Establishment Clause was designed to protect state freedom and thus cannot be incorporated in the same way as the Free Exercise Clause, which guarantees individual rights.⁶⁶ He finds mechanical incorporation of the Establishment Clause to be “awkward.”⁶⁷ He does not, however, end the inquiry there. As noted above, Amar recognizes that the question of whether the Establishment Clause should be incorporated depends heavily on the transformation of thought that occurred at the time of the Civil War and the adoption of the Fourteenth Amendment.⁶⁸

Unsurprisingly, state attitudes toward religion changed greatly from the time of the nation’s founding to the adoption of the Fourteenth Amendment. While almost half of the states had established churches in 1789, by the 1860s, no state had an established religion.⁶⁹ As Joseph Henry Lumpkin, Chief Justice of the Georgia Supreme Court, explained in an 1852 opinion:

Our revolutionary sires wisely resolved that religion should be purely voluntary in this country; that it should subsist by its own omnipotence, or come to nothing . . . Now, the

61. AMAR, *supra* note 24, at xiv.

62. *Id.* at 175.

63. *Id.* at 153.

64. *Id.* at 153.

65. *Id.* at xiv.

66. *Id.* at 33, 41.

67. *Id.* at 34.

68. See *supra* note 37 and accompanying text.

69. AMAR, *supra* note 24, at 251.

doctrine is, that Congress may not exercise this power, but that each State Legislature may do so for itself. As if a National religion and State religion . . . were quite separate and distinct from each other; and that the one might be subject to control, but the other not!

Such logic, I must confess, fails to commend itself to my judgment.⁷⁰

Attitudes toward religion and government changed significantly between the time of the founding and the adoption of the Fourteenth Amendment. Freedom from religious establishment was no longer a right limited to the states but had become a liberty of individual citizens. As such, one might conclude that the Establishment Clause should be incorporated under the Fourteenth Amendment like other provisions of the Bill of Rights.

Yet Amar does not suggest that the Establishment Clause should be incorporated as such. Instead, he suggests, the question of whether the clause should be incorporated “may not matter all that much.”⁷¹ As an example, Amar considers the question of whether Utah could proclaim itself “the Mormon State” if the Court unincorporated the Establishment Clause.⁷² Utah’s declaration would be what Amar calls a “non-coercive establishment”—it does not force individuals to participate in any religious exercise, but it clearly states a government preference for a particular religion.⁷³ Amar ultimately concludes that “even a non-coercive establishment” would violate principles of religious liberty and equality; however, he believes these values are adequately protected by other constitutional provisions, such as the Free Exercise Clause.⁷⁴ Amar explains: “[S]o a law that proclaimed Utah a Mormon state should be suspect whether we call this a violation of the establishment principles, free-exercise principles . . . or religious-liberty principles.”⁷⁶ He concludes: “[O]nce we see this, it turns out that the question—should we incorporate the establishment clause?—may not matter all that much.”⁷⁷

Other commentators also have suggested that unincorporation would have little effect.⁷⁸ Some believe that, regardless of any constitutional provisions, the religious diversity now present in the

70. *Id.* (quoting *Campbell v. State*, 11 Ga. 353, 366 (1852)).

71. *Id.* at 254.

72. *Id.* at 252.

73. *Id.*

74. *Id.* at 254.

76. *Id.*

77. *Id.*

78. *See id.*

nation will guard against laws that establish a particular faith.⁷⁹ Others turn to state constitutions to protect against religious establishment.⁸⁰ Still others believe that the Free Exercise Clause or the Fourteenth Amendment would offer direct protection against those violations that are so serious as to constitute a deprivation of liberty generally.⁸¹

In his *Zelman* concurrence, Justice Thomas suggests that state laws dealing with religious matters would be constitutional only “so long as these laws do not impede free exercise rights or any other individual religious liberty interest.”⁸² However, Justice Thomas also suggests that unincorporation would lead to an increase in state decisions to “experiment” with religion.⁸³ It is not clear what this experimentation would entail or what experiments would pass constitutional muster should the Establishment Clause be unincorporated.

Contrary to the suggestions of those scholars who believe unincorporation will have little practical effect, Part III of this Note argues that various proposed safeguards will not protect individuals from state establishment. To understand what is at risk from unincorporation, however, it is first necessary to examine how the Establishment Clause functions today. Thus, the next Section will study the extent to which state governments already have attempted to promote particular religions and the Court’s response under an incorporated clause.

E. State Endorsements and Religious Displays

Through the years, the Supreme Court has faced many challenges to state laws and actions claimed to be in violation of the Establishment Clause. The main framework for handling these issues was developed in the 1971 case *Lemon v. Kurtzman*.⁸⁵ There, the

79. See Note, *supra* note 18, at 1717 (“Even without *Everson*, religious liberty would be adequately preserved through mechanisms independent of the Establishment Clause, which include . . . the presence of religious pluralism in America.”).

80. See, e.g., Lisa S. Wendtland, Note, *Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions*, 71 VA. L. REV. 625, 625 (1985) (“As long as states respect the federal Constitution as a minimum restraint on government involvement with religion, they remain free to impose stricter limitations through their own constitutions.”).

81. Note, *supra* note 18, at 1717; *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (2002) (Thomas, J., concurring).

82. *Zelman*, 536 U.S. at 679.

83. *Id.* at 678-79.

85. 403 U.S. 602 (1971).

Court consolidated suits challenging Pennsylvania and Rhode Island statutes that provided aid to religious schools. Seven Justices struck down the states' programs under a new, three-pronged test developed from past decisions: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"⁸⁶ The *Lemon* test has been applied in numerous contexts ranging from religious school funding to tax deductions.⁸⁷

Courts have faced challenges to state action in the context of local religious displays, as well.⁸⁸ The Court decided its first major holiday display case, *Lynch v. Donnelly*, in 1984.⁸⁹ In *Lynch*, citizens challenged the placement of a crèche in the Pawtucket, Rhode Island, Christmas display.⁹⁰ The City of Pawtucket erected a display of decorations "traditionally associated with Christmas" each year in a park owned by a nonprofit organization.⁹¹ The display included, among other objects, candy cane poles, a Christmas tree, a "Season's Greetings" banner, a Santa Claus house, reindeer pulling Santa's sleigh, and figures of a clown, elephant, and teddy bear.⁹² Amid these decorations, the display also contained the challenged nativity scene.⁹³

To determine if the city's display constituted an unconstitutional establishment of religion, the Court conducted a brief survey of its past Establishment Clause jurisprudence.⁹⁴ Eventually, the majority concluded, "[i]n each case, the inquiry calls for line-

86. *Id.* at 612-13 (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)).

87. *See, e.g.*, *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 485-86, 489 (1986) (rejecting claim that state aid flowing to religious school as part of a vocational rehabilitation program violated the Establishment Clause under the facts presented); *Mueller v. Allen*, 463 U.S. 388, 393 (1983) (upholding Minnesota tax deduction against Establishment Clause challenge).

88. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (holding that a city did not impermissibly endorse religion by displaying a nativity scene); *County of Allegheny v. ACLU*, 492 U.S. 573, 601-02, 621 (1989) (holding the same with regard to the display of a Chanukah menorah placed just outside the City-County building, but holding unconstitutional the display of a nativity scene in the county courthouse).

89. 465 U.S. 668 (1984).

90. *Id.* at 670-71.

91. *Id.* at 671.

92. *Id.*

93. *Id.*

94. *See id.* at 673-78 (noting Congress's approval of government paid chaplains for the House and Senate, the government's recognition of "holidays with religious significance," the national motto "In God We Trust," and presidential proclamations of days of national prayer).

97. *Id.* at 678.

drawing; no fixed, *per se* rule can be framed.”⁹⁷ The majority found that the crèche was but one of many parts of the display, and the nativity scene did not “taint” the presentation so much as to violate the Establishment Clause.⁹⁸

The majority opinion in *Lynch* thus offered little concrete guidance as to what would constitute an unacceptable display in the next instance. Justice O’Connor’s concurrence, however, presented the first incarnation of a mode of analysis the Court would officially adopt in *County of Allegheny v. ACLU*: the “endorsement test.”⁹⁹ Unlike the majority in *Lynch*, Justice O’Connor specifically framed the issue presented as “whether Pawtucket has endorsed Christianity by its display of the crèche.”¹⁰⁰ She explained, “What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. . . . [P]ractices having that effect . . . make religion relevant, in reality or public perception, to status in the political community.”¹⁰¹ Thus, Justice O’Connor suggested, state action that appeared to endorse a particular religious denomination, or religion generally, could not withstand Establishment Clause scrutiny.

The Court officially adopted Justice O’Connor’s “endorsement test” in *County of Allegheny v. ACLU*, another holiday display case.¹⁰² At issue was Allegheny County’s placement of a nativity scene in the county courthouse and a Chanukah menorah “just outside” the City-County Building.¹⁰³ The Court fractured deeply in its treatment of the displays, and Justice Blackmun’s opinion represented a majority in only three sections.¹⁰⁴ That majority did agree, however, on the centrality of an endorsement analysis: “In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion, a concern that has long had a place in our Establishment Clause jurisprudence.”¹⁰⁵ The majority recognized that several recent cases had used “endorsement” criteria and concluded: “The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to

98. *Id.* at 686.

99. *Id.* at 690; *County of Allegheny v. ACLU*, 492 U.S. 573, 593-94 (1989).

100. *Lynch*, 465 U.S. at 690 (O’Connor, J., concurring).

101. *Id.* at 692.

102. *Allegheny*, 492 U.S. at 578.

103. *Id.*

104. *Id.*

105. *Id.* at 592.

a religion relevant in any way to a person's standing in the political community.'"¹⁰⁶

Applying the endorsement test, a majority of the Court found that the nativity scene located in the courthouse constituted an impermissible religious establishment.¹⁰⁷ The majority concluded that while "[t]he government may acknowledge Christmas as a cultural phenomenon, . . . under the First Amendment it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."¹⁰⁸ Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, dissented in that judgment, strongly criticizing the majority's endorsement analysis and proposing a more limited "proselytization test."¹⁰⁹ In the long run, however, the endorsement test gained support and has been applied in many contexts.¹¹⁰ States may not endorse religion. The Establishment Clause may serve as a bar against state action as basic as a holiday display.

III. THE RESULTS OF UNINCORPORATION

Cases like *Allegheny* illustrate the Justices' willingness to strike down state actions as unconstitutional religious establishments.¹¹¹ If unincorporated, the Establishment Clause could not serve as an independent justification for challenging such acts. As discussed earlier, some commentators suggest that application of the Establishment Clause is not necessary to guarantee individuals' religious freedom. The next Sections will demonstrate, however, that proposed, alternative safeguards will not effectively protect against state establishment.

106. *Id.* at 593-94 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (O'Connor, J., concurring)).

107. *Id.* at 601-602.

108. *Id.* at 601.

109. *See id.* at 674-76 (Kennedy, J., concurring in judgment in part and dissenting in part) (noting that under the endorsement test, the Court decides cases "using little more than intuition and a tape measure.").

110. *See, e.g. Zelman v. Simmons-Harris*, 536 U.S. 639, 655 (2002) ("[N]o reasonable observer would think a neutral [voucher] program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the imprimatur of government endorsement."); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 118 (2001) (finding little danger that schoolchildren would construe meetings held by a religious club in a public school as government endorsement of religion and finding the school's discrimination against the club unconstitutional).

111. *See supra* notes 102-108 and accompanying text.

A. *The Limits of Pluralism*

Aside from any constitutional protections in place, some commentators have suggested that limitations on state establishment are unnecessary in light of the great religious diversity present in the United States.¹¹² These commentators claim religious pluralism will serve as its own check against establishment, with each denomination interested in checking another's power.¹¹³ Despite a diversity of faiths, however, recent data reveals the existence of religious majorities at the county, state, and national levels.¹¹⁴ This Section will examine the extent of these majorities and demonstrate that they raise serious questions as to the efficacy of pluralism in protecting against state establishment.¹¹⁵

Limited information about religious affiliation in the United States is available from the federal government in the 2000 Statistical Abstract of the United States.¹¹⁶ Over four-fifths of those surveyed affiliated themselves with some form of Christianity, and in 1999, a majority of Americans stated their religious preference as "Protestant."¹¹⁷ Specifically, 55 percent of the population stated their religious preference as Protestant, 28 percent Catholic, 2 percent Jewish, 6 percent "Other," and 8 percent "None."¹¹⁸ Out of the entire

112. See, e.g., Note, *supra* note 18, at 1717-18.

113. *Id.* at 1718.

114. See *infra* notes 116-132 and accompanying text.

115. The collection of religious data presents several difficulties, as "Public Law 94-521 prohibits [the Census Bureau] from asking a question on religious affiliation on a mandatory basis." U.S. Census Bureau, Religion, at <http://www.census.gov/prod/www/religion.htm>. However, some government information on religious affiliation is available in the United States Census Bureau's Statistical Abstracts, available at <http://www.census.gov/prod/www/abs/statab.html>. More detailed information is available from the Glenmary Research Center in its publication *Religious Congregations & Membership in the United States 2000*. See *infra* notes 130-132. This private organization regularly collects information on religious adherence by contacting religious organizations in every state. See http://www.glenmary.org/grc/RCMS_2000/release.htm. Their information is particularly useful because it breaks down religious affiliation at the local, county, state, and national levels. Yet even this data cannot be completely accurate to the extent that it relies on religious organizations to report their own membership and at times may leave for large segments of an "unclaimed" population that does not belong to a particular religious organization and thus is not reported. This difficulty, however, works against the possibility of identifying religious majorities: many of those individuals in the "unclaimed" category may consider themselves adherents of a particular faith, even if they are not official members of a congregation. When this Note refers to a "majority" of religious adherents, it refers to a majority of *all* citizens, including the unclaimed population.

116. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2000, available at <http://www.census.gov/prod/2001pubs/statab/sec01.pdf>.

117. *Id.* at tbl.75.

118. *Id.* The category of "None" included those who did not designate a particular affiliation.

population, 43 percent responded that they had attended a church or synagogue in the last seven days.¹¹⁹

Most importantly for the issue of state establishment, another section of the abstract reveals that in 1990 there were Christian majorities in twenty-nine of the fifty states.¹²⁰ In Utah, the strongest example, 79.6 percent of the population considered themselves to be Christian church adherents.¹²¹ Several other states had majorities in the 70 percent range, including Alabama, Louisiana, Mississippi, North Dakota, and Rhode Island.¹²²

In addition to the Christian population, the abstract lists each state's Jewish population as of 1998.¹²³ The contrast is stark. No state was populated by a Jewish majority.¹²⁴ In fact, Jewish populations constituted less than 10 percent of the population in each state, nationwide.¹²⁵ The highest figures were in New York and New Jersey, with 9.1 percent and 5.8 percent, respectively.¹²⁶ In several states, Jewish individuals constituted only 0.1 percent of the population,¹²⁷ and on a national level, they composed 2.3 percent.¹²⁸ Despite a significant presence in some states, therefore, Jewish minorities would have a difficult time fighting religious laws proposed by a Christian majority.

One might argue that a grouping as broad as "Christian" is not significant, considering the range of views and practices among different Christian denominations. Yet detailed data from individual states reveals actual and near-majorities of particular denominations at the state level.¹²⁹ According to data from the Glenmary Research

119. *Id.*

120. *Id.* at tbl.76. The states that did *not* contain religious majorities were: Alaska, Arizona, California, Colorado, Delaware, Florida, Hawaii, Indiana, Maine, Maryland, Michigan, Montana, Nevada, New Hampshire, Ohio, Oregon, Vermont, Virginia, Washington, West Virginia, and Wyoming.

121. *Id.*

122. *Id.* Numerous states also had majorities in the 60 percent range, including Arkansas, Iowa, Kentucky, Massachusetts, Minnesota, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin. *Id.*

123. *Id.* The Jewish population "includes Jews who define themselves as Jewish by religion as well as those who define themselves as Jewish in cultural terms." *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* These states include: Arkansas, Indiana, Mississippi, Montana, North Dakota, South Dakota, West Virginia, and Wyoming.

128. *Id.*

129. See *infra* text accompanying notes 130-135. This data is taken from GLENMARY RESEARCH CENTER, RELIGIOUS CONGREGATIONS & MEMBERSHIP IN THE UNITED STATES 2000: AN ENUMERATION BY REGION, STATE AND COUNTY BASED ON DATA REPORTED FOR 149 RELIGIOUS BODIES (Dale E. Jones ed., 2002) [hereinafter RELIGIOUS CONGREGATIONS].

Center, over half of Utah's population in 2000 belonged to the Church of Jesus Christ of Latter-Day Saints.¹³⁰ Utah is not unique in the high concentration of one particular sect. Massachusetts and New York both have large Roman Catholic populations, constituting approximately 48.7 percent¹³¹ and 39.8 percent¹³² of each state's population, respectively. The most interesting state, considering Madison's concerns in *The Federalist 10*, is Rhode Island.¹³³ Rhode Island is populated by a majority of Roman Catholic citizens,¹³⁴ and four out of five counties in the state contain a Catholic majority. One of those counties was home to the Pawtucket Christmas display challenged in *Lynch*.¹³⁵

The available figures thus indicate that there are significant religious majorities at the local and state levels across the country. Although these majorities obviously do not negate the existence of a wide variety of faiths in the United States, they do cast serious doubt upon the claim that religious pluralism will prevent states from establishing a particular religion or local governments from erecting religious displays. For example, the Utah majority that belongs to the Church of Jesus Christ of the Latter-Day Saints actually could proclaim Utah to be the Mormon State.¹³⁶ Rhode Island's Catholic majority could erect a crucifix outside of the capitol building and display it year-round. Moreover, the Christian majorities in twenty-nine states could pass laws requiring their public schools to begin each day with a general, nondenominational prayer.

Supreme Court jurisprudence reinforces concerns that religious majorities may institute religious programs over minority opposition. For example, *Santa Fe Independent School District v. Doe* involved a public school in Texas that permitted student-led, voluntary prayer at home football games and graduation if a majority of the student body voted for it.¹³⁷ The Court recounted one of the prayers that had been given at graduation:

The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: "Lord,

130. See *id.* at State Report (Utah). Utah's total population in 2000 was 2,233,169, and the number of adherents to the Church of Jesus Christ of Latter Day Saints was 1,483,858. *Id.*

131. See *id.* at State Report (Massachusetts). Massachusetts' total population in 2000 was 6,349,097, and the number of Roman Catholics reported was 3,092,296. *Id.*

132. See *id.* at State Report (New York). New York's total population in 2000 was 18,976,457, and the number of Roman Catholics reported was 7,550,491. *Id.*

133. See *supra* note 34 and accompanying text.

134. See RELIGIOUS CONGREGATIONS, *supra* note 129, at State Report (Rhode Island).

135. *Id.*; *Lynch v. Donnelly*, 465 U.S. 668 (1984).

136. See *supra* note 72 and accompanying text.

137. 530 U.S. 290, 296-97 (2000).

we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen."¹³⁸

A majority of the student body also voted to allow a student to say a prayer before home football games, pursuant to a district policy providing for such elections.¹³⁹

The Supreme Court, however, invalidated the district's prayer policy entirely. The majority reasoned: "[W]hile Santa Fe's majoritarian election might ensure that *most* of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense."¹⁴⁰ One can imagine that a majority vote offers little consolation to those minorities who feel forced to choose between events like high school graduation and religious expression that may clash with their own deeply-held beliefs. Yet in light of the religious majorities discussed above, state institution of religious prayers, symbols, or even general Christian tenets is a real possibility. Religious pluralism will offer little protection against state establishment in the face of religious majorities. To protect against state establishment, therefore, individuals will need the assistance of greater restrictions than the lack of diversity that currently exists in the states.

B. State Constitutional Provisions

Another possibility for protecting religious freedom lies in state constitutional provisions comparable to the religion clauses of the First Amendment.¹⁴¹ Indeed, as school funding cases have attracted attention over the last few decades, commentators have turned to state constitutions to see what effect they might have on a state's decision to offer vouchers or other aid to private schools.¹⁴² Their results reveal a wide variety of constitutional provisions and different modes of interpretation at the state level. This Section will examine the differences among state constitutions, state courts' interpretation of such religion clauses, and the ability to amend those constitutions. Due to the real possibility of constitutional change at the state level,

138. *Id.* at 297 n.4.

139. *Id.* at 297-98.

140. *Id.* at 304-05.

141. U.S. CONST. amend. I.

142. See generally Frank R. Kemerer, *State Constitutions and School Vouchers*, 120 ED. LAW REP. 1 (1997) (surveying state constitutions' positions on the establishment of religion and related litigation); see Wendtland, *supra* note 80, at 631 (describing the "more restrictive stance" of state constitutions vis-à-vis the Federal Constitution with regard to the establishment of religion).

this Section argues that the states themselves are unlikely to provide adequate protection against establishment.

State religion clauses differ in significant ways from their federal counterparts. State provisions are often more detailed in describing a desired church-state balance than is the federal Constitution.¹⁴³ For example, in addition to general establishment bars, some states have constitutional provisions that specifically limit public aid to religious institutions.¹⁴⁴ In light of such detailed provisions, many states have indicated that their constitutions provide for a stricter separation of church and state than does the national document.¹⁴⁵ For example, the Minnesota Supreme Court declared in 1971 that the “limitations contained in the Minnesota Constitution are substantially more restrictive” than those of the federal First Amendment.¹⁴⁶ The California Supreme Court similarly noted in 1991 that the state constitution provides “additional guarantees that religion and government shall remain separate” and declared that “California courts have interpreted the [state religion clause] as being more protective of the principle of separation than the federal guarantee.”¹⁴⁷ In a 1997 study on state constitutions and school vouchers, Dr. Frank Kemerer recognized an entire group of states as having “restrictive” constitutional provisions.¹⁴⁸

143. Wendtland, *supra* note 80, at 631.

144. See *id.* at 630-31 (“Every state constitution with a general establishment clause . . . also contains at least one . . . more specific constitutional provision[].”). Any limitation on federal aid to religious institutions is accomplished through the Establishment Clause itself.

145. See *id.* at 638 (“[T]he more precise the clause, the more likely a state court is to adopt a stricter church-state standard than the Supreme Court.”). For a well-known example, compare *Witters v. Wash. Dept. of Servs. for the Blind*, 474 U.S. 481, 489 (1986) (“*Witters I*”), with *Witters v. Comm’n for the Blind*, 112 Wash. 2d 363, 373 (Wash. 1989) (“*Witters II*”). In *Witters II*, the Washington Supreme Court ruled that a state constitutional provision prohibited payments to a religious school that the United States Supreme Court unanimously permitted in *Witters I*, 112 Wash. 2d at 373.

146. *Ams. United, Inc. v. Indep. Sch. Dist. No. 622*, 179 N.W.2d 146, 155 (Minn. 1970) (upholding the state’s reimbursement of transportation costs for parochial school students against federal and state constitutional challenges).

147. *Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809, 820 (Cal. 1991) (plurality opinion) (holding that invocation of religious prayer during school functions violated the state’s establishment clause (citing *Fox v. City of Los Angeles*, 587 P.2d 663 (Cal. 1978))). Two justices did not join the plurality’s state constitutional analysis because they believed the case could be decided under the federal First Amendment, rather than the state constitution. *Id.* at 822 (Lucas, J., concurring); *id.* at 836 (Mosk, J., concurring).

148. Kemerer, *supra* note 142, at 4. Dr. Kemerer characterizes Michigan as having the most restrictive religion clause, which was added by referendum in November 1980, after a Michigan Supreme Court advisory opinion upheld a state statute authorizing funding for religious schools. *Id.* at 4. He also characterized as “restrictive” constitutional provisions in Florida, Georgia, Montana, New York, Oklahoma, Idaho, California, Colorado, Delaware, Idaho, Illinois, Minnesota, Missouri, North Dakota, South Dakota, and Wyoming. *Id.* at 6-7.

The above analysis suggests that unincorporation will not lead to a uniform increase in church-state ties across the nation. Those who would rely on state provisions to protect against establishment may be justified in states such as California, Minnesota, or Washington,¹⁴⁹ where state courts have interpreted their religion clauses as providing for a stricter separation of church and state than that envisioned by the federal document. These states, however, are but a small fraction of the nation as a whole. Standing in contrast are eleven states that have "expressly declared" their religion provisions to provide for limitations on establishment that are no broader than those of the First Amendment.¹⁵⁰ What impact unincorporation would have on these states is unclear.

In fact, many state supreme courts have held that their anti-establishment provisions are to be interpreted as equivalent to the federal Establishment Clause, despite constitutional language that is more restrictive than that found in the First Amendment.¹⁵¹ For example, in a school funding case, the Illinois Supreme Court ruled that the restrictions of the state constitution were "identical to those of the First Amendment,"¹⁵² even though the state constitution specifically prohibited "anything in aid of any church . . . or to help support or sustain any school . . . controlled by any church."¹⁵³ Thus, while the state constitution appeared to envision a strict separation of church and state, the judiciary failed to implement it.

This refusal is not particularly surprising. Case law indicates that many state founders desired to "go[] no farther" in drafting their religion clauses than did the Framers in crafting the Bill of Rights.¹⁵⁴ As discussed above, many states at the time of their founding actually supported various religious groups and were unlikely to provide for establishment limits any greater than they thought were constitutionally required.¹⁵⁵ In past years, therefore, states like Illinois, Iowa, Maryland, and Pennsylvania have continued to look past detailed (and often restrictive) provisions in their constitutions in order to permit the maximum amount of church-state interaction allowed at the federal level.¹⁵⁶ If the decisions of the United States Supreme Court no longer serve as binding precedent on these states, it

149. See *supra* notes 145-147 and accompanying text.

150. Wendtland, *supra* note 80, at 634-35.

151. Kemerer, *supra* note 142, at 27.

152. *Id.* at 28.

153. ILL. CONST. art. X, § 3.

154. Wendtland, *supra* note 80, at 643 n.96.

155. See *supra* notes 25-28 and accompanying text.

156. Wendtland, *supra* note 80, at 643 n.96.

is unclear whether their courts will continue to limit church-state interaction in any meaningful sense.

Most important in understanding the effect of state constitutional provisions is the public's ability to amend state constitutions. Even in states where courts are likely to read their constitutions to prohibit establishment, the possibility remains that the population will amend the constitution if the Establishment Clause is unincorporated. It would not be the first time such a step has been taken: at least one state's citizenry already has amended its constitution to permit religious aid forbidden by a state court. In 1955, the Virginia Supreme Court concluded that tuition payments to parents of children at religious schools violated the state constitution.¹⁵⁷ In 1956, the state population amended the constitution to permit the aid.¹⁵⁸

Citizens may have great success amending state constitutions partly because state amendment processes are often much less demanding than the federal amendment process. State constitutions have been amended with greater frequency than the federal document, leading some commentators to criticize the process: "State modes of constitutional reform are usually pointed to as an example of . . . making it too easy to effect constitutional change."¹⁵⁹

Unlike the federal system, states generally use one of four processes to amend their constitutions: constitutional convention, legislatively-initiated amendment, popular initiative, and constitutional commission.¹⁶⁰ Eighteen states permit amendment proposals via popular initiative, meaning that a certain percentage of voters may petition for an amendment, which then will be included on the ballot for popular approval.¹⁶¹

Although popular initiative is the least common method of amendment, its use and success have increased in recent years.¹⁶² Significantly, "more of the electorally successful constitutional initiatives have reduced rather than expanded rights."¹⁶³ The religious majorities discussed earlier present a credible threat of amending state constitutions if the Establishment Clause were to be

157. *Id.*

158. *Id.*

159. Peter J. Galie & Christopher Bopst, *Changing State Constitutions: Dual Constitutionalism and the Amending Process*, 1 HOFSTRA L. & POL'Y SYMP. 27, 29 (1996).

160. *Id.* at 32.

161. *Id.* at 46.

162. *Id.* at 47.

163. *Id.* at 48 (quoting Janice May, *The Constitutional Initiative: A Threat to Rights?*, in HUMAN RIGHTS IN THE STATES 166-167 (Stanley Friedelbaum ed., 1988)).

unincorporated. Some states, like Massachusetts, have recognized and attempted to avoid this problem by prohibiting the use of popular initiative to create religious change.¹⁶⁴ Yet the popular initiative process, along with other amendment techniques, remains available in many states. Religious majorities there may choose to utilize relatively easy amendment processes to “experiment” with religion as foretold by Justice Thomas.¹⁶⁵

A survey of state constitutional provisions thus indicates that local governments are unlikely to serve as effective protectors against religious establishment. Many state courts already refuse to interpret their constitutions as suggested by the plain meaning of the text. Without federal guidance and binding limitations, it is unclear what restrictions, if any, state courts will impose on establishment. Even if state courts enforce such limitations, moreover, constitutional amendment processes have been used in the past and can provide a real threat to religious liberty. The religious majorities in twenty-nine states may have ultimate control over establishment through their ability to remove state establishment provisions.¹⁶⁶

C. *Established Limits and the Free Exercise Clause*

Some scholars suggest that unincorporation will have little impact on government action because the Free Exercise Clause alone will protect religious freedom.¹⁶⁷ Although the Free Exercise Clause may protect against certain kinds of government actions, this Section proposes that significant obstacles remain to using the Clause to prevent various kinds of establishment. This difficulty is particularly true in the case of no coercive establishments like the holiday displays challenged in *Allegheny*.¹⁶⁸

Plaintiffs who attempt to challenge state establishments under the Free Exercise Clause will face a substantial standing hurdle.¹⁶⁹ The Court’s current jurisprudence significantly limits a plaintiff’s ability to bring establishment challenges, even under an incorporated Establishment Clause. To demonstrate her standing to bring suit, a

164. See *id.* at 51 (describing state measures limiting the use of popular initiatives to change constitutional provisions concerning religion).

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

166. See *supra* note 120.

167. See *supra* notes 73-77 and accompanying text.

168. See *supra* notes 103-109 and accompanying text.

169. Numerous commentators have criticized the Court’s current standing doctrine. See generally Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163 (1992) (criticizing certain applications of the “injury in-fact” standing requirement).

plaintiff must show that she has suffered an injury in fact that is fairly traceable to and likely to be redressed by favorable government action.¹⁷⁰ This can be particularly difficult in establishment cases.¹⁷¹

For example, in the 1982 case *Valley Forge Christian College v. Americans United for Separation of Church and State*, the Court denied that Americans United for Separation of Church and State (“Americans United”) had standing to sue under the Establishment Clause.¹⁷² Americans United had challenged a decision by the Secretary of Health, Education, and Welfare to dispose of unused government property by giving it to the Valley Forge Christian College.¹⁷³ In the original complaint, the group described itself as an organization composed of 90,000 “taxpayer members” and claimed that each member would be deprived of the constitutional use of her tax dollar by the government’s impermissible donation to the religious institution.¹⁷⁴

The District Court originally dismissed the complaint after finding that Americans United lacked standing.¹⁷⁵ A divided panel in the Third Circuit reversed the lower court’s judgment.¹⁷⁶ Rejecting the taxpayer standing theory asserted in the complaint, the Circuit Court found that the respondents had standing by virtue of their positions as “citizens.”¹⁷⁷ The court ruled that all had suffered an “‘injury in fact’ to their shared individuated right to a government that ‘shall make no law respecting the establishment of religion.’”¹⁷⁸ Writing separately, one judge explained that he believed standing in such a case was necessary to fulfill “the need for an available plaintiff,” without which “the Establishment Clause would be rendered virtually unenforceable.”¹⁷⁹

The Supreme Court rejected what it called the Circuit Court’s “unusually broad and novel view of standing.”¹⁸⁰ The majority explained that standing requirements are not satisfied by “abstract injury in nonobservance of the Constitution.”¹⁸¹ The Court also rejected the contention that the “psychological consequence” of an

170. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

171. *Ams. United v. U.S. Dept. of HEW*, 619 F.2d 252, 267-68 (1980).

172. 454 U.S. 464, 489-90 (1982).

173. *Id.* at 468-69.

174. *Id.* at 469.

175. *Id.*

176. *Id.* at 470.

177. *Id.*

178. *Id.* (quoting *Ams. United v. U.S. Dept. of HEW*, 619 F.2d 252, 261(1980)).

179. *Ams. United*, 619 F.2d at 267, 268.

180. *Valley Forge*, 454 U.S. at 470.

181. *Id.* at 482 (quoting *Schlesinger v. Reservists Comm.*, 94 U.S. 208, 223 (1974)).

unconstitutional act rose to the level of injury in fact and concluded that respondents had failed to allege a personal injury.¹⁸² Finally, the Court explained, “expenditure of public funds in an allegedly unconstitutional manner is not an injury sufficient to confer standing, even though the plaintiff contributes to the public coffers as a taxpayer.”¹⁸³

If it is difficult to obtain standing under the Court’s current jurisprudence, one can only imagine how challenging it would be to bring establishment-like claims under the Free Exercise Clause. This difficulty exists even for establishments that surely would be struck down under the Court’s current jurisprudence. For example, how would one frame a challenge against the *Allegheny* crèche? *Valley Forge* makes clear that the “psychological” injury of the symbol will not suffice to constitute an injury in fact.¹⁸⁴ Furthermore, the crèche does not create the type of injury or disability typically present in free exercise cases; the display does not force any individual to engage in any religious activity or prohibit her from doing so.¹⁸⁵

One might argue that protection of one’s *free* exercise of religion would guard against forced exposure to religious symbols that serve as the government’s endorsement of a particular faith. This argument would be a difficult one to make under the Court’s current jurisprudence. In *Braunfeld v. Brown* the Court upheld a Sunday closing law, explaining: “The statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.”¹⁸⁶ Furthermore, the Court recently rejected a challenge to a Washington state scholarship program that permitted students to engage in any course of study except theology.¹⁸⁷ There the Court noted that any disfavor of religion evidenced in the statute

182. *Id.* at 485.

183. *Id.* at 477. In the later case *Bowen v. Kendrick*, the Court clarified that there was no standing in *Valley Forge* because “the challenge was to an exercise of executive authority pursuant to the Property Clause of Article IV, § 3.” 487 U.S. 589, 619 (1988). Only two cases after *Valley Forge*, *Bowen* and *Tilton v. Richardson*, 403 U.S. 672 (1971), found taxpayer standing to challenge a federal statute on establishment clause grounds. Nancy C. Staudt, *Modeling Standing*, 79 N.Y.U. L. REV. 612, 628-29 (2004). For purposes of this Note, the focus is not whether taxpayers may challenge action under the Taxing and Spending Clause or the Property Clause but what sorts of injuries are sufficient to confer standing in the first place. If establishment itself cannot be recognized as an injury, as would be the case if the Establishment Clause were unincorporated, plaintiffs must show some injury to their rights under the Free Exercise Clause.

184. *Valley Forge*, 454 U.S. at 485.

185. See *infra* notes 186-189 and accompanying text.

186. 366 U.S. 599, 603 (1961) (plurality opinion).

187. *Locke v. Davey*, 540 U.S. 712, 725 (2004).

was “of a far milder kind” than that found unconstitutional in past cases.¹⁸⁸ The statute did not impose criminal or civil sanctions on any type of religious practice, did not deny religious officials the ability to participate in local government, and did not force individuals to choose between their religious beliefs and receiving a government benefit.¹⁸⁹ Thus, the Court found no Free Exercise problem in the statute at hand.¹⁹⁰

Like the Washington program, the *Allegheny* crèche does not force anyone to engage in any religious activities, nor does it prohibit any individual from receiving a government benefit. The same would be true if Utah simply proclaimed itself “the Mormon State,” provided it did not use that designation to limit citizens’ ability to choose their own form of worship. To the extent that an establishment is “non-coercive,” therefore, it is not clear how individuals could challenge that action under the Free Exercise Clause. The Establishment Clause functions in a way other provisions are unlikely to duplicate.¹⁹¹

D. Substantive Due Process

If religious diversity and state constitutions are unlikely to protect against state establishment, one might turn to the Fourteenth Amendment’s Due Process Clause for direct protection. Such an approach finds support in *Carolene Products*’ famous footnote four.¹⁹²

There, the Court acknowledged that “[t]here may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments.”¹⁹³ Furthermore, the Court acknowledged the need to pay special attention to “statutes directed at particular religious . . . or racial minorities,”¹⁹⁴ as the threat of “prejudice against discrete and insular

188. *Id.* at 720.

189. *Id.* at 720-21.

190. *Id.* at 725.

191. As the Court made clear in *Locke*, moreover, the determination that a government action is constitutional under the Free Exercise Clause has a large impact on a plaintiff’s ability to bring a successful challenge under the Equal Protection Clause. See *id.* at 721 n.3 (stating that the Court will apply rational-basis scrutiny to statutes that satisfy the Free Exercise clause); see also *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (same). The difficulty of bringing an establishment-type challenge under the Free Exercise Clause thus makes it difficult to bring an equal protection challenge. Furthermore, as in the case of Free Exercise challenges, plaintiffs bringing equal protection claims against non-coercive establishments likely will have a difficult time showing an actual injury in fact necessary for standing.

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

193. *Id.*

194. *Id.* at 153.

minorities . . . may call for a correspondingly more searching judicial inquiry.”¹⁹⁵ In short, the Court foresaw the dangers that could be posed by religious majorities and was ready to guard against them.

Despite the attractiveness of using substantive due process as a safeguard against state establishment, however, there are serious challenges to using this doctrine should the Establishment Clause be unincorporated. First, the same standing problems discussed in connection with claims under the Free Exercise Clause¹⁹⁶ will likely arise under the Fourteenth Amendment as well. Unless individuals are forced to or prohibited from engaging in religious activity, it will be difficult to obtain standing in court.¹⁹⁷

Second, if the Court decides to unincorporate the Establishment Clause, it likely will be based on a conclusion that no protection of state establishment was intended at the time of the founding or the adoption of the Fourteenth Amendment.¹⁹⁸ After concluding that the Framers and citizenry did not intend to protect against state religious establishment, however, it seems unlikely that the Court would then find such protection to be a fundamental right to be safeguarded by substantive due process.

Finally, debate over what liberties are protected under the Fourteenth Amendment is ongoing and heated.¹⁹⁹ The Court has been reluctant to expand the notion of liberty in many contexts.²⁰⁰ Although substantive due process appears to be an attractive safeguard against state establishment, therefore, significant obstacles

195. *Id.*

196. *See supra* notes 169-183 and accompanying text.

197. *See supra* notes 182-185 and accompanying text.

198. *See supra* notes 24-30, 50-69 and accompanying text.

199. One might take as an example the passage from *Planned Parenthood of Southeastern Pennsylvania v. Casey* that reasoned: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” 505 U.S. 833, 851 (1992). A majority of the Court quoted this passage with approval in the recent decision *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Justice Scalia’s dissent, however, strongly criticized the Court for using such language:

[I]f the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage: That ‘casts some doubt’ upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one’s ‘right to define’ certain concepts; and if the passage calls into question the government’s power to regulate actions based on one’s self-defined ‘concept of existence, etc.’ it is the passage that ate the rule of law.

Id. at 588 (Scalia, J., dissenting) (internal citation omitted). Even in the most recent decisions, therefore, substantive due process is a topic of much debate.

200. *See* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1494 (2002) (describing the difficulties associated with the assertion of liberty claims).

remain to using the Fourteenth Amendment to guard against state establishment directly.

IV. GOVERNMENT SPEECH AND THE DANGER OF ESTABLISHED RELIGION

As the foregoing Sections have demonstrated, unincorporation of the Establishment Clause is likely to have a significant impact on the way states treat religion. Suggested alternative protections, such as pluralism, state constitutions, and substantive due process, are unlikely to provide the level of protection currently guaranteed. Of course, one might suggest that current treatment of the Establishment Clause is too strict in the first place. Perhaps states should be able to establish religions within their borders. In contrast to such arguments, Part IV of this Note utilizes recent scholarly work regarding government speech to demonstrate that recognized problems of government speech are especially troubling in the context of religion. The next Sections will argue, therefore, that a general rule against state establishment is necessary to protect religious freedom and choice in a system of democratic government.

A. *The Government as Speaker*

The American government speaks.²⁰¹ Although it may seem strange to think of it in such terms, the government communicates its views much like any individual does through words or actions.²⁰² Unlike the speech of most individuals, however, government speech may take the form of criminal codes, taxes, and public education curriculum, easily reaching a large audience through far-reaching programs. The government's ability to speak in such a powerful manner may allow it to monopolize entire areas of debate,²⁰³ disguise opinions as objective truth or facts,²⁰⁴ and generally limit discussion in the marketplace of ideas.²⁰⁵ As Professor Mark Yudof explained in his

201. See Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1380 (2001) (describing the modes of speech of modern democratic governments).

202. See generally Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 862 (1979) (developing a framework for analyzing government speech under the First Amendment).

203. See *infra* notes 238-242 and accompanying text.

204. See *infra* notes 243-251 and accompanying text.

205. See *infra* notes 239-240 and accompanying text.

208. Yudof, *supra* note 202, at 865.

seminal article on government speech, “[t]he power to teach, inform, and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime.”²⁰⁸

Although government speech is not a new phenomenon, scholars are still working to develop a basic theory of its power, consequences, and limitations.²⁰⁹ The issue first arrived on center stage in Yudof’s 1979 article, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*.²¹⁰ Other scholars have since turned to the topic,²¹¹ but the many forms of government speech and the lack of clear constitutional provisions addressing them have made principled guidelines difficult to develop.²¹² Since guidance from the Court has not been readily forthcoming, moreover, some scholars have suggested that the Justices also have yet to formulate a clear theory of government speech under the Constitution.²¹³

Two principles do arise from recent cases. First, as the Court explained in *Rosenberger v. Rector and Visitors of the University of Virginia*, “when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”²¹⁴ Second, when the government creates a “forum” for public speech, it may not exclude speech based on viewpoint if such a distinction is not based on the purposes of the forum.²¹⁵ Unfortunately, the dichotomy between government speech and government forums leaves unresolved the most difficult issues of government expression. It raises questions as to what happens when the very act of government speech limits individual freedom, monopolizes the marketplace of ideas, and interferes with individuals’ First Amendment rights.²¹⁶ In these gray areas, in particular, government speech provides insight into the function and necessity of the Establishment Clause.

209. See Bezanson & Buss, *supra* note 201, at 1385 (referring to the “still-inchoate character of the government speech idea”).

210. Yudof, *supra* note 202.

211. See, e.g., Bezanson & Buss, *supra* note 201, at 1344.

212. See, e.g., *id.* at 1384, 1508 (focusing on eight forms of government speech and asserting that authority for this speech must be found in other provisions of the Constitution).

213. See *id.* at 1382-83 (noting that “[t]he Supreme Court’s opinions hint at the answers to some of these [government speech] questions, self-consciously evade others, and simply ignore most”).

214. 515 U.S. 819, 833 (1995).

215. *Id.* at 829.

216. See Bezanson & Buss, *supra* note 201, at 1381 (suggesting that the expansion of government speech creates an elevated risk of government monopolization of private speech, which in turn leads to an increased number of First Amendment challenges).

B. *To Speak or Not to Speak: Rust and Rosenberger*

One of the first challenges in government speech cases is determining whether the government is actually speaking. At times it is obvious that the government has made a statement; one generally does not question what entity created the criminal laws or tax code. In other instances, however, the identity of the speaker is far from clear. For example, courts have faced significant difficulties determining who is speaking in state programs that provide for "Choose Life," but not "Choose Choice," license plates.²¹⁷ In these kinds of cases, the outcome often depends largely on whether the special plates are considered government or individual speech, but that determination can be difficult to make.²¹⁸

A similar question of speaker identity arose in *Rosenberger*.²¹⁹ There, students at the University of Virginia challenged the University's decision not to pay publication fees for their Christian newspaper, despite funding other groups' similar, nonreligious activities.²²⁰ The majority and dissent disagreed upon who actually spoke in the newspaper. The dissent would have upheld the University's decision to prohibit the funding, viewing the aid as *government* endorsement that would support religion in violation of the Establishment Clause.²²¹ The majority, on the other hand, found that the University's funding scheme created a "public forum" in which *private* individuals and organizations spoke with the help of government aid.²²² The majority thus rejected the University's Establishment Clause concerns, ruling that it was unconstitutional to deny students funding based on their religious status.²²³

In doing so, the majority reinforced basic First Amendment principles limiting government censorship and prohibiting the imposition of financial burdens based on the content of one's

217. See, e.g., Anne Paine, *Needed Sign-ups for 'Choose Life' Plates Turned In*, THE TENNESSEAN, Jan. 13, 2004 (reporting on the ACLU's challenge to Tennessee's "Choose Life" license plates).

218. See *Henderson v. Stalder*, 287 F.3d 374, 377 (5th Cir. 2002), *remanded to* 281 F. Supp. 2d 866, 876 (E.D. La. 2003). The Louisiana District Court in *Henderson* concluded that the "prestige" license plates were not government speech but rather a nonpublic forum requiring viewpoint neutrality. 281 F. Supp. 2d at 876.

219. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 825-26 (1995).

220. *Id.* at 827.

221. *Id.* at 863-64 (Souter, J., dissenting).

222. *Id.* at 829.

223. See *id.* at 845-46 (holding that the denial of funds "was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires").

expression.²²⁴ The Court reaffirmed the recognized ban on government viewpoint discrimination, even when the private speech occurs in a "limited public forum."²²⁵ The government may not limit the content of speech in such a forum, even if it funds the speech or owns the property where the speech occurs.²²⁶ The Court in *Rosenberger* thus protected individual expression from viewpoint discrimination, provided that the government had opened a forum for individuals to speak generally.

While the Court took pains to protect a wide range of viewpoints in *Rosenberger*, its decision in *Rust v. Sullivan* allowed the government great latitude to limit private speech when done in the context of a government program.²²⁷ *Rust* involved regulations promulgated by the Secretary of Health and Human Services under Title X of the Public Health Service Act.²²⁸ The Act itself instructed that no funds appropriated under its family-planning services be used "in programs where abortion is a method of family planning."²²⁹ The Secretary interpreted the words "family planning" to include only "preventative family planning services" and specified that no Title X project could provide counseling about abortion as a family planning technique.²³⁰ Department regulations also prohibited health care providers from referring a pregnant woman to an abortion provider, "even upon specific request."²³¹

Grantees receiving Title X funds and doctors who supervised the funds' administration challenged the regulations on numerous bases, including First Amendment grounds.²³² They claimed the regulations constituted unconstitutional viewpoint discrimination by prohibiting employees from discussing abortion and compelling them to provide information about continuing a pregnancy.²³³ Relying on previous cases such as *Maher v. Roe*,²³⁴ the Court disagreed and ruled that the government "may make a value judgment" favoring childbirth over abortion.²³⁵ More broadly, it held: "The Government can, without

224. *Id.* at 828-29 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

225. *Id.* at 829.

226. *Id.* at 829-30.

227. 500 U.S. 173 (1991).

228. *Id.* at 177-78.

229. 10 U.S.C. § 300a-6 (1991).

230. *Rust*, 500 U.S. at 179.

231. *Id.* at 180.

232. *Id.* at 181.

233. *Id.* at 192.

234. *Maher v. Roe*, 432 U.S. 464 (1977).

235. *Rust*, 500 U.S. at 192-93 (quoting *Maher*, 432 U.S. at 474).

violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way.”²³⁶ In short, the Court ruled that the government may speak and use individual citizens as its mouthpiece.

Indeed, the Court in *Rust* rejected petitioners’ claims that the regulations violated the First Amendment rights of Title X employees. The majority reasoned that these employees remained free to pursue “abortion-related activities” in their free time and that the limitations imposed on their speech were an acceptable consequence of the decision to accept employment in a Title X program.²³⁷ Justice Blackmun, joined by Justices Marshall and Stevens, found this section of the majority opinion particularly troubling: “[I]t has never been sufficient to justify an otherwise unconstitutional condition [here, waiver of First Amendment rights] upon public employment that the employee may escape the condition by relinquishing his or her job.”²³⁸ The dissenting Justices viewed the regulations as impermissible viewpoint discrimination and would have found them unconstitutional.²³⁹

Rosenberger and *Rust* thus present an interesting dichotomy. When the government creates a forum for public speech, it may not place content-based limitations on the views expressed in that forum. On the other hand, when the government retains complete control over a particular program, it may force individual citizens to promote its chosen views as a condition of employment. The government may speak freely so long as it leaves no room for public debate in a program. As the next Section suggests, the consequences of this dichotomy in the context of government and religion are troubling.

C. *The Dangers of Rust and Religion*

As one might imagine, *Rust* was a controversial decision. The controversy was due in some part to its relation to the ongoing abortion debate.²⁴⁰ Aside from that controversy, however, commentators have found the case troubling for what it demonstrates about government speech. Professors Randall P. Bezanson and

236. *Id.* at 193.

237. *Id.* at 198-99.

238. *Id.* at 212 (Blackmun, J., dissenting).

239. *See id.* at 209-11 (“[O]ur cases make clear that ideological viewpoint is a . . . repugnant ground upon which to base funding decisions.”).

240. Bezanson & Buss, *supra* note 201, at 1396-97.

William G. Buss provide a helpful summary of the problems caused by government expression:

[T]he use of speech by government . . . presents heightened risks that the government may displace or monopolize private speech by inserting its voice in the speech marketplace, employing devices to conceal hidden government messages in private speech, or distorting the gatekeeping functions of private speakers through leverage, inducement, or direct government ownership of channels of expression.²⁴¹

The next subsections will use the *Rust* decision to examine two recognized problems of government speech that are particularly troubling in the context of religion: government monopoly over expression and hidden speakers delivering a government message.

1. Government Monopolies

Rust presents an excellent example of the government's ability to monopolize an issue of debate for an entire segment of the population. The Title X program challenged in *Rust* educated poor women about birth control.²⁴² Many of the women using the program's services could not afford any other medical care, making them entirely dependent on the government's advice as given by Title X employees. Commentators have recognized this kind of monopoly to be particularly dangerous. When the government controls an area so tightly that other viewpoints may not be discussed or must be criticized,²⁴³ it effectively shuts down the "marketplace of ideas" protected by the First Amendment.²⁴⁴ It creates a situation in which an individual's ability to make independent choices, and society's ability to engage in discourse to find the "best" answer, is limited. For the women in *Rust*, abortion was not an option because the government refused to discuss it.

One does not have to search far to imagine a similar monopoly in the context of government and religion. This threat would be posed by the insertion of religion into public schools. If the Establishment Clause were incorporated, as discussed above, states would be able to implement daily prayer or other religious activities in public classrooms. This provides the state with a particularly effective means of installing chosen religious values, as parents unable to

241. *Id.* at 1381.

242. See *infra* notes 227, 231 and accompanying text.

243. See *Rust*, 500 U.S. at 180 (noting that the regulations required Title X staff, when questioned about abortion, to reply that "the project does not consider abortion an appropriate method of family planning and . . . does not counsel or refer for abortion.").

244. See Yudof, *supra* note 202, at 872 (examining different approaches plaintiffs could take in raising First Amendment challenges).

afford private education would find their children subject to state-imposed religious messages.²⁴⁵

2. Hidden Speakers

The government speech in *Rust* also was troubling because the women involved may not have realized that they were hearing a restricted message from the government, rather than an objective portrayal of their medical alternatives.²⁴⁷ As Bezanson and Buss explain, "The argument is not that poor women are entitled to free abortion counseling. It is, instead, that they are entitled not to be misled into thinking that they are receiving unadulterated medical advice when that is not the case."²⁴⁸ By using individual citizens as mouthpieces, the government may conceal itself as speaker and lead an audience to believe that a message is objective truth as opposed to a biased opinion.

The government's actions as a hidden speaker thus limit the marketplace of ideas with the added danger of giving no indication that the government is doing so. Yudof warns: "[Government speech] distorts the judgment of citizens, advocates undemocratic or unconstitutional values, violates the right of citizens not to be called on to pay taxes to support expression that they find objectionable, or drowns out opposing messages by virtue of the government's ability to capture the listening audience."²⁴⁹ When taken to an extreme, Yudof also suggests that government communication may distort the entire democratic process to ensure an administration's re-election, and citizens may never realize that they have heard a partisan message.²⁵⁰

Again, this distortion is particularly troubling in the context of religion. State governments may use religious organizations to speak on their behalf without citizens recognizing that they have received political messages as opposed to spiritual advice. In his discussion of religion at the founding, Michael McConnell explains:

245. Depending on the form of the prayer, moreover, such parents are unlikely to find redress in the courts. As noted above, serious difficulties face plaintiffs seeking standing for various Establishment Clause claims. See *supra* notes 170-183 and accompanying text.

247. See Bezanson & Buss, *supra* note 201, at 1397 (suggesting that the Court in *Rust* may have held differently had they found that the women believed they were invited into a family planning service).

248. *Id.*

249. MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 204 (1983).

250. See Yudof, *supra* note 202, at 871-72.

"[E]stablishment of religion . . . enable[s] the government to control the institutions for dissemination of opinions and ideas, to suppress ideas dangerous to the regime, and to encourage ideas supportive of the regime."²⁵¹

Indeed, the government in an established state may attempt to suppress faiths that "present threats to the legitimacy" of the current state and "use religion as a supplementary means of social control, just as authoritarian regimes in our day use a government-controlled press."²⁵² An established church may provide "the power to indoctrinate, distort judgment, and perpetuate the current regime," as Yudof fears.²⁵³ McConnell, by no means an opponent of religion, also recognizes the ability of political regimes to use established religion to inculcate values it finds "useful for civic ends."²⁵⁴ In the wrong hands, an established religion may be abused to limit the democratic process by presenting political ideas as moral imperatives.²⁵⁵ The government's ability to hide its speech behind what appears to be spiritual advice would provide an extremely powerful means for controlling citizens.

3. The Establishment Clause as a Limit on Government Speech

Rust thus illustrates some of the dangers posed by government expression and the difficulties caused by the fact that the Constitution is generally silent on the issue of government speech.²⁵⁶ Such speech may limit severely the chances of informed discussion through which citizens can arrive at the answers they believe are best for themselves and their nation.²⁵⁷ This ability to disagree and debate is particularly important in the context of religion. Professors Stephen Holmes and Cass Sunstein explain:

Religious liberty is one of the central means by which the multidenominational United States handles its inner diversity. Our pluralistic society, we might say, is held together by a division. The 'barrier' between church and state has a positive, not merely a negative, function. It permits and encourages common citizenship despite religious pluralism, allowing citizens to disagree about ultimate matters while concurring on penultimate ones. Americans can disagree about 'the good' (that is, the personal and

251. McConnell, *supra* note 24, at 2183.

252. *Id.*

253. Yudof, *supra* note 202, at 865.

254. McConnell, *supra* note 24, at 2183.

255. Yudof, *supra* note 202, at 865.

256. Bezanson & Buss, *supra* note 201, at 1396-97.

257. Yudof, *supra* note 202, at 869.

religious ideals they deem worth pursuing), while agreeing about 'the right' (the rules of justice that govern non-violent coexistence and cooperation . . .).²⁵⁸

To some extent, the United States functions as it does because it is not constantly torn between opposing factions in a battle for official religious control. *Rust* was controversial largely because it dealt with abortion. As Holmes and Sunstein recognize, religion is likely to provoke the same sort of passionate and divided responses.

Indeed, the First Amendment recognizes the significance of religious expression. It singles out religious "speech"—free exercise—for protection. Even more importantly, the First Amendment specifically limits the government's ability to speak about religion. Yudof explains: "[T]he establishment clause is special, for it may be the only substantive constitutional restraint on what governments may say."²⁵⁹ Without the Establishment Clause, public holiday displays and similar government speech likely will be governed by the Court's ruling in *Rust*: "The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."²⁶⁰ Much in the same way that the government can choose childbirth over abortion, Allegheny County could pick Christianity over Judaism or Methodist over Baptist beliefs.

The problems of monopoly and disguised speakers are particularly troubling in the context of religion. The First Amendment recognizes this, limiting the government's religious speech while protecting that of individuals. This balance would be lost under unincorporation. As Yudof recognizes, the Establishment Clause *is* special. Its protections are unlikely to be duplicated and are central to the balance of government and religion in United States.

V. CONCLUSION

The Establishment Clause plays an important role in the American constitutional structure. Currently it guards against official school prayers, certain religious displays, direct funding of religious schools, and much more.²⁶¹ All of these protections are at risk if the Establishment Clause is unincorporated. Yet numerous judges and

258. STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 186 (1999).

259. Yudof, *supra* note 202, at 875.

260. *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

261. See *supra* notes 103-108, 137-140 and accompanying text.

commentators have advocated doing just that.²⁶² Support for this view appears to be growing,²⁶³ although commentators still debate the impact unincorporation would have on the current system of religious liberty. This Note proposes that other constitutional and practical safeguards will be insufficient to protect against state-imposed religion in the same way the Establishment Clause does currently.

Despite the variety of religious faiths in the nation as a whole, there are significant religious majorities at the state and local levels. These majorities increase the likelihood that states will establish preferences for particular religions, or religion generally, after unincorporation. They also make it possible to amend state constitutional provisions that may stand in their way. As discussed earlier, the state amendment process generally is much easier than that of the federal Constitution, and it already has been used successfully to increase state aid to religious institutions.²⁶⁴

Moreover, the Court's current vision of free exercise also is unlikely to provide protection against state establishments. First, plaintiffs may find it very difficult to obtain standing to bring suit under the Free Exercise Clause. Second, the Court's current vision of the Clause seems unlikely to offer protection against various types of no coercive establishment. Substantive due process, while a good candidate for protecting religious liberty generally, poses similar standing problems and is unlikely to be favored if the Court does decide to unincorporate.

Thus, individuals are likely to receive significantly less protection against government establishment if courts unincorporate the Establishment Clause. The dangers present in this situation are evident when viewed in the context of government speech, which raises the specter of monopolies and hidden bias. These problems are particularly dangerous in the context of religion. The public school system provides states with a captive audience for religious messages. More importantly, governments may abuse established religion as a means of social control, undermining the marketplace of ideas. As recognized over half a century ago in *Everson*,²⁶⁵ both government and religion stand to lose from their unity.

Individuals stand to lose as well. The Establishment Clause recognizes that there is injury in being forced to live in "the Mormon State" or observe a nativity scene every time one walks into the county

262. See *supra* note 16 and accompanying text.

263. See *supra* notes 1-11 and accompanying text.

264. See *supra* notes 157-165 and accompanying text.

265. See *supra* note 59 and accompanying text.

courthouse. Current limitations on establishment serve important functions by protecting individuals' religious freedom and limiting government speech. Unincorporation is inconsistent with the vision of liberty first proposed in the Bill of Rights and reaffirmed in the Fourteenth Amendment. It threatens serious consequences likely to have a negative impact on the nation as a whole. To avoid the dangers foretold in *Everson*,²⁶⁶ therefore, the Establishment Clause must remain an effective bar against government speech and the imposition of religious values on citizens both nationally and in the states.

Kathryn Elizabeth Komp *

266. *Id.*

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