# Articles

# Some Notes on the Establishment Clause

**Akhil Reed Amar***

In a state formed in a struggle for religious freedom, and at a law school and university named after Roger Williams, what topic could be more appropriate for an Inaugural Lecture than the topic of religious liberty?

My text tonight is a familiar one—the Establishment Clause of the First Amendment. Let us begin by looking carefully at these words, and pondering anew their significance: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The Establishment Clause did more than prohibit Congress from establishing a national church. Its mandate that Congress shall make no law "'*respecting*' an establishment of religion" also prohibited the national legislature from interfering with, or trying to *dis*establish, churches established by state and local governments.[1]

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* Southmayd Professor, Yale Law School. This essay derives from the *Roger Williams University Law Review's* Inaugural Lecture delivered on April 19, 1996.

1. For more support and elaboration, see Edward Dumbauld, The Bill of Rights And What It Means Today 104 & n.5 (1957); 2 William Winslow Crosskey, Politics and the Constitution in the History of the United States 1057, 1060, 1072-74 (1953); Wilbur Katz, Religion and American Constitutions 8-10 (1964); Gerard V. Bradley, Church-State Relationships in America 76, 92-95 (1987); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 Wash. U.L.Q. 371; Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 Notre Dame L. Rev. 311, 321-23 (1986); William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause*, 90 W. Va. L. Rev. 109, 136-39 (1987); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. Rev. 1113, 1132-35 (1988); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DePaul L. Rev. 1191 (1990).

In 1789, at least six states had government-supported churches. Congregationalism held sway in New Hampshire, Massachusetts and Connecticut under local-rule establishment schemes, while Maryland, South Carolina and Georgia each featured a more general form of establishment in their respective state constitutions.[2] And, even in the arguably "non-establishment" states, church and state were hardly separate; for example, at least four of these states, in their constitutions no less, barred non-Christians or non-Protestants from holding government office.[3] According to one tally, eleven of the thirteen states had religious qualifications for officeholding.[4] Interestingly, the federal Establishment Clause, as finally worded, most closely tracked the proposal from the ratifying convention of one of the staunchest establishment states, New Hampshire: "Congress shall make no laws *touching* religion" — a proposal that of course would immunize New Hampshire from any attempted federal *dis*establishment.[5] In the first Congress, Representative Samuel Livermore from New Hampshire initially won the assent of the House for this wording, only to lose in turn to another formulation.[6] But when all the dust had settled the final version of the clause returned to its states' rights roots. In the words of Joseph Story's celebrated *Commentaries on the Constitution*, "Thus, the whole power over the subject of religion is left exclusively to the state governments . . . ."[7]

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2. *See* Leonard W. Levy, Jefferson and Civil Liberties: The Darker Side 5 (1963); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1437 (1990). *Cf.* Bradley, *supra* note 1, at 13 ("[E]ach of the thirteen original states generously aided and promoted religion and should therefore, according to Levy's methodology, be called establishment regimes.").

3. *See* Pa. Const. of 1776, § 10; Del. Const. of 1776, art. 22; N.C. Const. of 1776, art. XXXII; N.J. Const. of 1776, art. XIX. In Rhode Island, Jews and Catholics were apparently ineligible for citizenship. *See* Bradley, *supra* note 1, at 29.

4. Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment 221 (1986).

5. *See* 1 Debates on the Adoption of the Federal Constitution 326 (Jonathan Elliot ed. 1888) [hereinafter Elliot's Debates] (emphasis added); 2 Crosskey, *supra* note 1, at 1068, 1073-74; Bradley, *supra* note 1, at 76, 79; David A. Anderson, *The Origins of the Free Press Clause*, 30 UCLA L. Rev. 455, 481 n.164 (1983).

6. Dumbauld, *supra* note 1, at 39, 43 n.37 (discussing events of August 15 and 20, 1789).

7. 3 Joseph Story, Commentaries on the Constitution of the United States § 1873 (1833).

The key point is not simply that, as with the rest of the First Amendment, the Establishment Clause limits only Congress and not the states. That point is obvious on the face of the Amendment and is confirmed by its legislative history. (It also, of course, has the imprimatur of Chief Justice Marshall's opinion in *Barron v. Baltimore*.[8]) Nor is the main point exhausted once we recognize that state governments are in part the special beneficiaries of, and rights-holders under, the clause. Indeed, the same thing could be said, to some degree, about the Free Speech Clause.[9] The special prick of the point is this: the nature of the states' establishment clause right against federal disestablishment makes it quite awkward to mechanically "incorporate" the clause against the states via the Fourteenth Amendment. Incorporation of the Free Speech Clause against states does not negate state legislators' own First Amendment rights to freedom of speech in the legislative assembly. But incorporation of the Establishment Clause has precisely this kind of effect; to apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right explicitly confirmed by the Establishment Clause itself!

To put the point a slightly different way, the structural reasons that counsel caution in attempting to incorporate the Tenth Amendment against the states seem valid here too. The original establishment clause, on a close reading, is not *anti*-establishment, but *pro*-states' rights; it is agnostic on the substantive issue of establishment versus non-establishment, and simply calls for the issue to be decided locally. (In this respect it is the American equivalent of the European Peace of Augsburg in 1555 and Treaty of Westphalia in 1648, decreeing that religious policy would be set locally rather than imperially.) But how can such a local option clause be mechanically incorporated *against* localities, requiring them to pass no laws (either way!) on the issue of, i.e., "respecting," establishment?[10]

To my knowledge no scholar or judge has argued for incorporating the Tenth Amendment, but few seem critical of, or even con-

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8. 32 U.S. (7 Pet.) 243 (1833).

9. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1151 (1991).

10. *See* Bradley, *supra* note 1, at 95; Conkle, *supra* note 1, at 1141; Porth & George, *supra* note 1, at 136-39.

cerned about, the blithe manner in which the Establishment Clause has come to apply against the states. The apparent reason for this lack of concern, and for the Supreme Court's initial decision to incorporate the clause, is an assumption that virtually all the provisions of the Bill of Rights, except the Tenth Amendment, were designed solely to protect an individual's rights. If this assumption is true, total incorporation of the first nine amendments seems eminently sensible, and wonderfully clean to boot. Unfortunately, this assumption is false.

There is, however, another clean solution to the problem that may well do more justice to history and structure. The Fourteenth Amendment might best be read as incorporating free exercise, but not establishment, principles against state governments. Like the Speech, Press, Assembly and Petition Clauses, the Free Exercise Clause was paradigmatically about citizens' rights, not states' rights; it thus invites incorporation. Indeed, this clause was specially concerned with the plight of minority religions, and thus meshed especially well with the minority-rights thrust of the Fourteenth Amendment.

Thomas Jefferson, often invoked today as a strong opponent of religious establishment, appears to have understood the states' rights aspects of the original establishment clause. While he argued for an absolutist interpretation of the First Amendment—that the federal government should have *nothing* to do with religion in the states, control of which was beyond Congress's limited delegated powers—he was more willing to flirt with governmental endorsements of religion at the state level, especially where no state coercion would impinge on the freedom of conscience of dissenters. The two ideas were logically connected; it was especially easy to be an absolutist about the federal government's involvement in religion if one understood that the respective states had broad authority over their citizens' education and morals. Thus, while *President* Jefferson in 1802 refused to proclaim a day of religious Thanksgiving, he had done just that as *Governor* Jefferson some 20 years before.[11] In defending his practice to Reverend Sa-

11. *Compare* Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), *reprinted in* 3 The Papers of Thomas Jefferson 177 (Julian P. Boyd ed. 1951), *with* Letter from Thomas Jefferson to Attorney General Levi Lincoln (Jan. 1, 1802), *reprinted in* 8 The Writings of Thomas Jefferson 129 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1897). *See also* Second Inaugural Address

muel Miller in 1808, Jefferson quoted both the First and Tenth Amendments, and explained:

> I am aware that the practice of my [Presidential] predecessors may be quoted. But I have ever believed that the example of state executives led to the assumption of that authority by the general government, without due examination, which would have discovered that what might be a right in a state government, was a violation of that right when assumed by another.[12]

Interestingly, a virtually identical view was voiced in the First Congress on September 25, 1789—the very day the Bill of Rights cleared both houses. When New Jersey Representative Elias Boudinot introduced a bill recommending "a day of public thanksgiving and prayer," South Carolina's Thomas Tucker rose up in opposition: "[I]t is a religious matter, and as such, is proscribed to us. If a day of thanksgiving must take place, let it be done by the authority of the several States."[13]

This states' rights understanding helps to explain why the religion clauses and the rights of speech, press and so on, were lumped together into a single amendment. To be sure, there is much truth in a libertarian reading, rooted in conventional wisdom: the Free Exercise Clause flanks the Free Speech Clause to remind us of the importance of protecting not only political speech (as emphasized by the adjoining Petition and Assembly Clauses) but religious speech too.[14] This libertarian reading also draws strong support from the history of the antebellum and reconstruction eras. But this conventional account tends to miss an important federalism dynamic at work in the 1780s.

Like the general topic of state religious policy, restrictions on speech and press were seen by many as beyond Congress's enumerated powers.[15] During the closing days of the Philadelphia Con-

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(Mar. 4, 1805), *reprinted in* 8 The Writings of Thomas Jefferson 341 n.1, 344 (suggesting that states have power over religion where federal government has none).

12. Letter of Thomas Jefferson to Reverend Samuel Miller (January 23, 1808), *reprinted in* 5 The Founders' Constitution 98-99 (Philip B. Kurland & Ralph Lerner eds., 1987).

13. 1 Annals of Cong. 949-50 (Joseph Gales ed., 1789) (1st ed. pagination).

14. *See* Anderson, *supra* note 5, at 484. *But see id.* at 488 (noting anachronism of this reading). *See also* Murray Dry, *Flag Burning and the Constitution*, 1990 Sup. Ct. Rev. 69, 72.

15. *See generally* William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 Colum. L. Rev. 91, 117-19 (1984).

vention, a proposal explicitly to guarantee "liberty of the Press" quickly went down to defeat after Roger Sherman shrugged it off as "unnecessary—The power of Congress does not extend to the Press."[16] During the ratification debates Sherman's one-liner became the Federalist party line on press freedom, affirmed over and over, not just by Sherman and fellow moderates like Oliver Ellsworth, Hugh Williamson, Richard Dobbs Spaight, and Edmund Randolph, but also by strong nationalists like Alexander Hamilton, James Iredell, Charles Pinckney, Charles Cotesworth Pinckney, Noah Webster, and James Wilson.[17] So too, Federalists of all stripes—Madison, Wilson, Iredell, Randolph, Spaight, Ellsworth, and Sherman, for example—declared that the federal government simply had no jurisdiction over religion in the several states.[18] Thus, the First Amendment opened with words suggesting an utter lack of enumerated power to regulate religion in the states or to restrict speech—"Congress shall make *no* law"—in sharp contrast to the language of later amendments dealing with areas where Congress clearly did enjoy enumerated Article I power to "make . . .

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16. The Records of the Federal Convention of 1787, at 617-18 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand].

17. *See* Roger Sherman, A Citizen of New Haven (II), *in* Essays on the Constitution of the United States 237, 239 (Paul Leicester Ford ed., New York, Burt Franklin 1892); Oliver Ellsworth, The Landholder (VI) *in id.* at 161, 164; Hugh Williamson, Remarks on the New Plan of Government, *in id.* at 395, 398; 4 Elliot's Debates, *supra* note 5, at 208-09 (Richard Dobbs Spaight); 3 *id.* at 203-04, 469 (Edmund Randolph); The Federalist No. 84 (Alexander Hamilton); James Iredell, Answers to Mr. Mason's Objections, *in* Pamphlets on the Constitution of the United States 360-61 (Paul Leicester Ford ed., New York, Burt Franklin 1888); 4 Elliot's Debates, *supra* note 5, at 259-60 (Charles Pinckney); *id.* at 315 (Charles Cotesworth Pinckney); Noah Webster, An Examination into the Leading Principles of the Federal Constitution, *in* Pamphlets on the Constitution of the United States 25, 48 (Paul Leicester Ford ed., New York, Burt Franklin 1888); 2 Elliot's Debates, *supra* note 5, at 449, 468 (James Wilson); James Wilson, Speech on the Federal Constitution, *in* Pamphlets on the Constitution of the United States 156-57 (Paul Leicester Ford ed., New York, Burt Franklin 1888). At least one leading Anti-Federalist agreed with the Federalists on this point. *See* Letters from the Federal Farmer (IV) *in* 2 The Complete Anti-Federalist 250 (Herbert J. Storing ed., 1981). For a similar statement in the first Congress, see 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1034-35 (1971) (remarks of James Jackson) (June 8, 1789).

18. *See, e.g.*, 3 Elliot's Debates, *supra* note 5, at 93, 330 (James Madison); 2 *id.* at 455 (James Wilson); 4 *id.* at 194-95 (James Iredell); 3 *id.* at 203-04, 469 (Edmund Randolph); 4 *id.* at 208 (Richard Dobbs Spaight); Oliver Ellsworth, The Landholder (VI) *in* Essays on the Constitution of the United States, *supra* note 17, at 164; Schwartz, *supra* note 17, at 1088 (August 15, 1789) (Roger Sherman).

law." For example, the Militia and War Power Clauses of Article I gave Congress broad power over military matters addressed by the Second and Third Amendments; Congressional authorization of various searches and seizures clearly fell within its explicit power to regulate customs and captures, among other things; and Article I expressly authorized Congress to "constitute tribunals," whose procedures were the main subject of the Fifth, Sixth, Seventh, and Eighth Amendments.[19]

The "Congress shall make no law" Amendment's precise location in the original Bill is also quite illuminating. Recall that the First Congress originally proposed not ten, but twelve amendments as its Bill of Rights. The First Congress's original First Amendment focused on congressional size and obviously modified Article I, Section 2, and the original Second amended Article I, Section 6, dealing with congressional salary. Then came our First (their Third) Amendment, glossing the Article I, Section 8 catalogue by suggesting that Congress lacked enumerated power to censor expression or regulate state religious policy—a kind of reverse "necessary and proper" clause. Only *after* this implied gloss on Section 8 was it appropriate to add later amendments implicitly expanding the catalogue of Article I, Section 9, many of whose provisions cut across powers that were indeed conferred in Section 8. Seen from this angle, the order of amendments precisely tracks the order of the original Constitution itself—first Section 2, then Section 6, then Section 8, and only then Section 9 and so on. (Later amendments governing the judicial process can also be seen as modifying Article III rules for federal courts; and the last two amendments laid down global rules of construction aimed at all federal powers, not just those of Congress.) When we remember that Madison originally proposed to interweave his amendments into the original Constitution rather than tack them on at the end, it makes sense that the order of amendments would track the order of the Constitution itself.

Of course, the idea that Congress simply lacked Article I enumerated power over various First Amendment domains may seem wholly fanciful today, given the widespread acceptance of expansive twentieth-century Commerce Clause cases, themselves in-

19. *See* U.S. Const. art. I, § 8, cls. 11-16 (war, army and militia powers); *id.* cls. 1, 3, 11 (customs, commerce and capture powers); *id.* cl. 9 (power to constitute tribunals).

spired by a broad reading of the nineteenth-century classic, *McCulloch v. Maryland*.[20] Reading the Constitution through twentieth-century eyes, we must squint quite hard to see the First Amendment as any different from the seven amendments that follow it, so far as enumerated powers are concerned. But to avoid anachronism we must ask why so many Federalists cheerfully conceded a lack of congressional power over press and religion in the states, but failed to make similar concessions in response to other anti-Federalist objections. Is there not a kernel of truth in the widespread eighteenth-century notion that, say, searches and seizures were naturally incidental to—"necessary and proper" for—the power to collect revenue in a way that press censorship and religious regulations were generally not? Vestiges of this eighteenth-century notion can be found even in *McCulloch*, where Chief Justice Marshall warned that Congress could not, "under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government. . . ."[21] Though this language has lain dormant in recent years, it hints at a stricter reading of enumerated powers in terms of their natural "objects" or "purposes."[22] Under this stricter view, each of the next seven amendments seems to track the natural object of specific enumerated powers much more closely than does the First.

The Senate, at least, appears to have thought so, for there seems to be no other good explanation for its conscious decision to fold certain prohibitions, but not others, into the "Congress shall make no law" category. The subjects covered by our First Amendment had initially been dealt with by the House of Representatives in two separate amendments. The first addressed religion and opened with the formulation "Congress shall make no law." The second encompassed the rights of speech, press, petition and as-

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20. 17 U.S. (4 Wheat.) 316 (1819).

21. *Id.* at 423.

22. Marshall's approach unsurprisingly resembles the colonists' arguments before 1776 that Parliament could enact bills to regulate trade for the overall benefit of the empire, but could not use this power pretextually to raise revenues. *See* Edmund S. Morgan, The Challenge of The American Revolution 3-42 (1976). The linkage is unsurprising because the debates prior to 1776 involved, in effect, an early attempt to "constitutionalize" federalism by marking the respective boundaries of the central and local governments within an extended empire. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1445 (1987); Andrew C. McLaughlin, *The Background of American Federalism*, 12 Am. Pol. Sci. Rev. 215 (1918).

sembly, but omitted the "no law" formulation in favor of language more like that of subsequent amendments (today numbered II through VIII).[23]

Although the Senate merged the two amendments behind closed doors, leaving us with no transcript of its oral deliberations, it is plausible to presume the merger was motivated by states' rights sentiment. After all, the Constitution had structured the upper house to safeguard the interests of state governments—whose legislatures of course directly elected Senators. In responding to other aspects of the Bill of Rights proposed by the lower house, the Senate acted true to its states' rights form: the upper house killed "the most valuable" amendment on Madison's list, the presciently numbered Fourteenth, imposing various restrictions on state government. Also suggestive is the extensive consideration the Senate gave to various ideas originating in the Virginia ratifying convention that Madison had chosen to omit from his proposed package of amendments.[24] In its formal instrument of ratification, the Virginia convention had expressly listed two (and only two) "essential rights" that the convention suggested were beyond the enumerated powers "granted" to the federal government: "liberty of conscience, and of the press."[25] In keeping with Virginia's view, the Senate first reworded the House's speech amendment so that it too began with the phrase "Congress shall make no law," and then folded this amendment into the only other one that shared this opening formulation.[26]

Most importantly, we must recall the precise wording of the First Amendment—"*Congress shall make no law . . .*"—precisely tracking and inverting the precise wording of the Article I Necessary and Proper Clause: "*Congress shall* have power . . . to *make all laws* which shall be necessary and proper . . . ." And we should also note that no state constitution placed press freedoms alongside religion clauses, thus suggesting a federalism-based logic for their conjunction in the First Amendment.

Unsurprisingly, Jefferson's absolutist reading of the First Amendment extended beyond the religion clauses to encompass speech and press. Yet here, too, it was an absolutism rooted in

23. Dumbauld, *supra* note 1, at 213-14.
24. *Id.* at 47 & n.14.
25. 1 Elliot's Debates, *supra* note 5, at 327.
26. *See* Anderson, *supra* note 5, at 481.

federalism and the idea of enumerated powers. Thus, his Kentucky Resolves of 1798 self-consciously read the First Amendment with a Tenth Amendment gloss:

> [I]t is true, as a general principle, and is also expressly declared by one of the amendments to the Constitution, that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people;" and that, no power over the freedom of religion, freedom of speech, or freedom of the press, [was] delegated to the United States by the Constitution . . . and that, in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no laws respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press . . . ."[27]

Although this passage could be read to imply that speech and press rights were reserved to "the people" rather than "the states," and thus limited state governments as well, Jefferson thought otherwise. As he explained to Abigail Adams in 1804: "While we deny that Congress have [sic] a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so."[28]

So too, Madison's famous *Report of 1800* on the Virginia Resolutions declared that "the power . . . over the press, was neither among the enumerated powers, nor incident to any of them" and that the First Amendment simply reaffirmed "a positive denial to Congress of any power whatever on the subject."[29] Madison then proceeded to quote the language of the Virginia convention's formal instrument of ratification linking press and religion to states' rights, and concluded that "liberty of conscience and freedom of the press were *equally* and *completely* exempted from all authority whatever of the United States."[30] The pointed italics were Madison's. Madison's words in 1800 mesh well with his earlier

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27. 4 Elliot's Debates, *supra* note 5, at 540-41. Note how the Resolution's misquote, substituting "laws" for "law" in the First Amendment, renders that Amendment's language even closer to that of the Necessary and Proper Clause.

28. Letter of Thomas Jefferson to Abigail Adams (Sept. 11, 1804) *in* 8 The Writings of Thomas Jefferson, *supra* note 11, at 311.

29. 4 Elliot's Debates, *supra* note 5, at 571.

30. *Id.* at 576.

words in the first Congress. In proposing an early version of the Establishment Clause, Madison wondered aloud whether it was, strictly speaking, "necessary"—because on Madison's view, Congress lacked enumerated power here—but noted that an amendment would resolve any possible ambiguity.[31] Note how he explicitly linked the establishment issue to the Necessary and Proper Clause:

> [S]ome of the State Conventions . . . seemed to entertain an opinion that . . . the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended . . . .[32]

And in 1791 debates over the first bank, Madison yoked together religion and press as examples of domains beyond Congress's Article I jurisdiction:

> The defence against the charge founded on the want of a bill of rights presupposed, he said, that the powers not given were retained; and those not given were not to be extended by remote implications. On any other supposition, the power of Congress to abridge the freedom of the press, or the rights of conscience, &c., could not have been disproved.[33]

Yet we must not let the similarities between the First Amendment's expressive rights and its Establishment Clause obscure a difference that may well have profound implications for the relative ease with which they can be "incorporated" against states by the Fourteenth Amendment. The expressive rights clauses—Speech, Press, Petitions, Assembly—sound in more than federalism, pure and simple. They explicitly speak of personal "freedoms" (as does the "Free" Exercise Clause) and "right[s] of the people." The Establishment Clause's bland language of laws "respecting . . . establishment" does not. Put another way, even nationalists in the

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31. 2 Schwartz, *supra* note 17, at 1088 (Madison's remarks of August 15, 1789).

32. *Id.* Madison's language here sharply contrasts with his discussion of our Fourth Amendment, which Madison saw as cutting across, rather than marking the boundary of, Article I enumerated power. *See id.* at 1030-31 (Madison's remarks of June 8, 1789).

33. 2 Annals of Cong. 1901 (1834) (Madison's remarks of February 2, 1791).

1780s may have been willing to concede that Congress lacked power to *restrict* speech and press, but none of them claimed that Congress lacked power to *protect* a vigorous debate about national issues against states that might seek to censor such speech. Nor is there anything in the First Amendment that limits congressional power to *promote* speech, press, petition, and assembly against state repression.[34] (And let us not forget that the Article IV republican government clause plausibly *obliges* Congress to protect political expression from state censorship.)[35] The First Amendment, then, was not agnostic on whether speech, press, petition, assembly, and free exercise were liberties of citizens or good things. By contrast, the Amendment was indeed agnostic on the issue of establishment. 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 disestablishment was given to the states. As a more pure federalism provision, then, the Establishment Clause seems considerably more difficult to "incorporate" against states.

In the end, of course, the "incorporation" question will ultimately depend on a careful examination of the Fourteenth Amendment itself; regardless of its status in 1789, perhaps by 1866, the Establishment Clause had come to be viewed as affirming an individual right against establishments rather than an agnostic federalism rule. For present purposes, it is enough to note that, given its special logic and language, the Establishment Clause has less in common with its fellow First Amendment clauses, and more with the Tenth Amendment, than conventional wisdom admits. As such, it raises distinctive "incorporation" problems, and will require scholars to examine with special care whether non-establishment—above and beyond other First Amendment provisions—was widely understood during Reconstruction as a "privilege or immunity" of citizens rather than states.

It is apt that the incorporation of the Establishment Clause first arose in a school case, *Everson v. Board of Education*,[36] and

34. *See* Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 19 (1965); 2 Crosskey, *supra* note 1, at 1057.

35. *See* United States v. Cruikshank, 92 U.S. 542, 552 (1875) ("The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.").

36. 330 U.S. 1 (1947).

has had its most visible—if controversial—impact in public schools. Consider, for example, the famous recent case from Rhode Island, *Lee v. Weisman*,[37] in which the United States Supreme Court invalidated a formal prayer at a public high school commencement ceremony. From one perspective, the twentieth-century state school is designed to serve a function very similar to that of the eighteenth-century state church: imparting community values and promoting moral conduct among ordinary citizens, upon whose virtue republican government ultimately rests.[38] For example, the Pennsylvania Constitution of 1776 dealt with public schools and religious organizations in back-to-back sections, and treated "religious societies" as entities designed for the "encouragement of virtue" and "for the advancement of religion *or learning*."[39] The Massachusetts Constitution of 1780 likewise spoke of "public instructions" and "public teachers" in its provisions for establishing churches, and declared that "the happiness of a people, and the good order" of society "depend upon piety, religion, and morality."[40] The language of Article III of the Northwest Ordinance of 1787, adopted by the Confederation Congress during the very summer that the Philadelphia Convention met, was to similar effect: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[41] Consider also the Massachusetts Constitution's language concerning Harvard College: "[O]ur wise and pious ancestors . . . laid the foundation of Harvard College . . . . [E]ncouragement of arts and sciences, and all good literature, tends to the honor of God, the advantage of the Christian religion, and the great benefit of this and the other United States of America . . . ."[42] Harvard, of course, was hardly unique; most of

37. 112 S. Ct. 2649 (1992).

38. *See* Gordon S. Wood, The Creation of The American Republic, 1776-1787, 427 (1969) ("Religion was the strongest promoter of virtue, the most important ally of a well-constituted republic."). On the importance of virtue for self-governing republics, see The Federalist No. 55 (James Madison).

39. Pa. Const. of 1776, §§ 44-45 (emphasis added).

40. Mass. Const. of 1780, pt. I, art. III.

41. Ordinance of 1787: The Northwest Territorial Government, 1 Stat. 50, 52 n.(a) (1789), *reprinted in* 1 U.S.C. LI, LIII (1994).

42. Mass. Const. of 1780, pt. II, ch. V, art. I.

the leading centers of learning in eighteenth-century America had religious roots.[43]

But to see the analogy between today's public schools and yesterday's state churches is to see once again the federalism dimension of the original establishment clause. The possibility of national control over a powerful intermediate association self-consciously trying to influence citizens' world views, shape their behavior, and cultivate their habits obviously struck fear in the hearts of Anti-Federalists. Yet local control over such intermediate organizations seemed far less threatening, less distant, less aristocratic, less monopolistic—just as local banks were far less threatening than a national one, and local militias less dangerous than a national standing army. Given the religious diversity of the continent—with Congregationalists dominating New England, Anglicans down South, Quakers in Pennsylvania, Catholics huddling together in Maryland, Baptists seeking refuge in Rhode Island, and so on—a single national religious regime would have been horribly oppressive to many men and women of faith; local control, by contrast, would allow dissenters in any place to vote with their feet and find a community with the right religious tone.[44]

This vision—of people voting with their feet to find or found the kind of local religious community that was best for them—would probably sound odd to many Americans today, but it should not surprise those of you familiar with the Founding of this state. And so this vision—of freedom through federalism—may make less sense for us today; but, I think, it would have made more sense to Roger Williams himself.

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43. The linkage between education and religion was so obvious that when Madison proposed giving Congress explicit textual authority to establish a national university, he felt compelled to explicitly deny power to make that university sectarian. The proposal failed. 2 Farrand, *supra* note 16, at 616. *See also* 1 William Blackstone, Commentaries *97 (linking together the "establish[ment]" of "the church of Scotland, and also the four universities of that kingdom").

44. *See* 3 Story, Commentaries on the Constitution of the United States § 1873 (1833); Herbert J. Storing, What The Antifederalists Were For 22-23 (1981); Letters of Agrippa (XII), *in* 4 The Complete Anti-Federalist, *supra* note 17, at 94.