JUSTICE THOMAS AND PARTIAL INCORPORATION OF THE ESTABLISHMENT CLAUSE: HEREIN OF STRUCTURAL LIMITATIONS, LIBERTY INTERESTS, AND TAKING INCORPORATION SERIOUSLY

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INTRODUCTION

Here is something the average guy in America cannot understand. Why is it constitutionally permissible for a public school to decorate the halls with posters celebrating "gay pride" month even over the reasonable objections of persons (including persons of faith) offended by that government-sponsored ideology, but unconstitutional for a public school to celebrate Christmas by putting up a crèche if even one person is offended? Is this confounding result really required by the Constitution of the United States? If so, is it required by the written Constitution as originally understood, or is it part of the living, breathing, intelligently-designed Constitution[1] crafted by the Justices of the Supreme Court of the United States?

Although one possible answer is to point out that the Establishment Clause imposes a structural limitation on government disabling government from endorsing or sponsoring religion, that merely substitutes one question for another. How does a structural limitation on "Congress" extend to define the structural powers of state and local government? In other words, under the doctrine of incorporation, how is a structural limitation on the power of Congress an individual "liberty" incorporated against the states by the Due Process Clause of the Fourteenth Amendment?[2] If we take the prevailing theory of

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[1] Proponents of the living, breathing, "evolving" Constitution have never explained how the Constitution "evolves" into a new species and in so brief a time. Surely, the sudden appearance of new constitutional rules in the fossil record is best explained by a theory of intelligent design, or Creation if you please, by shifting Supreme Court majorities. For example, Erwin Chemerinsky observes that nonoriginalists believe that "the meaning and application of constitutional provisions should *evolve by interpretation*." ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 18 (3d ed. 2006) (emphasis added). "Evolving by interpretation" sure sounds like an account of Creation to me, especially in light of Chemerinsky's acknowledgment that new constitutional rights, such as a right to abortion, can come into being by judicial decisions. *Id.*

[2] *See* Joseph M. Snee, S. J., *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 371–73. U.S. CONST. amend. I provides: "Congress

incorporation seriously, why should we think that the structural component of the Establishment Clause may "legitimately be read into the liberty protected by the Fourteenth Amendment?"[3]

Perhaps the best lens through which to view this puzzle is to imagine three separate lawsuits challenging daily recitation of the Pledge of Allegiance in government schools:

Case One

In the first case, *A* sues School District *X* and claims that the requirement that all students recite the Pledge violates his right not to speak under the Free Speech Clause.

Case Two

In the second case, *B* sues School District *Y* and claims that the requirement that all students recite the Pledge violates the Free Exercise Clause, because *B*'s religious beliefs forbid her from pledging allegiance to any nation or human institution.

Case Three

In the final case, *C* sues School District *Z* and claims that recitation of the Pledge in government schools is unconstitutional under the Establishment Clause because of the phrase "one Nation under God."[4]

What is surprising about these cases is the way they come out under black letter First Amendment doctrine. Under *West Virginia State Board of Education v. Barnette*, *A* will win his lawsuit because the school may not compel any student "to confess by word or act" his allegiance to any "matter[] of opinion."[5] However, *A*'s right not to participate in recitation of the Pledge does not include a right to silence his teacher and willing classmates who wish to participate. As Judge Easterbrook explained in *Sherman v. Community Consolidated School District 21*, "so long as the school does not compel pupils to espouse the content of the Pledge as their own belief, it may carry on with patriotic exercises. Objection by the few does not reduce to silence the many who *want* to pledge allegiance . . . ."[6] Similarly, if *B*'s Free Exercise claim succeeds—and under *Employment Division* v. *Smith*[7] it may not succeed—the result will be merely to grant *B* an opt-out from her forced participation

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shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

3 Snee, *supra* note 2, at 372.

4 *See* 4 U.S.C. § 4 (2000).

5 319 U.S. 624, 642 (1943).

6 980 F.2d 437, 445 (7th Cir. 1992). For an excellent discussion of Judge Easterbrook's opinion in this case, see Abner S. Greene, *The Pledge of Allegiance Problem*, 64 FORDHAM L. REV. 451 (1995).

7 494 U.S. 872, 879 (1990) (stating that, as a general rule, the Free Exercise Clause does not protect religious exercise against restrictions imposed by neutral laws of general applicability).

in the activity, not to enjoin teachers and willing students from carrying on with the Pledge exercise.[8] Remarkably, however, if *C* succeeds in convincing a court that the words "under God" in the Pledge violate the Establishment Clause, the result will be that *C*'s right to demand strict separation between church and state includes the right to "silence the many who *want* to pledge allegiance" to one Nation under God.[9] In other words, *C*'s "liberty" under the Establishment Clause includes the power to silence others, to control which lessons government schools may teach and willing pupils may learn. This is an amazing liberty, if liberty it be!

Judge Easterbrook's answer—that the First Amendment treats religious and secular activities differently and that "[s]eparation of church from state does not imply separation of state from state"[10]—is responsive only if the structural requirement of separation between church and "Congress" is somehow understood as an individual liberty incorporated against the states by the Due Process Clause of the Fourteenth Amendment. The purpose of this Article is to focus on the issue of "liberty" under the Establishment Clause and incorporation of that "liberty" under the Fourteenth Amendment. In this regard, the Article focuses particularly on the Establishment Clause jurisprudence of Justice Clarence Thomas and upon his insightful suggestion that "in 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."[11]

I. THE FOGGY ROAD TO INCORPORATION OF THE ESTABLISHMENT CLAUSE

The Bill of Rights was originally ratified as a check on the power of the federal government, and in *Barron* v. *Mayor of Baltimore*, the Supreme Court held that these amendments were not applicable to the

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[8] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 725 (2004) (holding that a general scholarship program excluding funding for students majoring in devotional theology was constitutional because the state had strong interests in not funding religious indoctrination and because "the exclusion of such funding places a relatively minor burden" on the excluded students); Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 537–39 (1st Cir. 1995) (holding that a compulsory educational assembly requiring fifteen-year-old students to view sexually explicit and sexually suggestive materials and skits did not amount to a constitutionally recognizable burden on the students' or the students' parents' free exercise of religion).

[9] *Sherman*, 980 F.2d at 445; *see, e.g.*, Newdow v. U.S. Cong., 328 F.3d 466, 487 (9th Cir. 2003) (enjoining recitation of the Pledge of Allegiance in a public school district because the phrase "under God" impermissibly endorsed religious principles, inculcated religious views, and coerced religious action), *rev'd on other grounds sub nom.* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17–18 (2004) (reversing on the issue of the noncustodial parent's prudential standing to sue in federal court).

[10] *Sherman*, 980 F.2d at 444.

[11] Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

states.[12] Chief Justice Marshall explained this holding in no uncertain terms:

> Had the framers of these amendments intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention. Had congress engaged in the extraordinary occupation of improving the constitutions of the several states by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.
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> . . . These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
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> . . . These amendments contain no expression indicating an intention to apply them to the state governments. This court cannot so apply them.[13]

However, by early in the twentieth century the Supreme Court found a way to "incorporate" certain provisions of the Bill of Rights against the states as "part of the liberty protected from state interference by the [D]ue [P]rocess [C]lause of the Fourteenth Amendment."[14] Under this concept of "selective incorporation," a particular provision of the Bill of Rights "is made applicable to the states if the Justices are of the opinion that it was meant to protect a 'fundamental' aspect of liberty."[15] In other words, only individual liberties that are deemed to be "'implicit in the concept of ordered liberty'"[16] or "'fundamental to the American scheme of [j]ustice'" are incorporated against the states by the liberty clause of the Fourteenth Amendment.[17] As Justice John Paul Stevens has put it so eloquently, "the idea of liberty" is the source of the incorporation doctrine.[18]

Moreover, under the doctrine of incorporation these fundamental individual liberties are protected only against "deprivations" by the states.[19] Individuals do not have a right to strike down laws that merely offend their sensibilities, because only laws that deprive them of protected liberty—i.e., laws which impose substantial burdens, undue

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[12] 32 U.S. 243, 250 (1833).

[13] *Id.*

[14] CHEMERINSKY, *supra* note 1, at 499.

[15] 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.6, at 799 (4th ed. 2007).

[16] *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[17] *Id.* at 800 (quoting Duncan v. Louisiana., 391 U.S. 145, 149 (1968)).

[18] John Paul Stevens, *The Bill of Rights: A Century of Progress*, *in* THE BILL OF RIGHTS IN THE MODERN STATE 13, 33 (Geoffrey R. Stone et al. eds., 1992).

[19] The Due Process Clause of the Fourteenth Amendment, the portal for incorporation, provides: "nor shall any State *deprive* any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1 (emphasis added).

burdens, or extreme restrictions on their individual liberty—constitute unconstitutional deprivations of liberty under the Fourteenth Amendment. Thus, the incorporated liberty of free exercise of religion is protected (if at all) only against laws that impose "substantial burdens" on an individual's religious exercise.[20] Similarly, freedom of speech protects an individual's right to say what he wishes to say and to refrain from being compelled to speak, not the right to censor the state's message or to silence willing messengers of the government's speech.[21] The right to just compensation for regulatory takings is protected only against "extreme"[22] regulations that deprive an owner of "economically viable use" of her property.[23] Even a woman's "fundamental liberty" to choose to terminate an unwanted pregnancy is protected only against laws that unduly burden her liberty to choose, not against laws that reasonably regulate her access to abortion or which merely seek to persuade her to give life to the child she is carrying.[24]

Thus, under the Court's theory of incorporation, structural provisions of the Constitution—i.e., those which define and limit the

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[20] *See* Locke v. Davey, 540 U.S. 712, 725 (2004) (holding that a government scholarship that could be used by college students to pursue a degree in any course of study except devotional theology imposed only a "relatively minor burden" on the free exercise liberty of scholarship recipients and thus did not violate the incorporated Free Exercise Clause); *see generally* Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

[21] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 630, 642 (1943). As Judge Easterbrook observed in *Sherman*, although a student has a right under the incorporated Free Speech Clause to not be compelled to recite the Pledge of Allegiance in a government school, she does not have a corresponding right to censor the curriculum or to silence her classmates "who *want* to pledge allegiance." Sherman v. Cmty. Consol. Sch. Dist. 21, 980 F.2d 437, 445 (7th Cir. 1992).

[22] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting) (stating that "only the most extreme regulations can constitute takings").

[23] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 499 (1987) (holding that a regulation requiring 27 million tons of coal to be left in the ground to protect surface structures from subsidence is not a taking because petitioners did not prove "that they have been denied the economically viable use" of their overall coal mining operations).

[24] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 877 (1992) (stating that "an undue burden is an unconstitutional burden"). In *Casey*, the Court specifically declared that a state could regulate abortion so long as the regulation did not impose an undue burden on the woman's liberty:

> To promote the State's profound interest in potential life, throughout pregnancy the State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion. These measures must not be an undue burden on the right.

Id. at 878.

powers of the national government—"resist incorporation,"[25] because these provisions do not create fundamental individual liberty interests. For example, no one would suggest that the powers of Congress to regulate interstate commerce and to declare war[26] should be incorporated and made applicable to the states by the Fourteenth Amendment.[27] Further, a provision which contains both a structural component and a liberty component is properly subject only to partial incorporation, in the sense that only the liberty component is capable of incorporation as a Fourteenth Amendment "liberty" protected by the Due Process Clause.

Surely, one would think that the Supreme Court must have struggled mightily with this problem when deciding whether to incorporate the Establishment Clause, because, as Akhil Amar has observed, "The original [E]stablishment [C]lause, on a close reading, is not antiestablishment but pro-states' rights."[28] In other words, the Establishment Clause is a structural provision that "is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally."[29] How could a structural clause designed to promote federalism and "states rights" be incorporated as a fundamental individual liberty under the Due Process Clause of the Fourteenth Amendment? How did the Court explain this paradox when it ruled that the Establishment Clause was applicable to the states? As Horace Rumpole, John Mortimer's fictional "Old Bailey hack," might say: "[A]nswer came there none."[30] Indeed, the first Supreme Court decision to incorporate the First Amendment, *Gitlow* v. *New York*, merely "assumed" that "freedom of speech and of the press—which are protected

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[25] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring) ("I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation.").

[26] U.S. CONST. art. I, § 8, cl. 3, 11.

[27] *See* Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 FIRST AMEND. L. REV. 162, 163–67 (2006). Professor Meier is a colleague of mine; I suggested this topic to him, and we shared many of our thoughts during numerous long discussions.

[28] AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 34 (1998); *see also* STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 18 (1995) (noting that the Religion Clause is "simply an assignment of jurisdiction over matters of religion to the states—no more, no less"). For an excellent and recent reappraisal of the "jurisdictional" understanding of the Establishment Clause, see Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843 (2006).

[29] AMAR, *supra* note 28. Amar continues: "[H]ow can such a local option clause be mechanically incorporated *against* localities, requiring them to pass no laws (either way) on the issue of—'respecting'—establishment?" *Id*.

[30] JOHN MORTIMER, *Rumpole and the Right to Silence*, *in* RUMPOLE À LA CARTE 80, 91, 119 (1990).

by the First Amendment from abridgement by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[31]

Gitlow's incorporation-by-assumption of the Free Speech Clause was followed by conclusory dictum in *Cantwell* v. *Connecticut*, a case concerning free speech and free exercise claims, incorporating not only the Free Exercise Clause but also the Establishment Clause:

> The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act.[32]

Justice Roberts's dictum in *Cantwell* led directly to Justice Black's unreasoned assertion, in *Everson* v. *Board of Education*, concerning the meaning of the Establishment Clause as applied to the states:

> 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. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[33]

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[31] 268 U.S. 652, 666 (1925); *see generally* DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW: RELIGIOUS LIBERTY AND THE FIRST AMENDMENT 93–96 (1987).

[32] 310 U.S. 296, 303 (1940). Professor Snee was very critical of *Cantwell*'s "unfortunate bit of dictum" concerning incorporation of the Establishment Clause, because it "has since led the Court down a path strewn with further dicta on the establishment of religion supposedly interdicted to the states by the Fourteenth Amendment." Snee, *supra* note 2, at 371.

[33] 330 U.S. 1, 15–16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). Justice Black made no attempt in *Everson* to explain or justify incorporation of the Establishment Clause. He merely asserted that the First Amendment was "made

Sadly, such is the way that seismic changes in our government and our liberties are all-too-often made in the Supreme Court—by naked power and with neither rhyme nor reason.[34] As Professor Snee observed, "[t]he inclusion of the [E]stablishment [C]lause into the liberty of the Fourteenth Amendment by the Supreme Court has no firm basis in the history of the clause or in logic"[35] and has never been persuasively justified. At a minimum, the Court was grossly irresponsible in *Everson* for failing to justify its transformative decision to incorporate the Establishment Clause, a decision that has spawned serious, lasting, and divisive consequences that continue to haunt us to this present day.[36]

II. JUSTICE THOMAS AND INCORPORATION OF THE ESTABLISHMENT CLAUSE

Justice Clarence Thomas is the Supreme Court's most consistent proponent of the jurisprudence of original intent,[37] and his views on incorporation of the Establishment Clause are the product of serious historical scholarship concerning the "original meaning of the Clause."[38] His views are also very nuanced and sophisticated. Indeed, he really has two separate, but closely-related positions, positions that I am labeling "no incorporation" and "partial incorporation."

For example, in *Elk Grove Unified School District* v. *Newdow*, Justice Thomas observed that the best scholarship on the original understanding of the Establishment Clause supports the conclusion that it is "best understood as a federalism provision—[which] protects state establishments from federal interference but does not protect any

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applicable to the states by the Fourteenth" and cited as authority a post-*Cantwell* decision, *Murdock v. Pennsylvania*. *Id.* at 8 (citing Murdock v. Pennsylvania, 319 U.S. 105 (1943)). *Murdock* did not implicate the Establishment Clause; it was decided as a freedom of the press and free exercise case. *Murdock*, 319 U.S. at 117. Professor Carl H. Esbeck criticizes the Court for incorporating the Establishment Clause "without debate or even seeming appreciation of what it was doing." Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 25 (1998).

[34] Doe v. Bolton, 410 U.S. 179, 221–22 (1973) (White, J., dissenting) (referring to the Court's creation of "a new constitutional right for pregnant mothers" to abort their unborn children as being fashioned "with scarcely any reason or authority" and as "an exercise of raw judicial power"). Professor Esbeck calls the Court's decision to incorporate the Establishment Clause, without even considering its original design as a structural provision designed to promote federalism, "an act of sheer judicial will." Esbeck, *supra* note 33, at 26.

[35] Snee, *supra* note 2, at 407.

[36] William Lietzau is very critical of "the Court's error regarding incorporation" of the Establishment Clause, which, he states, "proves to be much more than a mere misreading of history; it is an assault on the very heart of the [F]irst [A]mendment's religious liberty protections." William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191, 1193 (1990).

[37] *See generally* SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS 193–94 (1999).

[38] *See* Van Orden v. Perry, 545 U.S. 677, 693 (2005) (Thomas, J., concurring).

individual right."[39] Thus, incorporation of the Establishment Clause against the states is incoherent, because it "prohibit[s] precisely what the Establishment Clause was intended to protect—*state* establishments of religion."[40] In other words, incorporation of the Establishment Clause has perverted the purpose of the Clause, because as Justice Stewart once said: "a constitutional provision . . . designed to leave the States free to go their own way . . . [has] become a restriction upon their autonomy."[41]

It is unlikely that Justice Thomas will ever convince a Supreme Court majority to reject more than sixty years of precedent by deciding to "unincorporate" the Establishment Clause. However, his second position on incorporation—what I call "partial incorporation"—merely asks the Court to take its own theory of incorporation seriously by recognizing that "[w]hen rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."[42] In other words, the Establishment Clause may mean one thing when applied as a structural limitation on the power of the federal government, and something else when applied only to protect individual liberty against state action.[43]

For example, in *Zelman v. Simmons-Harris* a neutral voucher program that provided tuition aid to economically disadvantaged Cleveland schoolchildren to attend a private religious or nonreligious school chosen by their parents was attacked as a law that unconstitutionally advanced religion under the Establishment Clause.[44] Although the Court upheld the law because it viewed the voucher scheme as consistent with its Establishment Clause test,[45] Justice Thomas concurred and reasoned that the Fourteenth Amendment could not be employed to invalidate a neutral school choice program by incorporating a structural component of the Establishment Clause.[46] As he put it so well: "There would be a tragic irony in converting the

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[39] 542 U.S. 1, 50 (2004) (Thomas, J., concurring). In other words, he views the Establishment Clause as a structural limitation on the federal government and not as a clause that protects individual rights and liberties. *Id.*

[40] *Id*. at 51.

[41] Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 310 (1963) (Stewart, J., dissenting).

[42] Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).

[43] *See id.* at 678–79. As Professor Esbeck has observed, "in order to make a power-limiting clause suitable for absorption into the Fourteenth Amendment, the Court [in *Everson*] had to strain in order to squeeze a structural clause into a 'liberty' mold." Esbeck, *supra* note 33, at 27.

[44] *See Zelman*, 536 U.S. at 647–49.

[45] *Id*. at 653 (upholding the voucher program as a neutral scheme of "true private choice").

[46] *Id*. at 679–80 (Thomas, J., concurring). Justice Thomas made clear that he can and does accept incorporation of "religious liberty rights." *Id*. at 679.

Fourteenth Amendment's guarantee of individual liberty into a prohibition on the exercise of educational choice."[47] The incorporated Establishment Clause does not give *A* a constitutional right to restrict the liberty of *B*, nor to forbid the states from "giv[ing] parents a greater choice as to where and in what manner to educate their children."[48]

Similarly, Justice Thomas's concurring opinion in *Newdow* concluded that voluntary recitation of the Pledge of Allegiance in the public schools does not violate the Establishment Clause, because it does not "implicate the possible liberty interest of being free from coercive state establishments."[49] In other words, state endorsement of the notion that our Nation is "under God" does not violate the Establishment Clause so long as "[t]he Pledge policy does not expose anyone to the legal coercion associated with an established religion."[50] According to Thomas, the incorporated Establishment Clause does not impose a structural limitation on the states stripping them of the power to sponsor, endorse, or recognize a religious idea or symbol; rather, it protects the individual liberty to be free from laws that substantially burden a person's right to choose whether to participate in a religious ceremony or activity. *A*'s right under the Establishment Clause to refrain from participation in the "under God" component of the Pledge ceremony—like *B*'s right under the Free Speech Clause to refrain from any compelled affirmation of belief[51]—does not include the right to censor the curriculum nor to silence his classmates who wish to pledge allegiance to "one Nation under God."[52]

As with school choice and the Pledge, so also with public displays of the Ten Commandments by state or local government. The incorporated Establishment Clause "liberty" is not implicated so long as a person is free to avert her eye. As Justice Thomas stated in *Van Orden:*

> There is no question that, based on the original meaning of the Establishment Clause, the Ten Commandments display at issue here is constitutional. In no sense does Texas compel petitioner Van Orden to do anything. The only injury to him is that he takes offense at seeing the monument as he passes it on his way to the Texas Supreme Court Library. He need not stop to read it or even to look at it, let alone to express support for it or adopt the Commandments as guides for his life. The mere presence of the monument along his path

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47 *Id*. at 680.

48 *Id*.

49 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 (2004) (Thomas, J., concurring).

50 *Id*. at 54.

51 *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 633–34 (1943).

52 4 U.S.C. § 4 (2000); *see supra* notes 4–8 and accompanying text.

> involves no coercion and thus does not violate the Establishment Clause.[53]

If Justice Thomas is guilty of anything concerning his views on incorporation of the Establishment Clause, his sin is taking the Court's theory of incorporation seriously. No one has a liberty to direct the content of government speech merely because he is offended by the message. Nor does liberty give one the right to silence others or to restrict the liberties of others. The incorporated First Amendment is best understood as protecting the equal liberty of all to choose whether to participate in government programs and ceremonies that touch upon religion. However, so long as the states do not restrict individual religious liberty, they are not bound by the structural limitations of the Establishment Clause that apply to Congress and the federal government.

One common objection to the argument that the Establishment Clause is a federalism provision and should thus be "disincorporated"[54] is that the law applying the Establishment Clause to the states "is well settled and nobody is particularly anxious to change it."[55] Indeed, even most critics of the Court's Establishment Clause jurisprudence accept incorporation as a "deed . . . now done"[56] and recognize that "the sheer force of time would seem to ensure that the Establishment Clause will remain applicable against the states."[57] Justice Thomas's concept of partial incorporation responds to this criticism by accepting incorporation of the Establishment Clause while taking seriously the doctrine that the Fourteenth Amendment incorporates only individual liberty interests, not structural provisions defining the powers of

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[53] Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).

[54] *See* Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 632 (2006) ("A construction of the Establishment Clause strictly faithful to its original meaning would require disincorporation and the overturning of nearly sixty years of 'no-establishment' jurisprudence.").

[55] Andrew Koppelman, *Akhil Amar and the Establishment Clause*, 33 U. RICH. L. REV. 393, 404 (1999); *see also* Muñoz, *supra* note 54, at 633. Professor Koppelman's assertion that "nobody" is inclined to change the Court's Establishment Clause decisions is perhaps more a reflection of the social circles in which he moves than of reality. *See infra* note 59 and accompanying text. I know many people who would like to change what they perceive to be the anti-religious hostility of the Court's non-establishment jurisprudence. Professors Jeffries and Ryan capture this reality when they note that the issue of prayer and religion in schools reveals "a huge gap between the cultural elite and the rest of America. People generally may have supported school prayer and Bible reading, but the leadership class did not." John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 325 (2001).

[56] *See, e.g.*, KEVIN SEAMUS HASSON, THE RIGHT TO BE WRONG: ENDING THE CULTURE WAR OVER RELIGION IN AMERICA 137 (2005).

[57] Muñoz, *supra* note 54, at 633.

Congress. This accepts what is settled—the incorporation of the Establishment Clause—but requires the Court to carefully rethink each case under the Establishment Clause to ensure that the Clause is incorporated only to protect individual religious liberty from coercive state establishments of religion.[58] The Court's use of the Establishment Clause to cleanse religion from public culture has never been widely accepted by the American people,[59] and partial incorporation asks only that the Court treat liberty under the Establishment Clause the same way it treats every other First Amendment liberty interest—as an individual right protected against substantial burdens imposed by state law, not as a license to dictate what ideas government may endorse or recognize as part of the public culture of a pluralistic society.

III. PARTIAL INCORPORATION: RELIGIOUS LIBERTY WITHOUT RELIGIOUS APARTHEID

If Justice Thomas succeeds in convincing a Supreme Court majority to take the Court's own theory of incorporation seriously with respect to the Establishment Clause, what will be the impact of separating individual liberties from structural limitations under the Clause and applying only the former against the states? It will take years for all the

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[58] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 53 (2004) (Thomas, J., concurring). In other words, individual liberty under the incorporated Establishment Clause is protected only against "actual legal coercion" imposed by state law. *Id.* at 52.

[59] For example, a recent Fox News poll found that most Americans disagree with many of the Supreme Court's modern Establishment Clause decisions:

> The new poll finds that almost eight in 10 Americans (77 percent) believe the courts have overreached in driving religion out of public life, and a 59 percent majority feels Christianity is under attack.
>
> Majorities of Republicans (89 percent), Democrats (73 percent) and independents (69 percent) think the courts have gone too far in taking religion out of public life.
>
> Overall, most Americans disagree with several Supreme Court rulings on the separation of church and state. For example, an overwhelming 87 percent favor allowing public schools to set aside time for a moment of silence, and 82 percent favor allowing voluntary prayer. Another 82 percent favor allowing public schools to have a prayer at graduation ceremonies, and 83 percent think nativity scenes should be allowed on public property.
>
> Not only do three-quarters of Americans (76 percent) think posting the Ten Commandments on government property should be legal, but also two-thirds (66 percent) say it is a good idea to post the commandments in public schools.

Dana Blanton, *12/01/05 FOX Poll: Courts Driving Religion Out of Public Life; Christianity Under Attack*, FOX NEWS, Dec. 1, 2005, http://www.foxnews.com/story/0,2933,177355,00.html. Fox News is not alone in this finding. A survey conducted by the First Amendment Center found that "[n]early two-thirds of the public (65%) agree that 'teachers or other public school officials should be allowed to lead prayers in school . . . .'" *The First Amendment in Public Schools: A Comprehensive Survey of How Administrators and Teachers View the Rights and Responsibilities of the First Amendment*, FREEDOM FORUM, Mar. 1, 2001, http://www.freedomforum.org/templates/document.asp?documentID=13390.

dust to settle, but two things are clear to me—critics will declare, "The sky is falling"; and the critics will be wrong. Although the states would have more room to experiment with laws touching upon religion,[60] equal religious liberty under the First Amendment would continue to be incorporated against the states under the Fourteenth Amendment. Indeed, since the Establishment Clause would be incorporated only to advance, but never to "constrain[] individual liberty,"[61] religious liberty should flourish because no one will have a right to employ the Establishment Clause to dictate what others may say or view in the public square and in the public schools. Moreover, partial incorporation of the Establishment Clause strikes a reasonable "balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other."[62] So long as the states do not impose substantial burdens on individual religious liberty, they are free to recognize religion as a part of public culture and to experiment with the curricula of public schools and the financing of educational choice in ways that meet the needs of all their citizens, including religious subgroups who wish to be included in the public square and whose educational needs may be different from those in the majority.[63]

Although the precise line between unincorporated structural limitations on the federal government and incorporated individual religious liberty interests will require development and refinement on a case-by-case basis in the fullness of time, it is possible here to at least begin to sketch an outline of partial incorporation. For example, the so-called *Lemon-Agostini* test[64]—which prohibits laws that "have the 'purpose' or 'effect' of advancing . . . religion"[65]—imposes a structural limitation on government by denying it the power to endorse religion, to sponsor religion, or even to "express an opinion about religious matters"[66] or to "encourage citizens to hold certain religious beliefs."[67] As

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[60] Zelman v. Simmons-Harris, 536 U.S. 639, 680 (2002) (Thomas, J., concurring).

[61] *Id*. at 678.

[62] *Id*. at 679.

[63] *See id*. at 676–84.

[64] *See id.* at 648–49 (majority opinion) (citing Agostini v. Felton, 521 U.S. 203, 222–23 (1997)); *see id.* at 668 (O'Connor, J., concurring) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

[65] *Id.* at 648–49 (majority opinion) (citing *Agostini*, 521 U.S. at 222–23) (stating that the incorporated Establishment Clause "prevents a State from enacting laws that have the 'purpose' or 'effect' of advancing or inhibiting religion").

[66] Andrew Koppelman, *Secular Purpose*, 88 VA. L. REV. 87, 109 (2002). Koppelman describes this structural aspect of the Establishment Clause as "a restriction on government speech." *Id*. *See also* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test,* 86 MICH. L. REV. 266, 297 (1987) ("The principal kind of evil against which the [E]stablishment [C]lause protects is institutional, not individual.").

Justice Thomas points out, by incorporating these structural limitations against the states the Court has "elevate[d] the trivial to the proverbial 'federal case,' by making benign signs and postings subject to challenge"[68] even though the liberty of no person is restricted by their passive display on some public place. In other words, so long as no one is required to participate, the interior decorating of public schools, public courthouses, and the public square is a matter for each state and the People of each state to decide.[69]

For example, *County of Allegheny* v. *ACLU*, in which a crèche display in a county courthouse was enjoined as an unconstitutional endorsement of religion by local government,[70] would almost certainly come out the other way under Justice Thomas's view of partial incorporation. The Fourteenth Amendment does not forbid states from endorsing religion, but only from imposing religion in a way that substantially burdens individual religious liberty.

Although Justice O'Connor has tried to explain the endorsement test as a rule designed to protect an individual's right not to feel like an outsider or a disfavored member of the political community,[71] this view amounts to nothing more than an unconvincing attempt to portray a structural limitation on state government speech as a spurious right to censor public displays that one finds offensive. Why should we think that liberty under the Establishment Clause includes the right to control which holidays state governments may celebrate and which ideas state governments may express? This is an extraordinary "liberty," unlike any other liberty incorporated by the Fourteenth Amendment.

For example, no one would argue that the Free Exercise Clause protects a person's right to censor public displays that offend his sincerely held religious beliefs. Thus, *A* does not have a First Amendment right to enjoin a "gay pride" display in a public park because

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[67] Koppelman, *supra* note 66. Koppelman admits that his view is not concerned with protecting the liberty of "aggrieved" individuals, but rather with limiting the institutional powers of state and local governments. *Id*. at 112.

[68] Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring).

[69] As Judge McConnell has argued, "Not what flunks the [*Lemon-Agostini*] test, but what interferes with religious liberty, is an establishment of religion." Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 941 (1986); *see also* Meier, *supra* note 27, at 174–75 (observing that most Establishment Clause cases are not about protecting individual liberty, but rather are about a plaintiff who wishes to "restrain government from doing something with which the individual disagrees").

[70] 492 U.S. 573, 621 (1989).

[71] *See* Wallace v. Jaffree, 472 U.S. 38, 69 (1985) (O'Connor, J., concurring) (stating that government action endorsing religion is invalid "because it 'sends a message to nonadherents that they are outsiders, not full members of the political community'") (quoting Lynch v. Donnelly, 465 U.S. 668, 688 (1984)); s*ee also* Koppelman, *supra* note 66, at 112.

it offends his religious beliefs and sends a message to him that he is an outsider and a disfavored member of the political community. *A*'s remedy is to avoid the offensive display or to avert his eye when walking past it.[72] Similarly, *B* should not have a First Amendment right to enjoin a Christmas display that she finds offensive. The incorporated Establishment Clause protects individual liberty from substantial burdens imposed by state action, but there is no liberty to not be offended by government speech in the public square. Indeed, a rule cleansing religious displays from the public square actually promotes the evil it seeks to avoid, because by singling out religious displays for exclusion from the public culture the Court is sending a message that people of faith are outsiders, disfavored members of the political community whose holidays and ideas may not be recognized and celebrated in a public square that includes everyone else.[73] As Steven Smith argues, if religious symbols and holidays are cleansed from the public square, many religious citizens may "feel that their most central values and concerns—and thus, in an important sense, they themselves—have been excluded from a public culture devoted purely to secular concerns."[74]

In order to succeed in an Establishment Clause case brought against state or local government, the claimant should be required to demonstrate that the challenged law or policy substantially burdens an individual liberty protected under the Clause.[75] The kind of "psychic harm" one experiences when government endorses a controversial idea or symbol in the public schools or upon the public square[76] does not impose a substantial burden on an incorporated Establishment Clause liberty, unless a dissenter is compelled to affirm his belief in the offensive idea. If *A* has no right to forbid the teaching of evolution in the public schools because that lesson is offensive to his religious beliefs

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[72] *See* William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence,* 66 IND. L.J. 351, 358–59 (1990–1991) ("Outside the establishment area, the state's use of controversial symbols does not give rise to constitutional concern no matter how offensive those symbols might be.").

[73] *See* Smith, *supra* note 66, at 278 ("[I]n a polity in which government regularly acknowledges and accommodates citizen interests of various sorts, deliberate indifference toward one class of interests may easily shade into . . . disapproval—which Justice O'Connor's [endorsement] test would also forbid.").

[74] *Id*. at 310–11.

[75] The individual liberty protected by the Establishment Clause is perhaps best understood as a right of "religious choice," and then the "establishment clause analysis would lead to a proscription of all government action that has the purpose and effect of coercing or altering religious belief or action." McConnell, *supra* note 69, at 940.

[76] *See* Marshall, *supra* note 72, at 357 (referring to the endorsement test as "protecting people from psychic harm" or "from symbolic alienation").

protected under the Free Exercise Clause,[77] then *B* has no right to forbid the teaching of intelligent design in the public schools because that lesson is offensive to his liberty protected under the Establishment Clause. Since the structural component of the Establishment Clause limiting the power of the states to endorse or advance religion is not subject to incorporation, the merits and wisdom of education in the public schools are for school boards and state legislators—not federal judges—to determine, so long as individual liberty under the First Amendment is not substantially burdened.

If we return our attention to the three hypothetical lawsuits regarding the Pledge of Allegiance posed previously in this Article,[78] we will see that they should all come out the same way whether decided under the incorporated Free Speech, Free Exercise, or Establishment Clauses. In each case, individual liberty will be protected from compelled affirmation of belief, but in none of the cases will *A*, *B*, or *C* have a right to censor the curriculum or to silence classmates who wish to Pledge their allegiance to "one Nation under God."[79] This approach to incorporation of the First Amendment recognizes the important principle of uniformity of all the liberties protected by the First Amendment. Individual liberty under the Establishment Clause is neither more important—nor more fragile—than the liberties of belief, expression, and religious exercise protected under the Free Speech and Free Exercise Clauses. Moreover, as Justice Thomas has argued, partial incorporation of the Establishment Clause leaves to the People and the democratic process in the states the ability to enact laws and policies that best promote the interests and needs of all persons,[80] including persons belonging to religious subgroups who often feel like second class citizens in the public schools and public squares of their communities.[81] In other words, under Justice Thomas's approach to incorporation of the Establishment Clause, the equal liberty of all is protected without the

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[77] *See id*. at 375 (concluding that "offense is not cognizable as a component of a free exercise claim"). Marshall argues, however, that under the Establishment Clause, "[g]overnmental actions that improperly endorse religion are unconstitutional per se." *Id*. at 374. Marshall's position recognizes the Establishment Clause as imposing a structural limitation on the states, but he does not explain how this structural limitation is subject to incorporation as a Fourteenth Amendment "liberty."

[78] *See supra* notes 2–11 and accompanying text.

[79] 4 U.S.C. § 4 (2000).

[80] *See* Zelman v. Simmons-Harris, 536 U.S. 639, 679 (2002) (Thomas, J., concurring) (referring to the need to balance liberty under the Fourteenth Amendment with "the federalism prerogatives of [the] States").

[81] *See* Smith, *supra* note 66, at 310–11 (noting that there is "powerful evidence" that many religious people feel alienated from what they perceive to be the "antireligious" nature of public schools and certain other "areas of public life").

kind of judicially-imposed religious apartheid that forbids states from respecting the needs and traditions of religious citizens and subgroups.[82]

The most difficult issue under the jurisprudence of partial incorporation is that of prayer in the public schools. Since structural limitations on religious endorsement and sponsorship are not incorporated against the states, school prayer should be unconstitutional only to the extent that it restricts individual liberty under the Establishment Clause.

Lee v. *Weisman*[83] is an illustrative case. In *Weisman*, a public middle school invited Rabbi Leslie Gutterman to deliver an inclusive and nonsectarian "Invocation" and "Benediction" at its graduation ceremony.[84] Although attendance at graduation was not required, undoubtedly the ceremony was a "significant occasion[]" in the academic careers of all students, including those who were offended by any kind of school-sponsored prayer.[85]

Under both partial incorporation and the Court's opinion in *Weisman,* it is undisputed that liberty under the Establishment Clause "guarantees that government may not coerce anyone to support or participate in religion or its exercise."[86] Thus, it is clear that government may not compel students to participate in school prayer or to affirm their belief in the content of the prayer. Up to this point, both *Weisman* and partial incorporation are in accord in protecting liberty under the Establishment Clause. However, Justice Kennedy's majority opinion in *Weisman* goes a step further and imposes a structural limitation on government participation in "religious debate or expression"[87] that forbids the state from sponsoring a religious message "in a school setting."[88] Thus, even if the school makes clear that participation in a school-sponsored prayer is voluntary, the Establishment Clause protects "freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[89] Although this sounds as though the Court is concerned about protecting individual liberty from even subtle indoctrination in the public schools, Justice Kennedy made clear that students may be compelled "to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or

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82 *See id.*

83 505 U.S. 577 (1992).

84 *Id.* at 580–82.

85 *Id.* at 595–96 ("Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise . . . [without forfeiting the] intangible benefits" of taking part in the ceremony.).

86 *Id.* at 587.

87 *Id.* at 591.

88 *Id.* at 594.

89 *Id.* at 592.

immoral or absurd" or "offensive and irreligious."[90] For all its talk about protecting freedom of conscience from subtle coercive pressure, when its rhetorical veil is pierced *Weisman* is not really concerned with protecting individual liberty, but rather with enforcing a structural limitation prohibiting state-sponsored religious expression.[91] Under the jurisprudence of partial incorporation, *Weisman* should come out the other way; so long as no one is compelled to participate, a commencement prayer at a public school does not impose a substantial burden on individual liberty under the Fourteenth Amendment. Some students may find religious expression at graduation offensive, just as some students may find certain secular ideas expressed at graduation offensive. However, so long as no student is compelled to affirm his or her belief in any idea, individual liberty under the incorporated First Amendment does not give any student the right to censor the program or to dictate which messages other students may hear. As Justice Kennedy put it so well (before choosing to ignore it): "To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation."[92]

If religious students must endure a great deal of secular speech that offends their religious sensibilities, it does not seem too much to ask other students to endure a brief invocation to God notwithstanding their preference for a strictly-secular public culture. Both religious and secular students should be welcome in the public schools, but no student has a right to silence others or to demand that any idea be cleansed from school programs. We are not a strictly-secular people, and a strictly-secular public culture is a poor reflection of the diversity of our pluralistic Nation.

CONCLUSION

It is a cliché to observe that the Supreme Court's Establishment Clause jurisprudence is in a hopeless state of disarray.[93] This confusion

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[90] *Id*. at 591.

[91] *See id*. (stating that "the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions").

[92] *Id*. at 590–91.

[93] *See* Van Orden v. Perry, 545 U.S. 677, 694 (2005) (Thomas, J., concurring) (stating that "this Court's [Establishment Clause] jurisprudence leaves courts, governments, and believers and nonbelievers alike confused—an observation that is hardly new"); Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 117–20 (1992) (noting "inconsistencies," "contradiction," and "chaos" amid the Court's Establishment Clause jurisprudence, and concluding that: "It is a mess").

in the law no doubt results—at least in part—from the Court's decision to incorporate the Establishment Clause as a structural limitation on the power of the states to endorse or advance religion, thereby transforming a clause designed to promote federalism, by insulating state autonomy over religion from federal interference, into a provision that empowers federal courts to sit in judgment over the curricula of public schools and the decoration of public parks and buildings.

Although Justice Clarence Thomas believes "that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation,"[94] he has also expressed a view that allows the Establishment Clause to be incorporated to the extent that it protects an individual liberty against substantial burdens imposed by state action. Under this theory of partial incorporation, the states are free to recognize and celebrate the role of religion in the history and culture of America, so long as they do not compel individuals to affirm any religious belief or to participate in any religious exercise. Justice Thomas's theory of partial incorporation does not ask the Court to reject the doctrine of incorporation by "disincorporating" the Establishment Clause. Instead it challenges the Court to take its own theory seriously by incorporating the Establishment Clause only to the extent that it advances individual religious liberty.

Under the jurisprudence of partial incorporation, the states should not be bound by structural limitations of the Establishment Clause that apply to Congress and the federal government. So long as the states do not impose coercive burdens on individual religious liberty, they are free to recognize religion as part of public culture and to experiment with the curricula of public schools and the financing of educational choice in ways that meet the needs of all their citizens, including members of religious subgroups who wish to be included in the public square and whose educational needs may be different from those in the majority. The precise line between unincorporated structural limitations and incorporated individual liberty interests will take time to develop in the caselaw; however, decisions imposing structural limitations on the power of the states to endorse or advance religion, or to express an opinion about religion, should not survive re-examination under the theory of partial incorporation.

Of course, state constitutions may impose structural limitations on state and local government concerning endorsement of religion in public schools and public displays. Indeed, as Joseph Snee has stated, the religious freedom of American citizens is perhaps "safer in the hands" of

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[94] Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 45–46 (2004) (Thomas, J., concurring).

state legislatures and state courts, than in the hands of the federal judiciary.[95]

Although many commentators will undoubtedly flap their wings and cry "the sky is falling," lovers of liberty need not fear. Equal religious liberty will be secure—and indeed will flourish—under partial incorporation. Our Nation is not a strictly-secular one, and our public culture may and should reflect the rich, religious diversity of our people. No one should be compelled to affirm any belief or participate in any religious practice, but no one has the right to silence others, to control which lessons public schools may teach and willing pupils may learn, or to censor the public culture. As Justice Thomas has put it so well, "[w]hen rights are incorporated against the States through the Fourteenth Amendment they should advance, not constrain, individual liberty."[96] Equal liberty under the First Amendment is not equal when the Establishment Clause is interpreted to require a strict cleansing of religion from the public culture. Under Justice Thomas's approach to incorporation of the Establishment Clause, the religious liberty of all is respected without the kind of judicially-imposed religious apartheid that forbids the states from respecting the needs and traditions of religious citizens and subgroups. In other words, by taking the theory of incorporation seriously, Justice Thomas's jurisprudence of partial incorporation results in a triumph for pluralism and equal liberty under the First and Fourteenth Amendments.

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[95] Snee, *supra* note 2, at 407.

[96] Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring).