

CAN THE DOCTRINE OF SUBSIDIARITY HELP COURTS INTERPRET THE ESTABLISHMENT CLAUSE? ¹

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This article proposes that the concept of subsidiarity from Catholic social doctrine can be useful in understanding the function of the Establishment Clause in the First Amendment to the U.S. Constitution. Subsidiarity, however, does not serve as a source for judicially enforceable rules for applying the Clause; rather, it explains the Clause as essentially a federalism provision that leaves the resolution of church-state questions to the states.

Introduction

Since the 1940s, the federal courts have used the Establishment Clause of the U.S. Constitution to calibrate the relationship between church and state in every corner of the United States. Courts have inevitably had to adjust the myriad interactions between religious associations, religious individuals, and the government, propagating a gaggle of vague principles and multi-factor tests. The Catholic social doctrine of subsidiarity would seem a good candidate for cleaning up this doctrinal confusion, for subsidiarity promises a framework within which to adjust the respective competencies of public and private associations. Moreover, subsidiarity readily embraces the religious association as exactly the kind of structure that mediates constructively between the individual and the state.

But simply “applying” subsidiarity to the problem of religious establishments is far more difficult than at first blush. Subsidiarity does address itself to the problems of “religious establishments” as such, but at the same time it appears singularly *maladapted* as a source for judicially enforceable rules for resolving such problems. A court needs fairly rigid and predictable standards for saying what is and is not a prohibited religious establishment. But subsidiarity provides, instead, a flexible procedural framework which can help hammer out the complex interactions between religious associations and the state—one that is far more comfortable in the prudential sphere of politics than in the sphere of courts and legal rules. Thus, at first glance, one might conclude that subsidiarity not only provides *no* help to a court applying the Establishment Clause, but also that the Establishment Clause itself could not intelligibly embody a judicially enforceable norm of subsidiarity.

But here first impressions are misleading. Subsidiarity does help us understand the Establishment Clause, and in a profound and surprising way. Subsidiarity does not tell a court how to apply the Clause, but instead explains what the Clause *is*. In short, subsidiarity shows that the Establishment Clause is all about federalism, and says virtually nothing about substantive church-state issues. The subsidiary Establishment Clause contains the “right” answer about *where* church-state issues should be hammered out, not about how such issues should be resolved substantively. This is a radical view of the Establishment Clause, of course, but in the helpful sense that it points us to what lies at the roots of the Clause. Subsidiarity can help clear away over sixty years worth of jurisprudential detritus and see what the Establishment Clause was actually supposed to *do*. Subsidiarity also helps make sense of the framing and ratification of the Establishment Clause. Finally, it also explains why the Supreme Court’s Establishment Clause jurisprudence—which, since 1947 has attempted to orchestrate the minute details of American church-state relationships—has been such a failure.

A. Absolutely Not!

Before exploring how subsidiarity can help understand the Establishment Clause, it is necessary to explain how subsidiarity *cannot* help. This section briefly outlines the Catholic doctrine of subsidiarity. It emphasizes that, as useful as subsidiarity is as a conceptual framework for adjusting the competencies of public and private associations in society, it is not a good candidate for a judicially-enforceable constitutional norm. In other words, subsidiarity helps us talk intelligibly about the problems posed by religious “establishments,” but it does not help a court derive useful tests for policing the boundaries between church and state and, *a fortiori*, for liquidating the meaning of the Establishment Clause. Subsidiarity, instead, instructs us that church-state issues are the kinds of issues better resolved by prudential judgments in the political sphere. As we will see in the next section, this also points to a paradoxical, but useful, answer to the question of what function the Establishment Clause is supposed to perform in our federal system.

Subsidiarity is a theory about the relationships among social structures, the common good, and human dignity with a venerable pedigree in European political thought. It concerns how persons become genuinely free by associating with others, and what those associations, or “mediating structures,” imply about state authority.

Paradoxically, subsidiarity both empowers the state to remedy the incapacities of social groups, and limits state intervention by reference to the integrity of those groups.² The state *helps* but does not *absorb* intermediate associations. In that way, it is thought, the people within them will flourish most fully in their humanity, in their communities, and in their relationships to the state.³

Substantively, subsidiarity orders the relationships among state authority and social groups. Structurally, it describes the distribution of competencies among higher and lower public entities in a single system.⁴ Thus, subsidiarity may apply substantively to the interactions between the state and labor unions, and it may apply structurally to the interactions between a central government and its constituent governmental entities.⁵ The structural aspect of subsidiarity is closely connected to federalism.⁶

But however applied, subsidiarity focuses on the person. It assumes that the basic aim of societal structures, private and public, is to promote human dignity and, hence, genuine freedom. Persons are ends-in-themselves; they are also social beings and thus most authentically human only in community with others.⁷ Subsidiarity builds upward from this basic focus on the person. Human personhood requires a kaleidoscope of associations for its full expression. For instance, individuals need family associations to nurture their basic affective, material, educational, and spiritual needs.⁸ Such groups cannot function in isolation but must interact with other groups to serve their members fully.⁹ What results is an organically intermeshed civil society, “understood as the sum of the relationships between individual and intermediate social groupings, which are the first relationships to arise and which come about thanks to ‘the creative subjectivity of the citizen.’”¹⁰

Subsidiarity seeks to nourish these intermediate social groups—or “mediating structures”—whether by protecting them from government interference, empowering them through limited but effective government intervention, or coordinating their various pursuits.¹¹ A mediating structure could refer to any voluntary association—a family, a neighborhood, a church, a civic club—that “stand[s] between the individual in his private life and the large institutions of public life.”¹² A legal policy or social structure resonates with subsidiarity if it furthers this basic principle of facilitating, through mediating structures, both the flourishing of persons and the greater justice and responsiveness of state authority.

Subsidiarity recognizes that the state has an obligation to intervene in aid of lower societal structures in appropriate and well-

defined ways, but that the intervention must be of a limited, incremental, temporary, and remedial nature. Theorists of subsidiarity thus speak of its *positive* and *negative* aspects.¹³ Positively, the state (or any higher societal association) offers help to subordinate associations to the extent they cannot accomplish their own ends. But negatively, there is a strong presumption against extensive state intervention into lower associations. Subsidiarity thus exhibits a “principled tendency toward solving problems at the local level and empowering individuals, families and voluntary associations to act more efficaciously in their own lives.”¹⁴ The ultimate goal, built upon the uniqueness of every human person, is to realize a “genuinely pluralistic society.”¹⁵

No association nourishes its members’ dignity by dissolving their individuality into a homogenized mass. This is true by definition, given the purpose of an association is to nourish individual development. Just so, higher associations must not absorb the unique qualities and functions of lower associations. Interventions by higher associations are necessitated and limited by the same problem—*i.e.*, that the lower organization requires some aid because it, for whatever reason, cannot achieve its goals. But to preserve those lower associations as genuine associations, the nature of the intervention must be partial and incremental—“subsidiary” to the function and character of the association aided. Subsidiarity’s guiding principle, then, is that intervention should “assist but not usurp” mediating structures.¹⁶

The Catholic Church’s formulations of the principle of subsidiarity—contained principally in late 19th and early 20th century papal encyclicals on labor relations—are the most carefully elaborated modern statements of the principle and have consequently become benchmarks for its development.¹⁷ This foundational passage is from Pius XI’s encyclical *Quadragesimo Anno*:

Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them. The supreme authority of the State ought, therefore, to let subordinate groups handle matters and concerns of lesser importance, which would otherwise dissipate its efforts greatly. Thereby the State will more freely, powerfully, and effectively do all those things that belong to it

alone because it alone can do them: directing, watching, urging, restraining, as occasion requires and necessity demands. Therefore, those in power should be sure that the more perfectly a graduated order is kept among the various associations, in observance of the principle of “subsidiary function,” the stronger social authority and effectiveness will be, the happier and more prosperous the condition of the State.¹⁸

Much more could be said about the historical development of subsidiarity, and particularly its increasing accommodation of personalist philosophy and the freedom of conscience.¹⁹ But for purposes of this paper, what needs emphasizing is the mode in which a subsidiary state manages the common good. The subsidiary state pursues a substantive vision of the common good, but in a manner subsidiary to the efforts of social groups.²⁰ A just government constructs an ordered framework that assumes the diverse projects of individuals and social groups. The state does not define the common good, but safeguards and promotes it, making up for the natural incapacities of social groups, whose own efforts contribute to the common good.²¹ Russell Hittinger identifies this principle as central to subsidiarity: “[S]ubsidiarity presupposes that there are plural authorities and agents having their ‘proper’ (not necessarily lowest) duties and rights with regard to the common good.”²²

This subsidiary view of the relationship between state power and the common good is anti-perfectionistic. Limited human beings and their institutions will never ideally realize human dignity, as Chantal Millon-Desol describes:

To social problems, one cannot simply find a solution in the sense of a definitive systematization. There are means, imperfect and tentative, for managing this critical condition permanently in the equilibrium of the possible.²³

Consequently, subsidiarity does not furnish *a priori* criteria for state intervention, in contrast with classical liberalism on the one hand (which allows minimal intervention only for basic security) and with socialism on the other (which allows comprehensive state intervention). As John Czarnetzky and Ronald Rychlak explain, because subsidiarity focuses on the common good, applying it requires judgments that are “nuanced, comprehensive, and political”—judgments, consequently, “better left to political bodies, who are far better equipped than courts” to formulate

them.²⁴ The government thus has a great deal of prudential latitude over the decision whether to intervene, subject to the countervailing pressures of mediating structures.

Given subsidiarity's basic flexibility, one may legitimately ask whether it provides reliable standards for conditioning state intervention, and for attributing competencies among governmental actors, private associations, and individuals.²⁵ But subsidiarity boasts that its "vagueness" is not a defect, but its central asset. Subsidiarity calibrates the relationship between civil society and the state within the flux of circumstances, in pursuit of a maximum amount of liberty. But liberty expresses itself in concrete conditions that cannot be predicted by *a priori* rules.²⁶ The imprecision latent in subsidiarity therefore is exactly the point.²⁷ Authority acts in a truly subsidiary fashion only if it can adapt itself flexibly to the changing concrete demands of liberty. Thus, subsidiarity does not furnish a blueprint delimiting the functions of the state and this-or-that social group. Rather, it is a "purely formal" principle that manages the relationship between the state and civil society, while their own interactions fix the concrete boundaries between them. Subsidiarity itself does not ascribe rigid limits to the competencies of any social entity.²⁸

After this relatively brief outline of the theory of subsidiarity, we can say two things about applying the theory to the problem of religious establishments. First, the theory can help illuminate the nature of the problem and point us toward solutions. But, second, the theory appears ill-adapted to being embedded in a constitution as a norm that courts are supposed to apply to concrete situations.

Subsidiarity can help us talk intelligibly about what—at least in American constitutional jurisprudence—can often seem like an impossibly elusive concept: the precise nature of a religious "establishment" and why it is undesirable. As explained, the subsidiary state acts to remedy the incapacities of social groups, but never absorbs them, in the sense of substituting its own maladapted functions for their more precisely calibrated ones. Thus, subsidiarity would see the archetypal "religious establishment" as presenting a problematic distribution of competencies among state authority and religious associations. It would ask how that distribution hobbles the mediating character of the religious associations and, by extension, the freedom of the persons within them. One would look for church-state arrangements in which religious associations' mediating role becomes degraded because of involvement with state authority.²⁹ Perhaps the religious association's function has been compromised by losing religious authority to the state—as when, for instance, the government dictates a

form of worship or meddles in a church doctrinal dispute. Or perhaps the association has been compromised in the opposite direction by absorbing coercive authority *from* the state—as when, for instance, the government hands over licensing authority to a church. This structural and functional approach suggests a baseline for thinking about problematic church-state relationships: as to any discrete function, state authority and a religious association should never coalesce into an identical, entirely overlapping entity. In the vocabulary of subsidiarity, the state would have completely absorbed the function of a religious association, and henceforth those functions of governing authority and religious association would be indistinguishable.

Instructively, subsidiarity condemns the religious establishment *not* because, as we are used to saying, it “advances religion” or is “non-neutral with regard to religion”—these formulations both prove too much and nothing at all about the undesirability of certain church-state arrangements. Subsidiarity operates on a more concrete plane. It condemns the religious establishment because the state has inappropriately involved itself in the functions and competencies of a religious association. That involvement is undesirable precisely because of its impact on the mediating function of the religious group and its members, on the mediating function of other social groups, and on the ability of the state to manage the common good. The religious association’s absorption into the state means either that it can no longer contribute to the greater human flourishing of its own members (because it is no longer an autonomous organization), or can no longer contribute to, and indeed would impede, society’s realization of the common good (because it has monopolized one or more important aspects of that common good). Framing the inquiry in this way is helpful not only analytically but historically, because it targets the central rationale for founding-era establishments. As Michael McConnell explains, the “dominant purpose of the establishment” in both England and the colonies “was not to advance religious truth, but to control and harness religion in the service of the state.”³⁰

Subsidiarity thus provides a flexible tool for illuminating the core problem of a religious establishment. But its very adaptability—its sensitivity to the flux of structural relationships between state and religious associations—at the same time points to its uncomfortable fit with modern constitutional “tests” in the Establishment Clause area. Unlike current judicial analyses of religious establishments, subsidiarity does not propose any *a priori* substantive view about the “correct” relationship between church and state. Such a substantive view—*e.g.*, that the state should be formally or effectively “neutral” between religion and non-religion—would be foreign to subsidiarity because it

would introduce a substantive bias into what is essentially a procedural inquiry. It would create rigid divisions where subsidiarity seeks flexibility and adaptability. Subsidiarity is interested in facilitating the creation of a constructive equilibrium in which religious associations, and the people in them, are as free as possible to pursue their goals, consistent with the overall common good. It is inconsistent with that goal, however, to say that the common good already includes some substantive view of the relationship between government and religion.³¹

To be sure, we might say that subsidiarity has a built-in *procedural* view of church-state relationships—as already explained, it holds that government should not absorb the functions of religious associations, and vice versa. But this procedural “separation of church and state” is far more modest than the well-known varieties of substantive “separation”—again, such as theories of neutrality or non-endorsement. Consequently, the separation latent in subsidiarity would leave a broader space within civil society for the interaction of religious associations and government.

Whatever benefits it promises, subsidiarity is not a new and more powerful tool for *courts* to analyze church-state problems. Subsidiarity is a conditioning principle for attributing competencies among associations, which can aid political decision-makers in chiseling out solutions to multifaceted problems. But the decision-maker is not necessarily, or even preferably, a court applying a constitutional principle that purports to concertize, in advance, the requirements of subsidiarity.

But doesn't this mean that subsidiarity is useless for interpreting the Establishment Clause of the U.S. Constitution? For the last sixty years, the Clause has managed church-state disputes through the matrix of judicially-created legal rules. But we have just suggested that the “establishment problem” viewed through the lens of subsidiarity is not amenable to rule-based determination. The natural conclusion would seem to be that, whatever policy aid subsidiarity might furnish at the intersection of religion and government, it can offer no help in interpreting the Establishment Clause. Or can it?

B. On Second Thought, Yes!

The key to seeing how subsidiarity can, in fact, illuminate the Establishment Clause is to understand the relationship between subsidiarity and federalism. This is to ask not whether subsidiarity can be translated into judicially-enforceable constitutional rules, but whether

the principle can be expressed through a governmental structure. It is federalism that bears the strongest earmarks of subsidiarity.³² Indeed, for Chantal Millon-Delsol, a federal system represents “the concrete expression of the formal principle [of subsidiarity] [and] its most meaningful and elaborated expression.”³³ A federal system exemplifies subsidiarity because the coalition of lower state entities *preexisted* the formation of the central government, consenting to its creation and empowerment. Millon-Delsol explains the creation of federal systems in terms of subsidiarity:

The [governmental] competencies belong naturally and without need of any rational justification to the nearest entities. The competencies of the [central] state must, on the contrary, receive justification, since they emerge from a secondary need. The competencies of the federal state are enumerated, that is, restrictive and based on rational calculation.³⁴

Thus, the formation of a federal state is subsidiarity-in-action, the structural elaboration of the theory itself.³⁵

A federal organization resonates with subsidiarity because it promotes a liberty situated less within the confines of abstract theories of right than within concrete situations and realistic human capacities.³⁶ Rather than promising rationalized solutions to political and social dilemmas, federalism proposes a flexible matrix for pluralistic societies through a graduated governmental structure.³⁷ Subsidiarity and federalism, consequently, are concerned with managing pluralism, and not simply with decentralizing governmental power. Subsidiarity is not simply about devolution of power to the lowest possible level of government, but, as Russell Hittinger explains, it is “a normative structure of plural social forms ... an account of the pluralism in society.”³⁸ Likewise, federalism provides a matrix within which diverse constituent governments can co-exist for their mutual benefit without relinquishing their own identities or capacities for self-government.

Consequently, it can be said that the federalism of the U.S. Constitution shows subsidiarity at work. In ratifying the Constitution, the people of the constituent states reclaimed sovereignty and redistributed portions of it to a new central government. The new government possessed powers divided among branches and delimited to spheres of sovereignty with respect to the states. For instance, the national legislature’s powers were enumerated in terms of areas of competence, such as to “declare War,” to “establish a uniform Rule of Naturalization,” and to “regulate Commerce with foreign nations.”³⁹ The

limited nature of the grant of powers is confirmed by the Tenth Amendment, which provides that “[t]he 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.”⁴⁰ This strategy of formation articulates concretely what subsidiarity prescribes in theory.⁴¹

But even if subsidiarity describes the structural allocation of competencies in the U.S. federal system, how does that help us understand the Establishment Clause as a component of that system? Subsidiarity would view the Clause—one expressing what Congress may *not* do—as a decision by the constituent states *not* to empower the central government in a field the Clause describes as laws “respecting an establishment of religion,” and a concomitant decision to retain power over that field at the state level. The Clause would thus not posit any substantive theory of church-state relationships at the federal level, and would also be an unlikely source for judicially enforceable rules about church-state issues. The problem is, of course, that *this* Establishment Clause bears little resemblance to the Clause the Supreme Court has been struggling to interpret for the past two generations. *That* Clause is supposed to contain answers to questions such as “Does a large menorah next to a Christmas tree outside city hall constitute a forbidden establishment of religion?”⁴² The subsidiary Clause, by greatest contrast, would offer as its only response to such a question: “Such questions are better left to the states.”⁴³

But the counter-intuitive picture presented by subsidiarity ends up illuminating the Establishment Clause. For instance, subsidiarity shows why it is difficult to reconcile modern Establishment Clause jurisprudence—which treats the Clause as a source of rules for resolving specific church-state issues—with the history of the Clause, which suggests that the Clause was neither proposed as a normative source for resolving most church-state disputes, nor intended to embody any overarching theory of church-state relationships.

The genesis of the Constitution and the First Amendment bedevils our modern search for “constitutional” church-state principles. Framing, text, and ratification debates do not reveal what substantive church-state theory, if any, was being promoted by the Constitution and the religion clauses.⁴⁴ Gerard Bradley has come to the common-sense conclusion that “[t]he Philadelphia Framers were not concerned with religion, because they believed theirs was a project unrelated to it.”⁴⁵ But subsidiarity reorients our search for Establishment Clause meaning to the states’ perspectives. State concerns about the Constitution as a whole centered around the powers being confined to the new central government, and their likely effect on the states.⁴⁶ Subsidiarity sees state

concerns about church-state matters as mirroring their wider apprehensions about federal power. The framers and ratifiers would thus have had no inclination to debate what substantive theory of church-state relationships to embed in the new Constitution (as opposed to debating, for instance, the scheme of representation in Congress, or the taxing power of the federal government). This turns out to be the case, as John Witte observes: “It was commonly assumed at the convention that questions of religion and of religious liberty were for the states and the people to resolve, not the budding federal government.”⁴⁷

The church-state issue that did occupy the states was not substantive, but jurisdictional: whether the new Constitution reliably limited federal power over their own church-state arrangements.⁴⁸ Thus, six states were moved to condition ratification on the adoption of limitations of federal power, variously phrased, over some aspect of religion or religious establishments.⁴⁹ These proposals, however phrased, could not have been designed to create new federal powers over religion. Instead, they sought to curtail federal power over a sensitive area of state competence. Subsidiarity interprets such proposals within the framework of building a subsidiary government. Pre-existing constituent states wanted to safeguard their own prerogatives in an area in which the bitter memories of an established national church were still fresh. The Establishment Clause was to declare and underwrite that understanding.⁵⁰

Subsidiarity thus supports the understanding that the framing and ratification of the religion clauses, and the Establishment Clause in particular, were directed to preserving state power, and confining federal power, over church-state arrangements.⁵¹ The Clause forestalled the exercise of federal power over a particular realm of state decision-making (a power which, of course, federalist proponents of the new Constitution disclaimed).⁵² When federalists denied that such amendments were necessary, they emphasized, not positive federal guarantees of religious liberties, but the lack of enumerated federal powers to interfere in state religious arrangements and the checking function of a thriving multiplicity of religious sects.⁵³

This subsidiary view clarifies the sparse records of the framing of the religion clauses.⁵⁴ Instead of poring over subtle shifts in the clauses’ phrasing,⁵⁵ subsidiarity emphasizes how the framers’ structural motivations afforded consensus among federalists and antifederalists. The Establishment Clause thus becomes, not a latent formula for resolving church-state disputes, but a political compromise designed to avoid making those disputes a convulsive national issue. This also contextualizes the opaque debates over the phrasing of the religion

clauses. It shows that these reservations were not about what church-state theory the clauses were instantiating, but instead expressed anxieties about what possible *misuse* of the clauses would mean for state religious arrangements. For instance, Benjamin Huntington feared that a broad interpretation would grant federal jurisdiction to interfere in the New England states' compulsory ministerial taxes, but Madison assured him it would not.⁵⁶ Although the participants did not know the term, this was a debate over subsidiarity, and not over substantive church-state matters.

Unlike much originalist treatment of the Establishment Clause, a subsidiarity analysis avoids pummeling history for answers to unforeseen church-state problems.⁵⁷ For subsidiarity, the key historical point is this: before and after the passage of the Constitution and its religion clauses, the hard substantive work in the church-state area occurred not at the national level but in the states, where it would continue for another century-and-a-half. As Carl Esbeck explains, the “disestablishment” of existing state establishments was not the work of the First Amendment, but instead “unfolded more gradually, state by state, and somewhat differently in each state, depending on the state’s unique colonial background.”⁵⁸ The subsidiary Establishment Clause was concerned to see that church-state theories and debates were kept where they were useful—in the states.

Subsidiarity counsels that it is folly to think the Establishment Clause *added* a new sphere of federal competence to the Constitution. The next 150 years of American religious history silently but eloquently make that very point: the religion clauses played virtually no direct role in regulating church-state relationships.⁵⁹ That delicate task continued, as it had before, in myriad state constitutional provisions, statutes, and judicial decisions.⁶⁰ At most, the religion clauses could be said to have maintained the political and sociological conditions under which religious liberty could emerge through state experimentation and evolution. This has all the earmarks of a subsidiary solution to a thorny problem—seeking equilibrium as opposed to definitive solutions by locating decision-making authority at the level best adapted to managing the issue.

But the subsidiary Establishment Clause confounds our modern expectations. Dating from the 1940s, the Supreme Court has trained us to expect courts to massage a substantive church-state theory from the Clause, with a caravan of accompanying rules and tests. The first modern disestablishment case itself, *Everson*, attempted to do just that in one sweeping paragraph—a kind of judicial *fiat lux*—whose contradictions are still contorting the Supreme Court’s

jurisprudence.⁶¹ Subsidiarity whipsaws us in the opposite direction: it leaves one viewing the Establishment Clause as a constitutional appendix, where one was used to seeing it as a major organ. But subsidiarity furnishes more than a negative account of the Clause. At the same time, it affirmatively explains the role the Clause has played in managing the problem of religious establishments in our complex, pluralistic society.

The subsidiary Clause is more than a negative judgment about centralized authority, nor does it simply ignore the question of individual rights. To the contrary, the Clause stands as a prudential judgment about where the common good regarding church-state matters was to be reliably pursued and, consequently, where individual religious liberties were to emerge most securely and concretely. Subsidiarity thus shows that a limited Establishment Clause nonetheless advances a positive good, because it underwrites both federalism and religious pluralism as a way of managing the problem of religious establishments. This supports Steven Smith's argument that, in the two generations following the framing, a combination of federalism and religious pluralism worked powerfully in favor of religious liberties at the state level:

[I]t seems clear that this [religious] pluralism deserves most of the credit for the elimination of religious establishments in this country and for the spectacular growth of diversity of religions and faiths. For example, within a half-century after the adoption of the Constitution, all states had eliminated their official religious establishments, wholly without prodding, we should note, from the Supreme Court. During this same period a large number of religious movements and experiments sprang up throughout the country.⁶²

Further, subsidiarity does not empty the Clause of all judicially-enforceable content. But it shifts our expectations about the *kind* of content to be found there. We should expect to find in the subsidiary Clause "boundary" rules as opposed to "substantive" rules. If the thrust of the Clause is to cordon off an area of competence from the central government, and reserve it to the constituent states, then one should be able to derive from the Clause fairly concrete rules for policing those boundaries.⁶³ Conversely, one should not expect to find rules for resolving disputes that clearly lie across the boundary.

This more limited scope for the Clause does not drain the Clause of substance. The boundary, after all, must be delineated. A

court would need to discern the area of competence withheld from the central government—laws “respecting an establishment of religion.” But this does not simply resurrect the perennial difficulty of defining an establishment. The subsidiary Clause limits and channels the historical inquiry, because the Clause would now be viewed as a concrete political compromise worked out in a particular historical and legal context. For example, one would be interested in understanding as precisely as possible the legal contours of an “establishment of religion” at the time of the framing and ratification of the Clause. One would also inquire into the political and religious motivations behind the collective decision not to vest the new federal government with control over state religious establishments. Further, one would need to identify the legal mechanisms that would have been used by states to “disestablish” the existing establishments, for that would bear strongly on the legal means that were denied the federal government by the Clause. There is already a rich body of historical and legal scholarship on these issues.⁶⁴

Moreover, this view does not exclude all substantive content from the Clause. Even positing that the Clause was jurisdictional, the Clause might also disable federal laws that, as a practical matter, would trespass into state competencies. For instance, if the federal government established its own national religion, this would effectively interfere with state decisions in the church-state area. Or the federal government might enact a nationwide voucher scheme that practically impedes state-crafted voucher solutions, assuming that voucher schemes would fall within the “establishment” competencies of the states. Furthermore, the subsidiary Establishment Clause would not necessarily deprive the federal government of all power over the general subject matter of religion (so that it might have the power to pass laws like RLUIPA⁶⁵ or Title VII’s exemption for religious employers⁶⁶). The Clause would instead be understood as cordoning off the federal government from an area of competence defined in terms of a distinct set of legal conditions, conceived in light of the historical experience of establishments of religion.

The view that a subsidiary Clause is a likelier source for boundary rules than substantive rules helps explain core difficulties in the Court’s Establishment Clause cases. Subsidiarity suggests two explanations for those well-known⁶⁷ difficulties: (1) many church-state problems present complex, intractable conflicts that are not amenable to rule-based judicial resolution, and (2) justices must develop and apply their own theoretical premises to resolve church-state problems. To these dilemmas subsidiarity offers no solutions, except to say that they were predictable. If, as subsidiarity suggests, church-state problems

resist resolution by *a priori* rules and cry out for political compromise, then judicial attempts to solve them through rules would inevitably be mired in inconsistency and unpredictability. If, as subsidiarity suggests, the Establishment Clause does not incarnate any church-state theory, then judges attempting to employ the Clause *as if* it contained such a theory would inevitably import their own.

These kinds of judicial rule-making dilemmas are not merely instances of bad rules that fail to provide predictable answers. Rather, they are situations when courts attempt to craft all-encompassing rules for problems that seem inherently resistant to rule-based resolution. Establishment case law bristles with examples: whether aid to religious schools “advances religion”; whether an “accommodation” of religion appropriately lifts a burden on religious activity or unfairly “fosters” it; whether a law results in “religious divisiveness.”⁶⁸ Applying even sophisticated rules to such situations has not led the Court toward consistent solutions, but has rather invited justices simply to reformulate church-state problems in the rule’s terms, endlessly.

Subsidiarity also explains why Establishment cases have featured dueling theories of church-and-state, most purporting to be derived from the historical genesis of the Clause. Justices have adopted a smorgasbord of church-state theories, such as “separation of church and state,” “strict separation,” “accommodation,” “non-preferentialism,” “neutrality,” “benevolent neutrality,” and so on.⁶⁹ They have also taken differing views of the role history should play in the interpretation of the Establishment Clause, often using history to underwrite a particular theory or outcome.⁷⁰ A subsidiary view of the Clause explains why such promiscuous theorizing would occur. Because the Clause itself contains no substantive church-state theory, justices would have to import one.

Finally, subsidiarity suggests a different approach to the difficult question of how the Clause can logically apply to the states. The Court has applied the Clause against the states without seriously considering the Clause’s federalism aspects, and has recoiled from reassessing the content of the incorporated Clause in light of its original function.⁷¹ Commentators have often observed that application of the Clause to the states presents a basic logical problem.⁷² Subsidiarity provides a helpful way of reconceiving that problem.

But doesn’t a subsidiary view of the Clause *by definition* foreclose its application against the states? If the Clause is primarily a structural barrier against federal interference in state establishment matters, then isn’t it true, as Steven Smith has argued, that incorporating the Clause effectively *repeals* it?⁷³ Maybe, but that conclusion has less to do with subsidiarity, than with the content of the Fourteenth

Amendment. If the Fourteenth Amendment mechanically applies against the states all the substantive guarantees formerly applicable against the federal government, then simple logic dictates that the Establishment Clause cannot be incorporated—there is no substance to incorporate. On that view, applying the Clause to the states misses the fact that the pre-incorporation Clause already addressed itself to *both* the federal and state governments (unlike, for instance, the Fourth Amendment).⁷⁴ Subsidiarity, however, suggests a helpful way of re-conceiving incorporation.

Just as subsidiarity provides a vantage point for understanding federalism, it can do the same thing for incorporation. Incorporation, after all, involves a realignment of the federal structure. The extent of that realignment was the subject of intense and lengthy debate, with the debate focusing on the historical context and legal content of the Reconstruction Amendments.⁷⁵ A subsidiary analysis of the incorporation of the Establishment Clause would attempt to situate its incorporation within the wider historical and legal context of Reconstruction.

When the Supreme Court decided to apply the Clause to the states, it simply assumed that the Clause's protections were fundamental, and proceeded to apply them with reference to what it now widely recognized as shoddy historiography.⁷⁶ Subsidiarity, at the very least, would provide an intelligible matrix for understanding incorporation of the Clause.⁷⁷ One would focus on the historical context of Reconstruction, looking for evidence that states wanted to transfer to the central government certain responsibilities over church-state matters. Identifying specific church-state problems at issue would be crucial, for subsidiarity holds that the intervention of higher authority is limited by the contours of particular incapacities. Next, one would ask how the Fourteenth Amendment effects a transfer of authority to the federal government over some or all church-state problems. Subsidiarity would require that such a transfer occur through an intelligible political compromise, hammered out in light of concrete circumstances.

Whatever such an inquiry would yield, it would likely not drain the incorporated Establishment Clause of all substance. But it would probably result in a far more modest Clause. Its primary benefit would be to focus an inquiry concerning a major structural shift in federalism precisely on the dynamics of that shift. It would also remove the aura of unreality surrounding incorporation of the Establishment Clause—namely, that a constitutional provision that had never been used to police religion in the federal government, and whose history suggested no theoretical content beyond a structural limitation on federal power, could

somehow be brought to life after 150 years of dormancy and used to regulate the myriad religious controversies of an increasingly pluralistic and religious nation.

Notes

1. This paper is adapted from a much longer treatment of the subject that appears in an article forthcoming in the *Villanova Law Review*. See Kyle Duncan, *Subsidiarity and Religious Establishments in the U.S. Constitution*, 52 VILLANOVA LAW REVIEW 67 (2007).

2. See generally Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 AM. J. INT'L L. 38, 40-46 (2003); Robert K. Vischer, *Subsidiarity as a Principle of Governance: Beyond Devolution*, 35 IND. L. REV. 103, 108-21 (2001); George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 332-44 (1994); Ken Endo, *The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors*, 44 HOKKAIDO L. REV. 652, 642-10 (ch. I & II) (1994).

3. See, e.g., Carozza, *supra* note 2, at 45 (subsidiarity results in a “genuinely pluralistic society”).

4. See, e.g., Endo, *supra* note 2, at 640-38 (explaining the distinction between “non-territorial” and “territorial” subsidiarity).

5. See, e.g., Carozza, *supra* note 2, at 41 (labor relations); Bermann, *supra* note 2, at 342-43 (“internal divisions of component states”).

6. See Bermann, *supra* note 2, at 343 (observing the “special relationship that exists between subsidiarity and federalism”).

7. See, e.g., Carozza, *supra* note 2, at 42-43 (“subsidiarity presupposes that the human person toward whose flourishing the application of the principle is aimed is naturally social”).

8. See, e.g., John Finnis, *Natural Law & Natural Rights* 144-47 (1980) (discussing function of family in subsidiarity).

9. See Carozza, *supra* note 2, at 43.

10. COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH, par. 185 (2004) (quoting John Paul II’s encyclical *Sollicitudo Rei Socialis*, 15 (1988)).

11. On the role of mediating structures in subsidiarity, see generally Vischer *Beyond Devolution*, *supra* note 2, at 116-21, 116 n. 63. Vischer

relies primarily on the seminal works by Richard John Neuhaus & Peter Berger, *To Empower People: The Role of Mediating Structures in Public Policy*, in MARK GERSON, ED., *THE ESSENTIAL NEOCONSERVATIVE READER* (1996), and Peter L. Berger and Richard John Neuhaus, *Peter Berger and Richard John Neuhaus Respond*, in MICHAEL NOVAK, ED., *TO EMPOWER PEOPLE: FROM STATE TO CIVIL SOCIETY* (2d ed. 1996).

12. Vischer, *Beyond Devolution*, *supra* note 2, at 116 & n. 63 (quoting Neuhaus & Berger, *Mediating Structures*, *supra* note 11, at 213, 214).

13. *See generally* Carozza, *supra* note 2, at 44; Vischer *Beyond Devolution*, *supra* note 2, at 118-21.

14. Vischer, *Beyond Devolution*, *supra* note 2, at 116.

15. *Id.* at 45 (quoting Clifford Kossel, *Global Community and Subsidiarity*, 8 *Communio: Int'l Cath. Rev.* 37, 48 (1981)).

16. Carozza, *supra* note 2, at 66.

17. For a general discussion, *see* Carozza, *supra* note 2, at 41-42; Vischer, *supra* note 2, at 108-115; Endo, *supra* note 2, at 627-21.

18. Pope Pius XI, *Quadragesimo Anno*, par. 79, 80 (1931); *see also* Pope Leo XIII, *Rerum Novarum*, par. 35, 36, 37 & 55 (1891); Pope John Paul II, *Centesimus Annus*, par. 48 (1991) (discussing application of subsidiarity to government social assistance). The recently published *Compendium of the Social Doctrine of the Church* (2004) gathers together all the relevant Church texts on subsidiarity. *See* COMPENDIUM, par. 185-88. In his first encyclical letter, *Deus Caritas Est*, Pope Benedict XVI reaffirmed the centrality of subsidiarity to the Church's social teaching. *See Deus Caritas Est*, par. 29b (2005).

19. *See, e.g.,* Duncan, *supra* note 1, at 82-90.

20. On the idea of the common good, especially in the work of Jacques Maritain, *see, e.g., generally* Patrick Brennan, *Jacques Maritain*, in 1 *THE TEACHINGS OF MODERN CHRISTIANITY* 94-95 (2006). In Catholic social thought, the common good is conceived as "the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment." *Id.* at 96 (quoting *Gaudium et Spes*, in *VATICAN COUNCIL II: THE CONCILIAR AND POST CONCILIAR DOCUMENTS*, ed. Austin Flannery (1975) 59, 74).

21. *See* Chantal Millon-Delsol, *L'Etat Subsidaire: Ingérence et Non-Ingérence de L'Etat: Le Principe de Subsidiarité aux Fondements de*

L'Histoire Européenne (1992). All citations will be to the Italian translation of Millon-Delsol's book. See Chantal Millon-Delsol, *Lo Stato della Sussidiarietà* 59-61 (Rosario Sapienza trans., 1995)

22. Russell Hittinger, *Introduction to Modern Catholicism*, in 1 TEACHINGS OF MODERN CHRISTIANITY 23 (2006).

23. Millon-Delsol, *supra* note 21, at 123-26 (my trans.).

24. John M. Czarnetzky & Ronald J. Rychlak, *An Empire of Law? Legalism and the International Criminal Court*, 79 *Notre Dame L. Rev.* 55, 121 (2003) (discussing application of subsidiarity to the International Criminal Court).

25. See, e.g., Michael P. Moreland, *Subsidiarity, Localism and School Finance*, in 2 *JOUR. CATH. SOC. THOUGHT* 369-70 (2005) (discussing “recurring theme in the literature on subsidiarity ... that the principle of subsidiarity is indeterminate, vague, and ultimately unhelpful to the resolution of concrete legal and policy questions”).

26. Millon-Delsol, *supra* note 21, at 190; see also Czarnetzky & Rychlak *Empire of Law*, *supra* note 24, at 122 (as applied to the International Criminal Court, subsidiarity suggests that, “[b]y focusing on an inquiry into the common good of the nation and, therefore, the actual human beings involved, the calculus of whether to assert jurisdiction in a particular case is not mechanically foreordained”).

27. Millon-Delsol, *supra* note 21, at 190.

28. *Id.* at 193-94.

29. Throughout his discussion of the mediating functions of associations, Robert Vischer describes various examples of such degradation. See, e.g., Robert K. Vischer, *The Good, the Bad, and the Ugly: Rethinking the Value of Associations*, 79 *Notre Dame L. Rev.* 949, 965 (2004) (if state intervention prevents association from pursuing “ventures found meaningful by members, the functions of expression, identity, and purpose would be eviscerated; the association would cease playing a mediating role, and would simply be an arm of the state”).

30. Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 *Wm. & Mary L. Rev.* 2105, 2208 (2003).

31. Patrick Brown writes that, since “subsidiarity should be viewed as an open and heuristic notion,” then “[u]ltimately there is no rule, formula, or concept that can tell us precisely how power should be delegated or

tasks should be distributed between any particular hierarchy of communities or organizations or within communities or organizations. Everything depends on concrete insights appropriate to particular and often changing situations.” See, e.g., Patrick Brown, *Overcoming “Inhumanly Inept” Structures: Catholic Social Thought on “Subsidiarity” and the Critique of Bureaucracy, Law, and Culture*, in 2 JOUR. CATH. SOC. THOUGHT, *supra* note 25 , at 428.

32. See generally Millon-Delsol, *supra* note 21, at 215-20.

33. *Id.* at 215.

34. *Id.* at 217 (my trans.).

35. *Id.* (my trans.). Among some commentators, there appears to be a sharp difference of opinion about the relationship between subsidiarity and American federalism. Thus, David Currie claims that “subsidiarity is the guiding principle of federalism in the United States,” while George Bermann concludes that subsidiarity is neither in the “lexicon of U.S. Constitutional law,” nor a “central feature of U.S. Constitutional practice,” and is “foreign to the law and practice of federal legislation.” Compare David Currie, *Subsidiarity*, 1 GREEN BAG 359 (1998), with Bermann, *supra* note 2, at 403, 406. For discussion of this disagreement, see Duncan, *supra* note 1, at 93, n.130.

36. Millon-Delsol, *supra* note 21, at 217.

37. A famous example of this sort of “refusal” to provide definite solutions to social and political problems is Madison’s explanation in Federalist 10 and 51 of the Constitution’s solution to the problem of factions. See THE FEDERALIST Nos. 10, 51.

38. Hittinger, *supra* note 22, at 23.

39. See U.S. CONSTITUTION, Article I, § 8, cl. 11, 4, 3.

40. See U.S. CONSTITUTION, Amendment X.

41. For an elaboration of this point, with reference to framing-era debates, see Duncan, *supra* note 1, at 93-94.

42. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989) (noting Establishment Clause “limits religious content of the government’s own communications” as well as “[prohibits] government support and promotion of religious communications by religious organizations.... By prohibiting government endorsement of religion, the Establishment Clause prohibits precisely... the government’s lending its support to the communication of a religious organization’s religious message”).

43. That is not to say that the menorah-and-Christmas-tree situation even implicates the basic idea of a religious *establishment*, nor that the subsidiary Establishment Clause would bar the federal government from setting up such a display. The example is meant to suggest only that the subsidiary Clause would not have been formulated to answer substantive questions such as the one the Court labored at so mightily in the *Allegheny* case.

44. *See, e.g.*, John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* 64 (2000) (commenting that “[t]he record of the Congress’s effort [to draft the religion clauses] is considerably slimmer than is apt for such a momentous act”); Gerard V. Bradley, *Church-State Relationships in America* 112 (1987) (commenting that “[n]ot a single state recorded debates, and individual voting behavior was rarely memorialized”).

45. Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 *Case W. Res. L. Rev.* 674, 711 (1987).

46. *See generally* Gordon S. Wood, *The Creation of the American Republic (1776-1787)* 519-32 (2d. ed. 1998) (describing political debates surrounding extent and nature of federal powers under new Constitution).

47. Witte, *supra* note 44, at 61.

48. Commenting on the “mysterious” silence of the Framers on the content of the Religion Clauses “given the passionate debates engendered by those terms in later history,” James Hitchcock writes that the “silence is comprehensible on the assumption that the terms were largely devoid of positive content and were intended merely to ensure that the federal government did not interfere with the religious arrangements of the various states.” James Hitchcock, 1 *The Supreme Court and Religion in American Life* 29 & n.70 (2004) (collecting authorities).

49. Witte, *supra* note 44, at 63-64.

50. *See, e.g.*, Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 *IOWA L. REV.* 1, 16-17 (1998).

51. This understanding of the original meaning of the Establishment Clause has occasioned a lively debate among scholars. *See generally* Ira C. Lupu & Robert Tuttle, *Federalism and Faith*, 56 *EMORY L. J.* ___ (2006) (summarizing the debate over the federalism aspects of the Establishment Clause).

52. *See, e.g.*, Witte, *supra* note 44, at 61 (reporting Madison’s comment to the Virginia Ratifying Convention that “[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it, would be a most flagrant usurpation”).

53. *Id.* at 79-80; see also THE FEDERALIST No. 10, *supra* note 37, at 42-48 (discussing structural remedies against factionalism, and including within the causes of faction “[a] zeal for different opinions concerning religion”); *id.* No. 51 (claiming that “[i]n a free government, the security for civil rights must be the same as that for religious rights ... consist[ing] in the one case in the multiplicity of interests, and in the other, in the multiplicity of sects”). In his remarks to the Virginia Ratifying Convention in June 1788, Madison remarked that “[h]appily for the states, they enjoy the utmost freedom of religion,” which “arises from that multiplicity of sects, which pervades America, and which is the best and only security for religious liberty in any society.” PHILIP B. KURLAND & RALPH LERNER, EDS., THE FOUNDERS’ CONSTITUTION, Vol. V, 88 (1987).

54. *See, e.g.*, Witte, *supra* note 44, at 64-72.

55. *See id.* at 72 (noting that “[t]he final text [of the religion clauses] has no plain meaning” and “[t]he congressional record holds no Rosetta Stone for easy interpretation”).

56. *See id.* at 66-67.

57. *See, e.g., id.* at 72; STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 46-48 (1995) (discussing the difficulties of the modern, originalist project of trying to reconstruct the answers to first-order religion questions from the historical evidence).

58. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 B.Y.U. L. REV. 1385, 1393 (2004).

59. *See, e.g.*, Witte, *supra* note 44, at 87 (observing that “[f]or the first 150 years of the republic, principal responsibility for the American experiment in religious rights and liberties lay with the states”).

60. *See generally id.* at 87-100 & noted authorities.

61. In *Everson*, the Court announced:

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 from 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.

Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947). *Everson’s* tendentious use of history to interpret the Establishment Clause has been widely criticized. See, e.g., SMITH FOREORDAINED FAILURE, *supra* note 57, at 5; Daniel O. Conkle, Toward a General Theory of the Establishment Clause, 82 Nw. U. L. Rev. 1113, 1130-35 (1988); BRADLEY CHURCH-STATE, *supra* note 44, at 91-92; John Courtney Murray, Law or Prepossessions?, in *Essays in Constitutional Law* (Robert G. McCloskey ed., 1957)

62. Steven D. Smith, *Getting Over Equality: A Critical Diagnosis of Religious Freedom in America* 21 (2001).

63. Cf. Esbeck *Structural Restraint*, *supra* note 50, at 104-09 (exploring the question “boundary keeping” posed by a structural view of the Establishment Clause).

64. See, e.g., generally McConnell, *Establishment and Disestablishment*, *supra* note 30, at 2131-2181 (discussing the legal components of establishments in the colonies and early states).

65. See *Cutter v. Wilkinson*, 125 S. CT. 2113 (2005) (upholding section 3 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a)(1)-(2)).

66. See *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (upholding exemption of religious organizations from Title VII’s prohibition of employment discrimination on the basis of religion, 42 U.S.C. § 2000e-1).

67. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 106-112 (1985) (Rehnquist, J., dissenting) (asserting that “in the 38 years since *Everson* our

Establishment Clause cases have been neither principled nor unified.” and describing the disarray at length).

68. See, e.g., *Amos*, 483 U.S. at 334-35 (describing Court’s approach as “recogniz[ing] that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause”); *Van Orden v. Perry*, 125 S. Ct. 2854, 2871 (2005) (Breyer, J., concurring) (upholding Ten Commandments display by relying, in part, on the fact that “[t]his display has stood apparently uncontested for nearly two generations ... [and] [t]hat experience helps us understand that as a practical matter of *degree* this display is unlikely to prove divisive) (emphasis in original). For an excellent discussion of, and demolition of, this divisiveness project, see Richard W. Garnett, *Religion, Division and the First Amendment*, __ GEORGETOWN L. REV. __ (2006).

69. See, e.g., Witte, *supra* note 44, at 152-63 (classifying the “unique, and often sharply juxtaposed, approaches” the Court has developed since 1947 for addressing Establishment Clause problems).

70. For instance, compare the different conclusions reached by using history to interpret the Establishment Clause in then-Justice Rehnquist’s dissent in *Wallace*, Justice Black’s majority opinion in *Everson*, Justice Rutledge’s dissenting opinion in *Everson*, Justice Souter’s concurring opinion in *Lee v. Weisman*, and Justice Scalia’s dissenting opinion in *McCreary County*. See *Wallace*, 472 U.S. at 91-104 (Rehnquist, J., dissenting); *Everson*, 330 U.S. at 8-15 (majority opinion of Black, J.); *id.* at 32-43 (Rutledge, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 612-16 (1992) (Souter, J., concurring); *McCreary*, 125 S. Ct. at 2748-51 (Scalia, J., dissenting).

71. See, e.g., *Wallace*, 472 U.S. at 48-51 (rejecting as against an “elementary proposition of law” the district court’s “remarkable conclusion” that the Establishment Clause should be interpreted as not applying to the states); *but see Cutter*, 125 S. Ct. at 2126 (Thomas, J., concurring) (asserting that “ an important function of the Clause was to make clear that Congress could not interfere with state establishments,” and that the Clause “is best understood as a federalism provision” that “protects state establishments from federal interference.” (internal quotations omitted) (citing *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring); *Zelman*, 536 U.S. at 677-680 (Thomas, J., concurring); *Lee*, 505 U.S. at 641 (Scalia, J., dissenting)).

72. Steven Smith notes that “First Amendment scholars have often noted the federalist element in the religion clauses, particularly in the establishment clause, and have realized that this element poses difficulties, both historical and conceptual, for the theory that the establishment clause was ‘incorporated’ into the Fourteenth Amendment and thereby extended to the states.” SMITH FOREORDAINED FAILURE, *supra* note 57, at 18 (collecting sources). Akhil Amar captures the conundrum well: “[T]he 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. ... [T]o apply the clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself.” AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 33-34 (1998).

73. SMITH FOREORDAINED FAILURE, *supra* note 57, at 49-50.

74. See, e.g., AMAR BILL OF RIGHTS, *supra* note 72, at 34 (reasoning that, because “the original establishment clause ... is not antiestablishment but pro-states’ rights [and] ... is agnostic on the substantive issue of establishment versus nonestablishments and simply calls for the issue to be decided locally,” then attempting to incorporate the Clause is like attempting to incorporate the Tenth Amendment).

75. Generally on incorporation, see AMAR BILL OF RIGHTS, *supra* note 72, at 137-214; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); RAOUL BERGER, GOVERNMENT BY JUDICIARY 155-89 (2d. ed. 1997).

76. See *supra* note 61.

77. Other scholars have suggested rethinking incorporation of the Establishment Clause by reference to the context of Reconstruction. See, e.g., AMAR BILL OF RIGHTS, *supra* note 72, at 246-257; SMITH FOREORDAINED FAILURE, *supra* note 57, at 50-54; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L. J. 1085 (1995); Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994).