

Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account

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Incorporation of the Establishment Clause against the states through the Fourteenth Amendment is logically and textually impossible—so say most academics, a few lower-court judges, and a Supreme Court Justice. They maintain that because the Clause was originally understood as a structural limitation that protected state power against the federal government, it cannot restrain state power or fit within the Fourteenth Amendment texts that protect personal rights—indeed, that attempts to show that it does are laughable.

This purported incoherence and textual inconsistency enable anti-incorporation critics to avoid serious engagement of the anti-establishment dimensions of Reconstruction history. They also undermine the Clause's vigorous application against the states and place the Court's anti-establishment decisions under a cloud of illegitimacy.

This Article sets forth logical, textual, and historical justifications for Establishment Clause incorporation based on the original eighteenth-century understanding of the Clause as a purely structural limitation on federal power. By its terms, the Establishment Clause did not reserve state power but disabled congressional action. As an express disability on Congress, the Clause generated two immunities, one held by the states against congressional interference with state decisions about religious establishment or disestablishment, and one held by the people against congressional establishment of a national religion.

As part of Reconstruction's imposition of new federal limits on state power, the Fourteenth Amendment extinguished the state immunity from federal interference but extended the personal immunity to protect the people against state as well as federally established religions. This is logically coherent in the context of Reconstruction's goals and also sounds in the personal liberty and citizen immunities protected by the text of the Fourteenth Amendment. When framed by a logical and textual account of Establishment Clause incorporation, Reconstruction history suggests an originalist account of the Fourteenth Amendment's application of the Establishment Clause to the states.

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Incorporation of the Establishment Clause, therefore, is not laughable but eminently defensible. Its justifications require more careful consideration by courts and commentators than they have yet received.

INTRODUCTION	670
I. DIMENSIONS OF ESTABLISHMENT CLAUSE INCORPORATION	677
A. CASUAL INCORPORATION	677
B. ANTI-INCORPORATION ATTACKS.....	678
C. FRAMING EFFECT.....	683
D. FAINTHEARTED DEFENSES.....	690
II. A TEXTUAL LOGIC FOR ESTABLISHMENT CLAUSE INCORPORATION	692
A. CONSTITUTIONAL DISABILITIES AND IMMUNITIES.....	692
B. ESTABLISHMENT CLAUSE DISABILITY AND IMMUNITIES	696
C. ESTABLISHMENT CLAUSE INCORPORATION	704
III. INCORPORATION HISTORY IN A LOGICAL AND TEXTUAL FRAME	710
A. BEFORE THE FRAMING.....	710
B. FRAMING AND RATIFICATION	714
C. AFTER RATIFICATION	719
D. SERIOUS HISTORY	720
CONCLUSION.....	721

INTRODUCTION

In 1947, with little apparent forethought,¹ the U.S. Supreme Court incorporated the Establishment Clause against the states as a dimension of the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.² Scholarly attacks arose almost immediately,³ and have not abated;⁴ recently they picked up an

1. *See infra* Part I.A.

2. *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

3. *See* J.M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION ch. 10 (1949); Edward S. Corwin, *The Supreme Court as National School Board*, 14 LAW & CONTEMP. PROBS. 3 (1949); Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371 (1954).

4. *See, e.g.*, *Sch. Dist. v. Schempp*, 374 U.S. 203, 309–10 (1963) (Stewart, J., dissenting); AKHIL REED AMAR, THE BILL OF RIGHTS 33–35 (1998); GERARD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA 9–10, 95–96 (1987); DANIEL L. DREISBACH, REAL THREAT AND MERE SHADOW 89–96 (1987); WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8–11 (1964); STEVEN D. SMITH, FOREORDAINED FAILURE 21–25, 49–54 (1995) [hereinafter SMITH, FOREORDAINED FAILURE]; Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does Not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1 (1998); Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1135–42 (1988); Richard F. Duncan, *Justice Thomas and Partial Incorporation of the Establishment Clause: Herein of Structural Limitations, Liberty Interests, and Taking Incorporation Seriously*, 20 REGENT U. L. REV. 37 (2007); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479–82 (1991); James J. Knicely, *"First Principles" and the Misplacement of the "Wall of Separation": Too Late in the Day for a Cure?*, 52 DRAKE L. REV. 171 (2004); Philip B. Kurland, *The Irrelevance of the Constitution: The*

enthusiastic cheerleader in Justice Thomas.⁵ Defenders, meanwhile, have been few.⁶

Religion Clauses of the First Amendment and the Supreme Court, 24 VILL. L. REV. 3, 9–11 (1979); William K. Lietzau, *Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation*, 39 DEPAUL L. REV. 1191 (1990); James McClellan, *The Making and the Unmaking of the Establishment Clause*, in A BLUEPRINT FOR JUDICIAL REFORM 295, 314–19 (Patrick B. McGuigan & Randall R. Rader eds., 1981); Luke Meier, *Constitutional Structure, Individual Rights, and the Pledge of Allegiance*, 5 FIRST AMENDMENT L. REV. 162 (2006); Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585 (2006); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. REV. 311, 317–26 (1986); William C. Porth & Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W. VA. L. REV. 109, 138–39 (1987); Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1060 (2011); Rupal M. Doshi, Note, *Nonincorporation of the Establishment Clause: Satisfying the Demands of Equality, Pluralism, and Originalism*, 98 GEO. L.J. 459 (2010); Russell A. Hilton, Note, *The Case for the Selective Disincorporation of the Establishment Clause: Is Everson a Super-Precedent?*, 56 EMORY L.J. 1701 (2007); Clifton B. Kruse, Jr., Note, *The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 WASHBURN L.J. 65, 110–15, 126–33 (1962); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992) [hereinafter Note, *Rethinking Incorporation*]; see also Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 25–27 (1998) (arguing that “the Court had to strain in order to squeeze a structural clause into a ‘liberty’ mold”).

A few lower courts have questioned the Clause’s application to the states, though obviously such opinions do not survive appellate or en banc review. See, e.g., *United States v. Hardman*, No. 99-4210, 2001 U.S. App. LEXIS 17702, at *46 n.18 (10th Cir. Aug. 8, 2001) (2–1 decision), *vacated on rehearing en banc*, 297 F.3d 1116 (10th Cir. 2001); *Jaffree v. Bd. of Sch. Comm’rs*, 554 F. Supp. 1104, 1118–28 (S.D. Ala. 1983), *rev’d sub nom. Jaffree v. Wallace*, 705 F.2d 1526, 1530–33 (11th Cir. 1983), *aff’d*, 472 U.S. 38, 48–50 (1985); *E. Bay Asian Local Dev. Corp. v. State*, 81 Cal. Rptr. 2d 908, 912 n.2 (Ct. App. 1999), *vacated on petition for cert.*, 13 P.3d 1122 (Cal. 2000).

5. See *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of certiorari); *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment); *Van Orden v. Perry*, 545 U.S. 677, 692–93 (2005) (Thomas, J., concurring); *Cutter v. Wilkinson*, 544 U.S. 709, 727–28 (2005) (Thomas, J., concurring); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 49–51 (2004) (Thomas, J., concurring in the judgment); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677–80 (2002) (Thomas, J., concurring).

6. See *Schempp*, 374 U.S. at 253–58 (Brennan, J., concurring); 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION 33–39 (2008) [hereinafter GREENAWALT, RELIGION]; Richard L. Aynes, *Ink Blot or Not: The Meaning of Privileges and/or Immunities*, 11 U. PA. J. CONST. L. 1295, 1316–19 (2009) [hereinafter Aynes, *Ink Blot or Not*]; Richard L. Aynes, *McDonald v. Chicago, Self-Defense, the Right to Bear Arms, and the Future*, 2 AKRON J. CONST. L. & POL’Y. 181, 188–90 (2011) [hereinafter Aynes, *McDonald*]; Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 508–10 (2006) [hereinafter Greenawalt, *Common Sense*]; Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085 (1995) [hereinafter Lash, *Establishment Clause*]; Douglas Laycock, *A Survey of Religious Liberty in the United States*, 47 OHIO ST. L.J. 409, 411–16

Early opponents of Establishment Clause incorporation maintained that the Clause was originally understood merely to have reserved to the states the power to establish or disestablish religion.⁷ If the purpose of the Clause was to protect state prerogatives, the arguments went, then it was (i) logically incoherent to apply it against the states,⁸ and (ii) textually unjustified to use due-process “liberty” as the vehicle for doing so.⁹ A running joke likens it to applying the Tenth Amendment to limit state power.¹⁰

Early anti-incorporationists did not discuss the drafting or ratification history of the Fourteenth Amendment, even though the original understanding of that amendment would seem to be the decisive issue.¹¹ The only Reconstruction-era history they brought to bear concerned the failed federal Blaine Amendment,¹² which (among many other things) would have applied the Establishment and Free Exercise Clauses to the states. Why would Congress consider Blaine in 1876, the argument went, if the Fourteenth Amendment had already applied the Establishment Clause to the states in 1868?¹³ Ergo, the Amendment must not have applied the Clause to the states in 1868.

Early anti-incorporationists set the rhetorical template followed by virtually every anti-incorporation argument that has followed. Conclusions about the logical and textual incoherence of Establishment Clause incorporation frame a historical record consisting of Blaine and little else.¹⁴ After all, if Establishment Clause incorporation is not logically and textually defensible, why bother with any more history than Blaine?

(1986) [hereinafter Laycock, *Religious Liberty*]; Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 241–43 (2004) [hereinafter Laycock, *Theology Scholarships*].

7. See Corwin, *supra* note 3, at 11–12, 15; Snee, *supra* note 3, at 373–89, 392, 406. In its most precise sense, “incorporation” refers to judicial application against the states of the original eighteenth-century understandings of the various provisions of the Bill of Rights as dimensions of the liberty protected by the Due Process Clause of the Fourteenth Amendment. For stylistic simplicity, however, I often use “incorporation” less precisely, to refer simply to the application of the Establishment Clause and other provisions of the Bill of Rights against the states through the Fourteenth Amendment generally.

Additionally, I often use “anti-incorporationist” and “incorporationist” to refer to one’s position on the Fourteenth Amendment’s application of the Establishment Clause to the states, as well as on its application of all or most of the Bill of Rights to the states.

8. See *infra* Part I.B.1.a.

9. See *infra* Part I.B.1.b.

10. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see, e.g., AMAR, *supra* note 4, at 34; BRADLEY, *supra* note 4, at 95; Conkle, *supra* note 4, at 1141; Lash, *Establishment Clause*, *supra* note 6, at 1099; Lietzau, *supra* note 4, at 1206; Paulsen, *supra* note 4, at 317; Porth & George, *supra* note 4, at 139; Snee, *supra* note 3, at 388; Note, *Rethinking Incorporation*, *supra* note 4, at 1709.

11. The first serious examination did not come until fifteen years after the Clause was incorporated by *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947); see, e.g., Kruse, *supra* note 4, at 110–13 (relying primarily on the work of Charles Fairman to conclude that the Fourteenth Amendment was not understood to apply the Religion Clauses to the states).

12. 4 CONG. REC. 205 (1875).

13. See *infra* Part I.B.1.c.

14. See *infra* Part I.B.2.

But the Blaine Amendment is exceedingly weak historical evidence against Establishment Clause incorporation, a weakness obscured by framing Blaine with incorporation's supposed illogic and textual infidelity.¹⁵ Shorn of this frame, Blaine has little interpretive significance; the lenses of logical incoherence and textual infidelity do the real persuasive work.¹⁶ Blaine is just anti-incorporation overkill, a flashy, historical weapon aimed at an argument already logically and textually dead. The absence of logic and text are also crucial frames for the purported silence of the Fourteenth Amendment framers about Establishment Clause incorporation,¹⁷ and even enable an anti-incorporation "originalism" that manages no reference to evidence of original meaning.¹⁸

Reasoned defenses of Establishment Clause incorporation are few. The Supreme Court defends incorporation with bare appeals to precedent,¹⁹ while general incorporation theorists avoid the problem altogether.²⁰ Most scholarly defenses actually concede the anti-incorporationist critique, arguing that the Clause evolved into a nineteenth-century personal right from structural and nonsubstantive eighteenth-century origins.²¹ Application of the Establishment Clause to the states thus seems simultaneously indefensible and indispensable, like a *coup d'état* against an elected but corrupt government.

The lack of a logical, textual, and historically plausible account of Establishment Clause incorporation constitutes a critical doctrinal void. Challenges to state action have generated almost the entire corpus of contemporary Establishment Clause

15. See *infra* Part I.C.

16. See *infra* Part I.C.1.

17. See *infra* Part I.C.2.

18. See *infra* Part I.C.3.

19. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 48–49 (1985) (explaining that Establishment Clause incorporation is a legal doctrine "firmly embedded in our constitutional jurisprudence"); *Sch. Dist. v. Schempp*, 374 U.S. 203, 215, 217 (1963) (explaining that Establishment Clause incorporation is a "decisively settled" question, and disincorporation is "entirely untenable"); see also LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 149–50, 226–27 (2nd rev. ed. 1994) (arguing that although Fairman's work and Blaine decisively prove that incorporation was not intended by the Fourteenth Amendment framers, the openness of the Amendment's text to incorporation and the Court's unanimous and bipartisan First Amendment incorporation precedents affirm its legitimacy).

20. For example, Michael Kent Curtis's path-breaking *NO STATE SHALL ABRIDGE* (1986) [hereinafter *CURTIS, THE BILL OF RIGHTS*], does not discuss Establishment Clause incorporation. See also Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509, 1515 n.12 (2007) [hereinafter Wildenthal, *Nationalizing the Bill of Rights*] (noting but not addressing the question of Establishment Clause incorporation).

21. See *infra* Part I.D. A few scholars, notably Douglas Laycock, argue that the Clause was originally understood to constitute a substantive personal right—"freedom from establishment"—as well as a structural reservation of state power. See, e.g., Laycock, *Theology Scholarships*, *supra* note 6, at 241–43 (citing and discussing Douglas Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 WM. & MARY L. REV. 875, 885–910 (1986)); Laycock, *Religious Liberty*, *supra* note 6, at 411–16. While I am sympathetic to this reading of the Clause's original meaning, in this Article I take as a premise the predominant scholarly view that the Clause was purely structural and federalist in origin. See *infra* text accompanying notes 36–37.

doctrine. If the Establishment Clause were disincorporated, states would be constitutionally empowered to:

- (i) delegate government power to religious organizations;²²
- (ii) make theological judgments when parties consent to the state's jurisdiction;²³
- (iii) levy taxes dedicated to the support of a particular religion or religion generally;²⁴
- (iv) grant financial or in-kind assistance to prayer, worship, and other unambiguously religious activities;²⁵
- (v) endorse or condemn particular religions;²⁶
- (vi) underwrite prayer, religious education, and other religious services in public schools so long as participation is voluntary;²⁷ and

22. See *Bd. of Educ. v. Grumet*, 512 U.S. 687 (1994) (invalidating school district whose boundaries were consciously drawn to coincide with ultra-Orthodox Jewish community); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (invalidating municipal ordinance granting churches and schools the power to veto bars proposed within 500 feet).

23. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012) ("Accordinging the state the power to determine which individuals will minister to the faithful . . . violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions."); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (invalidating state court judgment that diocese did not follow its doctrine in dismissing bishop); *Kreshik v. Saint Nicholas Cathedral*, 363 U.S. 190 (1960) (holding state court lacked power at common law to decide theological questions in adjudicating church property dispute); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (holding same regarding state legislature).

24. See *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (invalidating sales tax exemption available only to religious periodicals); *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (explaining that the Establishment Clause prohibits the levy of any "tax in any amount, large or small, . . . to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion"); *Reynolds v. United States*, 98 U.S. 145, 162 (1878) (explaining that before ratification of the Establishment Clause, "[t]he people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe").

25. See *Mitchell v. Helms*, 530 U.S. 793, 857–60 (2000) (O'Connor, J., concurring in the judgment) (holding that aid to religious organizations dispersed on religiously neutral criteria violates Establishment Clause if actually diverted to unambiguously religious uses).

26. See *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (invalidating county courthouse display of Ten Commandments whose purpose was to endorse a certain theological understanding of the United States and its origins); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (invalidating stand-alone crèche depicting birth of Jesus displayed in city-county building).

27. See *Engel v. Vitale*, 370 U.S. 421 (1962) (invalidating voluntary recitation of state-

- (vii) appropriate religious symbols and practices for its own purposes even when they signify theological meaning or endorse a particular religion.²⁸

Some Establishment Clause doctrines that currently prevent these possibilities might be preserved by expanding the scope of the Free Exercise and Equal Protection Clauses,²⁹ though it seems unlikely that a Supreme Court willing to disincorporate the Establishment Clause would simply graft its state limitations onto other constitutional texts.³⁰ Yet even a few of the foregoing doctrinal alterations would rework the landscape of American church/state relations in ways that were unthinkable only a decade ago.

The existence of Establishment Clause doctrine thus rests on the legitimacy of applying the Clause to the states—a legitimacy now under sustained attack.³¹ Justice Thomas’s endorsement of disincorporation is especially important: it gives calls for disincorporation the salience and respectability they would otherwise lack,³² while also encouraging doctrinal revision that would drastically limit the Clause’s reach even if it remains applicable to state action.³³

composed prayer in public schools); Illinois *ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948) (invalidating voluntary religious instruction conducted by clerics on public school grounds during school day).

28. See *Van Orden v. Perry*, 545 U.S. 677 (2005) (plurality opinion) (upholding display of Ten Commandments on state capitol grounds because its history and context were secular); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 18 (2004) (Rehnquist, J., concurring in the judgment) (upholding recitation of “under God” in the Pledge of Allegiance because it has merely historical significance); *McGowan v. Maryland*, 366 U.S. 420 (1961) (upholding Sunday Closing laws because their original religious purposes had been eclipsed by contemporary secular purposes and meanings).

Professors Lupu and Tuttle have suggested one scenario in which the absence of an incorporated Establishment Clause would allow states to retain “truth-declaring jurisdiction” including the power “to recognize one faith as the political community’s preferred religion” and offering,

a preferred faith a significant set of privileges, including public funding of ministries and houses of worship, the right to place religious displays in public buildings, the right to appoint chaplains for public institutions, observation of the tradition’s religious holidays, and exclusive reference to that tradition’s religious beliefs in public proclamations[,] limited only by a tolerance norm prohibiting coercion or “undue pressure.”

Ira C. Lupu & Robert W. Tuttle, *Federalism and Faith*, 56 EMORY L.J. 19, 99 (2006) [hereinafter Lupu & Tuttle, *Federalism & Faith*].

29. See, e.g., *Church of the Lukumi Babulu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (invalidating state action that singled out a minority religion for special burdens); see also *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (suggesting increased judicial scrutiny under the Equal Protection Clause for government actions that burden particular religions).

30. Cf. Lupu & Tuttle, *Federalism & Faith*, *supra* note 28, at 103–04 (“It would make no sense to liberate the states from the periphery of the Establishment Clause and then set up doctrines that would require them to justify every move into that periphery.”).

31. See *supra* notes 4–5 and accompanying text.

32. See, e.g., Doshi, *supra* note 4, at 480–502 (using Justice Thomas’s anti-incorporation opinions to call for disincorporation); Hilton, *supra* note 4 (same); Knically,

As Professor Curtis has observed, the persisting idea that Bill of Rights incorporation is constitutionally unjustifiable “eats like acid at the legitimacy of federal protection of civil liberty.”³⁴ The supposed absence of logical and textual justifications of Establishment Clause incorporation likewise places Establishment Clause doctrine under perpetual clouds of instability, illegitimacy, and controversy.³⁵

Establishment Clause incorporation is both logically coherent and textually defensible.³⁶ Its logic and textuality can be defended, moreover, on the basis of the most widely accepted original understanding of the Clause as a purely structural limitation that prevented Congress from establishing a national church or interfering in state establishment or disestablishment decisions,³⁷ and without recourse to an original or evolved understanding that the Clause specified a personal right.³⁸ A crucial anti-incorporation premise—also conceded by many incorporationists—is the mistaken notion that “structural” constitutional provisions do not protect a personal liberty interest susceptible of incorporation.³⁹ To the contrary, constitutional structures that disable the government from acting are necessarily accompanied by correlative personal immunities from such actions, which sound in the personal liberty and citizen immunities protected by the Fourteenth Amendment against state deprivation.⁴⁰

The Establishment Clause is one such constitutional disability. The Clause is not a mere “reservation” of state power over religious establishment or disestablishment, as anti-incorporationists characterize it,⁴¹ but a disability that expressly precluded Congress from using its legislative power to establish a national religion.⁴² While the Clause indeed immunized the states from federal

supra note 4 (same); see also Jeffrey Toobin, *Partners*, THE NEW YORKER, Aug. 29, 2011, at 40 (arguing that Justice Thomas is a doctrinally influential Justice who has pushed the Roberts Court to the right); cf. Richard C. Schragger, *The Relative Irrelevance of the Establishment Clause*, 89 TEX. L. REV. 582, 632 (2011) (arguing the same to support suggestion that judicial enforcement of the Establishment Clause be abandoned).

33. See, e.g., *Newdow*, 542 U.S. at 51 (Thomas, J., concurring in the judgment) (arguing that the Establishment Clause should only prohibit state action that coerces religious belief or action); *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 (Thomas, J., concurring) (same); see also Frederick Mark Gedicks, *Undoing Neutrality? From Church-State Separation to Judeo-Christian Tolerance*, 46 WILLAMETTE L. REV. 691, 700–06 (2010) (demonstrating how current doctrinal trends could combine to displace equality with tolerance as the dominant Establishment Clause value).

34. CURTIS, THE BILL OF RIGHTS, *supra* note 20, at 3.

35. See, e.g., Knicely, *supra* note 4, at 177 (“[Q]uestions linger about the history, logic, and efficacy of *Everson*. If the history used by the *Everson* Court was wrong, ought not the Court correct it? And if the history is corrected, is not the Court obligated as a matter of law to revisit the legal doctrine that rests on its mistaken philosophical and historical premises?”).

36. See *infra* Part II.

37. See *infra* text accompanying notes 176, 181.

38. See *infra* text accompanying notes 125–26, 128–30.

39. See *infra* text accompanying notes 193–97.

40. See *infra* Part II.A.

41. See *infra* note 177 and accompanying text.

42. See *infra* Part II.B.1.a.

interference with their exercises of reserved power over religious establishment and disestablishment,⁴³ it also affirmatively immunized the people from the effects of any federal establishment of religion.⁴⁴ It is simply not accurate, as anti-incorporationists would have it, that the Clause lacked a dimension of substantive personal liberty susceptible of incorporation against the states through the Fourteenth Amendment. While the Establishment Clause disability indeed reserved to the states the exclusive power to establish or disestablish religion, it also substantively protected the people from threats to their liberty from a nationally established religion.

Application of the Establishment Clause against the states upon ratification through the Fourteenth Amendment eliminated the state immunity but extended the personal immunity to prohibit state as well as federally established religion, an elimination and extension that resonated with Reconstruction's reordering of federal-state relations.⁴⁵ This account also squares with the two possible textual vehicles for applying the Clause to the states, the Due Process and Privileges and Immunities Clauses of the Fourteenth Amendment,⁴⁶ and provides the logical and textual framework for an understanding of the Blaine episode that is likewise consistent with incorporation.⁴⁷ Indeed, proper framing of the historical record with logical and textual accounts of Establishment Clause incorporation yields a plausible originalist account of that incorporation.⁴⁸

Anti-incorporationists need to set aside their incredulity and ridicule of Establishment Clause incorporation and seriously engage the merits of the logical, textual, and historical foundations that support it.⁴⁹

I. DIMENSIONS OF ESTABLISHMENT CLAUSE INCORPORATION

A. Casual Incorporation

The Supreme Court gave little thought to how or why the First Amendment might limit state action before actually deciding that it did. In 1925, the Court "assumed" without explanation that the rights guaranteed by the Speech and Press Clauses bind the states through the Fourteenth Amendment,⁵⁰ just three years after

43. See *infra* Part II.B.1.b.

44. See *infra* Part II.B.1.c. & .2.

45. See *infra* Part II.C.1.

46. See *infra* Part II.C.2.

47. See *infra* Part II.C.3.

48. See *infra* Part III.

49. See *infra* Conclusion.

50. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925). The applicability of the freedom of speech to the states had been assumed long before formal incorporation of the Speech Clause. See, e.g., Michael Kent Curtis, *Historical Linguistics, Inkblots, and Life After Death: The Privileges or Immunities of Citizens of the United States*, 78 N.C. L. REV. 1071, 1144 (2000) [hereinafter Curtis, *Historical Linguistics*] (noting Judge Cooley's nineteenth-century belief that freedom of speech applied to the states through the Fourteenth Amendment Due Process Clause).

it had rejected the identical proposition.⁵¹ Fifteen years later it held the same for the Free Exercise Clause in *Cantwell v. Connecticut*,⁵² apparently because of its congruence with the Speech Clause.⁵³ Though Establishment Clause incorporation was not before the Court in *Cantwell*, the Justices acted as if the Clause had already been incorporated when the question was squarely presented in *Everson v. Board of Education*.⁵⁴ The basis for incorporation remained just as opaque when the Court used the Clause to invalidate a state religious education program the next term.⁵⁵

B. Anti-Incorporation Attacks

1. The Classical Template

Given the Court's thoughtlessness on Establishment Clause incorporation, it was hardly surprising that two prominent academics, Edward Corwin and Joseph Snee, immediately attacked it for lack of logical, textual, and historical support.⁵⁶

a. No Logic

Although Corwin alluded to the logical incoherence of Establishment Clause incorporation,⁵⁷ Snee developed the argument more fully. Exhaustively surveying

51. *Prudential Ins. Co. of Am. v. Cheek*, 259 U.S. 530, 543 (1922).

52. 310 U.S. 296, 303 (1940).

53. *See id.* at 307 (“The fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged.”); *see also* Lupu & Tuttle, *Federalism & Faith*, *supra* note 28, at 36 (“Because the Free Exercise Clause sounds in liberty in ways that strongly resemble the Speech and Press Clauses of the First Amendment, the textual logic of incorporating the Free Exercise Clause seems strong.”).

54. 330 U.S. 1, 14–15 (1947).

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the “establishment of religion” clause.

Id. (footnotes omitted); *accord id.* at 26–27 (Jackson, J., dissenting); *id.* at 29 (Rutledge, J., dissenting). *Everson* looked even stranger when barely four months later, the Court issued a set of bitterly divided opinions in *Adamson v. California*, 332 U.S. 46 (1947), rejecting “total incorporation” of the Bill of Rights. *See* Lupu & Tuttle, *Federalism & Faith*, *supra* note 28, at 40–41.

55. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 211–12 (1948) (rejecting without explanation counsel's request that the Court reconsider *Everson's* incorporation of the Establishment Clause).

56. *See* Corwin, *supra* note 3; Snee, *supra* note 3.

the 1787 and 1791 ratification debates, Snee concluded that “the establishment clause was meant to reserve powers to the several states, while the free exercise clause was meant to guarantee religious liberty of the individual citizen against federal encroachment.”⁵⁸ Unlike Corwin—and most others since—Snee located the Constitution’s prohibition of a nationally established church in the Free Exercise Clause,⁵⁹ insisting that the Establishment Clause only prevents congressional establishment of such a church, if at all, as supplementary protection for the religious liberty norm embedded in the Free Exercise Clause.⁶⁰ This enabled Snee to treat the Establishment Clause as an exclusively federalist protection of state prerogatives.⁶¹ If the Establishment Clause is a reservation of state power, Snee argued, it cannot logically be applied to limit state power.⁶²

b. No Text

Although neither Corwin nor Snee seemed generally opposed to the application of fundamental personal rights against the states through the Due Process Clause,⁶³ both were incredulous that a structural reservation of state power might be

57. See Corwin, *supra* note 3, at 10 (“[W]hat the ‘establishment of religion’ clause of the First Amendment does, and all that it does, is to forbid Congress to give any religious faith, sect, or denomination a preferred status; and the Fourteenth Amendment, in making the clause applicable to the states, does not add to it, but logically curtails it.” (emphasis omitted)).

58. Snee, *supra* note 3, at 379.

59. Compare *id.* at 389, 406, with Corwin, *supra* note 3, at 11–12 (reading the Establishment Clause to mean that “Congress should not prescribe a national faith”), and *id.* at 9–10 (agreeing with *Everson*’s declaration that the federal government cannot “set up a church”). Snee’s position is similar to that argued by Akhil Amar and Justice Thomas. See *infra* note 130.

60. See Snee, *supra* note 3, at 373 (The Establishment Clause was intended “as a reservation of power to the respective states; and . . . possibly as a politically wise means of forestalling any abridgement of the religious freedom of the free exercise clause on the part of the then suspect federal power.”); see also *id.* at 372 (“I take no issue with those who consider certain types of establishment to be naturally and immediately an infringement of that religious liberty and hence forbidden to both federal and state governments by the free exercise clause of the First Amendment as read into the Fourteenth.”); *id.* at 372 n.14 (“[C]ertain types of establishment would be forbidden under the Fourteenth Amendment, not because they are establishments, but because they are such as to infringe the religious liberty protected by that Amendment.”).

61. Compare *id.* at 379 (“[T]he establishment clause was meant to reserve powers to the several states, while the free exercise clause was meant to guarantee religious liberty of the individual citizen against federal encroachment.”), *id.* at 389 (“[T]he establishment clause drew a line of demarcation, not between federal power and personal freedom, but between federal and state sovereignty.”), and *id.* at 406 (“The free exercise clause precluded federal interference with individual religious freedom. The establishment clause prevented any federal interference, whether affirmative or negative, with existing state establishments: it reserved all power in this regard to the several states.”), with Corwin, *supra* note 3, at 14 (“[T]he principal importance of the [first] amendment lay in the separation which it effected between the respective jurisdictions of state and nation regarding religion . . .”).

62. Snee, *supra* note 3, at 389, 406.

63. See Corwin, *supra* note 3, at 19; Snee, *supra* note 3, at 372, 406.

characterized as such a right.⁶⁴ As Corwin elaborated, the prohibition on religious establishments cannot be incorporated unless it “carries with it invasion of somebody’s freedom of religion, that is, of ‘liberty.’”⁶⁵ As a purely structural provision confirming a reservation of state power, the Establishment Clause simply does not qualify.⁶⁶

c. No History

Although Corwin and Snee rejected any historical basis for Establishment Clause incorporation, they barely mentioned Fourteenth Amendment history. Snee contented himself with a citation to Professor Fairman,⁶⁷ while Corwin rested on a one-paragraph summation of the failed federal Blaine Amendment.⁶⁸ Proposed in 1875 and narrowly defeated, this amendment would have provided:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect, nor shall any money so raised or lands so devoted be divided between religious sects or denominations.⁶⁹

64. Corwin, *supra* note 3, at 19 (“It is only *liberty* that the Fourteenth Amendment protects.”) (emphasis in original); Snee, *supra* note 3, at 373 (The Establishment Clause does not “confer upon the citizen a constitutional right, and what is not a constitutional right under the First Amendment can hardly be a fundamental concept of liberty protected by the Fourteenth!”).

65. Corwin, *supra* note 3, at 20.

66. *See id.* at 19 (“So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anybody of religious liberty.”) (emphasis omitted); *see also* Snee, *supra* note 3, at 406 (“As a reservation of power, the establishment clause is not *per se* a constitutional guarantee of liberty.” (emphasis in original)).

67. Snee, *supra* note 3, at 372 n.10 (citing Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights?—The Original Understanding*, 2 STAN. L. REV. 5 (1949)); *see also* O’NEILL, *supra* note 3, at 155 (Application of the Establishment Clause to the states “was unpremeditated, unforeseen, unintended by the men responsible for the Fourteenth Amendment. . . . So far as the relation of government to an establishment of religion is concerned, any influence that is now or ever will be exercised by the Fourteenth Amendment, is a clear constitutional accident.”).

Professor Fairman was recruited by Justice Frankfurter to write a scholarly refutation of Justice Black’s bold thesis that the Fourteenth Amendment Due Process Clause was originally understood to have incorporated the first eight amendments to the Constitution against the states. *See* *Adamson v. California*, 332 U.S. 46, 68–92 & app. 92–123 (1947) (Black, J., dissenting). The episode is recounted in NOAH FELDMAN, *SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR’S GREAT SUPREME COURT JUSTICES* 307–16 (2010).

68. Corwin, *supra* note 3, at 17.

69. 4 CONG. REC. 205 (1875).

Noting Blaine's quotation of the Establishment Clause, Corwin reasoned that this language must have been thought necessary "to fill a gap in the Constitution"; otherwise, the amendment would have been a superfluous attempt to achieve an already-accomplished constitutional goal.⁷⁰ Assuming that Congress would not have exerted itself to do something it had already done, Corwin concluded that the Establishment Clause must not have been understood to apply to the states when Blaine was introduced.

* * *

Professors Corwin and Snee set the template for criticizing Establishment Clause incorporation: (1) as a federalist confirmation of reserved state power over religious establishment and disestablishment, the Establishment Clause logically cannot limit state power; (2) as a mere structural restraint the Clause does not protect a personal privilege, immunity, right, or liberty that the Fourteenth Amendment could have applied against the states; and (3) the post-ratification proposal of the Blaine Amendment decisively confirmed (1) and (2), showing that less than a decade after ratification, Congress did not understand the Fourteenth Amendment to have applied the Establishment Clause against the states.

2. Contemporary Revival

The question of Establishment Clause incorporation lay largely dormant until the 1980s, when it was reawakened by controversies over federalism,⁷¹ church-state relations,⁷² and constitutional interpretation.⁷³ Later scholarship, however, has hardly advanced from the template set down decades earlier by Corwin and Snee. Like them, most contemporary scholars reject incorporation on some combination of logic, text, and Blaine, while otherwise ignoring Reconstruction history.⁷⁴ A few

70. Corwin, *supra* note 3, at 17.

71. *E.g.*, *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *Nat'l League of Cities v. Usury*, 426 U.S. 833 (1976)) (holding that state immunity from federal regulation confirmed by Tenth Amendment is not judicially enforceable); *see* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 406 (2002) (describing the rise of "neofederalism" during the Reagan administration and its consistency with an original understanding of the Establishment Clause as structural and federalist).

72. *E.g.*, *Aguilar v. Felton*, 473 U.S. 402 (1985) (invalidating government monitoring to ensure that government aid is not diverted to religious uses), *overruled by* *Agostini v. Felton*, 521 U.S. 203 (1997); *Sch. Dist. v. Ball*, 473 U.S. 373 (1985) (invalidating government aid that might conceivably be diverted to religious uses); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (invalidating state statute providing for "moment of silence" at beginning of public school day on basis of legislative motivation to encourage silent, voluntary, individual prayer by students, and rejecting lower court determination that the Establishment Clause did not bind the states).

73. *E.g.*, Edwin Meese III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L. REV. 455 (1986) (advocating an "intentionalist" interpretive jurisprudence which precluded Establishment Clause incorporation).

74. *See, e.g.*, BRADLEY, *supra* note 4, at 95 (rejecting Establishment Clause incorporation on ground of incoherence); DREISBACH, *supra* note 4, at 92-95 (same on grounds of incoherence, Blaine, and general anti-incorporationist arguments of Fairman and

contemporary anti-incorporationist scholars take Fourteenth Amendment history a bit more seriously, but only to add that anti-establishment concerns were supposedly absent from congressional debates and other public discussions of the Amendment.⁷⁵

Justice Thomas follows the classical template. Though he does not mention Blaine, he argues that the original understanding of the Establishment Clause merely prohibited establishment of a “national religion” and clarified that “Congress could not interfere with state establishments.”⁷⁶ He thus concludes that incorporation is both illogical and textually problematic.⁷⁷ He consistently calls for either outright disincorporation of the Clause or substantial reduction in the scope and rigor with which it is applied to the states.⁷⁸ Despite a similarly strong

Berger); SMITH, FOREORDAINED FAILURE, *supra* note 4, at 21–26, 49–54 (same on grounds of incoherence and Blaine, and implicitly on the ground of textual inconsistency); Conkle, *supra* note 4, at 1135–42 (same on grounds of incoherence, textual inconsistency, and Blaine); Duncan, *supra* note 4, at 40–43 (same on implicit grounds of incoherence and textual inconsistency); Knicely, *supra* note 4, at 200–203, 206–10 (same on grounds of incoherence, textual inconsistency, and Blaine); Lietzau, *supra* note 4, at 1206–10 (same); McClellan, *supra* note 4, at 314–19 (same); Meier, *supra* note 4, at 164 (same on ground of incoherence); Paulsen, *supra* note 4, at 317–18 & n.38, 322–25 (same); Porth & George, *supra* note 4, at 138–39 (same); Rosenkranz, *supra* note 4, at 1060 (same on grounds of incoherence and textual inconsistency); Note, *Rethinking Incorporation*, *supra* note 4, at 1708–14 (same on grounds of incoherence, textual inconsistency, and Blaine); *see also* Jaffree v. Bd. of Sch. Comm’rs, 554 F. Supp. 1104, 1118–28 (S.D. Ala. 1983) (rejecting Establishment Clause incorporation on grounds of Blaine and general anti-incorporation arguments of Fairman and Berger), *aff’d in part, rev’d in part sub nom.* Jaffree v. Wallace, 705 F.2d 1526, 1530–33 (11th Cir. 1983), *aff’d*, 472 U.S. 38, 48–50 (1985).

75. *See, e.g.*, Brose, *supra* note 4, at 17–29 (rejecting incorporation on grounds of textual inconsistency and congressional silence about anti-establishment norms); Muñoz, *supra* note 4, at 631–35 (same on grounds of incoherence, textual inconsistency, Blaine, and congressional silence); Doshi, *supra* note 4, at 468–70 (same on grounds of incoherence, textual inconsistency, Blaine, and congressional silence); Hilton, *supra* note 4, at 1715–23 (same on grounds of textual inconsistency and congressional silence).

76. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50 (2004) (Thomas, J., concurring in the judgment).

77. *Id.* at 45–46 (Thomas, J., concurring in the judgment) (“[T]he Establishment Clause is [best understood as] a federalism provision, which, for this reason, resists incorporation.”); *id.* at 50 (“[T]he Establishment Clause . . . protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand.”); *id.* at 51 (“[E]ven assuming that the Establishment Clause precludes the Federal Government from establishing a national religion, it does not follow that the Clause created or protects any individual right. . . . [I]t is more likely that States and only States were the direct beneficiaries. Moreover, incorporation of this putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect—state establishments of religion. . . . I would welcome the opportunity to consider more fully the difficult questions whether and how the Establishment Clause applies against the States. One observation suffices for now: As strange as it sounds, an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected—state practices that pertain to an establishment of religion.” (internal citations and quotation omitted)).

78. Besides Justice Thomas’s opinion in *Newdow*, *see* *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011) (Thomas, J., dissenting from denial of certiorari);

commitment to originalism,⁷⁹ however, Thomas has never discussed Reconstruction-era history in connection with the Establishment Clause, not even with reference to Blaine. Like other anti-incorporationists, he is content to let logic and text do the heavy lifting.

C. Framing Effect

Logic and text have long been powerful tools of legal and constitutional reasoning.⁸⁰ Postmodern critiques have exposed the contingency and indeterminacy of such arguments,⁸¹ but have done little to dislodge their authority in law. Once a legal position is persuasively painted as illogical or irreconcilable with the authoritative texts, even powerful historical evidence will not save it.⁸²

Of course, “powerful” historical evidence—evidence that is unambiguous and uncontradicted—is rarely available. By now, historians take as givens that the meanings of historical records are irreducibly plural and that writing history requires interpretation as well as report.⁸³ No one encounters history “fresh,”

McDonald v. City of Chi., 130 S. Ct. 3020, 3084 n.20 (2010) (Thomas, J., concurring in part and concurring in the judgment); Van Orden v. Perry, 545 U.S. 677, 692–94 (2005) (Thomas, J., concurring); Cutter v. Wilkinson, 544 U.S. 709, 726–28 (2004) (Thomas, J., concurring); Zelman v. Simmons-Harris, 536 U.S. 639, 678–80 (2001) (Thomas, J., concurring).

79. *E.g.*, *McDonald*, 130 S. Ct. at 3058–84 (Thomas, J., concurring in part and concurring in the judgment) (arguing that the Second Amendment right to keep and bear arms was understood in 1868 as a privilege or immunity of national citizenship applied to the states by the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 584–93 (1995) (Thomas, J., concurring) (arguing that the Commerce Clause was not originally understood to have granted Congress the power to regulate activities that might reasonably be thought to “substantially affect” interstate commerce).

80. *See, e.g.*, MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER* 167, 170 (1933) (“[T]he effort to assume the form of a deductive system underlies all constructive legal scholarship. . . . [T]he rôle of deduction is not an accidental incident in law and natural science but is rather an essential part of their life.”); 1 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 407, at 391 n.1 (1833) (“It is obvious, that there can be no security to the people in any constitution of government, if they are not to judge of it by the fair meaning of the words of the text”); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1107 (1989) (“The traditional view of law is largely dependent upon objectivist assumptions about reasoning and categorization.”).

81. *See, e.g.*, JACQUES DERRIDA, *Signature Event Context*, in *LIMITED INC* (1972) (Samuel Weber & Jeffrey Mehlman trans., 1977); Paul Ricoeur, *What Is a Text?*, in *TWENTIETH-CENTURY LITERARY THEORY* 331 (Vassilis Lambropoulos & David Neal Miller eds., 1987).

82. *See* COHEN, *supra* note 80, at 195 (“[L]aw that is not logical, is like pre-scientific medicine—a hodge-podge of sense and superstition”); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 1–12, at 32, 38 (3d ed. 2000) (“To treat text as paramount . . . seems all but inevitable if the Constitution is to be seriously regarded as law [A]nything flatly contrary to it cannot stand”).

83. *See, e.g.*, HAYDEN WHITE, *TROPICS OF DISCOURSE: ESSAYS IN CULTURAL CRITICISM* 101–34 (1978) (arguing that historical facts are constituted by interpretation, and history itself by the narratives in which such facts are embedded); GORDON S. WOOD, *THE PURPOSE*

without pre-existing commitments and expectations.⁸⁴ This plurality and subjectivity are challenging for lawyers, who draw their arguments from a unified narrative that has assessed, labeled, and weighed the evidence to yield a single “objective” conclusion.⁸⁵ This underscores the improbability that one can read a historical record to contradict pre-existing judgments of incoherence or textual infidelity (let alone both).⁸⁶

The rhetorical hegemony of logic and text is well illustrated by arguments against Establishment Clause incorporation. The overwhelming consensus that incorporation is logically incoherent and textually impossible guarantees that readings of the historical record will likewise conclude that history weighs against incorporation. But as this section demonstrates, the historical evidence actually invoked by anti-incorporationists is scant, consisting entirely of congressional efforts to approve the Blaine Amendment, and the purported silence of Fourteenth Amendment framers and ratifiers about anti-establishment concerns. The former is

OF THE PAST *passim* (2008) (discussing the plurality and constructed nature of historical meaning); Steven K. Green, “Bad History”: *The Lure of History in Establishment Clause Adjudication*, 81 NOTRE DAME L. REV. 1717, 1730 (2006) [hereinafter Green, “Bad History”] (“Despite their commitment to objectivity, historians also understand . . . that history is not objective. Any exploration into history is selective, and all (good) accounts of history are interpretive.”).

84. See WOOD, *supra* note 83, at 8–9, 39, 223 (observing how historians sometimes project contemporary issues and concerns onto the past); cf. HANS-GEORG GADAMER, TRUTH AND METHOD 294 (Joel Weinsheimer & Donald G. Marshall trans., 2d rev. ed. 2004) (“[W]e understand traditionary texts on the basis of expectations of meaning drawn from our own prior relation to the subject matter.”); PAUL RICOEUR, HISTORY AND TRUTH 29 (Charles A. Kelbley trans., 1992) (“The historian goes to the men of the past with his own human experience. The historian’s subjectivity takes on a striking prominence at the moment when, over and above all critical chronology, history makes the values of past men surge forth.”).

85. See, e.g., JAMES B. WHITE, THE LEGAL IMAGINATION 802 (1973) (“From the beginning you know where the lawyer wants to come out, and every word points that way.”); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40–44 (1983) (describing the “jurispathic” character of legal narrative, which abides only one account of controlling law and liquidates all interpretive competitors); Green, “Bad History”, *supra* note 83, at 1729–30.

Historians . . . do not mine the pages of historical information to uncover “truths”; the study of history is not to provide “answers” to modern questions but to provide understanding of our past in the hope it may illuminate the present. In contrast, constitutional lawyers primarily approach history as advocates seeking authority for the propositions they hope to prove.

Id. (footnote omitted).

86. Cf. Peter H. Ditto, David A. Pizarro & David Tannenbaum, *Motivated Moral Reasoning*, in 50 PSYCHOLOGY OF LEARNING AND MOTIVATION 307, 310 (2009) (“[P]eople (like attorneys) often have a preference for reaching one conclusion over another, and these directional motivations serve to tip judgment processes in favor of whatever conclusion is preferred.” (citation omitted)); Dan M. Kahan, *The Supreme Court 2010 Term—Foreword: Neutral Principles, Motivated Cognition, and Some Problems from Constitutional Law*, 125 HARV. L. REV. 1, 19 (2011) (discussing the “unconscious tendency of individuals to process information in a manner that suits some end or goal extrinsic to the formation of accurate beliefs”).

hardly persuasive, and the second is simply wrong.⁸⁷ What makes this reading of history seem persuasive—indeed, dispositive—is its framing by incorporation’s supposed illogic and textual infidelity.

1. Framing Blaine

Daniel Conkle uses the logical and textual arguments from the classical template to inflate the weak significance of Blaine, just as Professor Snee did.⁸⁸ Conkle contends that his anti-incorporationist conclusion is “firmly supported” by historical evidence—consisting only of Blaine—but he bolsters this with “language and logic,” which “*independently* compel a rejection of the incorporation argument.”⁸⁹ Conkle concludes that the case for Establishment Clause incorporation is made “exceedingly difficult” by text and logic, imposing a “heavy burden of persuasion” on any historical argument supporting such incorporation.⁹⁰

The problems with using Blaine as anti-incorporation evidence are legion, but can be summarized as follows:

(i) It is odd to count the supposed redundancy of Blaine as anti-incorporation evidence when the Bill of Rights itself was thought redundant of the 1787 constitutional text, and the Fourteenth Amendment redundant of both the 1787 text and common law privileges and immunities.⁹¹ Indeed, people on both sides of the Blaine debate thought the proposal superfluous.⁹²

(ii) Blaine may have quoted the Religion Clauses merely to provide political cover for its more controversial nativist restrictions.⁹³

87. See *infra* Part III.

88. See *supra* Part I.B.1.c.

89. Conkle, *supra* note 4, at 1139, 1140 (emphasis added).

90. *Id.* at 1142.

91. See, e.g., AMAR, *supra* note 4, at 254 n.*; LEVY, *supra* note 19, at 83, 91; RODNEY K. SMITH, PUBLIC PRAYER AND THE CONSTITUTION 165 (1987) [hereinafter R. SMITH]; THE FEDERALIST NO. 84, at 578, 579 (Alexander Hamilton) (Jacob E. Cooke ed. 1961) (“Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations. . . . [W]hy declare that things shall not be done which there is no power to do?”).

92. See Steven K. Green, *The Blaine Amendment Reconsidered*, 36 AM. J. LEG. HIST. 38, 65 (1992) [hereinafter Green, *The Blaine Amendment*].

93. See AMAR, *supra* note 4, at 254 n.*; Green, *The Blaine Amendment*, *supra* note 92, at 51 n.84, 54 & n.107; John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 302 (2001); Lash, *Establishment Clause*, *supra* note 6, at 1147–48.

In addition to applying the Religion Clauses against the states, Blaine would have absolutely prohibited the use or control of tax money, public lands, and other state resources by “any religious sect.” See *supra* text accompanying note 69. These provisions were widely understood to have been directed against efforts by Roman Catholics to obtain state support for parochial schools serving a swelling Catholic immigrant population.

(iii) Between the ratification of the Fourteenth Amendment and the congressional debates on Blaine, the Supreme Court decisively rejected the general incorporation thesis without seriously investigating either the original public meaning of the Fourteenth Amendment or the intentions of its drafters and ratifiers.⁹⁴ The Blaine debates may not have reflected an original incorporationist understanding because by the time they took place the Supreme Court had decisively rejected that understanding.⁹⁵

(iv) The incorporation question was only a small part of the Blaine debates, which were principally focused on questions about aid to religious schools and state control of public education.⁹⁶ Even so, at least one participant in the Blaine debates believed that the Fourteenth Amendment had already applied the Religion Clauses to the states,⁹⁷ and little more than a year later, two other members of Congress manifested the same belief.⁹⁸

Were Blaine the only originalist evidence bearing on Establishment Clause incorporation, it is hard to imagine any careful scholar characterizing it as “substantial” evidence against Establishment Clause incorporation—and Conkle is a careful scholar. It is the logical and textual case against incorporation that enables Conkle and other anti-incorporationists to plausibly characterize Blaine as meaningful evidence. It is only because logic and text seem to point against incorporation that Blaine seems to point there, too.

2. Framing Silence

Several anti-incorporationists have argued that members of Congress did not discuss the Establishment Clause or anti-establishment norms in ratification debates

94. See *United States v. Cruikshank*, 92 U.S. 542 (1876) (holding that the Fourteenth Amendment did not protect the First Amendment right of assembly and Second Amendment right to bear arms); *Walker v. Sauvinet*, 92 U.S. 90 (1876) (same regarding the Seventh Amendment right to trial against contrary state action); see also *Twining v. New Jersey*, 211 U.S. 78, 96 (1908) (conceding that *Slaughter-House* “[u]ndoubtedly . . . gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended, and disappointed many others”); *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872) (conventionally read as having rejected application to the states of most provisions of the Bill of Rights).

Although Blaine was introduced on December 14, 1875, it was not debated and voted upon by Congress until August 4, 1876, see 4 CONG. REC. 5189–91 (1876), months after *Walker* and *Cruikshank* had been argued and decided in March and April 1876, ANNE ASHMORE, DATES OF SUPREME COURT DECISIONS AND ARGUMENTS (2006), available at <http://www.supremecourt.gov/opinions/datesofdecisions.pdf>.

95. CURTIS, THE BILL OF RIGHTS, *supra* note 20, at 170; Green, *The Blaine Amendment*, *supra* note 92, at 50–51; Lupu & Tuttle, *Federalism & Faith*, *supra* note 28, at 47–48.

96. Green, *The Blaine Amendment*, *supra* note 92, at 61.

97. 4 CONG. REC. 5585 (1876) (remarks of Sen. Oliver Morton (R-IN)).

98. See 2 CONG. REC. app. 242 (1874) (Sen. Thomas Norwood (D-GA)); *id.* at 384–85 (Rep. Roger Mills (D-TX)).

and public discussions relating to the Fourteenth Amendment and related legislation, although they did refer to free exercise norms.⁹⁹ Jonathan Brose provides the most detailed version of this argument.¹⁰⁰ Brose catalogues the various ways in which members of Congress referred to religion during these debates: liberty of “conscience,”¹⁰¹ “freedom of religious opinion,”¹⁰² freedom of “religious worship,”¹⁰³ “free exercise of religion,”¹⁰⁴ “freedom in religion,”¹⁰⁵ “reserved rights” for the regulation of “churches,”¹⁰⁶ and last, but not least, “establishment of religion.”¹⁰⁷ Brose repeatedly argues that no one understood the Fourteenth Amendment to protect anything except “personal rights,”¹⁰⁸ and that “the right to be free from the establishment of religion” is almost entirely absent from the debates, while free exercise rights are often mentioned.¹⁰⁹

The logical and textual frames are obvious in Brose’s reliance on the notion of “personal rights” to exclude Establishment Clause incorporation. Since the Clause only protected state power, Brose argues, the Fourteenth Amendment framers must not have understood it to be included in any references to “personal rights.”¹¹⁰ This pushes him to characterize virtually every reference to religion and religious freedom as a reflection of personal free exercise rights rather than structural anti-establishment norms. Many of these characterizations are questionable. “Liberty of

99. See, e.g., Brose, *supra* note 4, at 18–29; Muñoz, *supra* note 4, at 633–34; Doshi, *supra* note 4, at 469. *But see* Kruse, *supra* note 4, at 110–14 (arguing that references to both Religion Clauses were absent from the debates).

100. See Brose, *supra* note 4, at 18–29.

101. *Id.* at 19, 20 (Rep. John Bingham (R-OH), arguing that the Fourteenth Amendment would protect “freedom of conscience” and “rights of conscience” from state action); *id.* at 21 (Sen. Trumbull (D-IL), arguing that the Fourteenth Amendment would protect “the right of exercising personal conscience” against state action).

102. *Id.* at 21–22 (Sen. Wilson (R-MA), in an 1864 debate about abolishing slavery).

103. *Id.* at 23 (Rep. Hart (R-NY), citing Nevada Admission Act requiring constitutional guarantee that “no inhabitant shall ever be molested on account of his or her mode of religious worship”) (ellipses omitted).

104. *Id.* at 23 (Rep. Hart (R-NY), explaining that the Fourteenth Amendment provides that “no law shall be made prohibiting the free exercise of religion”); *id.* at 25 (Rep. Dawes (R-MA), listing “the free exercise of his religious belief” among the privileges and immunities of the citizen protected by the Ku Klux Klan Act); *id.* at 27 (Sen. Vickers (D-MD), saying that the Amnesty Bill would encroach upon reserved state rights, including “free exercise of religious worship”).

105. *Id.* at 24 (Rep. Maynard (R-TN), arguing that the Ku Klux Klan Act protects “freedom of speech, of the press; . . . in religion, in house, papers, and effects”).

106. *Id.* at 26–27 (Sen. Vickers (D-MD), arguing that the Amnesty Bill would “encroach upon [the States] reserved rights, of controlling and managing their schools, juries, churches, cemeteries, and benevolent associations . . .”) (alterations in original).

107. *Id.* at 28 (Sen. Thurman (D-OH), arguing that the civil rights included the protections of the Religion Clauses “against any establishment of religion by act of Congress” and infringement upon the “free exercise of religion”) (emphasis omitted); *id.* at 29 (Sen. Norwood (D-GA), saying that the Fourteenth Amendment provided that no state may “establish a particular religion”).

108. See, e.g., *id.* at 18–20, 22, 24, 26–28.

109. See, e.g., *id.* at 18–20, 22, 23, 26, 28.

110. See *id.* at 6, 17.

conscience,” for example, has been linked to the original understanding of the Establishment Clause.¹¹¹ Freedom of worship and free expression of religious opinion are similarly two personal rights that were regularly subverted by established religions in both the colonies and eighteenth-century England, and thus were understood to be protected by anti-establishment norms in the nineteenth century.¹¹² It is not obvious that these references signify free exercise rather than anti-establishment norms unless, like Brose, one first begs the question whether a structural restraint can sound in personal liberty.¹¹³

The purported silence of the Fourteenth Amendment framers on Establishment Clause incorporation would be an unreliable measure of constitutional meaning in any circumstance,¹¹⁴ let alone when, as here, the framers were actually *not* silent about the matter. As in Conkle’s invocation of Blaine, logic and text do the real rhetorical work in the anti-incorporation argument from silence.

3. Framing Original Meaning

Relying on Conkle’s arguments,¹¹⁵ Steven Smith illustrates how far the logical and textual arguments can push an anti-incorporationist originalism on virtually no historical evidence. Smith expressly makes the logical point from the classical template,¹¹⁶ right after implicitly making the textual one.¹¹⁷ He then turns to the

111. See Feldman, *supra* note 71, at 398–412 (arguing that a principal purpose of the Establishment Clause was to protect the liberty of conscience from violation by federally enforced tax assessments to support religion); Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 766–67, 786–88 (2005) [hereinafter Green, *A Reassessment*] (same).

112. See GREENAWALT, RELIGION, *supra* note 6, at 34–35; Green, *A Reassessment*, *supra* note 111, at 774–77, 787, 790–95; Laycock, *Theology Scholarships*, *supra* note 6, at 242–43; see also *School Dist. v. Schempp*, 374 U.S. 203, 234 (1963) (Brennan, J., concurring).

113. Compare Feldman, *supra* note 71, at 403 n.321 (“[Both Religion Clauses were originally] thought necessary to protect liberty of conscience: The Establishment Clause protected individuals from laws that would compel them to participate in a religion specified by the state, and the Free Exercise Clause protected them from laws that would have barred them from affirmatively engaging in their own religious exercises.”), with GREENAWALT, RELIGION, *supra* note 6, at 22, 34 (“Separation and disestablishment were the domain of the Establishment Clause; together with the Free Exercise Clause, it guaranteed religious equality. . . . [O]pponents of establishment regarded free exercise of religion and nonestablishment as very closely tied. Many of the strongest arguments against what dissenters perceived as establishments were cast in terms of liberty of conscience and equal civil rights.” (footnote omitted)).

114. See TRIBE, *supra* note 82, § 2–8, at 202–05; cf. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 571 (1979) (“[I]mplying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.”); *Girouard v. United States*, 328 U.S. 61, 69 (1946) (“It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.”).

115. See SMITH, FOREORDAINED FAILURE, *supra* note 4, at 21–22, 52–53. Smith argues that the Free Exercise Clause is also purely jurisdictional and thus lacks a substantive right or liberty that could be incorporated. I consider his arguments only as they relate to the Establishment Clause.

116. See *id.* at 24 (“[I]t seems nonsensical or incoherent to suggest that a provision representing ‘essential federalism’ has a substantive meaning independent of its federalism or that the provision has substantive content that can be ‘extended’ to the states. . . . [I]n its

pro-incorporationist position, specifically Kurt Lash's contention that by 1868 an understanding of the Establishment Clause as a personal liberty had displaced the original structural understanding.¹¹⁸ Smith concedes that this might overcome the logical and textual arguments against incorporation,¹¹⁹ but counters that Lash "must still confront the more familiar historical objection, which asserts that the enactors of the Fourteenth Amendment simply did not intend to incorporate the Bill of Rights, or at least the religion clauses, at all."¹²⁰ Here Smith invokes Blaine—and only Blaine—ultimately concluding that readings of the historical record by Lash and others do not "appreciably strengthen the case for incorporation."¹²¹

Smith did not intend his discussion of Lash's pro-incorporation argument as a comprehensive examination of the issue.¹²² He nevertheless illustrates how framing the historical record with logical incoherence and textual infidelity affects historical interpretation. When the dust clears, Smith has all but rejected that Establishment Clause incorporation was within the original meaning of the Fourteenth Amendment with virtually no investigation of the historical record. Though he notes "voluminous evidence" on both sides of the general incorporation debate,¹²³ he nonetheless rejects Religion Clause incorporation by the familiar play of Blaine as the lone historical anti-incorporation trump.¹²⁴ This dramatically demonstrates the rhetorical force of framing weak historical evidence with anti-incorporation arguments from logic and text.

original form it already 'extends' to the states in the only sense that it could apply to them.").

117. *See id.* at 21 ("If we ask . . . what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is 'None.'"); *see also id.* at 51 ("[T]he Fourteenth Amendment *could not* have incorporated the religion clauses because those clauses contained no substantive principle or right to incorporate." (emphasis in original)).

118. *Id.* at 50–54 (discussing Lash, *Establishment Clause*, *supra* note 6).

119. *Id.* at 50–52.

120. *Id.* at 52.

121. *Id.* at 53; *see also* STEVEN D. SMITH, *THE CONSTITUTION AND THE PRIDE OF REASON* 136–37 (1998) ("Nearly all scholars agree . . . that the establishment clause was intended at least in part to *protect* state-established religion from federal intervention. But 150 years later (and as a result of an 'incorporation' decision that was at best dimly understood by those who made it, if indeed they were conscious of having made such a decision at all), that clause is found to authorize federal intervention to *eliminate* offensive state religious practices." (emphasis in original)).

Smith does acknowledge that if Lash were right, the historical focus for originalist arguments would necessarily shift from the colonial and revolutionary eras to the mid-nineteenth century, though this would constitute a "major reorientation" of historically supportable doctrine and norms. SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 53–54.

122. SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 52 ("This book is not the place to rehearse that debate."). As Smith notes, Lash's article came to his attention as *Foreordained Failure* was going to press, and Smith's discussion appears in a chapter addendum. Smith has not revisited Lash's argument in subsequent work.

123. *Id.* (quoting WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT* 3 (1988) (original alteration omitted)).

124. *See id.* at 52–53.

D. Fainthearted Defenses

Defenses of incorporation mostly concede the anti-incorporationist critique that the Establishment Clause was originally understood as a purely structural and federalist limitation that could not have been logically and textually incorporated against the states. Their primary concern, therefore, is to establish that the public meaning of the Clause evolved from a structural restraint in 1791 to a personal right in 1868.

Justice Brennan's early defense of incorporation, for example, noted that the Establishment Clause could not have been incorporated if it were a mere reservation of state power over religious establishments,¹²⁵ but suggested that by 1868, the Clause's meaning had shifted to encompass a personal right susceptible to incorporation.¹²⁶ As for the Blaine Amendment, Brennan dismissed it as "prov[ing] too much," since Blaine would also have expressly applied the Free Exercise Clause to the states, and incorporation of that Clause is beyond dispute.¹²⁷

Kurt Lash's leading academic defense of Establishment Clause incorporation likewise accepts that the Clause was originally understood as a mere structural and federalist protection of state power over religion;¹²⁸ Lash even repeats the logical and textual arguments from the classical template.¹²⁹ He defends incorporation by an exhaustive review of antebellum legal history which shows, he argues, that by the late 1860s the Establishment Clause had evolved from a structural protection of state power to "a principle of personal freedom—the immunity from government power of the subject of religion."¹³⁰

125. *See* *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 254 (1963) (Brennan, J., concurring).

126. *Id.* at 254, 256.

127. *Id.* at 257. Blaine might not have "proved too much" after all; scholars have since argued that the Due Process Clause did not incorporate the Free Exercise Clause either, *see, e.g.*, SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 35–43, 49–54, not to mention the entire First Amendment, *see* Jay S. Bybee, *Taking Liberties with the First Amendment: Congress, Section 5, and the Religious Freedom Restoration Act*, 48 VAND. L. REV. 1539 (1995) [hereinafter Bybee, *Taking Liberties*].

128. *See* Lash, *Establishment Clause*, *supra* note 6, at 1098–99 ("[S]tatements by those involved in the framing of the Establishment Clause, early constitutional treatise writers, numerous congressional leaders, and even the Supreme Court, are remarkably consistent in their interpretation of the Establishment Clause as representing no power to the federal government and reserving the same to the states.").

129. *Id.* at 1099 ("Whether accomplished through the Due Process Clause, or . . . the Privileges or Immunities Clause, incorporation assumes the existence of a personal freedom that can sensibly be protected against state action. But how can the original Establishment Clause—an expression of the rights (or powers) of *states*—be read as a personal liberty *against* the states? It would make just as much (or as little) sense to incorporate the Tenth Amendment." (emphasis in original) (internal quotation marks omitted)).

130. *Id.* at 1141. Ahkil Amar suggests a similar defense of Establishment Clause incorporation, but in a way that makes incorporation ultimately beside the point. Like Lash, he concedes that the Establishment Clause was originally understood as a "pure federalism provision" intended to protect state establishments of religion from federal interference. AMAR, *supra* note 4, at 246. Like Lash, the question for Amar is whether the meaning of the

With respect to the ratification debates, Lash notes condemnation of Southern regulation of black churches by members of the Thirty-Ninth Congress,¹³¹ as well as other Reconstruction era references which referred to “privileges,” “immunities,” “rights,” or “liberties” protected by the Establishment Clause.¹³² He dismisses Blaine as a nativist effort to establish Protestantism that actually conflicted with then-current understandings of the Religion Clauses.¹³³

Lash’s work is the most complete and detailed defense of Establishment Clause incorporation in the academic literature,¹³⁴ and undergirds most contemporary defenses of incorporation.¹³⁵ It is noteworthy, then, that he emphatically rejects that any portion of the original understanding of the Establishment Clause was susceptible to incorporation.¹³⁶ Like Brennan, Lash concludes that only an evolved understanding of the Clause could have been applied against the states in 1868.¹³⁷

Clause had altered during the antebellum period, from a structural restriction to a “private right,” thus becoming susceptible to incorporation under Amar’s “refined incorporation” theory. *Id.* at 252, 255. Amar tentatively suggests that the Clause may have come to reflect an anti-establishment right as state establishments died out through the antebellum era and that this growing anti-establishment sensibility in the larger political culture was reflected in anti-establishment provisions in federal territorial ordinances. These, in turn, were adopted as anti-establishment provisions in state constitutions as the territories governed by such ordinances were admitted as states, and as longtime members of the Union abandoned their state establishments and adopted similar anti-establishment amendments or revisions to their state constitutions. *See id.* at 248–52.

Amar concludes that by the 1860s the Establishment Clause might have morphed into a protection of religious liberty, but one that largely duplicated the protection of liberty afforded by the Free Exercise and Equal Protection Clauses. *See id.* at 252–54, 256. For Amar then, as for Justice Thomas, whether the Establishment Clause was applied against the states by the Fourteenth Amendment is unimportant because the same work is done elsewhere in the Constitution. *Cf.* Kurt T. Lash, *Two Movements of a Constitutional Symphony: Akhil Reed Amar’s The Bill of Rights*, 33 U. RICH. L. REV. 485, 494 n.39 (1999) [hereinafter Lash, *Two Movements*] (“Amar has made the Establishment Clause disappear by defining its core (prohibiting coercive establishments) as ‘really’ involving free exercise concerns.”).

131. Lash, *Establishment Clause*, *supra* note 6, at 1142.

132. *Id.* at 1143.

133. *See id.* at 1147–50.

134. In addition to Lash, *Establishment Clause*, *supra* note 6, see Lash, *Two Movements*, *supra* note 130, at 492–98; Kurt T. Lash, *Beyond Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 447, 456–59 (2009) [hereinafter Lash, *Beyond Incorporation*]. *See also* Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U. L. REV. 1106 (1994) [hereinafter Lash, *Free Exercise*] (making analogous arguments in relation to the Free Exercise Clause).

135. *See, e.g.*, Aynes, *Ink Blot or Not*, *supra* note 6, at 1317–18 & nn.118–19; Aynes, *McDonald*, *supra* note 6, at 189–90 & nn.47–48, 52; Greenawalt, *Common Sense*, *supra* note 6, at 508–09 & n.122, 124; Laycock, *Theology Scholarships*, *supra* note 6, at 242 & n.549.

136. *See supra* text accompanying notes 128–29.

137. *See* Lash, *Beyond Incorporation*, *supra* note 134, at 458–59; *see also* LEVY, *supra* note 19, at 148, 225 (asserting that the framers of the Fourteenth Amendment did not understand it to apply the Establishment Clause to the states, but defending its incorporation on textual grounds).

II. A TEXTUAL LOGIC FOR ESTABLISHMENT CLAUSE INCORPORATION

The logical and textual arguments against Establishment Clause incorporation presuppose that the Establishment Clause was only a reservation to the states of power over religious establishment and disestablishment, which thus also prevented congressional establishment of a national church. As Justice Thomas states, “States and only States were the direct beneficiaries.”¹³⁸ In this view, a reservation of state power cannot logically limit state power, nor can it be a personal “privilege,” “immunity,” “liberty,” or right applicable to the states through the Privileges or Immunities or Due Process Clause of the Fourteenth Amendment.

This presupposition is wrong, and so are the conclusions drawn from it. The argument begins with Wesley Hohfeld’s famous schema of binary relationships in common law, in particular his conclusion that legal disabilities are logically paired with legal immunities.¹³⁹ Structural constitutional restraints are disabilities that logically correlate with corresponding constitutional immunities.¹⁴⁰

The Establishment Clause is a particular kind of structural allocation, a denial of power to Congress—not a reservation of power to the states—over religious establishments.¹⁴¹ As a structural restraint on the exercise of congressional power, the Clause originally constituted a constitutional disability on Congress’s exercise of lawmaking power that generated two immunities, only one of which was held by the states.¹⁴² Conceptualizing the Establishment Clause as a disability that generates multiple immunities enables an account of its later application against the states that is logically coherent,¹⁴³ textually faithful,¹⁴⁴ and consistent with Blaine.¹⁴⁵

A. Constitutional Disabilities and Immunities

1. The Logic of Common-Law Relationships

Professor Hohfeld famously aligned eight common-law concepts into four correlative relationships which, he argued, constitute the foundation of common law: immunities and disabilities, rights and duties, powers and liabilities, and privileges and “no-rights.”¹⁴⁶ Hohfeld maintained that every common-law entitlement is founded on one of these bilateral relationships; an immunity, right, power, or privilege, in other words, necessarily entails the presence of its correlate

138. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 51 (2004) (Thomas, J., concurring).

139. *See infra* Part II.A.1.

140. *See infra* Part II.A.2.

141. *See infra* Part II.B.1.

142. *See infra* Part II.B.2.

143. *See infra* Part II.C.1.

144. *See infra* Part II.C.2.

145. *See infra* Part II.C.3.

146. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30–58 (1913).

disability, duty, liability, or no-right.¹⁴⁷ Thus, “immunity” and “disability” constitute a logical bilateral relationship that protects the legal status and relationships of one party from the acts of the other. If A is *immune* from B’s action attempting to alter A’s legal status or relations, then B is necessarily *disabled* from performing the action, and vice versa: if B is *disabled* from performing an action that affects A’s status or relations, then A is necessarily *immune* from any legal consequence of B’s action.¹⁴⁸

The significance of immunity and disability is illuminated by their Hohfeldian opposites, “liability” and “power.”¹⁴⁹ A disability is the complete absence of legal *power*—literally, a “no-power.”¹⁵⁰ An immunity correlatively signifies the legal irrelevance and ineffectiveness of another’s actions, the opposite of which would be one’s *liability* under the law to incur the consequences of those actions.¹⁵¹ Hohfeld gives the example of landowner X and a third party Y who holds no right, title, or claim to X’s land: Y is disabled from alienating X’s title, and X is immune from the legal effects of any efforts at alienation by Y.¹⁵²

Finally, Hohfeldian relationships entail an “act-description,”¹⁵³ “some situation, or state-of-affairs,” to which one party is entitled at the expense of the other.¹⁵⁴ In case of a disability/immunity relationship, the act-description consists of a prohibited act and a descriptive subject matter that together delineate the scope of the disability/immunity. In Hohfeld’s hypothetical of X and Y immediately above, the act-description is the alienation (act) of X’s title to her land (subject matter).

2. The Logic of Constitutional Structure

“Structural” restraints arise from the Constitution’s allocation of sovereign power between the states and the federal government, and then among the three federal branches.¹⁵⁵ A structural restraint grants or withholds sovereign power to or

147. See David Kennedy, *Wesley Hohfeld*, in *THE CANON OF AMERICAN LEGAL THOUGHT* 47, 48 (David Kennedy & William W. Fisher III eds., 2006); Walter Wheeler Cook, *Hohfeld’s Contribution to the Science of Law*, 28 *YALE L.J.* 721, 727–28 (1919); Arthur L. Corbin, *Legal Analysis and Terminology*, 29 *YALE L.J.* 163, 166 (1919); cf. AMAR, *supra* note 4, at 151–52 (“The analytic truth of Hohfeld’s insight” that “rights logically implied correlative duties . . . is hard to dispute . . .”).

Some of Hohfeld’s contemporaries were not wholly convinced of the originality or utility of his scheme. See, e.g., Roscoe Pound, *Fifty Years of Jurisprudence*, 50 *HARV. L. REV.* 557, 571–76 (1937) (noting Hohfeld’s indebtedness to the nineteenth-century positivists and criticizing the artificiality of some of his legal concepts and relations).

148. See Hohfeld, *supra* note 146, at 55.

149. *Id.* at 44.

150. *Id.* at 45, 55.

151. *Id.* at 55.

152. *Id.*

153. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 199 (1980) (explaining that Hohfeldian relations are actually “three-term[ed],” consisting of the two parties to the relation and some “act-description signifying some act”).

154. Alan Ross Anderson, *The Logic of Hohfeldian Propositions*, 33 *U. PITT. L. REV.* 29, 31 (1971).

155. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 230

from the states or a branch of the federal government.¹⁵⁶ The Constitution's power-granting provisions relate almost entirely to the federal government since the states are assumed to possess the powers they wield unless the Constitution has assigned them exclusively to the federal government or withheld them altogether.¹⁵⁷ Thus, the Constitution enumerates the powers of Congress while assuming that state legislatures possess a general reserved power to legislate,¹⁵⁸ and expressly denying certain powers to both.¹⁵⁹

An array of Hohfeldian relationships is evident in the constitutional text, and Hohfeldian analysis is common in contemporary constitutional literature.¹⁶⁰ The

(1982); *TRIBE*, *supra* note 82, § 2–1, at 118–19; Esbeck, *supra* note 4, at 4, 8; Rosenkranz, *supra* note 4, at 1023; *THE FEDERALIST* NO. 9, at 51 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (“The regular distribution of power into distinct departments . . . are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.”); *THE FEDERALIST* NO. 47, at 323 (James Madison) (Jacob E. Cooke ed., 1961) (“Having reviewed the general form of the proposed government, and the general mass of power allotted to it: I proceed to examine the particular structure of this government, and the distribution of this mass of power among its constituent parts.”); *THE FEDERALIST* NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961) (“[T]he power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among distinct and separate departments.”).

156. See *TRIBE*, *supra* note 82, § 2–3, at 124–26 (“[G]overnment structure [is the] allocation of power.”); ERNEST A. YOUNG, *THE SUPREME COURT AND THE CONSTITUTIONAL STRUCTURE* 621–22 (2012); Esbeck, *supra* note 4, at 3 (“Structural clauses are helpfully thought of as power-conferring or power-limiting[;] . . . many such clauses serve both functions.”); e.g., *Dennis v. Higgins*, 498 U.S. 439, 453 (1991) (“[T]he Commerce Clause is a structural provision allocating authority between federal and state sovereignties.”) (Kennedy, J., dissenting).

157. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *TRIBE*, *supra* note 82, § 2–1, at 119.

158. Compare U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States . . .”), with *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (holding that the states of the United States “possess and exercise the authority of independent States . . . except as restrained and limited” by the Constitution).

159. See, e.g., U.S. CONST., art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* § 10 (“No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the obligation of Contracts”); see also Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 *TUL. L. REV.* 251, 314–15 (2000) [hereinafter Bybee, *Common Ground*] (summarizing the Constitution’s “principal focus” as “the distribution of power within a new federal government, the relationship between the new federal government and existing state governments, and the withdrawal of power from federal and state governments”).

160. See, e.g., J.M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 *U. MIAMI L. REV.* 1119, 1125–26 (1990); Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 *N.Y.U. L. REV.* 354, 392–93 (1999); Bybee, *Taking Liberties*, *supra* note 127, at 1546–66; Bybee, *Common Ground*, *supra* note 159, at 315–28; I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 *STAN. L. REV.* 1135, 1140 n.8 (2008); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 *GA. L. REV.* 343, 344 & n.4 (1993); Ronald R. Garet, *Three Concepts of Church Autonomy*, 2004 *BYU L. REV.* 1349, 1354–56, 1369–70; Louis L. Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*,

disability/immunity relationship in particular maps easily onto structural constitutional restraints; these function precisely as disabilities, limiting the federal or a state government's reach by denying it sovereign power to perform certain acts relating to certain subject matters. Constitutional disabilities on government action necessarily create correlative constitutional immunities from the consequences of actions that exceed the bounds of the disability.¹⁶¹

For example, it is a commonplace that federalism protects personal liberty.¹⁶² Private plaintiffs as well as the states have standing to challenge federal government action for injuries suffered when it transgresses the structural limits expressed or implied by constitutional text or the federal system.¹⁶³ In Hohfeldian

116 U. PA. L. REV. 1033 (1968); Ira C. Lupu & Robert W. Tuttle, *Courts, Clergy, and Congregations: Disputes Between Religious Institutions and Their Leaders*, 7 GEO. J.L. & PUB. POL'Y 119, 122 & n.20, 135–37 (2009) [hereinafter Lupu & Tuttle, *Religious Institutions*]; Gregory E. Maggs, *Innovation in Constitutional Law: The Right to Education and the Tricks of the Trade*, 86 NW. U. L. REV. 1038, 1048–49 (1992); William T. Mayton, “Buying-Up Speech”: *Active Government and the Terms of the First and Fourteenth Amendments*, 3 WM. & MARY BILL RTS. J. 373, 373 (1994); Simeon C.R. McIntosh, *On Reading the Ninth Amendment: A Reply to Raoul Berger*, 28 HOW. L.J. 913, 921–24 (1985); H. Newcomb Morse, *Applying the Hohfeld System to Constitutional Analysis*, 9 WHITTIER L. REV. 639 (1988); Allen Thomas O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141 (2009); Samuel C. Rickless, *The Right to Privacy Unveiled*, 44 SAN DIEGO L. REV. 773, 77–80 (2007); Frederick Schauer, *Hohfeld's First Amendment*, 76 GEO. WASH. L. REV. 914 (2008); Howard M. Wasserman, *Jurisdiction, Merits, and Non-Existant Rights*, 56 U. KAN. L. REV. 227, 232–34 (2008); Gordon G. Young, *Justifying Motive Analysis in Judicial Review*, 17 WM. & MARY BILL RTS. J. 191, 256–57 (2008); see also *Sierra Club v. Morton*, 405 U.S. 727, 732 n.3 (1972) (citing Jaffe, *supra*).

161. Bybee, *Common Ground*, *supra* note 159, at 318–22; Bybee, *Taking Liberties*, *supra* note 127, at 1547–50; see also Cook, *supra* note 147, at 726–27; Garet, *supra* note 160, at 1354–55; Lupu & Tuttle, *Religious Institutions*, *supra* note 160, at 122–23 & n.20; Maggs, *supra* note 160, at 1048–49; cf. Rickless, *supra* note 160, at 775–79.

Hohfeld himself identified the Contracts Clause, “No State shall pass any Law impairing the Obligation of Contracts,” U.S. CONST. art. I, §10, cl. 1 (ellipses omitted), as having created a disability/immunity relationship. See Hohfeld, *supra* note 146, at 57. This text disables the states from enacting legislation that alters or interferes with contractual obligations; parties to and beneficiaries of those obligations are correspondingly immune from legislation that purports to alter or interfere with their performance or enforcement.

162. *E.g.*, *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“Federalism . . . protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions.”); *New York v. United States*, 505 U.S. 144, 181 (1992) (“[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.”) (internal quotation marks omitted); see also THE FEDERALIST NO. 45, at 309 (James Madison) (deriding the idea that the Revolution was fought to restore the “dignities and attributes of [state] sovereignty” rather than to ensure personal “peace, liberty and safety”); MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL & SAMUEL L. BRAY, THE CONSTITUTION OF THE UNITED STATES 45 (2010) (“The Constitution’s structure—separation of powers, federalism—is designed in part to promote individual liberty, as well as effective, limited government.”).

163. *E.g.*, *Bond*, 131 S. Ct. at 2363–64 (“The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State. . . . [A]llocation of powers between the

terms, the disabilities that federalism imposes on federal action immunize individuals as well as the states from the consequences of such action when it violates the limits set by such disabilities, and empowers both states and individuals as immunity-holders to challenge violations of those limits.¹⁶⁴

B. Establishment Clause Disability and Immunities

1. One Disability, Two Immunities

The Establishment Clause originally disabled the federal government from enacting laws “respecting an establishment of religion.”¹⁶⁵ This disability generated two immunities, one held by the states against federal interference in state decisions to establish or disestablish religion, and one held by the people against the adverse legal consequences that would flow from federal establishment of a national church.

a. Federal Disability

The Establishment Clause has been widely characterized as a structural restraint that denies to government the power to act with respect to certain subject matters involving religion.¹⁶⁶ One of the first such references is an early twentieth-century

National Government and the States enhances freedom, first by protecting the integrity of the governments themselves, and second by protecting the people, from whom all governmental powers are derived.”)

164. *Id.* at 2364 (“States are not the sole intended beneficiaries of federalism. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate.” (citation omitted)). Private plaintiffs have standing to challenge violations of the separation of federal powers for the same reason. *E.g.*, *INS v. Chadha*, 462 U.S. 919, 935–36 (1983).

165. U.S. CONST. amend. I.

166. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 243, 244 (1997) (explaining that the Establishment Clause’s “flat ban on subsidization” of government by religion is a “structural and libertarian guarantee[.]”) (Souter, J., dissenting); *Lee v. Weisman*, 505 U.S. 577, 589–90 (1992) (explaining that the Establishment Clause restricts government action even when the action does not interfere with minority free exercise); *Downes v. Bidwell*, 182 U.S. 244, 294–98 (1901) (explaining that the Establishment Clause and the rest of the First Amendment constitute an absolute prohibition on congressional power to legislate); *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (“[T]he basic structure of the Establishment Clause, which imposes a restriction on Congress, differs markedly from that of the Fourth Amendment, which confers a right on the people. . . . [T]he constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time or place.”); *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 94 (1980) (“[P]art of the point of combining these cross-cutting commands [of the Religion Clauses] was to make sure the church and the government gave each other breathing space: the provision thus performs a structural or separation of powers function.”); REX E. LEE, *A LAWYER LOOKS AT THE CONSTITUTION* 129 (1981) (“The underlying concepts of the two religion guarantees are quite different. The free-exercise clause is analogous to other First Amendment provisions; its function is to secure free choice in religious matters

dictum in *Downes v. Bidwell*.¹⁶⁷ Considering whether the Uniform Duties Clause applied to imports from “unincorporated” territories,¹⁶⁸ *Downes* contrasted that question with the absolute character of certain of the Constitution’s other denials of federal power:

There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only “throughout the United States” or among the several States.

Thus, when the Constitution declares that “no bill of attainder or *ex post facto* law shall be passed,” and that “no title nobility shall be granted by the United States,” it goes to the competency of Congress to pass a bill *of that description*.¹⁶⁹

The Court went on to suggest that “the same remark may apply to the 1st Amendment,” including the Establishment Clause.¹⁷⁰

against governmental intrusions,” whereas “the establishment clause deals with structural matters.”); Esbeck, *supra* note 4, at 6, 21 (“Remedies tailored to relieving plaintiffs of injuries actually suffered are indicative of an individual rights clause,” whereas under the Establishment Clause, “courts have enjoined government from acting in an entire field of concerns deemed to be in the exclusive province of religion. . . . [F]rom its inception the Establishment Clause . . . had the role of a structural clause rather than a rights-based clause.”); Lupu & Tuttle, *Religious Institutions*, *supra* note 160, at 122–23 (“[T]he Constitution disables civil courts from resolving certain classes of questions. This is an adjudicative disability, not a right of autonomy, and it rest[s] on the Establishment Clause”); Meier, *supra* note 4, at 164 (“[T]he [Supreme] Court has tended to view the [Establishment] Clause as more of a structural provision rather than as a clause protecting individual rights.”); Jessica Powley Hayden, Note, *The Ties That Bind: The Constitution, Structural Restraints, and Government Action Overseas*, 96 GEO. L.J. 237, 243 (2007) (“One of the [Establishment] Clause’s central purposes was to manage federal power vis-à-vis the states. . . . Although the Religion Clauses, working in tandem, embody an individual right of religious freedom, the prohibition on establishment was meant to act as a prohibition on government action, not as a specific right held by the people.”); Note, *Rethinking Incorporation*, *supra* note 4, at 1710 (The Establishment Clause “is a structural limit upon federal power and a reservation of authority to the states.”).

167. 182 U.S. 244 (1901).

168. U.S. CONST. art. I, § 8, cl. 1 (“[A]ll Duties, Imposts and Excises shall be uniform throughout the United States.”).

169. *Downes*, 182 U.S. at 277 (emphasis in original).

170. *Id.* Three Justices concurring in the five-Justice majority were even more emphatic, describing the Establishment Clause and other First Amendment norms as “absolute withdrawals of power which the Constitution has made in favor of human liberty,” which “are applicable to every condition or status.” *Id.* at 297–98 (White, J., joined by Shiras & McKenna, JJ., concurring) (citing *Chi., Rock Island & Pac. Ry. Co. v. McGlenn*, 114 U.S. 542 (1885)); accord Thomas Jefferson, Resolutions Adopted by the Kentucky General Assembly, Res. III (Nov. 10, 1798), in 30 THE PAPERS OF THOMAS JEFFERSON: 1 JANUARY 1798 TO 31 JANUARY 1799, at 550, 550–51 (2003) (The First Amendment confirms that the Constitution afforded the federal government “no power” over the freedoms of religion, speech, or press, so that “libels, falsehoods, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals. That therefore the [Sedition Act] which does abridge the freedom of the press, is not law, but is altogether void and of no

Courts and commentators have since reconceptualized most provisions of the First Amendment as personal rights rather than structural disabilities.¹⁷¹ The Establishment Clause, however, continues to be understood as a structural limitation that wholly disables government from establishing religion.¹⁷² Unlike violations of personal rights, for example, Establishment Clause violations may not be counterbalanced by weighty government interests¹⁷³ or subjected to equitable defenses like waiver.¹⁷⁴ The Supreme Court has even suggested that in some

effect.”).

171. *E.g.*, *Sherbert v. Verner*, 374 U.S. 398, 413 (1963) (Stewart, J., concurring) (“[N]o liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth.”); *Near v. Minnesota*, 283 U.S. 697, 707 (1931) (“It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property.”); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press . . . are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); LEE, *supra* note 166, at 129 (“[F]ree-exercise problems arise in the standard First Amendment individual-rights context.”).

172. *See, e.g.*, *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991) (*Downes* “suggested that the constitutional prohibition against establishments of religion targets the competency of Congress to enact legislation of that description—irrespective of time and place.”); LEE, *supra* note 166, at 129 (The Establishment Clause “has a different thrust” than the Free Exercise Clause: “Unlike any other First Amendment provision, [it] deals with structural matters, specifically the relationships between government and religious institutions or religious movements.”).

173. *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 596 (1992) (holding that Establishment Clause violations may not be balanced against majoritarian preferences); *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266 (10th Cir. 2008) (opinion by McConnell, J.) (holding that all Establishment Clause violations except those involving religious discrimination are “flatly forbidden without reference to the strength of governmental purposes”); Esbeck, *supra* note 4, at 2–3 (“For government to avoid violating a right is a matter of constitutional duty owed to each individual within its jurisdiction. On the other hand, for government to avoid exceeding a structural restraint is a matter of limiting its activities and laws to the scope of its powers.”); Lupu & Tuttle, *Religious Institutions*, *supra* note 160, at 129 (“[A]n Establishment Clause–anchored doctrine of ministerial exemption . . . would admit of no interest-balancing whatsoever”); *see also* LEE, *supra* note 166, at 129 (Unlike Establishment Clause doctrine, free exercise doctrine “balanc[es] governmental interests against individual interests.”).

174. *See, e.g.*, *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 455 (9th Cir. 1994) (holding that majority student vote to allow graduation prayer could not waive constitutional limitations imposed by Establishment Clause), *vacated as moot*, 515 U.S. 1154 (1995); *EEOC v. Catholic Univ. of Am.*, 856 F. Supp. 1, 12–13 (D.D.C. 1994) (holding *sua sponte* that court lacked jurisdiction under Establishment Clause to adjudicate theological questions despite failure of either party to raise issue), *aff’d*, 83 F.3d 455 (D.C. Cir. 1996); *Johnson v. Sanders*, 319 F. Supp. 421, 432 n. 32 (D. Conn. 1970) (“The Establishment Clause is the guardian of the interests of society as a whole and is particularly invested with the rights of minorities. It cannot be ‘waived’ by individuals or institutions, any more than the

circumstances the Establishment Clause disability functions like a denial of subject-matter jurisdiction,¹⁷⁵ as to which questions of interest-balancing and equity

unconstitutionality of state-prescribed school prayers could be ‘waived’ by certain pupils absenting themselves from the classroom while they were conducted.”), *aff’d mem.*, 403 U.S. 955 (1971); Lupu & Tuttle, *Religious Institutions*, *supra* note 160, at 135–36, 146 (“[Establishment Clause limitations] cannot be waived or conferred by consent of the parties. . . . For example, even if all of the parents in a public school district agreed to permit official prayers in the schools, the practice would still violate the Establishment Clause. . . . Similarly, a congregation’s waiver of the ministerial exception should not vest a court with jurisdiction to decide on the quality of a minister’s job performance.”); Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330, 333 n.14 (1985) (“[The Establishment Clause] gives rise to rights that are clearly not subject to waiver or alienation by any individual—certainly not by a recipient of government aid to religion, or by a citizen-taxpayer who is the source of such aid. Thus it is plain that a church or church-related school could not, for example, ‘waive’ the right to avoid intrusive governmental entanglement in order to receive direct monetary aid from the public treasury.”); Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CALIF. L. REV. 123, 153–54 (2008) (“Many, if not most, constitutional rights are waivable by their intended beneficiaries. . . . Permitting waiver of a constitutional right makes sense when the justification for the right is primarily to bolster and reinforce the autonomy of the right holder and where permitting waiver does not undermine any larger social goals. However, waiver does not make sense, and is not permissible, when constitutional rights and obligations are intended to serve broader social functions, such as establishing a particular structure of government or reinforcing foundational social norms. . . . [T]he Establishment Clause of the First Amendment ensures a government in which church and state are separate. The goals and benefits of the Establishment Clause are primarily social and structural, not individual. As such, individuals may not choose to waive the protections of the Establishment Clause.”). *But see* *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Horne*, 698 F.3d 1295, 1301–02 (10th Cir. 2012) (upholding laches defense to Establishment Clause claim and vacating lower court determination that structural limits set by the Clause were not subject to waiver).

175. *See* *Serbian E. Orthodox Diocese for the U.S. & Can. v. Milivojevich*, 426 U.S. 696, 713–14 (1976) (explaining that courts may “exercise no jurisdiction” over a “subject matter” involving “theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.”) (quoting *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 733–34 (1871) (emphasis omitted)); *accord* *Dowd v. Soc’y of St. Columbans*, 861 F.2d 761, 764 (1st Cir. 1988); *Catholic Univ.*, 856 F. Supp. at 12–13; *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 811 (Md. Ct. App. 1996); *Gaydos v. Blaeuer*, 81 S.W.3d 186, 192–93 (Mo. Ct. App. 2002); *Cha v. Korean Presbyterian Church*, 553 S.E.2d 511, 514–15 (Va. 2001); *Pritzlaff v. Archdiocese*, 533 N.W.2d 780, 790 (Wis. 1995); *Esbeck*, *supra* note 4, at 42–43; *see* *Garet*, *supra* note 160, at 1355–56 (suggesting that if Establishment Clause violations were waivable, the Clause would represent a right/duty rather than an immunity/disability relationship). The absolute character of a structural disability does not fit with the conditional character of a group right to church autonomy, whose violation may be waived by the group right-holder or otherwise permitted if closely related to a weighty government interest. Frederick Mark Gedicks, *Narrative Pluralism and Doctrinal Incoherence in Hosanna-Tabor*, 64 MERCER L. REV. 405 (2013); Lupu & Tuttle, *Religious Institutions*, *supra* note 160, at 135.

The Court had traditionally rested this limitation on the First Amendment generally rather than in the Religion Clauses or the Establishment Clause alone, perhaps to preserve

are obviously irrelevant. These doctrines would not make sense if the Establishment Clause protected a personal right like the free exercise of religion,¹⁷⁶ but they fit nicely with a structural conception of the Clause as a denial of government power.

Anti-incorporationists commonly characterize the Establishment Clause as a structural restraint that reserved power to the states.¹⁷⁷ This is correct as far as it goes; a reservation of state power over a subject matter impliedly immunizes the people against federal action relating to that subject matter. Characterizing the Establishment Clause as a reservation of state power nevertheless obscures the full meaning and effect of the Clause. Denying the federal government sovereign power over religious establishments not only protected the states by leaving them free to exercise their power to establish or disestablish religion but also ensured that the people would not suffer the adverse legal effects of a federally established religion.

This is evident from the text, which disables Congress rather than merely reserving state power. The Establishment Clause does not read like that quintessential reservation of state power, the Tenth Amendment (and even the Tenth Amendment reserves power to the people as well as the states).¹⁷⁸ A reservation of state power over religious establishments would have looked something like, “The power to pass laws respecting an establishment of religion, not having been delegated to the United States by the Constitution nor prohibited by it to the States, is reserved to the States.” By contrast, the language of the Clause goes beyond reserving power to the states to affirmatively deny power to Congress. A textual reservation of power to the states would have only implicitly protected the people from federal action, whereas the actual text of the Clause expressly disabling Congress puts each of the states and the people on equal textual footing as direct beneficiaries of the disability.

As ratified in 1791, the Establishment Clause was a particular case of a more general and widespread understanding of the liberty-protecting effect of the

the freedom of association implicit in the Speech Clause as part of the exception’s doctrinal foundation. In *Hosanna-Tabor*, however, the Court expressly rejected the freedom of association as a basis for the ministerial exception, instead resting the exception on a religious group right to church autonomy under the Free Exercise Clause and on a structural disability on theological entanglement under the Establishment Clause. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 704–07 (2012).

176. Free exercise rights are subject to balancing and may be waived by their holders. *See, e.g., Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that state action targeting a particular religion may be upheld if narrowly tailored to a compelling government interest).

177. *E.g., Akhil Reed Amar, The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1158 (1991); Conkle, *supra* note 4, at 1133; Glendon & Yanes, *supra* note 4, at 481–82; Lietzau, *supra* note 4, at 1201–02; McClellan, *supra* note 4, at 295; Muñoz, *supra* note 4, at 631–32; Rosenkranz, *supra* note 4, at 1060; Doshi, *supra* note 4, at 467; Hilton, *supra* note 4, at 1707; Kruse, *supra* note 4, at 66; *see also* SMITH, FOREORDAINED FAILURE, *supra* note 4, at 18 (“[The Religion Clauses were] simply an assignment of jurisdiction over matters of religion to the states—no more, no less.”).

178. *Compare* U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion”), *with id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

Constitution's allocations of sovereign power.¹⁷⁹ As is well known, Federalists maintained that because the Constitution nowhere delegated to Congress any power over religious subject matters, Congress lacked the power to do any of the things that anti-Federalists feared, such as establish a national church, interfere with state decisions to establish or disestablish religion, or burden religious conscience. The Establishment Clause confirmed the disability implicit in constitutional structure by expressly denying to Congress the power to enact laws pursuant to its enumerated powers respecting the establishment or disestablishment of religion at the federal or state level, thereby generating immunities in both the states and the people.¹⁸⁰

b. State Immunity

As anti-incorporationists routinely argue, the Establishment Clause disability immunized the states from congressional attempts to interfere with state establishment or disestablishment of religion. The constitutional disability, which prevented Congress from passing any “law respecting an establishment of religion,” inoculated the states against the legal consequences of any federal law that purported to alter the legal status or relations of state-established or state-disestablished religions.

c. Personal Immunity

The congressional disability imposed by the Establishment Clause, however, did not immunize only the states. There is also consensus that the Clause was originally understood to restrain the federal government from constituting a church with the powers, privileges, and characteristics of eighteenth-century national churches like the Church of England;¹⁸¹ even anti-incorporationists agree that besides disabling

179. See *supra* notes 155–56, 162–64 and accompanying text.

180. Cf. GREENAWALT, RELIGION, *supra* note 6, at 29 (arguing that the Establishment Clause was originally understood to have deprived the federal government not only of jurisdiction over state establishment or disestablishment of religion, but also to have imposed a substantive prohibition against establishing a national church); McClellan, *supra* note 4, at 295, 314–15 (arguing that the Establishment Clause embodied dual purposes of protecting state prerogatives over religious establishment and disestablishment and protecting individuals from encroachments on personal liberty by a national church); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1505–06 (1987) [hereinafter McConnell, *Federalism*] (book review) (same); see also ELLIS M. WEST, THE RELIGION CLAUSES OF THE FIRST AMENDMENT 22 (2011) (“[A] constitutional provision may deny a government *jurisdiction* over a certain subject/domain for two entirely different reasons—to protect states’ rights *or* to protect a natural right” (emphasis in original)); Bybee, *Taking Liberties*, *supra* note 127, at 1549–50, 1557 (arguing that the entire First Amendment constituted a disability on Congress that generated both state and personal immunities).

181. See JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 89 (3d ed. 2010); Feldman, *supra* note 71, at 398–99; Green, *A Reassessment*, *supra* note 111, at 767–68; Greenawalt, *Common Sense*, *supra* note 6, at 488, 491; Lash, *Establishment Clause*, *supra* note 6, at 1088–89; McConnell, *Federalism*, *supra* note 180, at 1506.

Congress from interfering with state establishment and disestablishment, the Clause also disabled Congress from establishing a national religion.¹⁸² This substantive disability on establishing a national religion logically correlates to an immunity in the people of the United States from any legal consequences purportedly generated by a national religious establishment. The eighteenth-century founders feared a national religious establishment that would impose on personal religious conscience and practice, and not just the intrusions it might have imposed on state relationships with religion.

* * *

The Establishment Clause was originally understood as a disability on congressional action, not simply as a reservation of state power. This disability left the states free to effect religious establishment or disestablishment without congressional interference, but it also left the people as well as the states free of the consequences of federally established religion; the disability, in other words, created both state and personal immunities from congressional action.¹⁸³ The Establishment Clause's protection of personal liberty thus did not "evolve" beyond the Clause's original structural limitation, as argued by most defenders of incorporation,¹⁸⁴ but was present from the beginning in the personal immunity logically correlated to the Clause's structural disability.

2. Act-Description

The congressional disability and the state and personal immunities created by the Establishment Clause have an act-description that delineates their scope. Identifying the prohibited act is easy: the Clause disables Congress from using its legislative power—"Congress shall pass no law"—and the state and individual immunities consequently insulate their holders from the legal effects of congressional acts.

It is more complicated to describe the subject matter of those laws that Congress is disabled from passing—laws "respecting an establishment of religion." The original meaning of "establishment of religion" remains highly contested, and those disagreements cannot be resolved here. Nor is it necessary to do so; it is enough to show that the Establishment Clause encompassed substantive prohibitions as opposed to purely jurisdictional ones.

Virtually all Establishment Clause scholars agree that whatever else it entailed, the original meaning of the Clause encompassed at least one substantive prohibition—that against a national church like the eighteenth-century Church of

182. *E.g.*, AMAR, *supra* note 4, at 32; SMITH, FOREORDAINED FAILURE, *supra* note 4, at 23; Glendon & Yanes, *supra* note 4, at 497; Knically, *supra* note 4, at 219; Kurland, *supra* note 4, at 9; McClellan, *supra* note 4, at 295, 314–15; Muñoz, *supra* note 4, at 630; Paulsen, *supra* note 4, at 317; Porth & George, *supra* note 4, at 136–37; Steven D. Smith, *The Jurisdictional Establishment Clause: A Reappraisal*, 81 NOTRE DAME L. REV. 1843, 1871 (2006) [hereinafter Smith, *Jurisdictional Establishment Clause*]; Doshi, *supra* note 4, at 467; Kruse, *supra* note 4, at 77, 85–87; Note, *Rethinking Incorporation*, *supra* note 4, at 1707; *see supra* notes 58 (Snee) & 76 (Thomas) and accompanying text.

183. *See supra* note 180 and accompanying text.

184. *See supra* Part I.D.

England.¹⁸⁵ Accordingly, one may posit as the subject-matter prohibition of the Establishment Clause the general attributes of the “establishment of religion” or established church as that concept was understood in the late eighteenth century. An eighteenth-century “establishment of religion” generally possessed some measure of political or governmental power that privileged its members and burdened dissenters and nonmembers;¹⁸⁶ it received land grants, tax monies, and other financial assistance directly from the government to support devotional and other unambiguously religious activities;¹⁸⁷ and it was subject to governmental regulation of its leadership and liturgy.¹⁸⁸ The Establishment Clause thus prohibited (at least) federal funding and control of a particular religion, as well as that religion’s exercise of federal power.

Using federal power, funding, and control to define the act-description, one can understand the Establishment Clause disability on Congress as correlatively immunizing (i) the states from the effects of congressional legislation purporting to require or prohibit the exercise of state power by churches, state funding of churches, or state control of churches, and (ii) the people and their congregations from the effects of congressional legislation purporting to authorize the exercise of federal power by a church, federal funding of a church, or federal control of a church. This dual reading of the Establishment Clause as prohibiting both federally established religion and federal interference with state establishment and disestablishment of religion is overwhelmingly accepted as the original understanding of the Clause upon its ratification in 1791.¹⁸⁹

185. See *supra* text accompanying notes 59, 181–82.

186. See, e.g., CHESTER JAMES ANTIEAU, ARTHUR T. DOWNEY & EDWARD C. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 1–2, 4–20, 24–29 (1964); Lupu & Tuttle, *Federalism & Faith*, *supra* note 28, at 27; Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131, 2144–46, 2159–76 (2003) [hereinafter McConnell, *Establishment*].

187. See, e.g., ANTIEAU ET AL., *supra* note 186, at 1, 20–24; Lupu & Tuttle, *Federalism & Faith*, *supra* note 28, at 27; McConnell, *Establishment*, *supra* note 186, at 2131, 2146–59.

188. See, e.g., Lupu & Tuttle, *Federalism & Faith*, *supra* note 28, at 27; McConnell, *Establishment*, *supra* note 186, at 2131–44.

189. See *supra* text accompanying notes 59, 181–82. This dual reading was the subject of an exchange between Kent Greenawalt and Steven Smith about whether the Establishment Clause prohibition was substantive as well as jurisdictional. See Greenawalt, *Common Sense*, *supra* note 6; Smith, *Jurisdictional Establishment Clause*, *supra* note 182; see also WEST, *supra* note 180, at 2–3, 29–36 (criticizing Smith on similar grounds). Greenawalt shows how a substantive reading of the Clause would have prohibited Congress from establishing but not disestablishing religion in federal enclaves such as U.S. territories, the District of Columbia, or U.S. military camps or forts, whereas a jurisdictional limitation would have prohibited both establishment and disestablishment by Congress in such enclaves. Greenawalt, *Common Sense*, *supra* note 6, at 481–86. As Greenawalt suggests, it seems unlikely that the Framers who drafted the Establishment Clause or the public that ratified it intended to prevent the federal government from disestablishing religion in such enclaves. *Id.* at 498–99.

Professor Smith attempts to salvage the jurisdictional reading by characterizing it as “two-way” in the states—that is, Congress was disabled from interfering with state decisions to establish or to disestablish religion in the states—but only “one-way” in federal

C. Establishment Clause Incorporation

1. Incorporation Logic

Though anti-incorporationists generally acknowledge that the Establishment Clause prohibited Congress from establishing a national church, they seem not to appreciate its logical significance in the incorporation debate. Arguments about the incoherence of Establishment Clause incorporation implicitly presuppose that the Clause encompasses only the state immunity. Indeed, anti-incorporationists are incredulous that incorporation could have converted a reservation of state power into a limitation on state power.¹⁹⁰

enclaves—that is, Congress was disabled from establishing religion in such enclaves, but not from disestablishing it, should the need to do so have ever arisen. Smith, *Jurisdictional Establishment Clause*, *supra* note 182, at 1851–53.

This Article assumes that the Establishment Clause originally prevented the federal government from establishing a national religion. Whether this is a substantive prohibition or a one-way jurisdictional limitation is immaterial.

190. See, e.g., AMAR, *supra* note 4, at 34 (“The original establishment clause . . . is agnostic on the substantive issue of establishment versus nonestablishment and simply calls for the issue to be decided locally. . . . But how can such a local option clause be mechanically incorporated *against* localities . . . ?” (emphasis in original)); BRADLEY, *supra* note 4, at 95 (“How does one translate ‘Congress shall not interfere with state practices’ into a command to state governments?”); DREISBACH, *supra* note 4, at 94–95 (“The modern Supreme Court, in pursuit of its objective to ‘nationalize’ the Bill of Rights, has systematically denied th[e] central [federalism] purpose of the religion clauses”); KATZ, *supra* note 4, at 11 (“The only thing we really *know* about the original meaning of the ‘no establishment’ clause is that it forbade Congress to disestablish as well as to establish religion. And the Fourteenth Amendment certainly did not extend this prohibition to the states!” (emphasis in original)); O’NEILL, *supra* note 3, at 162 (Since the Establishment Clause protected against a federally established religion, holding that the Fourteenth Amendment protects against a federally established religion created by a state legislature is “a complete absurdity which probably no justice of the Supreme Court will ever express in so many words.”); SMITH, *FOREORDAINED FAILURE*, *supra* note 4, at 24 (“[I]t seems nonsensical or incoherent to suggest that a provision representing ‘essential federalism’ has [a] substantive content that can be ‘extended’ to the states.”); Brose, *supra* note 4, at 5 (“*Everson* . . . stated, without any analysis whatsoever, that the same reasons for which the Court incorporated the free exercise clause gave it ‘every reason’ to do the same with the Establishment Clause. With such ease did the Court turn the Establishment Clause on its head.” (footnote omitted)); Conkle, *supra* note 4, at 1141 (“[T]he establishment clause, as originally understood . . . embraced only a policy of *federalism* on the subject of church and state. To ‘incorporate’ this policy of states’ rights for application *against* the states would be utter nonsense” (emphasis in original)); Glendon & Yanes, *supra* note 4, at 481 (“[I]t is striking in retrospect to observe how little intellectual curiosity the members of the Court demonstrated in the challenge presented by the task of adapting, for application to the states, [Establishment Clause] language that had long served to protect the states against the federal government.”); Kurland, *supra* note 4, at 9–10 (“[N]othing in the history of the fourteenth amendment suggests that [Establishment Clause incorporation] was among its purposes or goals. The transmogrification occurred solely at the whim of the Court . . . without cogent argument.”); Lietzau, *supra* note 4, at 1206 (“The only ‘right’ embodied in the clause would be the right to have one’s state free to establish a religion. It is thus nonsensical to incorporate the establishment clause”); Paulsen, *supra* note 4, at 317–18 (“[I]t makes no

The fallacy of this argument is its assumption that the original meaning of the Establishment Clause is fully captured by the state immunity. An extension of the state immunity to limit state action would obviously have been incoherent. But, there was nothing incoherent about extinguishing the state immunity and extending the personal immunity to limit state as well as federal power respecting religious establishments, especially in a historical context like Reconstruction when Congress was preoccupied with imposing additional constitutional limitations on the states. As the Supreme Court observed in 1879, the Reconstruction amendments and the federal legislation they enabled were intended as “limitations of the power of the States and enlargements of the power of Congress.”¹⁹¹

The Fourteenth Amendment can be logically understood to have eliminated that portion of the Establishment Clause disability that denied power to Congress to pass laws affecting state religious establishment and disestablishment, while leaving intact the remainder of the congressional disability against creating a national church, and enlarging it to include a state-established religion. Correlatively, the Amendment eliminated the state immunity from federal laws respecting state establishment or disestablishment of religion, while leaving intact the personal immunity against a national church and enlarging it to an immunity against all government action establishing religion, federal and state.

In short, incorporation enlarged the boundaries of Establishment Clause disability from no federal law vesting federal authority, assistance, or control in a religion to no law vesting *government* authority, assistance, or control in a religion. Or, what amounts to the same thing, incorporation eliminated any immunity owing to states under the Establishment Clause and extended the personal immunity from the legal consequences of national establishments to those of state establishments as well. Whether this construction of Establishment Clause incorporation can be textually and historically defended remains to be demonstrated,¹⁹² but it is not illogical.

more sense to ‘incorporate’ [the Establishment Clause] against the states than it does to incorporate the other provisions in the Bill of Rights which are federalism-oriented. Undaunted, the Supreme Court forced a square historical peg into a round doctrinal hole by filing off a few of the more inconvenient sharp edges of history.” (footnote and parentheses omitted)); Porth & George, *supra* note 4, at 139 (“[T]he establishment clause not only restricts the power of the federal government, it specifically protects a popular prerogative in the states. It is logically impossible to turn such a protection on its head and make it a prohibition.”); Snee, *supra* note 3, at 389 (“By what magical metamorphosis does a clause which, under the First Amendment, is expressly a reservation of power to the states, become a denial of that very power by virtue of the Fourteenth Amendment?”); Note, *Rethinking Incorporation*, *supra* note 4, at 1709 (“As originally understood, the Establishment Clause prevented the federal government from interfering with state authority over religion. However, incorporation achieves the opposite result—the elimination of such authority.”).

191. *Ex parte Virginia*, 100 U.S. 339, 345 (1880); see also CURTIS, THE BILL OF RIGHTS, *supra* note 20, at 54 (“[M]any Republicans wanted personal liberty and personal rights placed in the keeping of the nation and protected from local legislation.”).

192. See *infra* Parts II.C.2, III.

2. Incorporation Texts

For application of the Establishment Clause to the states to make textual sense, there must be a Fourteenth Amendment text that can reasonably be understood to have actually effected that application. The textual vehicles available for Establishment Clause incorporation are the Due Process and Privileges and Immunities Clauses.¹⁹³ Accordingly, a plausible textual account of incorporation must offer a definition of the Establishment Clause disability that sounds in “liberty,” “privilege,” or “immunity.” Again, anti-incorporationists deride suggestions that the structural Establishment Clause could protect any of these.¹⁹⁴

The anti-incorporationist error here is the assumption that no one stands on the other side of a structural limitation,¹⁹⁵ no “beneficiary,” to use Professor Conkle’s

193. U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”).

194. See, e.g., Duncan, *supra* note 4, at 42 (“How could a structural clause designed to promote federalism and ‘states rights’ be incorporated as a fundamental individual liberty under the Due Process Clause . . . ? How did the Court explain this paradox . . . ? As Horace Rumpole . . . might say: ‘[A]nswer came there none.’”) (alteration in original); Knically, *supra* note 4, at 175 (“[T]he criticism that *Everson*’s incorporation of the Clause against the states required ‘a constitutional wrench’ in order ‘to squeeze a structural clause into a ‘liberty mold’ remains as unanswered today as it did when it was made more than fifty years ago.”) (quoting Arthur E. Sutherland, Jr., *Establishment According to Engel*, 76 HARV. L. REV. 25, 41 (1962)); Lietzau, *supra* note 4, at 1206–07 (“The individual right involved [in Establishment Clause incorporation], namely religious liberty, is ‘protected’ by the clause only through its ability to prevent federal frustration of local legislative competence in religious matters. A court injunction against state action is exactly the frustration the establishment clause attempted to preclude.”); McClellan, *supra* note 4, at 316 (“[T]he application of the establishment clause to the states through the due process clause requires a rather bizarre juggling of words and artful manipulation of legal and historical precedents.”); Snee, *supra* note 3, at 406 (“A clause which in effect told the states . . . that they had *all* power over religion so far as the Constitution was concerned, cannot . . . be read into the word ‘liberty’ of the Fourteenth Amendment to mean that they have *no* power.”) (emphasis in original); Hilton, *supra* note 4, at 1706 (“Insofar as the only Bill of Rights provisions that are candidates for incorporation . . . are those that guarantee individual rights, the Establishment Clause was never an appropriate candidate for incorporation. . . . The structural ‘square peg’ cannot fit into the liberty ‘round hole’”); Note, *Rethinking Incorporation*, *supra* note 4, at 1710 (“[The Fourteenth Amendment Due Process Clause] purports to protect individuals from deprivations of ‘liberty.’ . . . [But] the Establishment Clause is not a provision of individual liberty at all. Rather, it is a structural limit upon federal power and a reservation of authority to the states.”); see also MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 72–73 (1965) (“[I]t seems to me extraordinarily difficult to take seriously the suggestion that the framers and the ratifiers of the Fourteenth Amendment believed that its adoption was going to have a significant effect upon the country’s religious institutions. . . . [I]t is not easy to see how . . . laws of the state which, although they may respect an establishment, do not deny liberty can be made into unconstitutional deprivations of liberty.”).

195. Cf. Kennedy, *supra* note 147, at 51 (explaining that Hohfeldian analysis enables

term,¹⁹⁶ or a state but no individual beneficiary, as maintained by Justice Thomas and Professor Amar.¹⁹⁷ The enlarged personal immunity from federal and state establishments, however, reasonably falls under the definitional umbrella of either a personal liberty or an immunity of citizenship.¹⁹⁸

a. Due Process

The Supreme Court incorporated the Establishment Clause against the states through the Due Process Clause as perhaps the earliest instance of “selective incorporation.”¹⁹⁹ The Due Process Clause provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”²⁰⁰

It is hardly a textual stretch to include a personal immunity correlated with a government disability under the umbrella of due process liberty.²⁰¹ Immunities designate fields of action in which government is not permitted to alter the legal status or relationships of an immunity holder acting in that field.²⁰² It is difficult to imagine, then, how an immunity would *not* fall within the definition of a liberty interest for purposes of incorporation through the Due Process Clause. Indeed, one of Hohfeld’s achievements was to demonstrate how the domain of liberty exceeded that of rights—that is, that the areas of individual freedom protected by “rights” do not exhaust the areas protected by “liberty.”²⁰³ Constitutional provisions that prohibit the federal and state governments from acting in certain fields leave individuals free to act in those fields as they choose without government interference, and thus presumptively protect personal liberty.²⁰⁴

In short, that the Establishment Clause was originally understood as a structural limitation rather than a personal right did not preclude its incorporation against the states as part of the substantive liberty protected by the Due Process Clause. Fourteenth Amendment enlargement of the domain of unrestricted individual action through the Establishment Clause—by extending the personal immunity to state as well as federal establishments—fits comfortably within any plausible definition of due process liberty.

analytic criticism of those “who speak of rights without reference to their correlative duties, or power without reference to correlative liabilities”).

196. Conkle, *supra* note 4, at 1140.

197. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 50–51 (2004) (Thomas, J., concurring in the judgment); AMAR, *supra* note 4, at 34.

198. Or both. See AMAR, *supra* note 4, at 172 (describing Justice Black’s theory of incorporation “as a whole” based on all of the clauses in Section 1 of the Fourteenth Amendment).

199. See *Duncan v. Louisiana*, 391 U.S. 145, 148–49 & n.14 (1968).

200. U.S. CONST. amend. XIV, § 1.

201. See *supra* notes 162–64 and accompanying text.

202. See *supra* Part II.A.1.

203. Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 988; see also Pound, *supra* note 147, at 571–72, 575 (noting Austin’s distinction between “right” and “liberty”).

204. Though the presumption may be rebutted: The absence of government power sometimes enables private exploitation of persons whom government has an obligation to protect. See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 973–74 (1991).

b. Privileges or Immunities

An additional text for applying the Establishment Clause against the states is the Privileges or Immunities Clause, which prohibits the states from abridging the “privileges or immunities of citizens of the United States.”²⁰⁵ A personal immunity from the legal consequences of governmentally established religions reasonably falls within the textual meaning of an immunity of citizenship.²⁰⁶ Although the Privileges or Immunities Clause does not expressly disable state governments from establishing religion, this disability is logically present if the individual immunity against the legal consequences of religious establishments generated by the Establishment Clause disability is one of the “immunities” protected by the clause against state action. Again, historical support remains to be demonstrated,²⁰⁷ but it hardly distorts the text of the Privileges or Immunities Clause to include within its coverage a personal immunity from the effects of religious establishments as the logical consequence of a disability on federal and state governments to establish religion.²⁰⁸

3. Logic, Text, and Blaine

The classical anti-incorporationist template plays Blaine as a trump against Establishment Clause incorporation: if the Establishment Clause had already been

205. U.S. CONST. amend. XIV, § 1.

206. *Cf.* Lash, *Establishment Clause*, *supra* note 6, at 1130 (arguing that various Reconstruction-era controversies reflected an evolved understanding of the Establishment Clause “that stood for personal ‘immunity’ from state establishment of religion”); Lash, *Beyond Incorporation*, *supra* note 134, at 458 (arguing that by the 1860s anti-establishment norms had evolved into privileges or immunities of citizenship). While I agree with Professor Lash’s contention that the Establishment Clause entailed this personal immunity at the time the Fourteenth Amendment was ratified, I contend that it was part of the original understanding of the Clause, and not the result of interpretative evolution. *See supra* Part II.B.1.

207. *See infra* Part III.

208. *Compare* “disability” in BLACK’S LAW DICTIONARY 528 (9th ed. 2009) (defining disability as “inability to perform some function,” especially “the inability of one person to alter a given relation with another person”), *with* “immunity” *in id.* at 817–18 (defining immunity as “exemption from a duty, liability, or service of process”); *compare* “disability,” IV OXFORD ENGLISH DICTIONARY 713 (2d ed. 1989) (“Want of ability (to discharge any office or function); inability, incapacity, impotence.”), *with* “immunity,” VII *id.* at 691 (“Exemption from a service, obligation, or duty,” including “freedom from liability to taxation, jurisdiction, etc.” and a “privilege granted to an individual or a corporation conferring exemption from certain taxes, burdens, or duties.”).

The argument here is purely textual and does not depend on whether the contemporary meanings of “disability” and “immunity” coincide with their mid-nineteenth century meanings. *Cf.* Curtis, *Historical Linguistics*, *supra* note 50, at 1098–131 (developing pro-incorporation argument based upon original meanings of “privilege” and “immunity”). This Article sketches a historical argument for Establishment Clause incorporation *infra* Part III.

applied against the states by the Fourteenth Amendment, then Congress would not have bothered to try to re-apply it through Blaine.²⁰⁹

The logical and textual account of Establishment Clause incorporation provides an account of incorporation that is consistent with Blaine. The portion of the Blaine Amendment that would have applied the Establishment Clause to the states *specified* a state government disability. It contrasted markedly with the general state disabilities implied by the undifferentiated personal liberty protected by the Due Process Clause and the unspecified citizen immunities referenced in the Privileges or Immunities Clause. Blaine would only have made explicit the state disability to create religious establishments, correlative to the personal immunity from such establishments that are implied by textual references to undifferentiated “liberty” and unspecified “immunities.”

One need not wonder long why a Reconstruction Congress might have wanted to expressly protect an immunity or liberty that was already implicitly protected by an existing Fourteenth Amendment clause. The 1787 anti-Federalists wanted the same thing, having pushed for a Bill of Rights despite Federalist claims that the Constitution gave the federal government no power to violate such rights.²¹⁰ The Forty-Third Congress may have had similar concerns in mind when it proposed to expressly apply the Religion Clauses against the states in Blaine, having already endured crabbed judicial interpretations of the Thirteenth Amendment that placed in question the Freedman’s Bureau and Civil Rights Acts,²¹¹ followed by Supreme Court rejection of the proposition that the Fourteenth Amendment had applied all or most of the Bill of Rights to the states.²¹² Having witnessed the narrowing of the Thirteenth Amendment and the evisceration of the Fourteenth by a hostile judiciary, Blaine proponents argued for an unambiguous, tightly worded amendment whose very specificity would render it impervious to unsympathetic judicial constructions.²¹³

* * *

The Blaine Amendment would merely have made explicit the state disability necessarily linked to the undifferentiated liberty protected by the Due Process Clause or the unspecified personal immunities protected by the Privileges or Immunities Clause. The proposal of the Blaine Amendment seven years after ratification of the Fourteenth Amendment is thus logically and textually consistent with prior application of the Establishment Clause to the states through either the Due Process or Privileges or Immunities Clause.

209. *See supra* Parts I.B.1.c, I.C.1.

210. *See supra* note 91 and accompanying text.

211. *See* Richard L. Aynes, *Enforcing the Bill of Rights Against the States: The History and the Future*, 18 J. CONTEMP. LEGAL ISSUES 77, 81–85 (2009) [hereinafter Aynes, *Enforcing the Bill of Rights*].

212. *See supra* notes 94–95 and accompanying text.

213. *E.g.*, 4 CONG. REC. 5585 (1876) (remarks of Sen. Oliver Morton (R-IN)) (arguing that in light of the virtual destruction of the Fourteenth Amendment by judicial construction, the provisions of the Blaine Amendment should be “so specific and so strong that they cannot be construed away and destroyed by courts”).

III. INCORPORATION HISTORY IN A LOGICAL AND TEXTUAL FRAME

Fourteenth Amendment history is consistent with Establishment Clause incorporation when viewed through a logical and textual framework supporting incorporation. What follows is not a full-fledged originalist defense of Establishment Clause incorporation, but a historical sketch that illustrates how different the historical evidence appears when framed by logical and textual arguments that support incorporation, rather than their opposites. When framed by the logical and textual bases for incorporation, historical evidence suggests that at least one widely held understanding of the Fourteenth Amendment included its application of the Establishment Clause against the states.

In the period immediately preceding the drafting and ratification of the Fourteenth Amendment, there was both a specific historical context that supported incorporation as well as references by members of Congress to the need to apply anti-establishment norms to the states.²¹⁴ During the framing and ratification of the Amendment from 1866 to 1868, there were also references to what were then understood as anti-establishment norms, as well as references to general incorporation of the Bill of Rights that obviously encompassed the Establishment Clause.²¹⁵ Finally, post-ratification statements confirm the temporally prior evidence that many members of the Civil War and Reconstruction Congresses intended or understood the Establishment Clause to limit state action upon ratification of the Fourteenth Amendment.²¹⁶ All of this historical evidence calls for a serious reexamination of Fourteenth Amendment history relating to the question of Establishment Clause incorporation.²¹⁷

A. Before the Framing

Among the concerns of the victorious Northern states in the aftermath of the Civil War were rampant violations of Bill of Rights norms by most slaveholding states during the antebellum period and by the former Confederate states in the immediate aftermath of the war,²¹⁸ when the states were not formally bound by them.²¹⁹ These included violations of anti-establishment norms by slaveholding states.

214. *See infra* Part III.A.

215. *See infra* Part III.B.

216. *See infra* Part III.C.

217. *See infra* Part III.D.

218. *E.g.*, MICHAEL KENT CURTIS, *FREE SPEECH: "THE PEOPLE'S DARLING PRIVILEGE"* (2000) [hereinafter CURTIS, *FREEDOM OF SPEECH*] (documenting extensive violations of freedom of speech in the North and South during antebellum, Civil War, and Reconstruction eras); Kurt T. Lash, *The Constitutional Referendum of 1866: Andrew Johnson and the Original Meaning of the Privileges or Immunities Clause* 50–56 (University of Illinois College of Law, Working Paper, 2012) [hereinafter Lash, *Referendum of 1866*], available at <http://ssrn.com/abstract=2125363>. *See generally* CURTIS, *THE BILL OF RIGHTS*, *supra* note 20, at 28–56.

219. *See* *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). However, many state supreme courts adopted Bill of Rights norms as a matter of general law despite their not binding the

Slavery and the Civil War had given rise to sectional theological schisms which fractured Southern and Northern Protestants over whether their denominational beliefs legitimated or condemned American slavery.²²⁰ Antebellum slave states came to see white Southern churches as a crucial component of the social order founded on slavery.²²¹ As conflicts over slavery deepened, therefore, slaveholding governments dramatically increased their regulation of Southern religion, licensing only proslavery ministers,²²² dictating proslavery theology and doctrine,²²³ and generally suppressing—often violently—religious antislavery leadership (especially in black churches).²²⁴ Many Southern churches, for their part, seceded from antislavery denominations and adopted proslavery theologies to avoid government regulation and persecution,²²⁵ though also out of genuine conviction.²²⁶

states as a matter of federal constitutional law. *See generally* Jason Mazzone, *The Bill of Rights in Early State Courts*, 92 MINN. L. REV. 1 (2007).

220. *See* MARK NOLL, *THE CIVIL WAR AS A THEOLOGICAL CRISIS* (2006); *see, e.g.*, LINDA PRZYBYSZEWski, *RELIGION, MORALITY, AND THE CONSTITUTIONAL ORDER* 17 (2011) (“The dispute over the morality of slavery as a legal institution was rooted in opposing visions of the natural rights and natural capacities of African Americans.”); DAVID SEHAT, *THE MYTH OF AMERICAN RELIGIOUS FREEDOM* 76 (2011) (“Northern establishmentarians began to question slavery, and Southern establishmentarians began to see it as a linchpin to a moral society.”).

221. *See* SEHAT, *supra* note 220, at 76, 80; *see also* CLEMENT EATON, *THE FREEDOM OF THOUGHT IN THE OLD SOUTH* 292–93 (1951) (describing how Christian clerics in the antebellum South formulated “a plausible defense of slavery” by use of a “narrow and literal interpretation of the Scriptures”).

222. Aynes, *Ink Blot or Not*, *supra* note 6, at 1317; Aynes, *McDonald*, *supra* note 6, at 190.

223. Aynes, *Ink Blot or Not*, *supra* note 6, at 1317 (noting that antebellum slave-holding states tightly regulated “the content of religious doctrine presented to parishioners”); *cf.* Richard Albert, *Beyond the Conventional Establishment Clause Narrative*, 28 SEATTLE U. L. REV. 329, 356–63 (2005) (describing Frederick Douglass’s view that proslavery ideology corrupted American Evangelical Christianity in the slave-holding states).

224. DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 163 (2007) (noting that the Vesey slave-rebellion conspiracy generated “tighter security measures,” including “stricter limitations on black religious gatherings”); Lash, *Establishment Clause*, *supra* note 6, at 1137–39 (noting that “[b]lack religious assemblies were heavily regulated; slaves were not permitted their own ministers, nor could they worship without the presence of a white man”); Lash, *Free Exercise*, *supra* note 134, at 1133–34 (What emerged in the slave-holding states after the Nat Turner rebellion “was a complex and highly regulated system of religious exercise.”); *see also* ERIC FONER, *RECONSTRUCTION* 78–79, 88 (1988) (The end of slavery also brought an end to “white supervision” of black churches.); HOWE, *supra*, at 183 (“Friend and foe alike recognized the free black churches as bastions of opposition to slavery and havens for those escaping from it.”).

225. *See* HOWE, *supra* note 224, at 478 (“[S]outhern evangelicals gradually made their peace with their section’s ‘peculiar institution’ as the price for continuing undisturbed with their preaching and voluntary activities.”); Aynes, *McDonald*, *supra* note 6, at 189–90 (“[S]everal national churches split into northern and southern branches when the southern members seceded in order to maintain an ‘established’ church that would support slavery.”); *e.g.*, HOWE, *supra* note 224, at 478–79 (describing splits over slavery in Methodist and Presbyterian denominations).

226. JOHN PATRICK DALY, *WHEN SLAVERY WAS CALLED FREEDOM: EVANGELICALISM,*

Whatever their motivations, Southern Protestant churches became enthusiastic and indispensable supporters of state slaveholding regimes. “By 1860,” Professor Lash concludes, “the South had erected the most comprehensive religious establishment to exist on American soil since Massachusetts Bay,”²²⁷ an arrangement that persisted beyond the Civil War and ratification of the Thirteenth Amendment.²²⁸

As the Civil War drew to a close, dismantling the Southern establishment of proslavery Christianity became a congressional goal.²²⁹ Some members of Congress expressly articulated their support. In an 1864 speech arguing for the abolition of slavery by constitutional amendment, Rep. James Wilson (R-Iowa) quoted the First Amendment in full and then excoriated slave states for violating each of its provisions.²³⁰ He took clear aim at the Southern establishment of proslavery Christianity, criticizing slave-state laws and practices that permitted churches to operate only on condition that they taught exclusively proslavery theology:

PROSLAVERY, AND THE CAUSES OF THE CIVIL WAR 2, 3 (2002) (Southerners believed that “slavery had arisen in keeping with the ‘genius of the age.’”); PRZYBYSZEWSKI, *supra* note 220, at 18 (“Defenders of the southern laws of slavery . . . [argued] that God approved of the peculiar institution as a benefit to the inferior African race.”); SEHAT, *supra* note 220, at 79 (“Southern moral establishmentarians claimed that Christian slavery was a system of governance that was appropriate for slaves.”).

227. Lash, *Establishment Clause*, *supra* note 6, at 1137; *see also* EATON, *supra* note 221, at 292 (“The growing need of defending the institution of slavery . . . tended to produce religious uniformity in the South.”).

228. *E.g.*, Joint Comm. on Reconstr., 39th Cong., 1st Sess., Rep. No. 30 (Va., N.C., S.C.), at 52–53 (1866) (testimony regarding refusal of postwar Virginia county to license black minister to perform marriages); *id.* (Fla., La., Tex.), at 79 (testimony regarding refusal of postwar New Orleans police to allow black church meetings after 9:00 p.m.); *see* DALY, *supra* note 226, at 152 (“Proslavery ideology lived on in a world without slavery, much as the defense of the Confederate cause went on in a world without a Confederacy.”); FONER, *supra* note 224, at 89 (“The end of slavery does not appear to have altered the views of many white clergymen as to the legitimacy of the peculiar institution or the desirability of preserving unaltered blacks’ second-class status within biracial churches. The ‘whole doctrine’ of the scriptural justification for slavery remained intact”); PRZYBYSZEWSKI, *supra* note 220, at 19 (“Military defeat did not discourage white southerners from identifying white supremacy with the divine order.”); SEHAT, *supra* note 220, at 114–15 (suggesting that white southern control of black churches was an important aspect of the post-Amendment black codes); *id.* at 117 (noting postwar white southern view that the combination of African and Christian beliefs among the newly freed slaves required that “religious retraining . . . be a fundamental task for schools”).

The Joint Committee on Reconstruction took extensive testimony on the persistence of denominational schisms throughout the postwar South, as well as social ostracism and violent attacks directed at clerics from the North or associated with northern Protestant denominations. *E.g.*, Joint Comm. on Reconstr., *supra* (Tenn.), at 93; *id.* (Va., N.C., S.C.), at 38–39, 45–46, 53, 63, 88–90, 149–50, 167, 170, 173–75; *id.* (Fla., La., Tex.), at 67.

229. *See* Aynes, *Ink Blot or Not*, *supra* note 6, at 1317; Lash, *Establishment Clause*, *supra* note 6, at 1089; Lash, *Free Exercise*, *supra* note 134, at 1133–34.

230. CONG. GLOBE, 38th Cong., 1st Sess. 1202–03 (1864).

The bitter cruel, relentless persecutions of the Methodists in the South . . . tell how utterly slavery disregards the right to a free exercise of religion. No religion which recognizes God's eternal attribute of justice and breaths that spirit of love which applies to all men . . . can ever be allowed free exercise where slavery curses men and defies God. No religious denomination can flourish or even be tolerated where slavery rules without surrendering the choicest jewels of its faith into the keeping of that infidel power which withholds the Bible from the poor. Religion, "consisting in the performance of all known duties to God and our fellow-men," never has been and never will be allowed free exercise in any community where slavery dwarfs the consciences of men.²³¹

Also in 1864 Rep. John Farnsworth (R-IL) similarly accused "the slave power" of having taken "possession of the churches."²³²

Some anti-incorporationists try to blunt this evidence by arguing that slaveholding-state regulation of religion violated free exercise rather than anti-establishment norms, and thus tells us nothing about the original intentions or understandings relating to application of the Establishment Clause to the states.²³³ As Professor Lash has pointed out, however, this reflects a "presentist" bias that projects contemporary understandings of the Religion Clauses into the past.²³⁴ Throughout the nineteenth century, "the general understanding was that any law which supported or suppressed religion as religion violated the nonestablishment principle that government has no power over religion as such."²³⁵ At the very least, one may reasonably conclude that slave-state action to promote proslavery Christianity violated both free exercise and anti-establishment norms²³⁶ and that the concern of members of the Reconstruction Congresses to eliminate this practice reflected an intention to apply both norms to the states.²³⁷

231. *Id.* at 1202.

232. *Id.* at 2979 ("[T]he slave power got the control of the Government, of the executive, legislative, and judicial departments. Then it was that they got possession of the high places of society. They took possession of the churches. They took possession of the lands. Then it became criminal for a man to open his lips in denunciation of the evil and sin of slaveholding.").

233. *See, e.g., supra* Part I.C.2.

234. Lash, *Establishment Clause, supra* note 6, at 1140 (noting the "common (modern) tendency" of viewing the Establishment Clause as a constitutional prohibition on government support for religion, and the Free Exercise Clause as the source of protection of religious worship).

235. *Id.* at 1140–41 (emphasis omitted).

236. *See* Feldman, *supra* note 71, at 403 & n.321.

237. *See* Lash, *Two Movements, supra* note 130, at 495 ("Even when Reconstruction Republicans did not quote the Establishment Clause, they often used words or phrases that arguably could include both the Free Exercise and Establishment Clauses.").

B. Framing and Ratification

The drafting and ratification history of the Fourteenth Amendment also yields references to the application of anti-establishment norms to the states, especially after adjusting for presentist bias.²³⁸ Equally as important are statements by important framers of the Fourteenth Amendment that did not specifically reference anti-establishment norms, but which showed their understanding that the Amendment applied the entirety of the first eight amendments of the Bill of Rights to the states.²³⁹

1. Anti-Establishment References

In 1866, after the Fourteenth Amendment had been reported by Congress to the states for ratification, Rep. John Bingham (R-Ohio) announced as a theme of his reelection campaign: “We do not ally the church and the State” in the United States.²⁴⁰ In an address to Congress after the Republican victory in the 1866 elections, President Johnson similarly invoked the separation of church and state as one of the virtues of Republican government to have been affirmed by the Northern victory.²⁴¹

In addition to these express invocations of anti-establishment norms, there are references to “conscience” during the ratification debates.²⁴² Today rights of conscience are associated with free exercise norms, but they were once closely associated with disestablishment.²⁴³ Noah Feldman in particular has persuasively argued that eighteenth-century Americans understood religious “assessments”—that is, taxes levied to support an established church—as violations of the “liberty of conscience” despite the fact that they did not prohibit worship by religious dissenters in their own tradition; the mere fact that the State required one to financially support a religion in which he or she did not believe constituted the violation.²⁴⁴ Madison’s *Memorial and Remonstrance* is notable for its argument that even the relatively mild Virginia assessment bill, which would have allowed taxpayers to direct their assessments to the religion of their choice or even just to

238. See *infra* Part III.B.1.

239. See *infra* Part III.B.2.

240. See Aynes, *Ink Blot or Not*, *supra* note 6, at 1318 (quoting *Eloquent Speech of John A. Bingham*, THE CADIZ REPUBLICAN, Aug. 15, 1866, at 2 (reporting Bingham’s nomination address for the *Cincinnati Gazette*)).

241. CONG. GLOBE, 39th Cong., 1st Sess. app. 1, 5 (1866) (“Here religion, released from political connection with the civil government, refuses to subserve the craft of the statesman, and becomes, in its independence, the spiritual life of the people.”). *But see* Lash, *Referendum of 1866*, *supra* note 218, at 5 (noting that Johnson opposed ratification of the Fourteenth Amendment).

242. See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 158 (1866) (Rep. Bingham, referring to the Fourteenth Amendment as a protection for “equal personal rights” including “freedom of conscience”); *id.* at 237 (Rep. John Kasson (R-IA), speaking of the right of suffrage as a “natural right” protected by the Fourteenth Amendment, like “personal liberty” and “the right of exercising personal conscience”).

243. See *supra* text accompanying notes 110–11.

244. Feldman, *supra* note 71, at 398–405.

public education, violated one's liberty of religious conscience.²⁴⁵ Disestablishment eliminated religious assessments, and thus protected religious conscience.²⁴⁶ This association of anti-establishment norms with the protection of religious conscience was still common in the mid-nineteenth century.²⁴⁷

2. General Incorporation of the Bill of Rights

As late as the 1980s, the entrenched constitutional wisdom among legal academics was that the Fourteenth Amendment did not apply the Bill of Rights to the states.²⁴⁸ At most, the Amendment was thought to have applied to the states only certain natural or customary rights "implicit in the concept of ordered liberty," which overlapped a few provisions of the Bill of Rights.²⁴⁹

Professor Curtis's *No State Shall Abridge* was the first major attack on the conventional anti-incorporationist wisdom since William Crosskey's reply to Fairman's brief for Justice Frankfurter.²⁵⁰ Whether, how, and to what extent the Fourteenth Amendment applied the Bill of Rights to the states has since been extensively explored by Curtis and other incorporationists.²⁵¹ Due largely to their work, originalist evidence for incorporation of the entire Bill of Rights is now so well developed that it has dissolved the conventional wisdom,²⁵² although some contemporary scholars still contest general incorporation.²⁵³

245. See James Madison, *Memorial and Remonstrance Against Religious Assessments*, in 8 THE PAPERS OF JAMES MADISON 295, 298–304 (Robert A. Rutland, William M.E. Rachal, Barbara D. Ripel & Fredrika J. Teute eds., 1973) (June 20, 1785).

246. Feldman, *supra* note 71, at 399 ("The primary reason not to have an established religion . . . was the protection of liberty of conscience of dissenters.").

247. See Lash, *Establishment Clause*, *supra* note 6, at 1141.

248. See, e.g., RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 134–56 (1979) (arguing that the Fourteenth Amendment was not understood to have applied any portion of the Bill of Rights to the states); NELSON, *supra* note 123, at 117–19 (arguing that the Amendment was understood only to require equality of and due process in enforcement of fundamental and other rights the people enjoy under state law).

249. This was Fairman's conclusion. See Fairman, *supra* note 67, at 139; see also EARL MALTZ, *CIVIL RIGHTS, THE CONSTITUTION, AND CONGRESS* 117–18 (1990); JACOBUS TENBROEK, *THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* 223 (1951).

250. See William Winslow Crosskey, *Charles Fairman, "Legislative History," and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954); see also *supra* note 67.

251. See, e.g., AMAR, *supra* note 4; CURTIS, *FREEDOM OF SPEECH*, *supra* note 218; MALTZ, *supra* note 249; Aynes, *Enforcing the Bill of Rights*, *supra* note 211; Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57 (1993) [hereinafter Aynes, *John Bingham*]; Michael Kent Curtis, *The Bill of Rights and the States: An Overview from One Perspective*, 18 J. CONTEMP. LEGAL ISSUES 3, 4–11 (2009); James Jay Ward, *The Original Public Understanding of Privileges or Immunities*, 2011 BYU L. REV. 445; Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20; Bryan H. Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051 (2000).

252. See, e.g., MALTZ, *supra* note 249, at 117–18 (stating that although the Fourteenth Amendment's application of the Bill of Rights is "not proven beyond a reasonable

Establishment Clause incorporation obviously draws support from the historical argument for general incorporation. Two of the central figures in the framing of the Fourteenth Amendment, Representative Bingham and Senator Jacob Howard (R-Mich.), unambiguously expressed their understanding that it applied the entirety of the Bill of Rights to the states during congressional debates on whether to approve and report the Amendment to the states.

a. John Bingham

Representative Bingham was a pivotal figure in the congressional drafting and approval of the Amendment, having been a member of the Joint Committee on Reconstruction, the principal author of Section 1 of the Amendment, and a critical supporter of the Amendment in the House.²⁵⁴ An early version of Section 1 proposed by Bingham would have provided Congress with the power to legislatively enforce the rights guaranteed by Article IV and the Fifth Amendment.²⁵⁵ The proposal did not contain a self-executing enumeration of such rights, however, because Bingham, like many other Reconstruction Republicans,²⁵⁶ believed that the Privileges and Immunities Clause of Article IV already imposed the Bill of Rights and unenumerated natural and customary rights on the states.²⁵⁷ In Bingham's mind, the constitutional deficiency was lack of a federal enforcement mechanism for Article IV rights; state officials were constitutionally obligated by their oaths of office to protect these rights, but no provision of the Constitution

doubt[.] . . . one can only conclude that contemporaries must have understood the privileges and immunities clause to embody most of the Bill of Rights, and they probably viewed the first eight amendments as incorporated in their entirety"); Aynes, *John Bingham*, *supra* note 251, at 103 (stating that "Bingham's view that the Privileges or Immunities Clause of the Fourteenth Amendment applies the Bill of Rights to the states" was shared by "[m]any of his contemporaries," including "three highly-regarded legal treatise writers"); Aynes, *Ink Blot or Not*, *supra* note 6, at 1309 ("Though the full extent of the contours of the [Privileges or Immunities] Clause is subject to interpretation, there should be no controversy that, at the core, these provisions included the Bill of Rights."); Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1626 (concluding that evidence from 1886–67 "seems sufficient to support the inference that it nationalized the Bill of Rights.").

253. See, e.g., PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATES 434–76 (2002); NELSON, *supra* note 123, at 117–19. See generally Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1520–25 (surveying anti-incorporation views of contemporary scholars).

254. Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1532.

255. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866) ("The Congress shall have power to make all laws which shall be necessary and proper to secure to the citizens of each State all privileges and immunities of citizens in the several States [Art. 4, Sec. 2], and to all persons in the several States equal protection in the rights of life, liberty, and property [5th Amendment].").

256. See, e.g., CURTIS, THE BILL OF RIGHTS, *supra* note 20, at 51–52; Alfred Avins, *Incorporation of the Bill of Rights: The Crosskey-Fairman Debates Revisited*, 6 HARV. J. ON LEGIS. 1, 5–6, 10–11 (1968); Aynes, *John Bingham*, *supra* note 251, at 74, 78–80.

257. CURTIS, THE BILL OF RIGHTS, *supra* note 20, at 61–64; MALTZ, *supra* note 249, at 115; Aynes, *John Bingham*, *supra* note 251, at 74–75; Randy E. Barnett, *Whence Comes Section One? The Abolitionist Origins of the Fourteenth Amendment*, 3 J. LEGAL ANALYSIS 165, 248–50 (2011); Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1569.

empowered the federal government to enforce them. As Bingham explained in describing the need for this amendment, “[I]t is equally clear by every construction of the Constitution . . . legislative, executive, and judicial, these great provisions of the Constitution, this immortal bill of rights embodied in the Constitution, rested for its execution and enforcement hitherto upon the fidelity of the States.”²⁵⁸ Later on in the debate, when confronted with the (erroneous) argument that the Bill of Rights was already enforceable by the federal government against the states, Bingham made clear both the constitutional need and his intention to empower Congress to enforce the Bill of Rights against contrary state action:

A gentleman on the other side . . . wanted to know if I could cite a decision showing that the power of the Federal Government to enforce in the United States courts the bill of rights under the articles of amendment to the Constitution had been denied. I answer that I was prepared to introduce such decisions; and that is exactly what makes plain the necessity of adopting this amendment.²⁵⁹

Whether the idiosyncrasy of “Article IV incorporation” was coherent and defensible is not as important as Bingham’s clear and repeated statements about the need to give Congress power to enforce the Bill of Rights against the states.²⁶⁰

Some months later in the drafting process, Bingham proposed the self-executing rights language that (with the addition of the Citizenship Clause) was ultimately ratified as section 1 of the Amendment.²⁶¹ Bingham’s comments on this version of the Amendment also exhibited his understanding that it applied the Bill of Rights to

258. CONG. GLOBE, 39th Cong., 1st Sess. 1034 (1866); *accord id.* at 1291 (“[E]nforcement of the bill of rights is the want of the Republic.”); Aynes, *Enforcing the Bill of Rights*, *supra* note 211, at 86 (“This was simply a proposition to arm the Congress of the United States . . . with power to enforce the Bill of Rights as it stood in the Constitution.”) (quoting *Washington News*, N.Y. TIMES, Mar. 1, 1866, at 5); *id.* at 125 (describing widely circulated 1866 pamphlet authored by Bingham entitled “In support of the proposed amendment to enforce the Bill of Rights”); *see* Avins, *supra* note 256, at 5–6; Aynes, *John Bingham*, *supra* note 251, at 67; Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1539.

259. CONG. GLOBE, 39th Cong., 1st Sess. 1089–91 (1866) (referring to *Barron v. Baltimore*, 35 U.S. 243 (1833), and *Lessee of Livingston v. Moore*, 32 U.S. 469 (1833)); *see also* MALTZ, *supra* note 249, at 115; Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1540–41.

260. *See* MALTZ, *supra* note 249, at 115 (concluding on the basis of Bingham’s remarks that he “saw the Bill of Rights as included within the concept of privileges and immunities”).

261. CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person with the jurisdiction of the equal protection of the laws.”). Another provision gave Congress power to enforce the rights guaranteed by this language. CURTIS, *THE BILL OF RIGHTS*, *supra* note 20, at 85.

the states.²⁶² Bingham similarly confirmed this understanding in a House debate in 1867 after the Amendment had been reported to the states for ratification.²⁶³

b. Jacob Howard

Like Bingham, Senator Howard was a member of the joint committee. He also acted as floor manager for the Amendment when it was debated and approved by the Senate.²⁶⁴ Howard's understanding that the Amendment applied the Bill of Rights to the states was unmistakably set forth in his introduction of the Amendment to the Senate. In explicating the Privileges and Immunities Clause, after giving a preliminary definition of the "privileges and immunities of citizenship" based on the exemplars listed by Justice Washington in *Corfield v. Coryell*,²⁶⁵ Howard flatly declared: "To these privileges and immunities . . . should be added the personal rights guaranteed and secured by the first eight amendments of the Constitution," giving as examples the freedoms of speech, press, petition, and assembly; the rights to bear arms, to be informed of criminal charges, and to jury trial; and the rights against mandatory quartering of soldiers in one's home, unreasonable searches and seizures, excessive bail, and cruel and unusual punishments.²⁶⁶

* * *

As Earl Maltz has concluded, "one cannot plausibly argue that Howard and Bingham did not believe the Bill of Rights to be fully incorporated" against the states by the Fourteenth Amendment.²⁶⁷ No one in the House or the Senate disputed Bingham's and Howard's respective declarations that Section 1 applied the first eight amendments of the Bill of Rights to the states,²⁶⁸ and their arguments in this regard were widely understood and reported in the popular press.²⁶⁹ If the general incorporation thesis is correct, and there is a logical and textual basis for incorporating the Establishment Clause, then there is no reason to think that undisputed incorporation references to the "bill of rights" or "first eight amendments" by prominent members of the Thirty-Ninth Congress did not include the Establishment Clause, even in the absence of specific mention of what today would be understood as anti-establishment norms.

262. See CONG. GLOBE, 39th Cong., 1st Sess. 2542 (1866) (arguing that the Amendment would halt violations of the Eighth Amendment that were then common among the states).

263. CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867) (arguing that the Amendment would empower Congress to enforce "all the limitations for personal protection of every article and section of the Constitution").

264. See Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1532.

265. 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1823).

266. CONG. GLOBE, 39th Cong., 1st Sess. 2765–66 (1866). Howard introduced this enumeration with the phrase "such as" and thus expressly framed it as nonexhaustive. See Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1561. It is thus of no moment that he did not expressly cite either of the Religion Clauses.

267. MALTZ, *supra* note 249, at 115.

268. Wildenthal, *Nationalizing the Bill of Rights*, *supra* note 20, at 1568, 1583–84 & n.248.

269. Lash, *Referendum of 1866*, *supra* note 218, at 16, 26, 32.

C. After Ratification

Support for Establishment Clause incorporation is evident in expressions by members of Congress and other federal officials in the aftermath of ratification. In the 1871 debates about the Ku Klux Klan Act, Bingham himself unambiguously stated that the “privileges and immunities of citizens” protected against state encroachment by the Fourteenth Amendment are “chiefly defined in the first eight amendments to the Constitution,” whereupon he quoted those amendments, including the Establishment Clause, word for word.²⁷⁰ In 1874, Senator Thomas Norwood (D-GA) rejected the view that the Fourteenth Amendment had not conferred “new privileges and immunities” of citizenship, observing that “[b]efore its adoption any State might have established a particular religion” and violated all the other provisions of the Bill of Rights, but no longer: “[T]he instant the fourteenth amendment became a part of the Constitution,” Norwood concluded, “every State was that moment disabled from making or enforcing any law which would deprive any citizen of a State of the benefits enjoyed by citizens of the United States under the first eight amendments to the Constitution.”²⁷¹ Finally, many lower federal courts, federal prosecutors, practicing lawyers, and individual Supreme Court Justices assumed in the wake of ratification that the Fourteenth Amendment had applied the Bill of Rights to the states.²⁷²

* * *

The Fourteenth Amendment was drafted and ratified against a background that included, among many other things, a desire on the part of at least some members of Congress to dismantle the proslavery Christian establishment created by the slaveholding states. Debates during the drafting of the Amendment included references to religious “conscience,” then associated at least as much with anti-establishment norms as with free exercise norms. Additionally, Rep. Bingham and Sen. Howard, two of the most important framers and supporters of the Amendment, clearly understood the Amendment to apply the entirety of the first eight amendments of the Constitution to the states. Finally, while the Amendment was before the states for ratification, Bingham himself ran for reelection on his belief that the Amendment applied anti-establishment norms to the states, making specific reference to preventing the alliance of church and state, and in the years immediately following ratification, Bingham and others indicated their belief that the Amendment had applied anti-establishment norms against the states.

270. CONG. GLOBE, 42d Cong, 1st Sess. app. 84 (1871).

[T]hat the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows: [Exact recitation of Amendments I through VIII.]

Id.

271. 2 CONG. REC. app. 233, 242 (1874). All issues of the *Congressional Record* are available at <http://memory.loc.gov/ammem/amlaw/lwcrlink.html#anchor42>.

272. See R. SMITH, *supra* note 91, at 161; Avins, *supra* note 256, at 8–9; Aynes, *Enforcing the Bill of Rights*, *supra* note 211, at 98–99 & n.115.

Combined with the logical and textual basis for Establishment Clause incorporation, this history presents a plausible case for an original understanding that the Fourteenth Amendment applied the Establishment Clause to the states.

D. Serious History

There is, unsurprisingly, historical evidence that weighs against incorporation. For example, in a diversity case handed down in 1871—well before *Slaughter-House* (1873), *Walker* (1876), and *Cruikshank* (1876) made clear the Supreme Court's rejection of incorporation—the Court applied the general common law prohibition on theological entanglement without any mention of the Establishment Clause, suggesting the Court's belief that the anti-entanglement norm did not apply to the states as a matter of federal constitutional law despite its resonance with the Establishment Clause.²⁷³ Many Blaine-like amendments that would have applied the religion clauses to the states were proposed in Congress after ratification of the Fourteenth Amendment but well before *Slaughter-House*, *Walker*, and *Cruikshank* had rendered incorporation a doctrinal dead letter.²⁷⁴ Although many lawyers and judges assumed that the Fourteenth Amendment had applied the Bill of Rights to the states,²⁷⁵ others assumed the opposite.²⁷⁶ None of these developments would have been expected from a Congress, a federal judiciary, or a practicing bar that understood the Fourteenth Amendment to have applied the Establishment Clause against the states in 1868. A careful examination of antebellum and Reconstruction-era history would doubtless uncover additional anti-incorporation evidence to be weighed against the pro-incorporation evidence sketched above and present elsewhere in the historical record.²⁷⁷

To date, however, only Professor Lash has considered Establishment Clause incorporation based on the entire historical record, and he did so on the premise that incorporation of the original meaning of the clause was neither logical nor textual.²⁷⁸ Lash's work also predates much of the pro-incorporationist scholarship that has so firmly established the general incorporationist position.²⁷⁹

Given the logical and textual accounts of Establishment Clause incorporation, it is no longer sufficient to cite Blaine as if it single-handedly demolishes any originalist case for incorporation. It is far past time for a comprehensive reexamination of historical evidence on the question whether the Fourteenth Amendment was generally understood to have applied the Establishment Clause to the states at the time it was ratified.

273. Compare *supra* note 94 and accompanying text (summarizing anti-incorporation holdings of these decisions), with *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). See also *HOWE*, *supra* note 194, at 76–85.

274. See, e.g., *HAMBURGER*, *supra* note 253, at 437–38 & n.115; *O'NEIL*, *supra* note 3, at 158–60.

275. See *supra* text accompanying note 271.

276. Avins, *supra* note 256, at 8, 10.

277. See *supra* Part III.A–C.

278. See *supra* notes 128–37 and accompanying text.

279. See, e.g., *supra* note 251.

CONCLUSION

Anti-incorporationists find Establishment Clause incorporation an inexhaustible source of amusement.²⁸⁰ But the laughter is premature: there are logical, textual, and historical accounts of Establishment Clause incorporation, notwithstanding its eighteenth-century origins as a purely structural provision of the Constitution.

Structural constitutional provisions are disabilities that are logically linked with immunities.²⁸¹ As a structural provision originally disabling Congress from passing laws relating to religious establishments, the Clause immunized the states against the consequences of resisting federal interference in state decisions about religious establishment and disestablishment, but also immunized the people from the consequences of resisting encroachments on their personal liberty by a congressionally established religion.²⁸²

In the aftermath of the Civil War, the United States expanded federal power at the expense of the states with the ratification of the Fourteenth Amendment and other Reconstruction amendments. With respect to the Establishment Clause, this expansion eliminated the state immunity against federal interference in state religious establishments and expanded the personal immunity to immunize individuals from the consequences of state as well as federal religious establishments.²⁸³

There is nothing illogical about expanding a personal immunity from the consequences of federally established religion to include state action that seeks to establish religion. Nor is there anything textually strange about characterizing a personal immunity from the consequences of government-established religion as a dimension of the personal “liberty” protected against state action by the Due Process Clause or as an “immunity of citizenship” protected against such action by the Privileges and Immunities Clause.²⁸⁴ There is historical evidence that members of the Reconstruction Congress intended and understood the Fourteenth Amendment to have precisely the effect of imposing anti-establishment norms on the states.²⁸⁵ The Blaine Amendment, finally, can be logically, textually, and historically understood as a congressional attempt to counter the Supreme Court’s evisceration of the Fourteenth Amendment by expressly placing the personal immunity against government-established religion under federal protection and enforcement.²⁸⁶

It takes extraordinary self-assurance to make fun of one’s opponents as laughably wrong. Sometimes the laughs are warranted.²⁸⁷ But sometimes they merely disguise the frailty of conventional wisdom—which, after all, owes its

280. *See supra* notes 10, 190, 194 and accompanying text.

281. *See supra* Part II.A.

282. *See supra* Part II.B.

283. *See supra* Part II.C.1.

284. *See supra* Part II.C.2.

285. *See supra* Part III.

286. *See supra* Part II.C.3.

287. *See e.g.*, DR. ORLY TAITZ, ESQUIRE, <http://www.orlytaitzesq.com> (arguing that President Obama is not a natural-born citizen); *The Lack of Natural Born Citizen Status of Barack Hussein Obama, II*, THE BIRTHERS, <http://www.birthers.org> (same).

status largely to familiarity and acceptability.²⁸⁸ That would seem to be the case here, where the supposed illogic, textual infidelity, and ahistoricity of Establishment Clause incorporation seem to have been established as much by repetition as by analysis and research.²⁸⁹

The Supreme Court's decision to apply the Establishment Clause against the states through the Fourteenth Amendment proved to be a crucial moment in American constitutional history, and its delegitimation and potential reversal raise immense constitutional stakes. The issue warrants more serious consideration and investigation than it has received.

288. See JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 9 (1958).

289. See *supra* Part I.B–C.