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# STATE CONSTITUTIONS, RELIGIOUS PROTECTION, AND FEDERALISM

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Advocates of a strict separation of church and state make a compelling case that the agnostic and neutral language of the First Amendment is meant to shield people from public support of religion. These “separationists” contend that the United States Constitution does not provide any validation for religious belief in the public sphere. Traditional focus and interpretation of the First Amendment of the U.S. Constitution has resulted in a jurisprudence that interprets the religious clauses primarily as ensuring “freedom *from* religion” rather than protecting “freedom *for* religion.” This has become the dominant mode of legal thought regarding religious liberty in the United States.

Religious liberty clauses at the state level offer a different perspective. An analysis of early and current state constitutions reveals that our federal political system has a long tradition of accommodating religious liberty. Furthermore, these state constitutions often validate religion by invoking God as the foundation of order, liberty, and good government. Advocates of religious liberty might do better to focus their attention on state constitutions rather than their national counterpart. State constitutions avoid the agnostic and neutral language found in the U.S. Bill of Rights and typically offer stronger protection for religious liberty as well.

To this end, advocates of religious liberty might consider pursuing a “federal” approach to religious freedom as a means of achieving a higher level of protection than is found in the U.S. Constitution. An examination of state constitutions provides compelling evidence that religious freedom, like many aspects of the Constitution, was meant to be dealt with largely at the state level.

## AMERICAN CONSTITUTIONALISM

Constitutionalism in the United States is a *state* tradition. On May 15, 1776, just before Jefferson penned the Declaration of Independence, the Continental Congress adopted a resolution calling on the various colonial legislatures to draft written constitutions in preparation for statehood. When independence was declared, the colonies adopted these new constitutions and became independent American states. By the time of the Philadelphia Convention in 1787, written constitutions had existed in the United States for over a decade.

The fifty-five men who gathered in Philadelphia to draft our national constitution were profoundly influenced by the state constitutional experience. As a result, the Constitutional Convention of 1787 was slow and tedious. Contrary to what we often teach school children, this sluggish pace was not because the attendees were unfamiliar with constitution-making or constitutional principles. Much to the contrary, the slow deliberation was largely a result of preconceptions the framers held about what the new national government should look like. Most of these preconceptions were based on their respective state constitutions.<sup>1</sup>

While state constitutions served as reference points for the men of the Philadelphia Convention, they also served another important purpose. On any particular issue that lacked consensus, the Framers of the national constitution often punted the issue back to the states to let them deal with it on a state-by-state basis. For instance, the procedures for conducting elections, determining the qualifications for voters, selecting senators, and choosing presidential electors were all left to the American states to handle. The U.S. Constitution would remain silent on these issues because there wasn't a consensus among the Framers as to how to handle these questions at the national level.

As a result, numerous provisions of the U.S. Constitution refer the reader back to state constitutions, leading political scientists to argue that the U.S. Constitution is actually an incomplete document unless state constitutions are read in conjunction with it. As political scientist Donald S. Lutz writes, the U.S. Constitution's:

[f]orm and content derived largely from the early state constitutions, as borrowings and as reactions. These often over-looked documents occupy a critical position in the development of American constitutionalism. They are the culmination of a long process, and the foundation upon which the United States Constitution rests. That is, the Constitution is an incomplete foundation document until and

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1. DONALD LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 97 (1988).

unless the state constitutions are also read.<sup>2</sup>

In short, the U.S. Constitution depends heavily on state constitutions. The Constitution itself is a product of the state constitutional tradition and makes use of state constitutions to complete those issues where the U.S. Constitution is largely silent. Religion is one of these issues.

Religion is addressed most frequently, but not exclusively, in the preamble of most state constitutions. The purpose of a preamble at the beginning of a written constitution is largely philosophical. Preambles are not legally binding. Nor do they establish political institutions or policies. The main purpose of a constitutional preamble is to provide a statement of values and beliefs about the origin, operation, and purpose of government. In essence, constitutional preambles provide the basic beliefs of the constitutional framers.<sup>3</sup> The preamble to the United States Constitution is probably the best example of this:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.<sup>4</sup>

In essence, the preamble addresses some of the most fundamental questions of political theory. In the case of the U.S. Constitution, the preamble provides the function of government (order, justice, peace, prosperity), the philosophical justification of government (preservation of liberty), and the source of governmental authority (the people of the United States).

A similar pattern is seen in state constitutions, although there are some striking differences. Since 1776, there have been 145 state constitutions used by the American states. The number is a product of a greater replacement rate among state constitutions and unique historical circumstances such as southern secession.<sup>5</sup> Almost all of the 145 state constitutions have a preamble. Only two current constitutions, New Hampshire and Virginia, do not. These two constitutions start with a Bill of Rights, which in many ways provides the same philosophical underpinnings of government but has the added impact of legal enforceability. Putting a Bill of Rights at the beginning

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2. *Id.* at 96.

3. ALLAN G. TARR, UNDERSTANDING STATE CONSTITUTIONS 90 (2000).

4. U.S. CONST. pmbl.

5. Christopher Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 Am. Pol. Sci. Rev. 837 (1999).

of the document, rather than at the end, is a common pattern in state constitutions.<sup>6</sup>

**Table One: Number of Constitutions by State**

Alabama – 6	Montana – 2
Alaska – 1	Nebraska – 2
Arizona – 1	Nevada – 1
Arkansas – 5	New Hampshire – 2
California – 2	New Jersey – 3
Colorado – 1	New Mexico – 1
Connecticut – 4	New York – 4
Delaware – 4	North Carolina – 3
Florida – 6	North Dakota – 1
Georgia – 10	Ohio – 2
Hawaii – 1	Oklahoma – 1
Idaho – 1	Oregon – 1
Illinois – 4	Pennsylvania – 5
Indiana – 2	Rhode Island – 3
Iowa – 2	South Carolina – 7
Kansas – 1	South Dakota – 1
Kentucky – 4	Tennessee – 3
Louisiana – 11	Texas – 5
Maine – 1	Utah – 1
Maryland – 4	Vermont – 3
Massachusetts – 1	Virginia – 6
Michigan – 4	Washington – 1
Minnesota – 1	West Virginia – 2
Mississippi – 4	Wisconsin – 1
Missouri – 4	Wyoming – 1

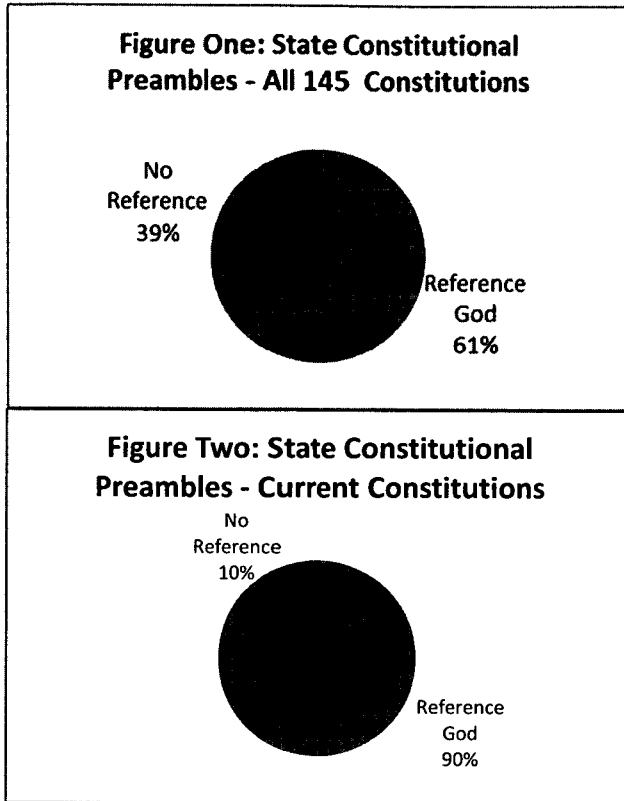
State constitutional preambles frequently invoke God as the source of good government. The reference to God usually takes one of several forms – the Almighty, the Supreme Being, the Supreme Ruler, Divine Providence, or simply God. Perhaps more poetically, the South Carolina Constitution of 1868 professes its gratitude to the “Great Legislator of the Universe,” while the Vermont Constitution of 1777 acknowledges the goodness of the “Great

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6. TARR, *supra* note 3, at 11.

Governor of the Universe.”<sup>7</sup>

Of the 145 constitutions used by the American states since 1776, eighty nine constitutions or sixty one percent contain references to God in their preambles. In most cases these preambles invoke God as the source of good government, appeal to God for help with good governance, or give thanks



to God for the blessings of good government. The aforementioned Vermont Constitution of 1777, for example, gives thanks to the “Great Governor of the Universe” for the blessings of democratic government, noting that He alone “knows to what degree of earthly happiness mankind may attain by perfecting the arts of government.”<sup>8</sup> The preamble to the Connecticut Constitution of 1818 acknowledges “with gratitude, the good providence of God, in having permitted [the people of Connecticut] to enjoy free government. . . .”<sup>9</sup> The North Carolina Constitution of 1868 states that the people of North Carolina are “grateful to Almighty God ... for our civil,

7. S.C. Const. (1868); VT. CONST. (1777).

8. VT. CONST. pmb. (1777).

9. CONN. CONST. pmb. (1818).

political, and religious liberties. . . .”<sup>10</sup>

While it is tempting to say that such references merely reflect the literary style of early American people or the unique colonial experience of the states formed during the Revolution, the pattern is not restricted to those constitutions drafted during the days of the early Republic. Of the fifty constitutions currently in use by the American states today, an astounding ninety percent mention God in their preamble. To this end, invocations of God in state constitutions are not just an artifact of the past.

For example, God is mentioned prominently in the preamble to the Wyoming Constitution, which gives thanks to “Almighty God for our civil, political, and religious liberties. . . .”<sup>11</sup> The current constitution of Wisconsin is “grateful to Almighty God for freedom. . . .”<sup>12</sup> Washington’s Constitution gives thanks to the “Supreme Ruler of the Universe for our liberties. . . .”<sup>13</sup> While establishing their constitution, the people of Texas “humbly [invoke] the blessings of Almighty God. . . .”<sup>14</sup> Utah is “[g]rateful to Almighty God for life and liberty. . . .”<sup>15</sup> New York professes thanks to “Almighty God for our freedom. . . .”<sup>16</sup> Even California operates under a state constitution that invokes God.<sup>17</sup> In total, forty-five of fifty current state constitutions mention God in the preamble. The distribution of the five states that do not mention God in their preambles—New Hampshire, Oregon, Vermont, and Tennessee and Virginia—indicate that there is no geographical or regional pattern for the references to God, or lack thereof, in state constitutions.

What state constitutions reveal is that unlike the national constitution, which is devoid of religious reference, previous and modern state constitutions explicitly invoke God in the preambles as the basis of good government, order, and liberty. This is part of a long constitutional tradition in the United States—a tradition that starts well over 150 years before the U.S. Constitution was drafted.<sup>18</sup>

#### RELIGION AND CONSTITUTIONALISM

The American tradition of invoking God in political documents stems back to the Pilgrims’ arrival in 1620. Having survived the long and dangerous journey to the New World, the exhausted voyagers paused off the shore of the virgin American wilderness, what would later be Massachusetts, to draft what many historians and political scientists consider the first glimmer of

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10. N.C. CONST. pmb. (1868).

11. WYO. CONST. pmb.

12. WIS. CONST. pmb. (1848).

13. WASH. CONST. pmb. (1889).

14. TEX. CONST. pmb. (1876).

15. UTAH CONST. pmb. (1895).

16. N.Y. CONST. pmb. (1777).

17. CAL. CONST. pmb. (1879).

18. DONALD LUTZ, A PREFACE TO AMERICAN POLITICAL THEORY 113-140 (1992).

constitutional government in the New World. The famous Mayflower Compact, named after the tiny ship that carried the Pilgrims across the Atlantic, is not really a constitution in the modern sense. It does not establish political institutions, lay out political processes, or define legal rights. Rather, the Mayflower Compact is an agreement among all free men on the ship to abide by majority rule in decision-making for the colony. In short, it is a political arrangement rather like the social contract envisioned by Enlightenment thinkers. It obligates the members to follow whatever political institutions and laws are established once the colony is planted. The Pilgrims felt this was important for their safety and the good of the colony.

While historians and political scientists typically focus on the democratic nature of the Mayflower Compact, the religious nature is often overlooked. The first line of the document reads “[i]n the name of God, Amen.”<sup>19</sup> The invocation is more than just seventeenth century formality or the styling of religious refugees. For the Pilgrims, the entire premise of the Mayflower Compact was that it created order by obligating men to follow the will of the majority. However, the only enforcement powers behind the document were the ink in which they had signed, their honor, and the fact that they had made this pledge in the name of God. In essence, the Mayflower Compact was as much a covenant with God as it was a compact among fellow travelers.

This concept of political documents as covenants between people and God sounds novel today, but it has a long tradition in American politics.<sup>20</sup> Colonial charters of the seventeenth century are rife with religious language, religious instruction, religious obligations, and religious laws. In fact, a good portion of these colonial charters enforce church law as the basic means of a well-ordered society. The blending of religion and politics is pervasive in early colonial charters like the Virginia Articles (1610), the Massachusetts Body of Liberties (1641), and the Pennsylvania Charter of Liberties and Plan of Government (1682).

While the connection between religion and government was strong during the seventeenth century, which was referred to as the “Planting Generation,” it took a more philosophical turn during the eighteenth century.<sup>21</sup> Much of the philosophical language of the “Founding Generation” was based on natural law theory that was prevalent during the Enlightenment. Many Enlightenment thinkers argued that men were endowed by God with natural rights. They likewise argued the idea that man’s freedom was a divine gift rather than a political creation. This sentiment is evident in our Declaration of Independence, which, unlike the U.S. Constitution, invokes God as the source of human rights. This articulation of natural rights became

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19. MAYFLOWER COMPACT (1620).

20. LUTZ, *supra* note 1, at 21-31.

21. JOHN WITTE, JR. & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 23-26 (2000).



the basis for our limited, constitutional government.

The Founding Generation, while perhaps more philosophical and less religious than the Planting Generation, nonetheless believed that religion was an important force for the preservation of the fledgling United States. This generation's argument went something like this: democratic government is based on the people; the people need virtue and morality to maintain self-government; religion provides the necessary moral compass and virtue for self-government; therefore, religion and good government are inherently linked. John Adams supported this argument through his comment that constitutional government would only work for "a moral and religious people." In connection, Benjamin Rush said that while all religions promote virtue, Christianity was most suited to virtuous government. Even those men that remained suspicious of organized religion, like Benjamin Franklin and Thomas Jefferson, still considered the teachings of Christ as valuable to a virtuous democratic system. Apparently to them the tenets of "love thy neighbor" and "thy brother's keeper" complemented the democratic ideal.

Because religion was viewed as a complementary part of good government, the fifty-five men who met in Philadelphia in 1787 harbored no opposition to religion as a positive social force. Instead, their disagreements centered on the extent to which government should sanction or endorse religion. This is why state constitutions play such an important role in our constitutional system. Well aware of the long religious traditions and stark denominational differences of each state, the Founders realized there was very little consensus on the degree, form, or doctrine of worship at the national level. This awareness led to there being minimal discussion of religion at the Constitutional Convention since most delegates recognized that any effort to centralize religious authority was not only unlikely, but contrary to the purpose of designing a *limited* national government.

As a result, the U.S. Constitution only references religion in three places. The first mention of religion is in the No Religious Test Clause found in Article VI, clause 3 of the U.S. Constitution.<sup>22</sup> This provision prohibits the requirement that officeholders adhere to or participate in a certain religion. However, it does not prohibit a person from holding office *because* they are religious. The latter formulation would have been foreign to the Founding Fathers. This provision simply protects people from religious discrimination without being anti-religious in intent.

The second reference is found in Article II, § 1, which specifies the wording of the oath of office for the President of the United States. This oath, which takes into consideration that presidents may be religious, is required before the President begins execution of the office.<sup>23</sup> By its wording, it allows

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22. U.S. CONST. art. VI, cl. 3.

23. U.S. CONST. art. II, § 1.

a president-elect to *affirm* rather than *swear* his duty to uphold the Constitution. This often overlooked provision is a nod toward Pennsylvania Quakers who were influential in Pennsylvania politics. It is designed to accommodate men whose religion would prevent them from swearing allegiance to anything other than God. Atheists and proponents of a strict separation of church and state incorrectly read the word “affirm” as providing a way of avoiding swearing an oath. Thus, they believe that it allows for a non-reliance on religion in upholding the Constitution. The fact that the alternative to “affirm” was originally included in the oath to *accommodate* religious people has been lost.

The third and most famous reference to religion in the U.S. Constitution is the Free Exercise Clause of the First Amendment. This clause states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”<sup>24</sup> The prohibition is telling to the extent that the restrictions are clearly directed towards the actions of the *national* government, with no mention of the states. This is because religion, like many other constitutional issues, was left to the jurisdiction of the states.

The wording of the First Amendment to the U.S. Constitution when contrasted with similar religious liberty amendments at the state level helps make the case that religion has a special status in American state constitutions that is absent in the national constitution. While the national constitution uses agnostic language which implies no government interference or endorsement of religion, most state constitutions take a markedly different approach to protecting religious liberty. Many state constitutions openly use the word “God” or make direct reference to the “Almighty” in their religious liberty clauses. For example, the New Hampshire Constitution states “[e]very individual has a natural and unalienable right to worship God according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained, in his peers on, liberty, or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience. . . .”<sup>25</sup> The Virginia Constitution reads:

[t]hat religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love, and charity towards each other.<sup>26</sup>

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24. U.S. CONST. amend. I.

25. N.H. CONST. art. V.

26. VA. CONST. art. I, § 16.

The Nebraska Constitution reads “[a]ll persons have a natural and indefensible right to worship Almighty God according to the dictates of their own consciences.”<sup>27</sup> The Oregon Constitution similarly declares “[a]ll men shall be secure in their Natural right, to worship Almighty God according to the dictates of their own conscience.”<sup>28</sup>

All of the above provisions are still in effect today. It is interesting to think how different the legal debate over religious freedom in the United States would be if the First Amendment to the U.S. Constitution stated, “Congress shall make no law respecting an establishment of religion, or prohibiting the free worship of Almighty God.” Such a statement would be an endorsement of religion. The specific reference to God in the provision would prevent the agnostic or atheistic interpretations that often accompany First Amendment legal cases today.

The frequent invocations of God in the preambles and in the religious liberty clauses of state constitutions indicate that religion, far from vanquished in American constitutionalism, is merely another aspect of our federal government intended for state jurisdiction. The fact that the references to God found in state constitutional preambles and religious liberty clauses are absent in the national constitution indicates that the state language is more than mere stylistic prose or eighteenth century tradition. If it were perfunctory language—merely stylistic window dressing for state constitutions—there would have been little resistance to including similar language at the national level as well. The absence of such language at the national level, and near ubiquity at the state level, means the religious invocations found in state constitutions had significant meaning that the Framers of the national constitution wished to avoid. In short, religion was one of the issues that was largely meant to be punted back to the states in our federal system.

#### JURISPRUDENCE AND RELIGIOUS LIBERTY

A “federal” perspective on religious liberty—leaving religious issues to the states—is not widespread in the courts. Judges traditionally view the First Amendment religious clauses as *individual* protections against government power rather than jurisdictional proscriptions. As a result of this interpretation the separationist position has been easier to defend, because it imparts an obligation by government to resist state or local activity that might be construed as supportive of religion. This interpretation requires the national government to intervene in state and local affairs only when individuals feel their religious freedom (or freedom from religion) has been violated.

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27. Neb. CONST. art. I, § 4.

28. OR. CONST. art. I, § 2.

A good example of the court's tendency to interpret the First Amendment religious clauses as individual protections is the 1985 case of *Wallace v. Jaffree*, an Alabama case centered on a father's complaint against his children's school.<sup>29</sup> The father argued that a one-minute voluntary prayer at the beginning of each school day was a violation of his children's First Amendment rights, because it amounted to state sanctioned religion and imposed religious ideals on the children. The Supreme Court concurred in a 6-3 decision, holding that the First Amendment was designed to protect *individuals* from attempts by government to interfere with the right to believe, worship, and express themselves in accordance with the dictates of their own conscience. The Court further held that the intent of the First Amendment religious protections was to protect *individuals* from not only government, but from religious preferences of the majority as well.<sup>30</sup>

While this reading of the First Amendment is pretty typical, it overlooks the possibility that the First Amendment should be viewed in an entirely different manner. Only recently has a "federal" interpretation of the religious clauses gained some traction. Most notably, Justice Thomas has argued that the First Amendment religious clauses are jurisdictional rather than individual protections.<sup>31</sup> Political scientists Christopher Banks and John Blakeman provide some interesting insight into Justice Thomas' jurisprudence, which relies heavily on a federal perspective in interpreting the First Amendment:

[f]or Thomas, the clause [the establishment clause] is not a rights-granting clause that protects individuals from government; rather, it is a jurisdictional clause regulating the relationship between the federal government and the states. Thus the federal government has no power to establish religion at the national level and only minimal power at best to regulate state and local religious policy-making. Moreover, the establishment clause can no longer prohibit state and local policymaking affecting religion, so more power over religious issues would devolve to state and localities.<sup>32</sup>

Thomas' interpretation of the First Amendment as implying a federal relationship on religious issues is evident in his reasoning in two recent cases: *Zelman v. Simmons-Harris* and *Elk Grove Unified School District v. Newdow*.<sup>33</sup> These cases build on a jurisprudence started a few decades ago

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29. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

30. *Id.*

31. CHRISTOPHER P. BANKS & JOHN C. BLAKEMAN, *THE U.S. SUPREME COURT AND NEW FEDERALISM: FROM REHNQUIST TO THE ROBERTS COURT* 133-188 (2012).

32. *Id.*, at 135.

33. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Elk Grove Unified Sch. Dist. v.*

during the Rehnquist years.

The Rehnquist court is credited with creating a new “judicial federalism” in the 1970’s and 1980’s by siding with the states in several important cases, thus acting as a counterweight to decades of expanding power by the national government. In the *Zelman* and *Newdow* cases, Thomas has expanded on this approach further by suggesting an even more stringent federal position on *religious* issues. Thomas could be considered to be advocating what political scientists call “dual federalism,” where the state and national governments have clearly defined but exclusive powers. The two layers of jurisdiction are kept distinct, like a layer cake. This is in contrast to “cooperative federalism” where the national government has involved itself in state affairs and states assist as administrative agents where needed. In contrast to a layer cake, cooperative federalism is sometimes diagramed as a marble cake where jurisdiction is shared and mixed.

Justice Thomas hints at a dual model of federalism in the 2002 case regarding school vouchers, *Zelman*. The case dealt largely with the constitutionality of using vouchers to issue public money to private, religious schools.<sup>34</sup> The Court ruled 5-4 that the issuance of vouchers did not violate the First Amendment based on five key criteria.<sup>35</sup> Two of the critical criteria discussed were that the vouchers were not for religious instruction but rather for general education and that the vouchers were not given directly to religious institutions but to parents.<sup>36</sup> While Thomas’s concurrence focuses largely on the constitutionality of the vouchers, the language buried in the middle of the opinion hints at a reevaluation of how the First Amendment, particularly the Establishment Clause, should be interpreted:

The Establishment Clause originally protected States, and by extension their citizens, from the imposition of an established religion by the Federal Government. Whether and how this Clause should constrain state action under the Fourteenth Amendment is a more difficult question. . . . Consequently, in the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government.<sup>37</sup>

In *Newdow*, Justice Thomas’ federal perspective on the Establishment Clause is more forceful. The *Newdow* case was the highly publicized challenge to the constitutionality of the Pledge of Allegiance. Michael

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Newdow, 542 U.S. 1 (2004).

34. *Zelman*, 536 U.S. 639.

35. *Id.*

36. *Id.*

37. *Id.* at 678, (Thomas, J., concurring).

Newdow filed suit on behalf of his daughter, citing a violation of her First Amendment rights by forced recitation of the Pledge of Allegiance, which includes the phrase “one nation under God.”<sup>38</sup> The Ninth Circuit held in favor of Newdow.<sup>39</sup> However, the Supreme Court later ruled that Newdow did not have standing to sue, as the mother had sole custody of the child, and the appellate court’s decision was reversed based on procedural grounds. Three of the nine justices dissented on the issue of standing, arguing the Newdow did have a basis for filing suit, but nonetheless agreed with the reversal of the Ninth Circuit’s ruling. Thomas’ argument in favor of religious liberty was the most forceful.

Thomas argued that a dual model of federalism *should* apply to religious issues, particularly with regard to the Establishment Clause of the First Amendment. While the Free Exercise Clause can be incorporated and applied to the states, the Establishment Clause should be interpreted as jurisdictional with the intent to shield state religious practices from national interference. In his concurrence in *Newdow*, Thomas writes, “I would acknowledge that the Establishment Clause is a federalism provision, which, for this reason, resists incorporation. . . . The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments.”<sup>40</sup>

Aside from Justice Thomas, it seems unlikely that the Court will adopt a “federal” perspective on the Establishment Clause anytime soon. Though there is a compelling case for such an interpretation, Banks and Blakeman contend that there are too many forces pushing against a change in the way the Court looks at the First Amendment. Many of the constituencies that are most interested in church-state issues—interest groups, local government, churches—benefit from the current interpretation of the First Amendment either through protection of their immediate interests or from the opportunity to foist controversial issues on the national government and hence avoid the ire of unhappy supporters. As a result of these political motivations and competing pressures, Banks and Blakeman contend that:

Justice Clarence Thomas’s federalism interpretation of the establishment clause most likely will not evolve to become an integrated part of the Supreme Court’s purported federalism revolution. The constituencies that would be most affected by a federalism approach to church-state relations are not supportive of it; nor are Thomas’s colleagues currently on the Court.<sup>41</sup>

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38. *Newdow*, 542 U.S. 1.

39. *Id.*

40. *Id.* at 45-49 (Thomas, J., concurring).

41. BANKS & BLAKEMAN, *supra* note 30 at 173.

Justice Thomas may continue to be a lone voice for a federal perspective on the First Amendment. However, the lack of support at the national level does not mean advocates of religious liberty should give up hope of a more favorable jurisprudence. While the courts continue to see the First Amendment as individual level protections for the most part, they have also become more responsive to the concept of federalism in general. The challenge for “accommodationists” is to reorient the debate over religious liberty as one that views First Amendment protections as providing a minimum level of protection while state constitutional protections provide a higher level of protection that is consistent with the intent of the Founders, the design of our constitutional system, *and* the protection for freedom of conscience. Focusing on the religious language found in state constitution is a place to start.