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2007 National Lawyer's Convention The Federalist Society *and its* Federalism and Separation of Powers Practice Groups *present a panel debate on* Federalism: Religion, Early America and the Fourteenth Amendment

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FEDERALISM: RELIGION, EARLY AMERICA AND THE FOURTEENTH AMENDMENT

DEAN EASTMAN: Thank you, Judge Pryor. We thought for a minute it was a Senate confirmation committee passing those leaflets out.

(Laughter.)

DEAN EASTMAN: Well, since you already laid the gauntlet on whether I can be moderate, let me disabuse everyone of that in a moment. This is the 60th anniversary — it's the 20th anniversary of the Federalist Society, which is a great thing to celebrate. It's also the 60th anniversary of *Everson*, which is not so great to celebrate. In fact, I'm going to stake out a pretty hard ground here. I believe that it's one of the most radical transformations in constitutional law ever to occur with one of the greatest negative consequences for the long-term possibility of continued success of this nation ever.

It was done by judicial fiat. It's not even holding in the case. There is no thoughtful, reasoned analysis, but by pure ipse dixit. In one sentence from the pen of Justice Black, "If the Establishment Clause means anything, it means at least this: Neither a state nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion to another." Now in that short sentence, he did two very radical things. He completely altered the notion of the Establishment Clause even as it existed against the federal government. The non-preferential view of the Establishment Clause that had prevailed up until then now becomes no aid to any religion, no aid to all religions. It completes the wall of separation of church and state metaphor. And he just kind of tucks it in there, "aid all religions", and it's not even an issue in the particular case. But we'll leave that aside today.

The other radical part of that statement that I want to focus on today is the throwing in of the word "state". "Neither the state nor the federal government can pass any such laws". Never before had the Establishment Clause been

understood to apply to the states. It of course does so by virtue of the Fourteenth Amendment. The citations to support his authority are the Fourteenth Amendment incorporation cases involving the freedom of speech or the Free Exercise Clause. And he just says, look, we've already incorporated the First Amendment without any reasoning or any discussion whatsoever of the obvious differences between those clear liberty-protecting clauses and this different-in-kind clause of the Establishment Clause. Not a word. Not a word of discussion. And for more than a half-century, no one seriously challenged Justice Black's ipsi dixit here.

Now to be sure, Justice Potter Stewart questioned it in his dissenting opinion in *Schempp* in 1963. He wrote, "The Establishment Clause was primarily an attempt to ensure that Congress not only would be powerless to establish a national church but would also be unable to interfere with existing state establishments." And Justice Rehnquist made a similar point when he dissented in *Wallace v. Jaffrey*, as Judge Pryor pointed out, in 1985. And then Justice Harlan, concurring in *Waltz v. Tax Commission, City of New York*, in 1970, questioned whether applying the clause in the same manner as it applies to the federal government when you're dealing with state issues made sense. But that's about all that we have challenging Justice Black's views back in Everson.

Well, 55 years after that opinion comes down, Justice Thomas gives us an invitation. In *Zelman v. Simmons-Harris*, the Ohio school voucher case in 2002, he begins his opinion by saying, "As a matter of first principles, I question whether our normal Establishment Clause test should be applied to the states." And then in *Elk Grove v. Newdow* in 2004, the infamous Pledge of Allegiance case, he has several comments furthering his discussion; "the difficult question of whether and how the Establishment Clause should constrain state action under the Fourteenth Amendment," he talks about. And then he goes on. "I would take this opportunity to begin the process of rethinking the Establishment Clause," which he would acknowledge is a Federalism provision, which for this reason resists incorporation. And a year later

in *Van Orton v. Perry*, the Texas Ten Commandments cases, he says, "I have previously suggested that the Clause's text and history resist incorporation against the states."

Now note, this is not your typical invitation. When in *Newdow* he suggests that he would take the opportunity to begin rethinking that, but then he proceeds to tell us that he would acknowledge it's a federalism provision that resists incorporation, he's being pretty clear what his thinking is on the subject.

The rethinking that needs to occur to take place is not his so much as his colleagues'.

(Laughter.)

DEAN EASTMAN: And ours. And ours. Now, it seems to me that Justice Thomas's rethinking invitation is particularly appropriate to this Society, which is really devoted both to understanding the original understanding of the clauses and trying to recover them wherever possible, but also, first and foremost, reminding us of the importance of Federalism to our overall structure of government. So I think there are a couple of questions we should consider in taking Justice Thomas's invitation to rethink *Everson* seriously.

Just what was the original meaning of the Establishment Clause? Now here, I'm not going to talk about the current fight, whether it's the non-preferential view, or the non-coercion view, or the strict separation of Church and State view, or all those, the endorsement view, the psychological coercion view, or any of those things that are the fodder for current Supreme Court jurisprudence on the Establishment Clause. I am instead talking about the Federalism issue, and does it really resist incorporation?

And the second issue, it seems to me we should address is, so what if it does? Apart from our devotion to originalism, is this just one of those cases where 60 years is too much water under the bridge? What is to be gained by restoring the original meaning? And what is to be lost if we don't? So let me take those two questions in turn.

The original understanding — when Madison first proposed the language that would ultimately become the Establishment Clause of the First Amendment, here is the

language he suggested in the House of Representatives: "Nor shall any national religion be established." The Committee Report modified it slightly: "No religion should be established by law." And that slight change has been used by folks to try and claim that it wasn't just a national church that they were trying to prohibit, but any aid whatsoever to religion.

But if you read the debates, and they're very sparse, that's not what the objections to that language were. The objections were rather just the opposite. Representative Sylvester, in response to the Committee Report, and derivatively by Madison's original proposal, feared that those clauses would have a tendency to abolish religion altogether. Representative Huntington agreed. He says, "The words might be taken in such latitude as to be extremely hurtful to religion," and he gave as an example, they might interfere with the ability of churches to sue to enforce contractual obligations that they had relied on to build a church or what have you. Those are all things that are going on at the local government.

So, Livermore comes back and he proposes to add the words "Congress shall make no law touching religion." And it's significant because that's the closest language during the debate to the final version that we actually get. The language ultimately adopted comes out of a conference committee. And here, we have the limitation that it applies only to Congress, but also this odd language, "touching religion", rather than not establishing religion or not establishing a national religion. And given that Livermore's suggestion comes on the heels of Sylvester and Huntington's concern that the first proposals were not protective enough of religion in the states, I think we see coming out of that congressional debate the twofold purpose, no national church, but there were a lot of other ways in which the federal government might interfere with state support or reliance on religion as it goes about its daily efforts.

The Necessary and Proper Clause was front and center in the fight over the ratification of the Constitution at how expansive that authority was, and one of the concerns was

that Congress might use the Necessary and Proper Clause to use means tied to some other delegated power to restrict or otherwise shut down religious efforts in the states. So Livermore's proposal, "Congress shall make no laws touching religion," seems to very neatly encapsulate both sides of that; no national church and no federal interference otherwise with the state supports of religion.

In other words, this is the way we're going to leave this question to the states. And some states like Virginia might go Jefferson's way of a fairly strict separation, and other states like Massachusetts might have a fully established church. But because it was the states where the police powers were going to reside, that power to regulate the health, safety, welfare, and morals of the people, that we were going to leave those questions to the more local government rather than having a one-size-fits-all rule come out of Washington, which they did think would be destructive of religion.

This doesn't change much in the Senate. We've got a couple of other proposals in the Senate, but then it goes through a conference committee which consisted of several members of the clergy, people who were members of Congress at the time that were on that conference committee. And then the language we get, "Congress shall make no law respecting an establishment of religion," is very similar to the proposal that Livermore gave us.

Now, those twin things I think perfectly answer Representative Sylvester's objection. And it's now, I think, fair to say that some pretty prominent scholarship over the last quarter-century or 20 years has started to re-take up this charge. Akhil Amar, who I don't think probably began out to lead to this conclusion, has written that the Clause made clear that Congress could not interfere with the existing state establishments. And I think that's the right historical record.

Justice Story said that the Constitution left religion to the states. And so, you get this invitation from Justice Thomas. And here's what he said in *Newdow*, picking up on this theme. "The Establishment Clause is best understood as a Federalism provision. It protects state establishments, but it does not protect any individual rights." So the notion of

incorporation of individual rights through the liberty component of the Due Process Clause in the Fourteenth Amendment makes a lot less sense when you're talking about the Establishment Clause than when you were talking about the Free Speech or the Free Exercise Clause. Justice Potter Stewart described it as an irony of incorporation that a clause evidently designed to leave the states free to go their own way should now have become a restriction on their autonomy.

Okay, so now my second question: Why does it matter? Aren't we better off with the separation of church and state and all the religious pluralism that we have? Well, there's an aspect beyond just getting the constitutional question right that we ought to be focused on. If we were to design a system today, would we have a separation clause, or would we have one that allowed religion to flourish side by side and in collaboration with at least local governments?

Let me give you a few things from the founding generation. The Northwest Ordinance — "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." When you go through the founders' statements on this, and we'll do more of it in the Q&A, they are full of recognition that you cannot expect to have a self-governing people in a government that will sustain itself over the long-term in this experiment in self-government that will succeed over the long term if you don't have a fundamental reliance on virtue.

Now, virtue is not the same thing as religion, of course, but President Washington, in his farewell address to us, his kind of last charge to his fellow citizens, reminds us that we would be foolish — "Reason and experience both forbid us to think that we could accomplish this civic education and moral virtue without reliance on religion." When you're talking about the long-term ability or capacity to sustain a self-governing set of institutions, it requires more than anything else a virtue in the citizenry. And the founders all thought that you get that virtue in the citizenry with reliance on and

collaboration with religion. If we're not going to fix this, we may find ourselves in deep trouble in the long run.

Thank you.

(Applause.)

PROFESSOR HAMILTON: I like to think Federalist Society for inviting me today. I always enjoy meeting up with friends here, and I'd like to apologize for Amtrak. Apparently there were leaves on the track.

(Laughter.)

PROFESSOR HAMILTON: You would've thought they'd gotten around that a few years ago. But they had to put sand in the engine, which didn't sound right to me. But whatever.

I'm going to focus in the end on Justice Thomas's reintroduction or introduction of the notion of Federalism as a way of reading incorporation or disincorporation, whichever position he's taking, and sometimes it's hard to tell. But I'd like to start with a background of the way in which religion and the state are grounded in the culture and then to move on to how to read what Justice Thomas is actually suggesting.

You know, the values of the Framers were deeply theological in the sense that by the time they got to the Convention, they all agreed on the fallen nature of man, that you can trust no one, no human holding power. And so it was absolutely necessary to the extent that they could, to divide power, to separate power, to distance powerful entities from each other, to pit them against each other, and to learn from the abuses of power in Europe. That was the atmosphere at the Constitutional Convention, and religion was mentioned twice; once when it was proposed there be a chaplain to provide prayers — nobody would pay; that was the end of that — and secondly, when James Madison said that he wanted to make sure that we didn't replicate the problems in England of religion determining who would vote.

Now, the Establishment Clause, whether it applies to the federal government, the states, or locally, wherever it applies, it is a brilliant innovation in the sense that this is the first time that a governing group has proposed that religion and the state be clearly distinguished from each other, that the one

would not be permitted to be in union with the other to control the country. This is a response, obviously, to England, to the European establishments. It's a brilliant move. And in my view actually, it's the reason for the vibrancy of religion in the United States.

Now, we have many democracies around the world, and many of them do not have separation of church and state or disestablishment principles. But none of them have the same degree of vibrancy and intense religious fervor among such a wide diversity of religious groups. That's what distinguishes the United States from every other democracy in the world. And I'll get back to that.

But having said that, that diversity that creates its problems, as Philip has pointed out. What was religion at the time of the framing, when they would've been thinking about the Establishment Clause and these issues? It was characterized by division, distinction, and difference. The Massachusetts Congregationalists were intent on either removing or exterminating the Quakers and the Baptists. It was in fact the Baptists, not the Catholics, who were the first to think in terms of separation. And why? Because they were an abused minority. They were told they couldn't believe what they wanted to believe. They were told they had to pay taxes to support an established church. They had extremely articulate clergy that went around the states and preached separation in those terms. There never has been a Kumbaya period for Christianity in the United States. There's no period in our history where you can find all of the Christian sects holding hands and agreeing on anything, in fact.

More recently — in the middle actually, after the Baptist and the Quakers had their problems with Congregationalists and everybody else isn't getting along, we get to the problems with the Catholics and Protestants, which is a very complicated story that has a lot to do with how you define democracy and dual allegiance to church and state. But I won't get into that today.

And more recently, of course, we have the very last permissible group to discriminate against in the United

States, of course, is the Atheists. They are the single most hated minority group at this point. But they are still part of the culture of diversity and distinction and actually vibrancy.

So what I would stress is that the distinctive quality of the United States is its ability to support an ever-increasing diversity. If you've read Diana Eck's work, which is absolutely fascinating, about the number of sects in the United States, it's mind-boggling. And it's not just on the coasts. It's in the Midwest and the South as well.

So why would you place this Establishment Clause disability on the federal government? That's the question. And the answer is pretty clear. There was a fear of the concentration of power in the national government, and a fear of concentration of power joined by a religious entity being able to use the national power to dominate the country. And so, there had to be a way to make sure that no religious entity could do that. That, I take it everybody agrees that the federal government may not establish a religion.

So the question before us, is why not apply it to the states? The Establishment Clause was a political compromise. The principle of keeping the power spheres of government and religion distinct does not require reference to federal or state government. The idea obviously makes sense, applied to the states as well as the federal government because it's been applied to the states for years. It's not the principle that would keep it from being applied to the states. It's that political compromise.

So if we're going to go with original intention, the original intention on the basis of the compromise is no incorporation of the Establishment Clause against the states because the states weren't supposed to be limited by the Establishment Clause, which would mean that Justice Thomas would have to be willing to roll back every case under the Establishment Clause. He is not. And let me explain what is wrong with the approach that he has suggested.

In the end, having read this over many times, thinking I was getting it wrong each time, I'm just mystified because he starts out by saying disincorporation — the Establishment

Clause is not a rights-bearing clause. It's the rights-bearing clauses that should put you into incorporation. So he's not against incorporation as a general matter, only with respect to the Establishment Clause because it's not a rights clause.

But then he points to cases that he agrees should stand, even if disincorporation occurs through the Establishment Clause. And the cases that he points to are cases like *Larkin v. Grendel's Den*, where churches had the ability to determine whether or not a liquor license would be issued near them. Or *Kiryas Joel*, where we have a religious organization that uses its own neighborhood boundaries as the sole determinant to figure out what the school district boundaries are. Or Rosenberger, where the question was whether or not the government can prefer one religion over other religions.

Now he wants to say that these are rights-based cases because if you keep the government from coercing religion, you increase religious liberty, and so therefore, these cases might more properly be decided under the Free Exercise Clause. But that is definitely a Supreme Court pretzel argument. It doesn't make any sense. Those cases are all about power. Does the government have the power to give its power to a religious entity to determine liquor license control? The Court says no. Does the government have the power to draw a school district according to the way a religious group wants it drawn because they are a chosen insular group? The answer is no. These are power cases.

Now he's right that if you have disestablishment, you are more likely to increase liberty. That's exactly what James Madison believed. Disestablishment is one of the means to religious liberty. But it doesn't mean that you are only dealing with rights. You're still in this arena of power, of a separation of power between church and state and not just talking about individual rights.

So in the end, he says that his theory is an anti-coercion theory. But it's very unclear why you need to disincorporate the Establishment Clause to have a full anti-coercion. Chief Justice Rehnquist's view was that you shouldn't let the Establishment Clause govern any instance unless you could prove coercion, and only in cases of coercion, then the

Establishment Clause would kick in. In the end, that is actually Justice Thomas's theory. It's all about coercion and switching Establishment Clause power cases under the umbrella of the Free Exercise Clause.

So in the end, it seems to me that we are getting a lot more than we need. His theory of disincorporation does not take you down new paths. It simply re-articulates what it is that Chief Justice Rehnquist was working on from the day he walked into the Court. And whether I agree with that or not, that's in place, and I think that it is no service to the doctrine, which by these quarters is being criticized as being incredibly confusing and inconsistent — there's new service to that doctrine to now introduce the concept of disincorporation after all these years of incorporation.

So in the end, I have to say I am not persuaded by Justice Thomas's theory. He calls it Federalism. There's no one who's a greater fan of federalism in this room that I am, but it isn't. In the end, he has a theory of coercion. Disincorporation is irrelevant, and we are back to where we started.

Thanks very much.

(Applause.)

JUDGE PRYOR: Before we turn it over to a little Q&A from the audience, I was going to ask each of the panelists if they would like to say a few remarks in response to what they've heard from each other, beginning with Professor Eastman.

You can remain seated for these kind of short remarks. And then I'll recognize those who want to ask questions. You can start lining up at the microphone.

If you've been to one of the panels that I've moderated before, you know you're likely, if your real intention is to filibuster and not ask a question, I'll probably interrupt you. What we really care about is an opportunity for questions. But you've heard from both Professor [ ] and Professor Hamilton.

Dean Eastman, what, if anything, would you like to say in response?

Can we have the mics turned on at the table?

DEAN EASTMAN: With respect to [ ], buy his book. He has a lot more of that in there, and it's good stuff.

I've got two questions from Marci. I agree, one of the things that distinction is America so much and goes back to Tocqueville talking about this, and we continue to talk about it, is the vibrance of our religious institutions. My question is how much of that ongoing vibrance is equity capital built up prior to 1947, and how long will it last if 1947's decision in *Everson* is going to have the consequences I predict?

And the second thing I want to take up is the issue that Justice Thomas's opinions on this are confused. I don't think so. I think what he's doing is laying down marker for us, this invitation to revisit the incorporation in the Establishment Clause. That's part one. And then part two says, well, look, if we're not going to go wholesale and unincorporated, you know, which he hasn't even gotten Justice Scalia to join with him on that effort yet, then he starts laying the groundwork for, what would an incorporated establishment look like if we're going to keep it incorporated, that is as respective of Federalism as it can be?

In his repudiation of jot for jot incorporation, the notion that because the states have a different source of power and different kinds of duties than the federal government does, that if we're going to apply the Establishment Clause to the states, it ought to be applied in a different manner than it's applied against the federal government. And so, yeah, that position contradicts the first half of the opinions, but it's not incoherent. He's just saying, look, if I don't get five votes for part one, here's part two, and let's start looking at it in those terms. I think that's perfectly coherent. And there's much more than just an anti-coercion principle and it.

Although, I do regret his citation of *Kiryas Joel*. But it's just a brief citation. He doesn't elaborate on it. I think *Kiryas Joel* has to go the other direction if you take seriously his other arguments in the case.

PROFESSOR HAMILTON: Well, with respect to the first question about the vibrancy of belief in the United States, the statistics show that it is obviously still one of the most highly religious countries in the world, but not just in

identification of identity as religious but also in practice. Far more practice of religious activity occurs in the United States than any place in the world where there is religious liberty permitted. And so, I don't see any decline in religious values as of, starting with the '40s to now and that we have banked.

But your implicit question is really about whether or not this is a Christian country, right? I mean isn't that the implicit question? And it's quite clear that the notion of a Christian country is actually just an abstraction with no content. There's never been, as I said before, a Christian entity. There have always been Baptists and Methodists and a wide variety who all disagree with each other on very important issues. So I would reject the "Christian country" label.

With respect to Justice Thomas, that's a very charitable reading that he's not contradicting himself. I think it's not accurate. But in the end, if you concede that he's wrong about *Kiryas Joel*, then you're walking down my path pretty much. If that doesn't belong in his theory, then he's inconsistent. And what's going on here is that he wants to do something radical, but in his gut he knows none of those cases will ever be reversed. So he's got to figure out how to build those cases into his doctrine and they don't fit. So I just think he's just got to admit some cases don't fit his theory.

JUDGE PRYOR: Okay, thank you.

We'll take our first question —

PROFESSOR HAMILTON: Wait. I have something to say.

JUDGE PRYOR: Well, all right. Professor Hamilton wants to respond.

PROFESSOR HAMILTON: I just want to say one quick thing. It's not just embedded in case law. I defy anyone in this room to issue a press release in which they say that the states may now have a single religion. That won't happen. It won't even happen in Utah or Maryland. It's just not going to happen. And why? Because it's embedded in the culture that no one religion controls government levers.

DEAN EASTMAN: I'll agree — I mean, then we'll go to the questions. Years ago, I was debating a federal judge on this question them and she said, ell, that would just violate,

and let me quote, the First Amendment's, quote, separation of church and state. And I said, you know, I know you said the word "quote", but it's not in there. And she said, well, it certainly is. And I said, look, I've got a copy right here, and I read it to her. And I said those words are not there, so why are you putting quotes around them? And her answer was, you obviously have a defective copy.

(Laughter.)

DEAN EASTMAN: And so Marci's right. It's deeply embedded. I just question whether it's right.

JUDGE PRYOR: One last remark.

(Laughter.)

JUDGE PRYOR: Okay. First question.

AUDIENCE PARTICIPANT: (Off mic.)

Professor [ ], Article 6, Section 3 has a prohibition against the religious qualification test for officeholders. But it also has a requirement for state, for federal and state officers to take an oath or affirmation, which implies a belief in divine power or a least some virtuous responsibility for veracity. You referred to Amendment 10 and the Republican form of government as the two bulwarks that the disestablishment types refer to.

What does Section 3 of Article 6 tell us about the free exercise and the antiestablishment provisions for incorporation?

JUDGE PRYOR: Professor Hamilton, do you want to respond — either one of you?

DEAN EASTMAN: Yes. There was — during the ratification debates in South Carolina, one of the amendments proposed was to insert the word "other" in the no religious test clause, recognizing that the oath clause was itself a religious test and, you know, just to clean it up a little bit so that we would acknowledge that. But it says oath or affirmation, and today that's often taken as a protection of atheists for example. It wasn't. The Affirmation Clause was designed to protect those who were even more scrupulous in their religious belief; Quakers, largely, who took seriously the admonition in the Bible not to swear an oath against heaven

in anything. So that's what the Affirmation Clause is. It's not the way we've interpreted it more recently.

JUDGE PRYOR: Next question.

AUDIENCE PARTICIPANT: I'm David Mayer from Kaplan University Law School in Columbus, Ohio, and I wanted to ask the panel about the bifurcation of the First Amendment Religion Clause into two separate clauses, the Free Exercise Clause and the Establishment Clause, which it seems to me is also an invention of 20th-century constitutional law.

Thomas Jefferson used his famous wall metaphor to refer to both free exercise and non-establishment. I think it's fair to say Madison thought of a unitary freedom of conscience right which had two aspects. Also grammatically, there is one clause; it has two phrases. So my question is, couldn't it be argued that the bifurcation of the First Amendment Religion Clause is as much or if not greater transformation of original understanding than the incorporation doctrine?

JUDGE PRYOR: I'd like Professor Hamilton, if you're interested, to respond to that first. Go ahead.

PROFESSOR HAMILTON: I think that's — well, there are two answers to that. One is, it's hard to read the history that way, given the way that the clause was drafted and moved around. So they were separate clauses. And frankly, on your theory, it's all one clause, so it's speech, establishment, et cetera. I don't think that's very persuasive. I'll leave it at that.

Just the way that Madison drafted it, and it went through all these changes — sometimes it had an Establishment Clause in it; sometimes it had free exercise; sometimes it had a conscience clause in it — quite a variety, and dealt with that so there were individual entities.

DEAN EASTMAN: And oftentimes, it had both a free exercise and freedom of conscience clause, which was odd.

PROFESSOR HAMILTON: Right.

DEAN EASTMAN: But I think there's another point to be made here. And that is the two parts of the clause — I mean, you're right; grammatically, it's single. But the two parts of it aim at different things. And it allows you, if you

accept my Federalism understanding of the Establishment Clause, to, for example, recognize that Massachusetts had an establishment but also had one of the strongest free exercise or freedom of conscience clauses of the original states. And they didn't see those things as incompatible.

We have so interpreted the Establishment Clause of the last 50 years to almost force a confrontation between the two that didn't exist. It was perfectly okay to have state support of religion generally or even a particular religion, as long as you didn't compel a belief in it. And then some states did go further and compel a belief in it, and that's where you end up with a freedom of conscience and free exercise clauses coming to the forefront.

PROFESSOR HAMILTON: But the Massachusetts freedom of conscience clause, what it meant was you had a right to believe anything you wanted, and if you disagreed with the dominant religion in the state, you should leave. It did not mean coexistence.

JUDGE PRYOR: Yes, sir.

AUDIENCE PARTICIPANT: Mark Mittleman from St. Louis. When we talk about incorporation, I've noticed that all the panelists have sort of left out the tortured history of the Fourteenth Amendment interpretation in which first the Privileges and Immunities Clause was read out, and then the Due Process Clause was used to bring back something called incorporation. We know for one thing that Justice Thomas is also interested in recovering the Privileges and Immunities Clause and perhaps dealing with incorporation in that fashion.

Could you all comment on that whole aspect of the incorporation?

DEAN EASTMAN: I often compare this problem, when I'm teaching my students, to the little childhood game where the critter pops up and you hammer it down, and it pops up after another hole. This ideal of fundamental rights is such a part of our history and the whole understanding of governing structures that if you shoot it down on privileges and immunities where it was designed to be, it pops up under due process or substantive due process of the substantive

component of equal protection or the unenumerated penumbras in the Ninth Amendment or whatever. And you know, the problem is not with the understanding we ought to have on enumerated rights or fundamental principles, or even incorporation of some things. The problem is that the Court doesn't understand the basis on which those decisions ought to be made.

JUDGE PRYOR: Phil, do you want to say anything about that?

JUDGE PRYOR: Professor Hamilton.

PROFESSOR HAMILTON: Well, and just one other quick note, and that is that one of the reasons you're not hearing a lot about the Fourteenth Amendment's intent is because if you read the Fourteenth Amendment's history in toto, you can find a contradiction for almost every page. It is a convoluted, confusing set of statements. And for law office history, it's great because you can pick out what you want. But for real history, it's not very helpful. It's very hard to tell an intent for anybody in those rooms. So we're kind of stuck with theory, as opposed to any kind of concrete original intent.

JUDGE PRYOR: John Bingham from Ohio?

JUDGE PRYOR: Next question.

AUDIENCE PARTICIPANT: Let me lay out a basic framework, kind of where I'm coming from on this, and you can analyze that, and then secondly, a question of false from that.

Basically, I describe this, there was a basic pole between two positions at the time of the founding. One is more representative of Jefferson, who views religious freedom as an individual right, and the other is the communitarian position, which had a long tradition of the Puritans in believing in, the general common belief at the time should prevail in a particular state. And a Federalist approach to the interpretation of the First Amendment seems to be a compromise that really allowed for both the communitarian and individual's perspective of Jefferson to coexist in the states during that time period. But over time, it seems as though Jefferson's position has won.

In light of that comment in light of that fact that he viewed it as an individual right, and he said in his bill for religious freedom that it's sinful and tyrannical to force a person to pay for the propagation of ideas which he does not believe in. And that's the foundation of his perspective, which has come to prevail.

What's the implications for, for example, education. When you extend the implications of — I mean you might separate church and state on the level of institutions, but really the propagation of ideas in education is really fundamental, and so wouldn't the implication of the First Amendment in education be that there should be a separation of church and state? Is that the final, I mean, separation that's going to have to occur if we're going to implement the kind of methodology that's presently being proposed?

DEAN EASTMAN: I'd go the other direction. I think if we were to take Jefferson seriously in its full implications, that I should have to pay for no idea that I disagree with, then we wouldn't have public schools at all because they can teach a whole lot of crap in there that I disagree with.

(Laughter.)

(Applause.)

DEAN EASTMAN: But that's why the Federalism solution is the right one in a pluralistic society. And maybe the growth of our country makes it impossible to have establishment statewide, but it ought not to be impossible to have the little community of Kiryas Joel want to have a public school supported by their community, where they can say prayer in accord with their faith.

What we've done is pretend that there's no public aspect of religion. Justice Scalia talks about this in his defense in *Lee v. Weisman*. If religion were just a matter of private concern to be treated as, you know, something that should be confined to the privacy of one's home, like pornography — wonderful turn of phrase — then there wouldn't be these conflicts. But you know, most believers think that you ought to have a public affirmation, particularly at monumental moments of your life, like graduation, like swearing in somebody into office when they're going to take an oath, and

that this public community aspect of religion is critically important.

And so what we've done is adopt a separation view that excludes that but adopts with almost religious fervor every counter-religion view. And we insist that people go to public schools to learn it.

PROFESSOR HAMILTON: Well, but that presumes there is “a religion”, and there is not “a religion” in any community in the country, as proved by the Wiccan woman in Virginia who wanted to read at the opening of the City Council. They had a cycle, right, and so they had a Baptist and they had a Methodist, they had a Rabbi. I think they even had an Imam. But they said the Wiccan couldn't do it. Now that's what America is right now. The Wiccan is there, and she believes vibrantly. The notion that there is "a religion" to do what John just described is just false.

If there was a religion to do that, that might be one thing, but there is no single religion — except if communities can use political power to define their boundaries to exclude all others, which is what Kiryas Joel was about. It wasn't about including themselves. It was about excluding the others. That's a different issue.

JUDGE PRYOR: Do you want to say anything more, gentlemen?

DEAN EASTMAN: No, no, no. Mariah. It wasn't Sally.

PROFESSOR HAMILTON: Well, the Wiccans will tell you they are a religion. They will tell you.

PROFESSOR HAMILTON: No, no. They well.

PROFESSOR HAMILTON: Yeah, you should.

JUDGE PRYOR: Before we get to the next question, it will remind everyone, if you have a cell phone that has a ring tone like “When the Saints Go Marching In” or “Hold that Tiger”, please quiet it.

Next question.

AUDIENC PARTICIPANT: Charlie Stanbaugh from Jacksonville, Florida. The state and local governments, I think, have abdicated the constitutionally given responsibility for the protection of the morality over the morals of their citizens. And it seems to me that you either

accept that as a good thing or you look for a way to challenge the current situation, which is the incorporation of the states and that Fourteenth Amendment. So which do we prefer?

DEAN EASTMAN: Yeah, I'm not so sure the states have abdicated that responsibility. I think that it's been taken from them, at least a good number of the states. I'm thinking, for example, most recently the *Texas v. Lawrence* case involving the Texas anti-sodomy statute, which they considered to be part of their ongoing efforts to the Police Power Clause. The Supreme Court said you're not allowed to do that anymore. In fact, you cannot do anything to further morality. So, this aspect has been taken from them. You know, we can then debate whether that's a good thing or a bad thing. It's certainly a good thing if we define liberty in a very expensive way. But I don't think that's the way the Founders envisioned it.

You know, there was a reason that the police power was defined in the way it does. You go back and you trace the history of the definition of the police power in Supreme Court precedent. It used to be health, safety, welfare, and morals of the people. We now just kind of truncate it; health, safety, and welfare. And so we've lost something there, and I think it coincides with the loss in *Everson*.

PROFESSOR HAMILTON: This is another one of those broad sweeps that can't accurately be supported. The notion of local government has given up on morality is just hard to hear.

In my community, which is Washington Crossing, where Washington crossed the Delaware, Pennsylvania, there is a rule which we just learned about. I didn't know about it. My son did; he's a teenager, which I was glad he know about it before I did. There was a party down the street from us this weekend after a school dance and the cops came because they were very loud. Fifty kids were arrested. Now it's not because 50 kids were drinking. It's because 10 kids were drinking. But the moral rule in Washington Crossing is that if you stay at a party where there's drinking, you're just as guilty as the kids who were drinking.

That's morality, and you can find that threaded all through the law. And so you may have objections to certain types of morality, but that — I just don't think you can say that we've lost morality in toto in the local communities. I just don't see it.

DEAN EASTMAN: Maybe it's just because I live in California.

PROFESSOR HAMILTON: They could be.

(Laughter.)

JUDGE PRYOR: Move to Alabama where, when I was attorney general, I had to defend a sex toy law.

(Laughter.)

AUDIENCE PARTICIPANT: Mark Scarberry, Pepperdine Law School, also in California, there in Malibu. If we're thinking about whether the Establishment Clause can be incorporated, and in doing that thinking about what's its content, and does that make it subject to something that could be incorporated, I noted that John focused on the original public meaning as of the time of adoption of the First Amendment. Wouldn't it make more sense to ask what it was thought to mean at the time of the adoption of the Fourteenth Amendment? I'm wondering if you could comment on that, if perhaps you think the meaning at that point went so muddled, as the other two panelists have suggested, that that's not helpful.

And then for Philip, if nativism was pushing the Court toward separation of church and state and incorporating that, was there a push to then incorporate it to bring back the Privileges and Immunities Clause, incorporate not just the Establishment Clause that way, but other constitutional rights as well which would then limit those rights to citizens and the immigrants who weren't citizens who wouldn't get the protection of those rights against nativist state governments?

DEAN EASTMAN: Yes, let me — it's a very good question. The reason I focus on the founding period is not so much to say that necessarily is going to govern the Fourteenth Amendment. And you're right; the understanding of the Fourteenth Amendment would govern. But I was focusing on it because if I'm right about their view of the non-interference

aspect of the Establishment Clause and its two components, a no national church, because that would essentially shut down all the other churches, and no other interference, because there are lots of other ways we might interfere, then the notion of incorporation is particularly weak when you're talking about the Establishment Clause because it basically allows, in fact requires, the federal government through the courts to do precisely the thing that was forbidden to them by the First Amendment.

And so, if that's the understanding in 1791, you'd want a much clearer articulation that they want to turn that understanding on its head than anything we get out of the Fourteenth Amendment debates.

AUDIENCE PARTICIPANT: Of course, by 1868 there weren't state establishments.

DEAN EASTMAN: No, there weren't any of the hard state establishments, but there was extensive support of religion.

The whole school system — I mean we talk about public versus private. That didn't exist. You know, the first thing put up with a town meeting hall, which was the church, and on Saturday nights it was the dance hall. On Sunday, it was the church. And during the week, it was the school. And on Wednesday night, it was the town council meeting. You know, talk about separation of church and state. It didn't exist. This is the same building and the same people and the same players.

AUDIENCE PARTICIPANT: And the nativism wasn't so overt in the Supreme Court that —

AUDIENCE PARTICIPANT: — the Court would then seize on privileges and immunities in that more subtle way.

JUDGE PRYOR: Okay. Next question.

AUDIENCE PARTICIPANT: Thanks. Professor Hamilton, I wonder, to the extent — and I would tend to agree with you — that we largely have inculturated a resistance to outright state establishments, but having so stated, is it necessary to then defend the incorporation if the fear is not the rise of fully established state religions but rather that question of whether or not prayer at school is all

right if they don't let the Wiccans — in other words, if we let the market decide when a religion is risen to a level within a community that it would be practiced, much as, you know, third parties have to fight to get on the political ballot?

PROFESSOR HAMILTON: Well, I mean, I'll take all day to criticize the two-party system. I do get a big mistake.

But you know, I just think that for this audience, it's not persuasive, I'm fully aware. But the reality —

SPEAKER: Well, you might persuade me.

PROFESSOR HAMILTON: — yeah, well, the reality that is unavoidable is that if you sit on a subway in New York, there's going to be many religions in the same car with you. We live in a culture of unbelievable diversity, and we live in America, where if you don't like what your mother church says, you just create your own church. You break off. You take your parish and you go packing.

We proliferate religions in the United States, and it is extremely subversive in the same concerns that Philip has with respect to the Catholics at a certain time in history. I think it's very subversive to attempt to identify or honor either a majority or a gathering of religions without reference to the vast diversity. Diversity has always been the mark of American religion, and it still is. And I understand, I think, why we have such a push for a Christian country right now. But I think it's reactionary rather than looking forward into where America really is going.

DEAN EASTMAN: But here's the problem. That diversity, courtesy of the Supreme Court, has brought us to the point where the overwhelming number of believing citizens can't say as innocuous a prayer as "God of the free and home of the brave, watch over these graduates."

PROFESSOR HAMILTON: Wait. Let's do the numbers. The majority of Christians don't want to do that. The problem with the debate in America right now is that conservative Christians are religious and everybody else is secular. But if you have an 86-percent believer rate in a country, they are not secular. It's religious people debating religious people. Some religious people want prayers in the schools. Many religious people don't want prayers in the

schools. And all I ask for is accurate factual bases to have these debates. So that's the accuracy of it.

DEAN EASTMAN: No, it's not. So what we ought to do is throw it up to a vote like they did in *Santa Fe School District* down in Texas. Let's have two votes. First, should we have a student comment before the football game, and second, if we should — so, two votes — then pick somebody to give it. And it passed overwhelmingly that, yes, we ought to have a student comment, and then we ought to pick this student so she can actually give an invocation — an overwhelming majority. And you know, I find that — not in New York, I'll concede, and not in San Francisco and probably not in LA. But in a lot of places in this country, you would win 80 or 90 percent of those numbers.

PROFESSOR HAMILTON: And both of the people who brought that claim and the people who brought the claim against Judge Roy Moore in Alabama for his two-ton granite 10 Commandments have had to be under National Guard protection. Think about that. So what you're talking about is rank majoritarianism and empowering that kind of will to power that is exactly what Nietzsche described that is extremely subversive to what is best about America.

DEAN EASTMAN: But Marci, what you're talking about is single heckler's veto to shut down the thing that the overwhelming majority of people in certain locales want. That's not pluralism. That's mandate from the Supreme Court that would tell to, you know, large majorities you can't do what you want. If you think prayer has some public aspect, you're not allowed to do that. We're going to restrict your free exercise in ways never envisioned by the Founders, and we're going to do it from Washington, DC, by nine people on the court. That's neither Federalism nor a proper understanding of originalism of either Free Exercise or the Establishment Clause.

(Applause.)

PROFESSOR HAMILTON: Yes, that's a good stump speech, but it's not accurate.

JUDGE PRYOR: Well, as a matter of some historical accuracy, I had some role in the removal of that two-ton

monument from the rotunda of the Alabama Judicial Building. But I don't recall, Professor Hamilton, Steve Glassroth, who was the plaintiff in the case and is a lawyer in Montgomery, ever having been under National Guard protection.

PROFESSOR HAMILTON: Well, that's according to his lawyers.

JUDGE PRYOR: It's news to me. But I had 24-hour security.

(Laughter.)

PROFESSOR HAMILTON: My point is proved.

AUDIENCE PARTICIPANT: I was wondering if you disincorporate the Establishment Clause, what do you think that would mean in practical terms for the states, like what types of laws do you think states should be able to pass respecting religion, or would they pass? And what types of laws would they still not be able to pass?

JUDGE PRYOR: I think that's a good question. That must be a law student.

DEAN EASTMAN: It's a very good question, and it goes back to what I think Justice Thomas was trying to do in the second half of his opinion, and that is try and tease out the difference between where there's a coercive establishment that actually would violate free exercise or freedom of conscience principles and what is not. And he wants to repudiate the entire line of cases and thinking from Justice O'Connor on the endorsement principle, that it doesn't violate your freedom of conscience to have to walk by Ten Commandments or to have to listen in respectful silence to a prayer that the majority in the community wants to have at a monumental event in their children's lives.

So, you know, a lot of those things that we take as violations of the Establishment Clause now would be perfectly permissible, even saying I'm Kiryal Joel, look, this is going to be for the Hassidic Jewish community because our practices make it so difficult to engage otherwise. There's nothing wrong with that. Now, if you force somebody who doesn't believe in that to have to live in that district and go to that school and adhere to that belief, now you've crossed the

line. But it's a Free Exercise line; it's not an Establishment Clause line. At least, that's what Justice Thomas was trying to tease out in the second half of the *Newdow* opinion primarily.

PROFESSOR HAMILTON: And of course, the problem with Philip's statement is that he's now reduced the vast diversity of religious belief in the United States to two sides. There's not two sides. There's thousands. And that's the problem. That's what's difficult by the United States, and I don't think that rolling back where we've come is going to help us into the future. This is a future we don't understand. It's very difficult to figure out how to bring it into the culture and treat as Americans so many people who don't believe anything remotely like what you believe. That's hard.

JUDGE PRYOR: Our next question. This will be the last. I think we're done. Yes, this will be. Well, we'll allow one other answer this question.

AUDIENCE PARTICIPANT: Hi. My question is principally for Professor Hamilton, but don't worry. It's just really more asking for information.

PROFESSOR HAMILTON: Trust me. I'm not worried up here. You have no idea.

DEAN EASTMAN: We're on the same side most of the time.

AUDIENCE PARTICIPANT: I hate it when people come here, and they feel like they're personally being fired upon constantly. And I do have to say that, you know, I've been very involved in politics for a while and used to be involved professionally. And you may know that in 2004, two different Republican Party headquarters, local ones, were fired into. And when I showed up at my place that I was working at — I was establishing a new one — I had a note on the door that said “get out”. So I don't know what having to be under guard after you've filed a lawsuit says about our life, but I think that at least the experience as I've had it is that we're — I don't know if it's at a moment that any different, but we're certainly an interesting moment.

JUDGE PRYOR: Is there a question?

AUDIENCE PARTICIPANT: There is a question. Sorry.

Professor Hamilton, at the very beginning of your, of your speech, you said that the separationists, separationism was really the force behind the Establishment Clause as it was created at the Constitutional Convention. And I wonder if you could perhaps suggest some reading on that or some history in regards to that because it sounded as though you're arguing that kind of the Baptist spirit of separation had really won the day there when there weren't many states that, as had been pointed out previously, had established churches then.

They were the entrenched, powerful ones that were — the people from society were all members of those churches. Most of the people who went to the conventions were not religious — I don't know if you want to say dissenters — were not members of minority religions in the United States at the time. And not establishing a church nationally at that time, I think it's not radical to say at the time, that was a much weaker level, leaving the power the states and letting states continue to have their established churches or to establish new churches. It's kind of a weak compromise, isn't it? You lose most of your position if the feeling was separation —

JUDGE PRYOR: The question?

AUDIENCE PARTICIPANT: — wouldn't it more be that there would have been a provision in the states affecting the states to begin with? Isn't it more — it just seemed to me that since the power was with the established churches, did they kind of win by allowing them to keep their state establishments?

PROFESSOR HAMILTON: Well, yeah, they won the political compromise, that's true, as did the plantation owners with respect to slavery. There are all sorts of very ugly compromises that were necessary to get the Constitution through. And the person I view as the single most brilliant person at the convention is James Wilson. With respect to slavery, he said the Constitution will never survive it. So yeah, it was a political compromise.

Did the established churches win? Yes, but what's interesting is that they almost immediately began to

disassemble, and the states start to amend their constitutions very quickly to add their own disestablishment clauses, I mean not the next day but over the next decades. And so if establishment or having a dominant church is part of the American fabric, it's interesting that it was gone by 1833. And you have ask the question, historically what does that say about establishment? And what that tells you is that the establishment that's being, you know, trumpeted up here is a very weak sister of the establishments that were in place. But it is still related in the sense that the government can be co-opted by a particular religious viewpoint.

JUDGE PRYOR: Our last question.

AUDIENCE PARTICIPANT: In regards to the diversity of religion, which Professor Hamilton accurately mentions, to me I'm just — I'm throwing this out — does that not point to a greater need to unincorporate the Fourteenth Amendment against the states so that the states, those states that do have more of a predominant religious view, not necessarily of a religious sect but a philosophy, and also that philosophy could frame their moral debate, for instance, in a different way than the *Miller* test does on pornography? I mean, the *Miller* test gives a token local standard. But to me, does that — shouldn't the states actually have more power to frame the religious issue in terms of their morality because of the fact of diversity because not every area in the country has an extreme amount of diversity of religion or religious philosophy.

PROFESSOR HAMILTON: No. That's exactly the opposite of what ought to happen. What you're suggesting is that a state with a majority of a particular religion or a politically powerful religion, which is a different thing, provide the intellectual moral framework for the state. That seems to me relatively indefensible on the part of every other person in the state. There is no state that has all of one set of believers.

AUDIENCE PARTICIPANT: No. I'm not talking about a church I'm talking about a religious philosophy, that if people in a state have a certain religious or moral philosophy, they should have more power and not be dictated to by

Supreme Court decisions as to what their, how their morality is going to be framed in terms of their religious debate because —

PROFESSOR HAMILTON: You're arguing for ecumenicalism.

DEAN EASTMAN: I think you're right. And pluralism in religion actually supports that. And the Federalism solution offers that. Now, you might say the states have grown so big that the Federalism solution doesn't even work at the statewide level, and the cottage industry of scholarship that has been produced after Justice Thomas's invitation in *Zelman* to start re-exploring this question.

One of the more interesting student articles has suggested that if we are going to incorporate Establishment Clause and it is one that fosters pluralism at a local community level, that we ought to apply to the states in the same way we apply to the federal government but not to the local governments, which are in size comparable to the old states, a very interesting idea that would allow the pluralistic community — but the only way you could go in the other direction is if you assume every religious exercise has to be private because once you assume that part of the religious exercise has to be public, public affirmation at the community level, then what you're really doing is shutting down free exercise in order to implement that version of anti-establishment proposition. And I think there's just no support for it, and I think it's debilitating to foster any kind of moral virtue we need to survive.

PROFESSOR HAMILTON: It doesn't have to be private. The question is whether the government is going to co-opt and stand behind it. That's the issue of disestablishment. Religion fills our public square. It is full of religion. The question is whether or not any particular religion or group of religions coming to agreement — which I'd like to be at that meeting — are going to be able to get the government to stand behind them to give them more heft for their beliefs to dominate the community. That's what disestablishment is about.

JUDGE PRYOR: Thank you. That completes the panel.

(Panel concluded)