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by Brian M. Miller*

I. INTRODUCTION

In December of 2017, hundreds of protestors descended on Washington, D.C., from all over the United States. The crowds converged on the blocks surrounding the Supreme Court of the United States, where onlookers might have spotted signs reading "It's Not About the Cake," and "Open to All," rising from one side of the crowd, and signs reading "Serves All People, But Can't Create All Art," and "Justice for Jack" rising from the other side.[1] That morning the Supreme Court heard a case about a Colorado cake shop owner who, because of his religious convictions, refused to create a cake that was to be used at a wedding of two men.[2] One small-scale business transaction (or lack thereof) sparked protests and heated debate across the entire country. Why?

The reasons are obvious to anyone familiar with United States religious freedom jurisprudence. The Supreme Court was asked to decide whether the United States Constitution gave Jack Phillips the right to be exempt from a Colorado law that mandated he serve the wedding cake to the gay couple.[3] The Court's answer to that question not only would decide a dispute between one businessperson and one couple, but also would set the tone for all future claims for religious exemptions nationwide.

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[1] Mark Sherman, et al., *Protesters Gather as Supreme Court Wrestles With Case of Wedding Cake for Same-Sex Couple*, ABC 7 NEWS WJLA, Dec. 5, 2017, https://wjla.com/news/local/protesters-outside-supreme-court-ahead-of-historic-case-on-wedding-cake-for-gay-couple (last accessed June 20, 2020) (portraying the protests by video).

[2] Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n, 138 S. Ct. 1719, 1723 (2018).

[3] *Id.*at 1723–24.

Although the Supreme Court eventually decided the case on narrower grounds than some commentators preferred,[4] the Court has historically ushered religious freedom issues from distinctly local disputes to enshrinement in national law. In *Trinity Lutheran Church of Columbia v. Comer*,[5] one Christian school was not reimbursed by the State of Missouri for resurfacing its playground, and after the Supreme Court decision, all state or local entities potentially must fund religious entities in the same way they fund nonreligious entities.[6] In *Everson v. Bd. of Educ. of Ewing Tp.*,[7] one local school board was reimbursed for the costs of bussing students to Catholic schools,[8] and, after the Supreme Court decided the case, the federal Establishment Clause applied to every state and local government in the country.[9]

As anyone trying to trace a unifying thread through First Amendment cases will understand, the Supreme Court's religion jurisprudence has historically been inconsistent and often unclear. At least one thing is clear: for most of the major Supreme Court decisions over recent decades implicating the First Amendment's religion clauses, likely a million or more people were encouraged and a million or more were disheartened. That's because whatever the decision, the newly articulated legal principle controls every government within United States borders.

Because of the far-reaching impact of such decisions, in the past few decades seemingly no stone has remained unturned in the doctrine of religious liberty. When is a person, or a corporation, entitled to an exemption from a general law it claims burdens its religious exercise?[10] When may government provide funding to a religious institution?[11] When must it?[12] May a town display a nativity scene in a public park at

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[4] *See, e.g.*, Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 133 (2018) (arguing that "the Court ducked central questions raised by [the conflict in that case]. Rather than sorting out the principles for determining whether religious liberty authorizes discrimination against gays and lesbians in the marketplace, the Court focused on whether state officials treated religious objections with the proper respect and consideration. The Court turned a matter of constitutional principle into one of adjudicative etiquette.").

[5] 137 S. Ct. 2012 (2017).

[6] *Id.* at 2021.

[7] 330 U.S. 1 (1947).

[8] *Id.* at 3.

[9] *See id.* at 15–16; Sch. Dist. of Abington Tp. v. Schempp, 374 U.S. 203, 218 (1963) (citing *Everson* for that rule).

[10] *See, e.g.*, Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

[11] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[12] *See, e.g.*, *Trinity Lutheran*, 137 S. Ct. at 2012.

Christmas time?[13] The list goes on, and the scholarship attempting to answer such difficult questions is extensive and superb.[14]

Because of the distinctly national scale—thanks to the Supreme Court's approach—of these disputes, some commentators have sought for an acceptable "compromise"; a rule or state of affairs that perhaps does not give an outright win to any side but ultimately arrives at a deal that a majority of people do not hate. For example, Andrew Koppelman, in his recent book *Gay Rights vs. Religious Liberty?*, argues for a national legislative compromise—one that contemplates strong and broadly applicable nondiscrimination laws, but affords narrow exemptions to entities that are open about their religious beliefs that may require them to behave contrary to the general law.[15]

But perhaps the best compromise will not be found on the national scale at all. What if there was a different type of "compromise" that satisfied more people—one that gave a positively desirable result to a large majority of citizens, not just as to the issue of religious exemptions, but as to all issues implicating relations between religion and government? Allowing local governments greater power and freedom to chart their own course on matters of religion is, in my view, that compromise. Yet, relatively little scholarly work has been done to address whether government actions implicating the religion clauses should be handled differently based on which government is involved. Should a mayor's Thanksgiving proclamation that gives thanks to Jesus be treated by courts identically to the President's Thanksgiving proclamation which does the same? Should a federal law prohibiting any federal funds from being distributed directly to religious entities be treated the same as a local ordinance that prohibits such funding? In a way, it is only natural that little attention has been given to such questions of local power and diversity in the substantive area of

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[13] *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668 (1984).

[14] *See, e.g.*, Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793 (2006) (arguing that regulatory exemptions for religious practice do not violate the Establishment Clause as it was originally understood); Micah Schwartzman, *What if Religion Is Not Special?*, 79 U. CHI. L. REV. 1351 (2012) (arguing that religion cannot be distinguished from other sorts of beliefs and practices for special treatment); Nelson Tebbe, *Excluding Religion*, 156 U. PA. L. REV. 1263 (2008) (arguing that governments should be able to selectively exclude religious entities from government support programs without violating the Constitution).

[15] ANDREW KOPPELMAN, GAY RIGHTS VS. RELIGIOUS LIBERTY?: THE UNNECESSARY CONFLICT 11(2020) ("The response I develop here is to exempt only those who post warnings about their religious objections, so that no customer would have the personal experience of being turned away."); *see also id.* at 64 (arguing that the proper form of religious accommodation "could be done by statute, but not by judicial declaration").

religion. After all, both the Establishment Clause and the Free Exercise Clause have applied to state and local governments for over seventy years.[16] Yet, granting the fact of incorporation, the Constitution does not necessarily require that the religion clauses apply against local governments in exactly the same way as they do against the federal government and states.[17]

A couple scholars have begun to unpack this issue. In 2004, Richard Schragger examined the nature of centralized versus dispersed political power and their likely effects on individual liberty and concluded that courts should give greater respect to local government actions affecting religion, but direct greater suspicion toward federal government actions that do so.[18] More recently, Roderick Hills argued that because of the breadth and intensity of disagreement on issues of religious freedom in a nation as large and diverse as the United States, courts should defer to states' and localities' stances on "reasonable and deep disagreements"[19]—issues for which parties on both sides claim a fundamental right to governmental support or accommodation.[20] Under both theories, local governments (and state governments, in Professor Hills's view) should have more leeway than the federal government to either support or inhibit religion in the pursuit of the public good as conceived by the majority of the jurisdiction's citizens.

In recent years, unfortunately, the Supreme Court has not followed a path like the one Professors Schragger and Hills have encouraged.[21]

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[16] *Everson*, 330 U.S. at 15–16 (applying the Establishment Clause to the states in 1947); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (applying the Free Exercise Clause to the states in 1940).

[17] *See* MICHAEL W. MCCONNELL, THOMAS C. BERG, & CHRISTOPHER C. LUND, RELIGION AND THE CONSTITUTION 73–75 (4th ed. 2016) (posing the question of whether normative considerations might justify allowing local government entities more leeway under both the Free Exercise and Establishment Clauses).

[18] Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1811 (2004).

[19] Roderick M. Hills, Jr., *Federalism, Democracy, and Deep Disagreement: Decentralizing Baseline Disputes in the Law of Religious Liberty*, 69 ALA. L. REV. 913, 916–18 (2018).

[20] Additionally, some scholars have argued that nationwide laws that limit local discretion in certain areas brushing against religion are undesirable compared to alternatives. *See, e.g.*, Michael C. Pollack, *Land Use Federalism's False Choice*, 68 ALA. L. REV. 707, 727–29 (2017) (favoring "decision-channeling" federal rules, and disfavoring "decision-displacing" rules, like those instituted by RLUIPA, in the context of national land use regulation).

[21] By this I mean that the Supreme Court has not followed an approach that allows greater discretion to local governments than to other entities. Professors Schragger and Hills do not argue for the exact same approach. Professor Schragger emphasizes local

Particularly for free-exercise claims, it has likely, if anything, reduced governmental discretion in general, including for local governments.[22]

This Article not only builds on Schragger's and Hills's theories, but also (1) offers independent historical and theoretical justifications for local power over church-state matters, and (2) closely inspects existing church-state doctrine for bases from which to allow greater local discretion. Specifically, it argues that local governments have historically served as the best homes for democratic and associational expression, and that this historical reality indeed reflects the values of democratic theory more generally. It then explains why local governments are especially effective at securing such values in the context of religion. Within that framework, this Article moves to critique modern Supreme Court doctrine as falling short of securing attainable democratic ideals in the context of church-state disputes. From there, this Article identifies a couple footholds in modern jurisprudence from which lower courts, notwithstanding recent Supreme Court decisions, could and should offer more leeway to local governments on issues implicating religion.

This Article proceeds in three parts. Part I provides a brief history of local governments, starting in pre-Revolution England and the colonies, and describes how local entities often preexisted the central government as the primary means of self-government, including on matters dealing with religious practice. The history reveals that, contrary to modern assumptions, local governments were not always seen as subunits of states, but instead, were often treated as voluntary quasi-private associations that possessed considerable power as a matter of custom. Part I continues by demonstrating why that historical honor is well-deserved—that local governments do an especially good job at dealing with matters affecting religion from a democratic and utilitarian perspective. Part II applies that historical-theoretical perspective to recent Supreme Court cases. It concludes that the Supreme Court has wrongly failed to identify the "level" of government as centrally important in religion cases. It critiques recent cases that limit government discretion under the banner of religious free-exercise, and cases that appear to give substantial power to the states and the federal government on the Establishment Clause side. Part III provides a smaller-scale, short-term solution. It first concludes that, despite the

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autonomy even against states, yet Professor Hills argues for greater autonomy for both localities and states.

[22] To be clear, the Supreme Court, as I will explain, has not specifically decided that a local government's unique status as a locality is immaterial to church-state disputes. Instead, such considerations are for the most part simply not on the Court's radar.

Court's overall ignoring of the value of local autonomy, the variety of balancing tests the Court has employed to address these disputes give lower courts some limited room to consider the nature of the government entity when considering whether a government action runs afoul of the First Amendment's religion clauses. Next, Part III recounts the difference between facial and as-applied challenges and argues that the preference for as-applied challenges articulated by the Supreme Court should be especially strong when a local government action is challenged. Relatedly, it then considers the principles undergirding the law of remedies and contends that courts considering local government actions that affect religious interests should, when possible, prefer narrow, party-specific remedies like damages and individualized exemptions over broader remedies like complete invalidation of a law.

II. LOCAL GOVERNMENTS AS THE HISTORIC HOMES FOR COMMUNITY EXPRESSION

The predominant understanding of modern United States federalism is relatively simple. The federal government, for the areas in which it acts, is supreme over state and local governments.[23] And state governments are supreme over local governments, which basically serve as agents bound to do their states' will.[24] Yet, because of the historical importance and preexistence of local governments, that strict hierarchical system assumed today was not always a foregone conclusion. From before the American Revolution, local governments in England and what became the United States served as the primary conduits of community association and self-governance.[25] Local governing bodies often sprung up in communities organically for the purpose of furthering the welfare and values of that community.[26] When larger governments coalesced and claimed authority over massive territory, local entities within that territory were generally left alone to act under broad customary powers.[27] These powers were often leveraged

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[23] U.S. CONST. art. VI ("This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[24] *See* discussion in section II.A, *infra*.

[25] *See* discussion in section II.A, *infra*.

[26] *See, e.g.*, Charles W. Tooke, *The Status of the Municipal Corporation in American Law*, 16 MINN. L. REV. 343, 349 (1932).

[27] *Id.*

toward explicitly religious ends. Local governments were not treated like states or states' agents.[28] They were distinct in identity and role.

That history is not an arbitrary result of chance acts of political will. It was, in some ways, natural. Local governments grew up organically because they are accessible settings for group association and effective conduits of democracy. Often presiding over populations that are relatively homogenous, geographically and culturally, local governments are ready-made tools for community self-expression. And although broad policy agreement, especially on matters touching religion, is almost unheard of at the national (and even state) level recently, localities foster it often. Thus, when thousands of localities across a nation are allowed to pursue diverse policy solutions reflective of local values, the aggregate result is substantially more democratic than that achieved by one-size-fits-all compromises. For an area marked by such fundamental and long-lasting philosophical disagreement as church-state relations, making room for such local variation is especially appropriate.

A. Brief History of Local Government Power

At least since the Supreme Court's decision in *Hunter v. City of Pittsburgh*,[29] the prevailing assumption has been that local governments are essentially little fingers of state governments, completely at the mercy of state legislatures and presumptively limited in power and discretion.[30] *Hunter* was decided in 1907. So, decades later when the religion clauses were incorporated against the states, local governments were lumped in basically without discussion. Thus, for seventy or more years the Supreme Court has, without hesitation, applied the religion clauses almost identically to the federal government, the states, and localities.[31] Based on the historical roots of local governing bodies, that approach is misguided. A look back in time reveals that local governments long served a special and active role for their constituencies—a role that did not depend on any state directive

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[28] I mean this as an overarching general rule, not an unwavering rule that necessarily applied to every local governing body.

[29] 207 U.S. 161 (1907).

[30] Frank Vram Zerunyan, *The Evolution of the Municipal Corporation and the Innovations of Local Governance in California to Preserve Home Rule and Local Control*, 44 FORDHAM URB L.J. 217, 221 (2017).

[31] One exception appears be the rules surrounding standing to challenge expenditures under the Establishment Clause. A taxpayer challenging federal spending in federal courts is for the most part limited to challenging congressional action. Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587, 593 (2007) (plurality opinion).

and often included substantial interaction with the dominant religious institutions of that local geographic area.

1. The Greater Founding Era

Many local governments preceded the governments of the state or national jurisdictions in which they came to sit. Indeed, in England, many localities preexisted the Norman Conquest.[32] Such local governing bodies were usually called "boroughs" and were operated by administrative and judicial bodies made up of local property holders.[33] These bodies, though "unincorporated" in the legal sense, possessed significant power. They were often "essentially democratic,"[34] and thus generally able to exercise any power or authority those voters within the local populace thought proper.[35]

When a greater English government eventually coalesced, these boroughs generally retained their considerable power and discretion. Significantly, this retention of autonomy was not typically dependent on an affirmative declaration of the Crown or Commonwealth[36] purporting to "grant" power.[37] Instead, local governing bodies were thought to retain powers as a matter of custom—they had the powers they historically exercised.[38] That fact makes sense as a matter of historical evaluation. Local governing bodies had long autonomously exercised power over their local populations because the local populations submitted themselves to that authority quasi-democratically.[39] So, even after the Norman Conquest and the establishment of a greater kingdom or commonwealth, local government power was not dependent on a top-

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[32] Tooke, *supra* note 26, at 346.

[33] *Id.*

[34] *Id.*

[35] That these societies were often "democratic" of course does not mean that all residents or even most residents had the right to participate in local governance decisions.

[36] Throughout this section I generally use "Commonwealth," "Crown," "Kingdom" and sometimes "England" interchangeably. For the purposes of this discussion, the central point does not depend on the shifting balances of power and evolving governmental structures of England as a whole.

[37] Tooke, *supra* note 26, at 349 ("We find, however, that by the time of the Commonwealth the law recognized in them the power of enacting such wholesome and good laws and ordinances for the better government, oversight and correction of the borough or city and the people thereof as to the governing authorities should seem good and proper, 'so as they be not repugnant to the laws of the nation nor against the public and common good of the people' within or without their limits. Such local legislative power was seldom expressly granted by charter; it was as formerly rather incidental to the preservation of the ancient customs assured to the borough by the Crown.").

[38] *Id.*

[39] *Id.* at 346.

down delegation of that power but was almost always instead based on a bottom-up democratic or associational mandate by the local populace.

Of course, the Crown did eventually get involved. Even so, its involvement was surprisingly limited for quite a long time. First, England "recognized" the powers of local governments. Specifically, it recognized that local boroughs and cities had broad legislative power that should be used to the benefit of the local population, provided such use was not repugnant to English law.[40] Again, this broad autonomy and power was not typically the result of a charter from the Crown, but instead from the customary powers of those localities, which came from the traditions of the local populace itself.[41]

Second, the Crown did issue charters to many local governments, allowing them to "incorporate."[42] But corporate charters were limited in purpose and effect. They usually had little impact on a local governing body's ability to legislate broadly based on the preferences of its local community. Instead, the charter served to make the locality a "person," of sorts, for some purposes under English law.[43] It enabled the city or borough to sue and be sued, to contract, and to own, sell, and buy property.[44] Far from making local governing bodies more "public," or more like arms of the state, incorporation, if anything, solidified the private status of localities, treating them like individual persons for the purposes of English law.[45] Indeed, not until around a century after the American founding were corporations divided into categories like "private" and "public."[46] Corporations of all sorts, including municipal corporations, were simply corporations.[47]

For centuries, local governments in England held great power and discretion; not because the government of England said they could, but because such entities simply functioned in accordance with the wishes

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[40] *Id.* at 349.

[41] *Id.*

[42] *Id.* at 348.

[43] *Id.*

[44] *Id.* ("The result of incorporation was to enable the borough to hold property, and to sue and be sued as an individual or as the private corporation of a later day.").

[45] *Id.*

[46] Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1082 (1980) ("It must be understood that before the nineteenth century, there was no distinction in England or in America between public and private corporations, between businesses and cities. As a legal matter, all these corporations had the same rights.").

[47] An interesting doctrinal and historical fact, discussion of which is beyond the scope of this article, is that today's "private" corporations do have rights to religious exercise.

of the people[48] over which they operated.[49] When the government of England did recognize them, it primarily did so to affirm that they could carry on as they had, and even treated them as private persons for purposes of contract and property law. This overall framework continued through the establishment of the American colonies and subsequent revolution. By the time that English system of local governments began to deteriorate, the American experiment was a half-century under way.[50]

Not surprisingly, local governments in the colonies and the early United States shared some similarities with their historic English counterparts. When English (and Dutch) colonies were established in North America, presumptions about local power were carried across the Atlantic as well. Small population centers sprouted across rural areas of New York and New England, and these centers were generally presumed to have all standard local legislative powers.[51] So, like in England in years before, local governments popped up almost naturally, and by local democratic right possessed significant autonomy and power over their small jurisdictions.

One notable difference between these local entities and many of their predecessors across the sea, however, was that the relevant "larger" government was typically more involved from an earlier stage.[52] Early in the life of these local governing bodies, the Crown, colonial legislature, or state would often grant incorporation.[53] Like in England for centuries past, however, incorporation was not primarily a grant of legislative power but was a conferral of a degree of personhood.[54] It allowed the incorporated localities to deal with

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[48] At least, according to the wishes of those with the requisite status to have a say in the local governing body's direction.

[49] In fact, this conception of local government power was even prevalent centuries earlier in the Roman Empire. Tooke, *supra* note 26, at 346 ("This attribute of juristic personality enabled [local governments] to acquire large property rights and to maintain local customs and institutions, which from many points of view were separate and distinct from those of the Roman State as a whole.").

[50] Tooke, *supra* note 26, at 349 (describing how the English system of local government began to deteriorate in the mid-1800s).

[51] *See, e.g.*, Joan C. Williams, *The Invention of the Municipal Corporation: A Case Study in Legal Change*, 34 AM. U. L. REV. 369, 419–20 (1985).

[52] Indeed, the very nature of the colonies was that the original establishment of colonial settlements was often blessed by the monarch over the nation for which the colony was established.

[53] Tooke, *supra* note 26, at 350–52 (describing the establishing and incorporating of towns in various colonies under English and Dutch systems).

[54] *See, e.g.*, Williams, *supra* note 51, at 408.

property, make contracts, sue, and be sued.[55] In some cases, however, the central authority would more specifically grant special legislative powers to these municipal corporations, like the power to levy a new type of tax.[56] Thus, it appears that in the colonies local governments sat in a somewhat nebulous state, presumptively holding substantial power and authority simply by the fact of the communities' existence, but also in many ways subject to the ultimate authority of the Crown.[57] They were quasi-private entities with a right to exist and operate by the will of the geographically-coalesced community that willed it, and at the same time used by colonial governments (and sometimes the Crown) as administrative centers for the furtherance of greater colonial policies.

Towns in the colonies thus drew much of their power democratically from the ground up. As Gerald Frug described, colonial towns

> increasingly established their power on the basis of the direct popular sovereignty exercised in town meetings. By the late eighteenth century, colonial legislatures were far from being considered a threat to town liberty — a role assigned to the English King and his colonial representatives — since these legislatures were composed of representatives of the towns who were under explicit instructions to represent the towns' interests.[58]

When the colonies revolted and a new nation was eventually established, local governments again teetered on a narrow fence—functioning as independent quasi-private corporations with substantial power over their residents, but also under the will of the new state legislature for purposes of maintaining incorporated status.[59] In some

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[55] *See, e.g.*, *id.* ("Thus, in considering whether towns could sue and be sued, by 1826 New York courts had begun tentatively to suggest that towns were corporations. But the issue was by no means clearly settled. In 1828 the legislature attempted to resolve the matter by passing an act that proclaimed towns and counties to be 'bodies corporate,' with the power to sue and be sued, to purchase and hold lands, to contract, and 'to make such orders for the disposition, regulation or use of its corporate property, as may be deemed conducive to the interests of its inhabitants.'").

[56] Tooke, *supra* note 26, at 355 ("The various cities applied from time to time for authority to levy taxes for specified local purposes, and the acts of the colonial legislatures conferring this power constitute the nearest approach to a legislative control over their activities.").

[57] This nebulous state would likely not have been confusing to people at the time. Local governments sat in relation to the state substantially (though perhaps not entirely) in the same way as private corporations do today. The primary difference is these governing bodies acted with what we might now call "public" powers.

[58] Frug, *supra* note 46, at 1096.

[59] Again, though the nature of these local entities might appear ambiguous or in flux to us modern onlookers, their relationship to the state was really somewhat straightforward.

states, like Connecticut and Rhode Island, the powers of local governments resulting from incorporation were deemed to flow from the new state legislature (even if the original corporate charter came from the English Crown).[60] As Charles Tooke later noted, after the American Revolution, and "from the organization of the new state governments[,] it was assumed that the legislature was the source of all *new corporate powers*."[61]

It is important to note what that does not necessarily mean. It does not mean that local governments received all their powers from states, or that local governments were primarily administrative arms of states.[62] State supremacy in the early United States appears to have been mostly about those powers granted by corporate charter. So, just as a state legislature through a corporate charter could give a locality the right to be considered as a person for certain purposes under the law of that state, so too the state could change course and by legislative action stop treating the locality as such a person. This state power, in my view, says little to nothing of state supremacy over actions that localities take under their customary powers;[63] under their seemingly natural authority to legislate over their community consistently with that community's democratically expressed wishes.

Before and after the American founding, local governments were not primarily treated like states, or like administrative arms of states. They were treated more like voluntary associations allowed to exercise power by those who chose to, or happened to, live under their territorial jurisdiction. In a way, then, localities in England and the United States often functioned as manifestations of true social contracts in ways that larger entities did not and perhaps cannot.[64] Because of their limited geographic size, often relatively homogenous cultural makeup, and responsiveness to the will of residents, local governments existed as

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They were subject to state control as to their corporate status in the same way that modern corporations' corporate status can largely be dictated by state law. The relationship was less like that of superior and subordinate governments than of the state and private associations.

[60] Tooke, *supra* note 26, at 351.

[61] *Id.* at 355.

[62] After all, as Charles Tooke described it, legislative power over local governments at this time was still "extremely limited." *Id.*

[63] Again, central governments from before the American Revolution often simply identified preexisting powers of local governments. Just as a church or a private company needs no permission to declare and enforce rules over its members, so too were localities allowed to operate as to their residents without much constraint.

[64] Larger entities perhaps cannot function in this way because the larger the jurisdiction's geographic area, the more difficult it is for people to voluntarily move somewhere else.

beacons of democratic ideals, mostly independently of any outside grants of power.

Significantly, these local bodies often waded directly into matters of religion. The customary powers of boroughs in England in the 1600s, even for non-incorporated boroughs, included the right to "have a way to their church, or to make By-lawes for the reparations of the Church, the well ordering of the Commons and such like things."[65] A Connecticut court in 1796 held that "[e]very town incorporated by law contains in it all the rights, powers and privileges of an ecclesiastical society, and are subject to all duties: and so long as they remain one entire body may manage their ecclesiastical concerns in town meetings . . . ."[66] As the Supreme Court has noted, local government in the 1700s and 1800s gave grants directly to religious schools for the education of poor citizens.[67] One reason for this heavy "entanglement" between local government and religion appears to be that local communities were often relatively homogenous from a religious standpoint, and operated under "parishes," local units of church government.[68] Parish authority and other forms of community government sometimes operated in an interlocking and overlapping way, and courts (among other entities) apparently did not see this as a problem.[69] Indeed, when a state granted corporate status to a town or parish, the citizens of that locality were still generally bound to their preexisting obligations to the local government.[70] Overall, in these early local jurisdictions, "the relationship . . . between the aspects of association represented by the town and the aspects of association represented by the family and by religion was often quite close."[71] Although England itself in the sixteenth through eighteenth centuries fluctuated between oppressive national religious establishments and relative individual freedom, the right of local entities to operate amongst their own communities was never seriously questioned.[72] Localities could therefore "practice" religion to the same degree individuals could. And in the colonies, though territory-wide establishments were common, smaller groups of people were often

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[65] Williams, *supra* note 51, at 386.

[66] *Id.* at 419 (emphasis added).

[67] Espinoza v. Montana Dept. of Rev., 140 S. Ct. 2246, 2258 (2020) (citing MCCONNELL, ET AL., *supra* note 17, at 318–19).

[68] Williams, *supra* note 51, at 419–20 (describing such parishes).

[69] *Id.*

[70] *Id.*

[71] Frug, *supra* note 46, at 1097.

[72] JOHN WITTE, JR., & JOEL A. NICHOLS, RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 18–20 (4th ed. 2016).

expressly allowed to collectively operate under their own set of religious convictions.[73] Exemplary of the relative freedom and power of religious corporate bodies, in 1820 James Madison made a point to argue against their ability to perpetually acquire property.[74]

Thus, in the founding era, local governing bodies, incorporated or not, held substantial autonomy to act in areas closely implicating religion. This power was largely inherent, not the result of a grant from the Crown, colony, or state.

2. The Wrong Turn of Modern History

Of course, most modern readers of the law assume that local government power relating to church-state issues is not nearly as broad as this historical account describes. So, what brought about the change? Many factors contributed, of course, but I will discuss a couple primary checkpoints: the views made famous by John F. Dillon and the culmination and enshrinement of such views in the Supreme Court's opinion in *Hunter v. City of Pittsburgh*.[75] These views solidified local governments' radically subordinate status to their respective state governments. After explaining the view solidified by these sources, I will critique that view as relying on a misunderstanding of the history of local power.

Strong local government autonomy mostly ruled the day until the mid to late 1800s.[76] By that time, classic liberal principles, through which people often viewed society as primarily divided between the state and the individual, could not manage local governments' dual or overlapping status.[77] Thus, the distinction of private corporations and public corporations was fabricated, and local governments were thrown into the latter.[78] And slowly, the smaller "public" institutions had to fall

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[73] *Id.* at 22.

[74] MCCONNELL, ET AL., *supra* note 17, at 62.

[75] 207 U.S. at 161.

[76] Frug, *supra* note 46, at 1108 (explaining that "prior to the 1850's, local autonomy remained largely intact").

[77] *Id.* at 1099 ("On a deeper level, the corporation represented an anomaly to liberal thinkers who envisioned the world as sharply divided between individual rightholders and state power, the ruled in conflict with the ruler. The corporation exhibited traits of both poles: it was part ruled and part ruler, both an association of individuals and an entity with state-granted power.").

[78] *Id.* at 1099–1100 ("The corporation as an entity that was simultaneously a rightholder and a power wielder thus disappeared. In its place emerged the private corporation, which was an individual rightholder, and the public corporation, an entity that was identified with the state. The very purpose of the distinction was to ensure that some corporations, called 'private,' would be protected against domination by the state and that others, called 'public,' would be subject to such domination.").

in line under the larger public institution—the state.[79] Exemplary of this developing perspective is the view of John F. Dillon, who for a time served on the Supreme Court of Iowa. In his opinion, "[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the [state] legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control."[80] Dillon thus thought that because corporate status is granted by the state, the state has plenary authority over all dealings of the municipal corporation if not limited by a state constitutional provision.

Not all of his contemporaries agreed, though. Thomas Cooley of the Michigan Supreme Court, commenting on the rights of local governments, said that "when the state reaches out and draws to itself and appropriates the powers which from time immemorial have been locally possessed and exercised . . . we seem forced back upon and compelled to take up and defend the plainest and most primary axioms of free government . . . ."[81] He thus viewed the preservation of local government power against significant encroachments by the state as a fundamental protection of democracy and personal liberty:

> The doctrine that within any general grant of legislative power by the constitution there can be found authority thus to take from the people the management of their local concerns, and the choice, directly or indirectly, of their local officers, if practically asserted, would be somewhat startling to our people, and would be likely to lead hereafter to a more careful scrutiny of the charters of government framed by them, lest sometime, by an inadvertent use of words, they might be found to have conferred upon some agency of their own, the legal authority to take away their liberties altogether.[82]

Unfortunately, Judge Cooley's view did not win out in the long run. Beyond the purifying force of predominant liberal thought, sociological concerns demanded city subjugation. Racist and classist views permeated the minds of many in power, driving them to find a way to keep at bay the "mob-like" actions of cities, thought to be overrun with the working class, immigrants, and racial minorities.[83]

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[79] *Id.*

[80] City of Clinton v. Cedar Rapids & M.R.R. Co., 24 Iowa 455, 475 (1868).

[81] People ex rel. Le Roy v. Hurlbut, 24 Mich. 44, 109 (1871).

[82] *Id.* at 97.

[83] Frug, *supra* note 46, at 1107–08 ("Indeed, the vision of cities as being the home of 'mobs,' the working class, immigrants, and, finally, racial minorities, is a theme that runs throughout much of nineteenth and twentieth century thought.").

By the early 1900s, the United States Supreme Court had laid the final straw breaking local autonomy and solidifying the categorically inferior status of localities across all states. In *Hunter v. City of Pittsburgh*, the Supreme Court considered a dispute between the City of Pittsburgh and the nearby City of Allegheny, which was to be annexed into Pittsburgh. Even though the majority of the affected Allegheny residents opposed the annexation, a Pennsylvania statute allowed it under a provision that approved of such annexations if the majority of voters, which here also included Pittsburgh residents, were in favor of the action. The Court was asked to consider whether the annexation violated various constitutional rights of citizens of Allegheny or impaired a contract between the City of Allegheny and its residents that contemplated taxation only by that city for the purpose of providing services to only those residents.[84]

The Supreme Court rejected these claims, and also took the time to lay down a sweeping statement on the inferiority of municipal corporations. It said that "[m]unicipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them."[85] The Court then went on to explain that just as states have complete discretion to grant corporate status to local entities, so too they have complete discretion to limit the powers of those entities, and the United States Constitution places no constraints on such withdrawals of local power.[86]

That perspective spread like wildfire among the states. Within fifteen years of *Hunter*, "Dillon's position on state control of cities was 'so well recognized that it [was no longer] open to question.'"[87] Thus, the prevailing assumption since then has been that for local governments to act, they must have received that power to act from their state. States have approached this local-state relationship in different ways, ranging from a presumption of local authority, unless the state affirmatively limits local power, to a presumption of no local authority, unless a state affirmatively grants power. These approaches are broadly categorized as forms of either "[H]ome [R]ule" (presuming local power)[88] or "Dillon's

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[84] 207 U.S. at 174–77.

[85] *Id.* at 178.

[86] *Id.* at 178–79.

[87] Frug, *supra* note 46, at 1115 (citing WILLIAM MUNRO, THE GOVERNMENT OF AMERICAN CITIES 53 (1923)).

[88] *See, e.g.*, State ex rel. Haynes v. Bonem, 114 N.M. 627, 631 (1992) (describing New Mexico's home rule statute at the time).

Rule"[89] (named after John Dillon and presuming no local power). These approaches, though, at least share in common the ultimate fundamental assumption articulated in *Hunter*: that a state can limit local power without any constraints other than those that are self-imposed.

This assumption rests on a misapplication of history. As the reasoning of John Dillon and of the Supreme Court in *Hunter* shows, the foundational legal fact supporting a principle of total local subordination to the state apparently is incorporation. Because the state grants corporate status to the municipal corporation, as the argument goes, the municipality owes its entire existence to the state. And if the municipality's existence is entirely state-dependent, then its powers are also entirely state-dependent. Thus, if the state has the right to create or not create the municipality, it has the right to exercise its control over the municipality without constraint.[90] Municipal corporations, then, are simply political subdivisions of states—administrative arms—existing primarily to enact their state's policies.

The problem with this line of reasoning can be identified by referring back to the history of local governments generally and municipal corporations specifically. As described above, historically local governments often preceded state and national governments or otherwise sprung up and exercised power without action by the "state." And when those central governments did get involved, they often recognized powers of the localities as a matter of customary fact; the localities were not necessarily "granted" powers. When a state did choose to grant corporate status to a locality, that act was not typically about delivering a new set of legislative powers. It was instead about allowing the locality to be treated as a person for various purposes under state law—suing and being sued, holding property, and contracting. A more accurate assessment of this history, then, shows that states perhaps had significant power over the corporate status of localities. But the localities' power to legislate as to local affairs was a natural result not of an action by the state but of local community association and democratic expression.

An analogy may be useful. Imagine neighbor A does not own a lawn mower and thus has never mowed her back yard. Neighbor B, tired of seeing the overgrowth next door, lends a lawn mower to neighbor A and

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[89] *See, e.g.*, S. Constructors, Inc. v. Loudon Cty. Bd. of Educ., 58 S.W.3d 706, 712 (Tenn. 2001) ("It is from this rationale—that local governments have no inherent right to autonomous self-government—that the rule of strict construction of local governmental authority arises in this state.").

[90] *See supra* note 87 and accompanying text.

says, "use this to mow your backyard." If I employed the reasoning of *Hunter*'s broad declaration of local inferiority, I might absurdly say that neighbor B now controls all aspects of what neighbor A can and cannot do with her back yard. But if I took a more reasoned approach, I might instead say that neighbor B simply has the right to take the lawn mower back, preventing neighbor A from continuing to mow. Neighbor A might be subordinate to neighbor B's will as to the use of the lawn mower, but not as to the use of the back yard, to which neighbor A always had a right to generally use as she wished.[91]

Curiously, during the time the Supreme Court failed to recognize the historical status of localities when it meant preserving their power against states, it did treat localities as distinct when doing so meant limiting their power. In 1890, the Court addressed a case in which a county government argued they were shielded from a lawsuit in federal court by the Eleventh Amendment, which by its terms protects states.[92] Although the Court recognized the close relationship between a county and state, it rejected the county's argument, holding the Eleventh Amendment only protects true state entities.[93] It explained that,

> while the county is territorially a part of the State, yet politically it is also a corporation created by and with such powers as are given to it by the State. In this respect it is a part of the State only in that remote sense in which any city, town, or other municipal corporation may be said to be a part of the State.[94]

Thus, by the early 1900s, the Court inhibited local power in two ways, and did so contrary to history in one of those ways. Its decision to treat localities as fundamentally distinct from states under the Eleventh Amendment was correct, but it failed to apply that distinction as it should have when discussing the powers of localities vis-à-vis the state more generally.

The historical account described above prompts significant questions beyond the scope of this Article. Should *Hunter* be overruled entirely? Do local governments possess some sort of customary or common-law right to self-government—a right that can be leveraged to defend against state or federal action? Might the answer to that question depend on the history of the particular locality (such as whether and

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[91] Of course, this analogy should not be stretched beyond its limited purpose. I do not mean to say that state and local governments do or did relate to each other as "neighbors."

[92] Lincoln Cty. v. Luning, 133 U.S. 529 (1890).

[93] *Id.* at 530.

[94] *Id.*

with what powers the locality "preexisted" the state or the corporate charter)? For the purposes of this Article, though, this history means something more specific in the context of religion: local governments should not categorically be considered purely as subdivisions or administrative arms of the states in which they reside. And if they are not, then treating them identically to states under the religion clauses likely reflects a misunderstanding of those entities' historical nature and function. History showcases the central democratic role local governments have played regarding matters of religion. And, as the next subsection explains, this history is justified by democratic and utilitarian principles.

B. Democratic Ideals and Local Power in Church-State Matters

There's a reason why local governments historically had significant discretion over church-state matters: decentering such power and discretion across local governments furthers democratic principles and makes room for public expression of community ideals in ways that actions of states and the federal government likely cannot. In modern times, though, many people are skeptical of local power and discretion.[95] Understandably so, because such authority has been used in the past to harm vulnerable populations.[96] But local governments, when given the chance, are also often the first governments to enact positive change.[97] Some people, then, likely see local governments as

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[95] *See, e.g.*, Jonathan Chait, *Why the Worst Governments in America Are Local Governments*, N.Y. MAG., INTELLIGENCER, Sept. 7, 2014, https://nymag.com/intelligencer/2014/09/ferguson-worst-governments.html (last accessed June 20, 2020) (contending that "[t]he myth of localism is rooted deep in our political psyche. Left and right alike use *small* and *local* as terms of approbation, *big* and *bureaucratic* as terms of abuse. None of us is equipped to see that the government that actually oppresses us is that which is closest to us").

[96] This has been especially true on matters of race. Nearly all the laws passed that enforced segregation in the Jim Crow South were enacted and enforced by state and local governments. Likewise, before the Supreme Court's decision in Loving v. Virginia, 388 U.S. 1 (1967), all the policies against interracial marriage were enacted and enforced by state and local governments. Consider also San Francisco's unconstitutional ordinance from the 1880s that appeared to establish a neutral permitting system but was applied discriminatorily against people of Chinese descent. Yick Wo v. Hopkins, 118 U.S. 356, 369–70 (1886).

[97] Cities and states have, for example, led the charge to ban discrimination based on natural hair, even though the federal government has not made a similar move. Mariel Padilla, *New Jersey is Third State to Ban Discrimination Based on Hair*, N.Y. TIMES, Dec. 20, 2019, https://www.nytimes.com/2019/12/20/us/nj-hair-discrimination.html (last accessed June 20, 2020) (describing the several cities and states that had taken such action as of late 2019).

high-risk, high-reward. This Article challenges that characterization. It argues that when the balance of power over matters affecting religion is shifted from centralized to decentralized governing centers, more people benefit in the aggregate and fewer are significantly harmed, including groups that are minorities on the national scale. Thus, local government power in some substantive areas is instead low-risk, high-reward. Specifically, in the realm of religious liberty, dispersing political power among the tens of thousands of local governments across the United States would lead both to less infringement on individual religious liberty and to more cooperative government support for the common good.[98] Additionally, local government power provides a necessary avenue by which communities can chart their own course, affirming their unique values in a public setting. Thus, our church-state jurisprudence should, to the extent possible within certain broad constraints, result in less frequent invalidation of local government actions under both the Establishment Clause and the Free Exercise Clause.[99]

As a general rule, the nation as a whole is more diverse (ethnically, religiously, racially, and economically) than most local jurisdictions are

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[98] Erin Duffin, *Number of Cities, Towns and Villages (Incorporated Places) in the United States in 2019, By Population Size*, STATISTICA, June 2, 2020, https://www.statista.com/statistics/241695/number-of-us-cities-towns-villages-by-population-size/ (last accessed June 20, 2020).

[99] These broad constraints, related to the substantive law, may look substantially similar to those outlined by Professor Hills. He explains that, based on Supreme Court precedent, many different approaches to support for religion may be permissible depending on the factual situation:

> Dividing the doctrine into judicially crafted rules that forbid, allow, or require discrimination on the basis of religion to avoid coercion of either religious believers or non-believers, one can conveniently organize the precedents discussed above into six categories:
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> I. Discrimination in favor of religion to avoid coercion of religious believers is . . . .
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> A. . . . . required: E.g., *Hosanna-Tabor*, *Yoder*'s "hybrid" exception, *Sherbert*'s balancing test for "systems of individualized exemptions";
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> B. . . . . allowed: E.g., *Amos*, *Cutter*;
>
> C. . . . . forbidden: E.g., *Texas Monthly*, *Estate of Thornton*
>
> II. Discrimination to avoid coercion of religious non-believers is . . .
>
> A. . . . . required: E.g., Remnants of *Lemon*'s "secular effects" test in *Zelman*;
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> B. . . . . allowed: E.g., *Locke v. Davey*;
>
> C. . . . . forbidden: E.g., *Widmar-Rosenberger*, *Trinity Lutheran Church v. Comer*.

Hills, *supra* note 19, at 945–46.

when considered in isolation.[100] For example, around twenty-one percent of people in the United States identify as Catholic.[101] Fifty percent of people in Lafayette, Louisiana identify as Catholic,[102] but only five percent do so in Shreveport, Louisiana.[103] That same overall trend likely continues for other religious or nonreligious groups—many localities across the nation contain many more persons of one demographic than the national average, and contain far fewer persons of another demographic than the national average. The reasons for this relative homogeneity are complex and will not be addressed in this Article. What this Article will address, though, are some implications of that general fact.

The main implication of that fact is that a system of diverse policies among local governments is more likely to cater to the preferences of more people than would a single nationwide policy. Imagine that, at the national scale,[104] fifty percent of people support, and fifty percent oppose, exempting religious institutions from zoning laws limiting property owners to use their properties for residential uses only. But then look more closely. Imagine that there are four cities in the nation. In two of them, cities A and B, the division is still about fifty-fifty. But in the other two it is more one-sided: in city C seventy percent of the populace supports the exemption and thirty percent opposes; in city D seventy percent oppose and thirty percent support.

If Congress passed a law declaring that local governments must grant religious entities such an exemption from certain general laws,

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[100] *See* William H. Frey, *Six Maps that Reveal America's Expanding Racial Diversity*, THE BROOKINGS INSTITUTION, Sept. 5, 2019, https://www.brookings.edu/research/americas-racial-diversity-in-six-maps/ (containing a map depicting that in most counties in the United States, all racial minorities are less represented than in the United States population overall, and that in relatively few counties are more than one racial minority more represented than on the national level); Yishai Blank, *City Speech*, 54 HARV. C.R.-C.L. L. REV. 365, 390 (2019) (referencing "[t]he relative homogeneity of local populations and the relatively lower number of issues that concern many local communities").

[101] *America's Changing Religious Landscape*, PEW RESEARCH CENTER, May 12, 2015, https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/ (last accessed June 20, 2020).

[102] *Denominational Distribution: The Most Catholic and Protestant Cities in the U.S.*, BARNA GROUP, Mar. 15, 2018, https://www.barna.com/research/denominational-distribution/ (last accessed June 20, 2020).

[103] *Diocese of Shreveport by the Numbers*, ARKANSAS CATHOLIC, Jan. 27, 2020, https://www.arkansas-catholic.org/news/article/6363/Diocese-of-Shreveport-by-the-numbers (last accessed June 20, 2020).

[104] This hypothetical could likewise be applied to a state.

fifty percent of the nation's populace would be satisfied and fifty percent would be displeased.

But what if, instead, Congress abstained, and local governments were allowed to decide the issue themselves? In City C such a law requiring exemptions would probably pass, and in City D it probably would not. Perhaps for cities A and B, one would decide one way and one would decide the other way. The overall result is that a higher percentage of the overall population would be satisfied with the law governing its jurisdiction. Sixty percent would be pleased, and forty percent would be displeased.[105] Compared to the number of people satisfied by a unified policy in a 300-million-person nation divided fifty-fifty, that is a massive difference. In reality, many localities' populations are likely even more homogenous than the above example assumes, so the improvement in overall satisfaction under a system of local variance would likely be even greater. But the example illustrates the point which some scholars have raised: as a general rule, when governing decisions are made by those closer to the governed, the decisions are more likely to reflect the views of the governed.[106]

Tapping into these principles, Yishai Blank argues that localities should have certain free speech rights. Although he does not tailor his argument to religion specifically, he explains that when cities are allowed to express their unique views, they become a necessary component to the pursuit of certain goals: "participatory democracy, minority protection, policy experimentation, economic efficiency, and redistribution . . . ."[107]

Professor Hills provides a related utilitarian justification for greater state and local power regarding religious free exercise and establishment specifically. He explains that, assuming state and local governments are at least constrained from venturing to the very extremes of free exercise infringement or religious establishment, local and state variation will lead to more people being more satisfied with the policies governing their jurisdiction.[108] In my view, this argument is especially compelling when applied to localities, and less so when

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[105] For example, if each percentage point in this example is one person, then a total of 240 people would be pleased, compared to 160 displeased; this amounts to sixty percent pleased and forty percent displeased.

[106] *See, e.g.*, Hills, *supra* note 19, at 952 ("Just as proportional representation better ensures [sic] the representation of each interest than first-past-the-post plurality voting, federalism better assures representation for each reasonable point of view than national legislation.").

[107] Blank, *supra* note 103, at 389.

[108] Hills, *supra* note 19, at 954–59.

applied to states. But I am in agreement with much of Professor Hills's underlying theory.

Professor Schragger likewise argues for greater deference to local government actions on matters of religion, but he does so primarily based on the importance of dispersing both governmental and religious power instead of allowing an agglomeration of such powers in one or a couple centers.[109] He claims dispersion of political power away from centralized governments and toward local governments (1) prevents the amassing of power mobilized to help or hurt religion, and (2) challenges private religious power that may become overambitious and thus dangerous to those affiliated with minority faiths.[110] In this way, he challenges the classic Madisonian position that smaller jurisdictions are more vulnerable to factional takeover than larger jurisdictions.[111] Professor Schragger thus persuasively argues that the stakes are higher for centralized governments than for local governments. If a "faction" gains enough influence in the U.S. Congress to enact its will, then it can pass nationwide laws that contravene the preferences (or worse, violate the rights) of potentially more than half of the nation's 325 million people.

A Madisonian could of course respond that, although the consequences of factional takeover of Congress might be more severe than factional takeover of various counties or cities, such a takeover is substantially less likely to occur at the national level because of the overall diversity of the United States populace.[112] I agree that, generally, larger jurisdictions may be more resistant to factional takeover. In my view, however, certain political realities weaken that position when applied to the United States. First, the structure of the United States Congress openly gives more weight to the preferences of rural citizens than it does to urban citizens.[113] Whether justified or not,

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[109] Schragger, *supra* note 18, at 1815.

[110] *Id.*

[111] *Id.*

[112] THE FEDERALIST NO. 10 (James Madison) ("The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.")

[113] The Constitution provides for equal representation of states in the Senate, U.S. CONST. art. I, § 3, cl. 1, and representation in House of Representatives based on the population of the state, U.S. CONST. art I, § 2, cl. 1. Each state is, however, guaranteed at least one representative in the House. *Id.* The result is a great disparity between the power of one person's vote in a sparsely populated state and that of someone's vote in a densely populated state. This also translates to disproportionate voting power in the

every state, regardless of its population, is guaranteed at least two senators and one representative in Congress (and at least three electoral votes toward choosing the President). And because urban areas are generally more diverse—culturally, racially, and religiously—diverse perspectives are less represented institutionally at the national level.

This apparent failure of representative democracy may be exacerbated by gerrymandering and hyperpartisanship. Because the Supreme Court of the United States has declined to weigh in substantively on political gerrymandering,[114] states are mostly free to continue the practice unless they constrain themselves. Without exploring here what, if any, constraints should apply to states' drawing of congressional districts or state legislative districts, partisan gerrymandering could undeniably have certain effects. One obvious effect is that many voting districts are more Democratic or more Republican than they would be without intentional line drawing to make them that way. Thus, candidates and incumbents in those districts have less incentive to choose ideologically moderate solutions to policy problems. A conservative candidate or representative can be more conservative, and a liberal candidate or representative can be more liberal, without jeopardizing their chances of election or reelection. The bottom line: perhaps, compared to James Madison's hopes and expectations, Congress is less likely to pick moderate compromises and more likely to swing back and forth between more extreme policies depending on which party holds the majority of seats in both houses. Thus, an improper local government action is by nature less harmful, and perhaps not substantially more likely to occur, than a similar action taken by a federal or state government.[115]

Finally, local variation is preferable to standardization in the area of religion because people can more easily relocate to another town than

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electoral college. As an example, Wyoming (a rural, sparsely populated state) has a population of around 580,000 and has three electoral college votes. The ration of population to electoral college votes is about 193,000:1. New Jersey (a state made up mostly of urban and dense suburban areas) has a population of about 8,820,000 and fourteen electoral college votes; a ratio of about 630,000:1. So a single Wyoming citizen's vote is worth over three times that of a New Jersey citizen's vote.

[114] *See* Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019) (treating the issue as a nonjusticiable political question).

[115] Of course, many other factors come into play, some of which may support the Madisonian position. For example, the smaller size and relative homogeneity of localities compared to larger jurisdictions may mean that local governments do not benefit from the same sort of protective inertia as that of their larger counterparts. Local government policies may change more quickly than state and federal policies, so bad policies (and good policies) may come into effect at the local level with less warning.

they can to another country. This familiar justification of course, echoes Charles Tiebout's famous theory that citizens, as consumer voters, vote with their feet by moving to localities with policies that better suit their desires.[116] I do not assume that all residents can relocate without much difficulty, or that local governments are always likely to change their policies to attract more taxpaying residents or businesses. Instead, I simply argue that a bad local law is far less consequential than a similarly bad federal or state law. If Atlanta passed a law declaring that landowners are not allowed a religious exemption from certain zoning regulations, many landowners would have the means to move to another city with a different policy.[117] But if Congress declared the same thing, far fewer landowners would have the means to move to another country to avoid the law's effects.[118]

In my view, then, principles of democracy and self-governance, as well as quasi-utilitarian considerations, support allowing local governments more discretion than the federal and state governments regarding laws touching religion. But perhaps this invites a different sort of question: why not go even smaller? Why not totally decentralize decision-making power, down to the individual level? In other words, why not favor a system in which government at all levels could do essentially nothing that touched religion—no laws even resembling any sort of support for religion, and no laws that have any negative effect on any sort of religious practice? This argument carries some logical force at first blush. If the better decisionmaker is the one closer to those affected by the decision, then theoretically the best decisionmaker of all is the individual deciding their own course of action. I will not evaluate here the various and longstanding arguments for and against libertarianism more generally. But I will briefly describe why I think this approach may be bound to fail in the specific context of religion.

Put simply, many religious belief systems demand a prominent public presence. Take as an example, the most common broad religious affiliation in the United States, Christianity. One central claim of

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[116] Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417–24 (1956). Professor Blank also relies on Tiebout's theory to justify free speech rights for cities. *Supra* note 100, at 396–97.

[117] Being able to simply say "go somewhere else" does not justify a bad law. But for laws within the broad bounds of constitutionality that are still harmful or problematic to some people, moving may sometimes be a good option. It is, at least, better than being trapped under the force of that law.

[118] Of course, the people who would have the means to move are disproportionately wealthier. Although fewer lower-income people could easily take advantage of a favorable set of policies under another local government across state or elsewhere, at least more people even from lower incomes could move to another locality than to another country.

Christianity is that "Jesus is Lord."[119] This pivotal credal phrase likely originated in the Greek language spoken in much of the Roman Empire in the early Common Era. "Kyrios Iesous" ("Jesus is Lord") appears to be an open and opposing alteration to the imperial affirmation "Kyrios Kaiser" ("Caesar is Lord").[120] From the roots of Christianity, then, Christians have affirmed their core conviction that Jesus, and not the political ruler or rulers of the day, is the true and ultimate governing authority. That conviction, carried through the related hope of the "Lord's Prayer" that God's kingdom would "come . . . on earth as it is in heaven,"[121] has driven strands of Christianity to seek to institute governing policy that they view as consistent with the intentions of Jesus for the world. Such pursuits have no doubt looked quite diverse over time and between Christian sub-groups. But many share some form of a belief that the kingship, or deity, of Jesus bears directly on how governing bodies should operate and the laws they should or should not enact.[122]

Thus, at least significant sub-groups within major religions may demand that certain rules be implemented through their adherents' daily actions at the society-wide level. And, often, that means religion seeks to spread its views or the implications of its views through the coercive force of government. The Establishment Clause, at least as it has been applied in the past sixty or so years, would appear to stand

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[119] *See, e.g.*, *Romans* 10:9 ("[I]f you confess with your lips that Jesus is Lord and believe in your heart that God raised him from the dead, you will be saved."); *Philippians* 2:10–11 (" . . . so that at the name of Jesus every knee should bend, in heaven and on earth and under the earth, and every tongue should confess that Jesus Christ is Lord, to the glory of God the Father").

[120] Ruth Padilla DeBorst, *Confessing Resistance or Complicit Silence?*, 12 J. OF LATIN AM. THEOLOGY, No. 1, 7, 8 (2017) ("When the Roman Emperor claimed *Kyrios Kaiser* (Caesar is Lord), daring followers of the Way sung, 'At the name of Jesus every knee shall bow and every tongue confess that Jesus Christ is Lord'. . . .").

[121] *Matthew* 6:10.

[122] For example, a resolution by the Southern Baptist Convention, the largest Protestant denomination in the United States, declares that "[a]ll Christians are under obligation to seek to make the will of Christ supreme in our own lives and in human society . . . ." *On Gospel Allegiance and Political Engagement*, Southern Baptist Convention, 2019, https://www.sbc.net/resource-library/resolutions/on-gospel-allegiance-and-political-engagement/(last accessed June 20, 2020). And a Vatican statement on Catholic political engagement explains that "[f]aith in Jesus Christ, who is 'the way, the truth, and the life' (J[ohn] 14:6), calls Christians to exert a greater effort in building a culture which, inspired by the Gospel, will reclaim the values and contents of the Catholic Tradition." Vatican Congregation for the Doctrine of the Faith, *Doctrinal Note on Some Questions Regarding The Participation of Catholics in Political Life*, Nov. 24, 2002, https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html (last accessed June 21, 2020).

opposed to some such efforts. But the pressure has nonetheless continued from religious groups to recognize religious interests in the public sphere through government authority.[123] For people who sincerely believe their views demand community-wide recognition and implementation, vacating the public sphere and sticking to private personal piety is not an option—such a path would, in their view, both contravene God's will and abandon a sincere pursuit of the public good. Accordingly, some scholars, noting "that some religions are communal in nature," have suggested that complete disestablishment at the local level perhaps means that some "believers are not able to live their religiously grounded way of life, because the only communities permitted under the Establishment Clause are diverse, pluralistic regimes with no official religion."[124]

Simply taking those points as anthropological or sociological facts, and not weighing the merits of the religious adherents' beliefs, an extreme libertarianism or individualism likely cannot adequately accommodate such prevalent and diverse religious convictions that demand communal expression (indeed, it is no historical accident that so many local governing bodies sprang up organically and democratically and exercised influence over the religious life of the local community). Some religious factions[125] will always seek to leverage government force toward their desired ends. Thus, pressure will always push on governing bodies to take actions that could be construed as "establishing" a religion or religious belief system. Increasing local government power and discretion in areas touching religion, then, provides a better avenue through which to channel that ever-present force than if individuals were the only "policymaking" bodies to be found.[126] And placing that power with local governments instead of a

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[123] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 570 (2014) (holding that a town practice of opening public meetings with a clergy-led prayer, that was typically uniquely Christian in nature, did not violate the Establishment Clause).

[124] MCCONNELL, ET AL., *supra* note 17, at 73.

[125] Here this term is not used in a necessarily negative sense. It only refers to a subset of a religion with a unified public goal.

[126] Professor Blank argues that cities, because of their relative internal homogeneity and relative closeness between the government and community compared to larger jurisdictions, are necessary avenues by which communities speak their views. Blank, *supra* note 103, at 389–90 ("Local governments generally enable people to collectively engage in political matters in order to become masters of their own fate as a community. The relative homogeneity of local populations and the relatively lower number of issues that concern many local communities—though not true in many large or even medium size cities—makes consensus easier to reach and allows people to deliberate controversial matters.").

larger centralized government will help minimize the consequences when a religious faction does capture power.[127]

Finally, it is important to emphasize that, though the theories this Article articulates could potentially justify greater local power in many substantive areas, this Article only argues for such autonomy for matters directly implicating religious liberty. Other issues implicating other class distinctions, like race, may not be as suited for local variance. A fuller theory of which other substantive areas might be well-served by a revived localism is beyond this Article's scope. But for the time being it suffices to say that although some issues like explicit racial discrimination have been largely settled in the court of public opinion (at least in the nominal sense, as a large majority of people for some time now has categorically disfavored discrimination based on race), issues of religious freedom have continued to evade any sort of meaningful national consensus.

Thus, not only have local governments historically served as unique bastions of independent self-governance, they also happen to be the best suited governments to do so regarding matters implicating religion. As Professor Blank has said, "[l]ocal governments generally enable people to collectively engage in political matters in order to become masters of their own fate as a community."[128] Because local governments are more likely to choose policy positions favored by more of the citizens subject to the government measures, more citizens on the whole will be satisfied when the power is dispersed among the many and diverse governing bodies of this nation's towns and cities. And for those citizens who are displeased by the decisions of their local government, moving elsewhere is more feasible than moving to escape the entire country. So, compared to a system in which governmental power is centralized at the federal or state government, or even radically dispersed to the individual level, this system of local discretion and variation provides a greater opportunity for America's citizens to propagate their community's desired values in a meaningful way with more limited negative externalities. Such a system fits comfortably with our democratic ideals.

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[127] Professor Schragger makes a related point based on another concern. Schragger, *supra* note 18, at 1875 ("Indeed, religious privatism has become the Court's solution to the problem of church-state relations. But this privatism raises its own concerns: by bypassing localities and asserting broad norms of government neutrality, the Court has inadvertently undermined the civic community as both a relevant political entity and a counterweight to private religious power.").

[128] Blank, *supra* note 103, at 389–90.

III. EVALUATING RECENT TRENDS AT THE SUPREME COURT

Despite the historical and theoretical advantages of a system of local discretion, the Supreme Court has not distinguished between different levels of government when considering religion clause challenges. Although the Rehnquist Court gave some signs of deferring to the political branches of governments in general,[129] the Roberts Court has pushed a slightly different direction. Over the last fifteen or so years, the Supreme Court has limited government discretion, especially on the free exercise side, even while maintaining some leniency on the establishment side. The result, some commentators have argued, may be that governments, from the smallest to the largest, must affirmatively support religion if they want to support anyone at all.[130] Supreme Court jurisprudence thus has failed to account for the history and theory described in Part I that supports local autonomy on matters of religion.

There is no need here to recount all the relevant Supreme Court decisions up until the late stages of the Rehnquist Court; Professor Schragger explored those cases extensively.[131] He noted that, by and large, the Supreme Court has not directly relied on the level of the government entity when determining the constitutionality of a government action under the religion clauses.[132] But he also argued

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[129] Schragger, *supra* note 18, at 1816 (speaking of the Rehnquist Court and explaining that "[o]n the Free Exercise Clause side, the Supreme Court has rewritten the requirements for religious accommodation, holding in Smith v. Employment Division that generally applicable neutral laws may be applied to religiously motivated activity without meeting a compelling interest test," and describing that "on the Establishment Clause side, the Court has recently lifted the traditional limitation on public funding of religious education with its decision in Zelman v. Simmons-Harris that a voucher regime that permitted Cleveland school children to use public monies to attend religious schools did not violate the Establishment Clause").

[130] *See, e.g.*, Edward Correia, *Trinity Lutheran Church v. Comer: An Unfortunate New Anti-Discrimination Principle*, 18 RUTGERS J. L. RELIGION 280, 294 (2017) ("First, Trinity Lutheran creates a very narrow channel through which the government must navigate. If it goes too far in providing assistance, it violates the Establishment Clause, but once any benefit is permitted by the Establishment Clause, it is also required by the Free Exercise Clause to be offered to religious organizations, including pervasively sectarian organizations such as churches. Deciding when a government program violates the Establishment Clause in direct aid cases is not easy. Thus, many states would prefer to take a more cautious approach to avoid this complicated line-drawing. The decision in Trinity Lutheran takes that choice away from them. There is no intermediate zone of discretion for states attempting to draw a more cautious Establishment Clause line. Or, another way of saying it is that the Locke version of 'play in the joints' is probably dead.").

[131] Schragger, *supra* note 18, at 1832–37.

[132] *Id.* at 1838 ("Granted, neither Smith nor Boerne made an institutionalist argument that state or local governments can be trusted to act responsibly toward religious

that the Court had moved toward allowing more discretion to policymaking branches generally in the area of funding.[133] This trend was showcased most obviously by the decision in *Locke v. Davey*.[134] In that case the Court held that the Free Exercise Clause did not require the State of Washington to provide a scholarship to a student who otherwise would have qualified based on the scholarship's criteria but was disqualified because he wanted to use the funds to study devotional theology.[135] More specifically, the Court described such governmental action as that which falls within the "play in the joints"—not covered by either of the religion clauses.[136] So, though the State of Washington likely could have funded the plaintiff's schooling without violating the Establishment Clause, it did not have to fund the schooling to comply with the Free Exercise Clause.[137] The *Locke* decision thus secured some room for policymaking branches of governments to act without constraint from the religion clauses of the federal constitution. That decision applies to all governments throughout the United States, not to local governments alone. But, in a way, it won half the battle for local autonomy.

However, the Roberts Court may interpret the Free Exercise Clause more broadly, and so limit the discretion of government actors. In *Trinity Lutheran*, the Court held that the State of Missouri violated the Free Exercise Clause by not issuing a grant to a school operated by a church.[138] In that case, the state created a grant program by which educational entities could be reimbursed for funds spent to rubberize playground surfaces. The plaintiff church (which operated a school with a playground) applied for the grant. Based on the criteria set forth by the state's program, the school ranked highly on the list of prospective recipients. But the state denied the grant because of the school's religious status based on a state constitutional provision that prohibited any public funds from going to religious institutions.[139]

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minorities, or that the dispersal of political authority is a necessary component of religious liberty.").

[133] *Id.* at 1865. Professor Schragger also argues that the combination of *Smith* and *Boerne* gives (or should give) more room for localities to chart their own course on matters of religion without federal interference. *Id.* at 1837–38.

[134] 540 U.S. 712 (2004).

[135] *Id.* at 715. He was disqualified under a "no-religious-aid" provision in the Washington State Constitution.

[136] *Id.* at 719.

[137] *Id.*

[138] 137 S. Ct. at 2024–25.

[139] *Id.* at 2017–18.

The Supreme Court held that exclusion from the grant program violated the school's free-exercise rights.[140] It is still somewhat unclear how broad that decision was.[141] For example, perhaps the result would have been different if the funds were to be used for a purpose that appeared more "religious" than a playground—say, if the grant program supported building renovation costs and the plaintiff sought funds to help with its renovation of a worship center. At the very least, the Court's decision could give some support to a broader principle: that governments must always fund religious entities if they also want to fund any other private entities.[142]

This reading is bolstered by the Court's recent decision in *Espinoza v. Montana Department of Revenue*.[143] That case arose from a state program that gave scholarship funds to students attending private schools. When the petitioners sought to use such scholarship funds at religious schools, the state supreme court struck down the entire program under a state constitutional provision that, like the provisions in *Locke* and *Trinity Lutheran*, prohibited aid to religious institutions.[144] The Supreme Court of the United States decided that application of the no-aid provision violated the Free Exercise Clause.[145] Despite objections that the government action was more similar to that of *Locke v. Davey*,[146] the Court held that the state could not exclude religious entities from the program.[147] It did not claim to abandon *Locke v. Davey*, but instead attempted to distinguish it. The Court said that governments may avoid funding religious actions (like pursuing an education to become a minister) but could not exclude people or entities from funding programs based on their religious status.[148] Ultimately, it viewed the latter as "indirect coercion" and thus a "punishment" for the free exercise of religion.[149]

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[140] *Id.* at 2024–25.

[141] The Court distinguished *Locke v. Davey* because in its view the *Trinity Lutheran* case involved discrimination based on the religious status of the claimant, whereas the program in *Locke* allowed funds to religious individuals, but not to support religious action. *Id.* at 2023.

[142] *See, e.g.*, Correia, *supra* note 130.

[143] 140 S. Ct. 2246 (2020).

[144] *Id.* at 2251.

[145] *Id.* at 2263.

[146] *Id.* at 2257.

[147] *Id.* at 2261 ("A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.").

[148] *Id.* at 2256.

[149] *Id.* at 2256–57.

For the purposes of this article, the point of discussing these cases is not necessarily to evaluate the merits of the Court's understanding of the Free Exercise Clause as applied to the governing entities in those particular cases (generally states or state agencies). It is to point out another problem: that the expanded understanding of the Free Exercise Clause applies against local governments just as much as it does against the federal government and to states, and so limits the discretion of governments operating over even the smallest jurisdictions. This trend is of course substantially strengthened by the federal Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA)[150] and the propagation of state-level Religious Freedom Restoration Acts (RFRAs).[151] Such provisions intentionally constrain governments even beyond what the Free Exercise Clause requires. They identify situations in which government actions affecting religious interests must satisfy strict scrutiny. And significantly, they likely affect local government power most of all.[152]

On the issue of government-supported religious expression under the Establishment Clause, however, the Roberts Court appears to be taking a more deferential approach. But this deference may not ultimately benefit local governments. In *Town of Greece v. Galloway*, the Court upheld the practice of a locality beginning its public meetings with prayer, most often led by local Christian clergy.[153] In the Court's view, even sectarian prayers at public meetings, if not conducted in a way that coerces members of the public into taking part, do not violate the Establishment Clause.[154]

The Court has recently signaled its continued narrower interpretation of the Establishment Clause across a range of factual contexts. In *American Legion v. American Humanist Association*,[155] the Court decided that the State of Maryland's display of forty-foot-tall cross on public land as part of a World War I memorial did not violate

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[150] 42 U.S.C. § 2000cc.

[151] More than twenty states have passed such provisions in response to the Supreme Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997), that held the federal RFRA was unconstitutional as applied to state and local governments.

[152] RLUIPA targets land use, which is a policy area traditionally handled by local governments. Richard Briffault, *Our Localism: Part I--The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 3 (1990) ("Land use control is the most important local regulatory power."). So, the federal statute forcefully limits local governments in one of the primary areas they typically have discretion.

[153] 575 U.S. at 569–70.

[154] *Id.* at 589–90.

[155] 139 S. Ct. 2067 (2019).

the Establishment Clause.[156] Applying a presumption that historically standing monuments are constitutional, and over arguments that a cross is necessarily Christian, the Court held the cross in that context had acquired a secular meaning, and therefore the state's maintenance of the cross did not impermissibly establish a religion.[157] That decision thus may provide more leeway to governments that want to display symbols with religious significance on government land.

The Court's religion jurisprudence over the last fifteen or so years certainly resists any simple characterization. But there does appear to be a general trend of operating under a slightly more expansive understanding of the Free Exercise Clause[158] and a more limited understanding of the Establishment Clause. The overall effect, then, is to raise both the floor and ceiling; policymakers at all levels of government can choose between supporting religious interests to the same degree as they support anything else or, in some special circumstances, supporting religious interests more than other interests. Little discretion is allowed, though, to governing bodies that want to support some interests, but not religious ones.

There are several intertwined problems with this trend as it relates to the discretion afforded to local governments. First, although it appears to give all governments more space to support religious messages or entities either financially or symbolically, it does not necessarily allow localities to take the contrary path. This system therefore inhibits the goal of diversity between localities because no government may take a course of action that avoids supporting religion, unless that government chooses to support no one at all. Second, the recent trend appears to give about as much discretion to states and the federal government as it does to localities.[159] That is a problem for

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[156] *Id.* at 2074.

[157] *Id.*

[158] The Court's decision in South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020), may be a minor counterexample to this trend. In that case, the Court denied an injunction requested by California churches against enforcement of a California policy that sought to limit the spread of the pandemic-causing disease known as COVID-19. The policy limited the number of people who could attend a religious service. *Id.* at 1613 (Roberts, C.J., concurring). Chief Justice Roberts, who voted with the majority, wrote his own opinion that explained the policy appeared consistent with the Free Exercise Clause because it subjected churches to the same gathering restrictions as concerts, sporting events, and other large gatherings. *Id.* The Court's decision prevailed over objections that the policy treated religious interests as inferior to secular interests because many other businesses, such a grocery stores, restaurants, and hair salons, were not subject to the same restrictions. *Id.* at 1614 (Kavanaugh, J., dissenting).

[159] Of course, one major exception is laws in areas beyond the reach of Congress's comparatively more limited powers.

localities because of the hierarchy built into the United States system of federalism. Once the state or federal government acts in its discretion, like it did with RLUIPA, to provide some additional support for religious entities, local governments are often powerless to chart their own course in that subject area.[160] So, this incomplete "discretion for all" trend under the Establishment Clause in fact provides more discretion for the federal government and state governments than for localities. It is as if someone declared to a father and his financially-dependent son, "each of you may choose to take a vacation to either Aruba or New York." The freedom to choose only truly extends to the son to the extent the father does not object to the son's choice. In other words, the Supreme Court's relative lenience toward religious establishments, when applied to the federal government and state governments, allows the federal government and states to limit localities' discretion on the free-exercise side.[161]

IV. LETTING LOCAL DISCRETION IN THROUGH THE BACK DOOR

Is there a bright side? Sort of. The Supreme Court has not explicitly foreclosed considering the local nature of a government actor in church-state disputes. The various balancing tests the Court employs give some room for lower courts to consider such factors, and doing so could result in more lenience to local governments in these cases than that afforded to the states and the federal government. Moreover, even if a court does determine that a local government action is problematic under the religion clauses, when choosing a remedy, the court should often choose a narrower remedy that allows the government to continue its popular programs even while providing relief to the specific parties those programs might harm most. These approaches are second-best to the ideal of the Supreme Court explicitly recognizing the unique nature of local governments in its substantive religion clauses analysis. Nevertheless, if courts follow these approaches, they can create some necessary space for community expression and local variation that will serve the democratic and liberty interests of this nation's people.

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[160] A federal law preempts a conflicting state or local law. And because, as a general rule, local governments have recently been treated purely as creatures of state law. A state law often preempts a conflicting local law.

[161] Again, RLUIPA is a good example of this phenomenon. The Supreme Court has not held the land use provisions of RLUIPA violate the Establishment Clause, so local governments must operate with limited discretion in the substantive areas covered by that federal statute.

A. Balancing Tests

Although the Supreme Court has not recognized the distinct historical nature of local governments as great bulwarks of self-government and community expression, it has not gone as far as to say that a local government's status as a local government is entirely irrelevant. Indeed, the Court's analysis in several cases over the last few decades provides a precedent-rooted way for courts to consider such a factor moving forward. By incorporating a variety of balancing tests into both Free Exercise Clause and Establishment Clause jurisprudence, the Court has paved the way to consider whether local government actions may be less burdensome on the interests each religion clause aims to protect. These balancing analyses exist on the free-exercise side from both the vestiges of pre-*Employment Division v. Smith*[162] foundational case law and from statutes calling for a form of elevated scrutiny. And the balancing analyses are even more diverse and ad hoc on the Establishment Clause side, where the factual and historical context of a government display or program is central. All in all, the "level," so to speak, of the government actor performing the challenged action can and should matter in these analyses. And, typically, factoring in that consideration will lead to greater deference for local governments than for the state and federal governments.

1. Free Exercise Balancing

Free Exercise Clause claims are governed by the standard set by the Supreme Court in *Employment Division v. Smith*.[163] Under that standard, a claimant is not entitled to a religious exemption from a neutral and generally applicable law that incidentally burdens the claimant's religious practice.[164] But in some cases a form of elevated scrutiny analysis still applies. These include when the government action being challenged specifically targets religion,[165] when the nature

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[162] 494 U.S. 872 (1990).

[163] Often a religious freedom claim will be brought not directly under the Free Exercise Clause, but under a statute such as the federal RFRA or a state RFRA. In such circumstances the *Smith* standard would not apply.

[164] *Smith*, 494 U.S. at 878–79.

[165] Masterpiece Cakeshop, Ltd. v. Colo. Civ. R. Comm'n, 138 S. Ct. 1719, 1724 (2018) (holding the claimant's free-exercise rights were violated when the government commission that pursued an action against him exhibited hostility and animus toward the claimant's religious viewpoint); Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 524 (1993) (holding that an ordinance that targeted a single religious group because of its religion-motivate animal sacrifice practice violated the Free Exercise Clause).

of the government action invites individualized exemptions,[166] and when the government action burdens a "hybrid" right—one that involves elements of religious exercise and other fundamental rights like free speech.[167] In such cases, the government must show that its action is narrowly tailored in pursuit of a compelling government interest.

Local governments should have an easier time making such a showing than their state and federal counterparts. First, a local government action is likely to be more "narrowly tailored," in the general sense of that term, than a law of similar substance passed by a government that presides over a larger and more diverse jurisdiction.[168] Second, local governments historically have held the role of legislating for the sake of health, safety, morals, and the general welfare.[169] And they have done so as a manifestation of voluntary community association and self-government. Because of this historical understanding of local government power, when local governments take any sort of action toward these four classic ends, the interest it pursues is, I argue, more "compelling" compared to a similar action by the federal government, which possesses no such police power and is not as equipped institutionally to take such action.[170] Finally, even compared to state governments, local governments are, for the reasons described in Part I, well-suited to be a means by which citizens express their values publicly.[171] For all these reasons, courts should recognize that the scales ought to be tilted in local governments' favor more than in states' or the federal government's favor when their actions are subject to elevated scrutiny.

An example related to "hybrid rights" cases may be helpful here. Imagine a local schoolboard policy that allows community members and organizations to use school auditoriums after school hours for certain

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[166] *Smith*, 494 U.S. at 884.

[167] *Id.* at 881 (describing cases that fit that category).

[168] Throughout this section, the "narrow tailoring" I conceive of is admittedly different than that which is dictated by modern doctrine. Modern doctrine, at least in the context of religious exemptions, often asks whether a government action is narrowly tailored as to its effects on an individual claimant; I ask whether the government action more generally is as narrow as it could be to substantially serve the relevant government interest.

[169] *See, e.g.*, Berman v. Parker, 348 U.S. 26, 32 (1954) ("Public safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs.").

[170] I do not argue that all actions of local governments are in pursuit of compelling interests. But, because of those entities' unique role as catalysts of self-government, associational and democratic rights are more at stake when a local action is challenged than when a state or federal action is challenged.

[171] *See supra* part II.

types of public events, but not for religious services of any kind. Then picture that a religious group brings a lawsuit claiming the policy not only infringes on its free exercise of religion, but it is also impermissible viewpoint discrimination in violation of the First Amendment's Free Speech Clause.[172] Although the law is not precisely clear on what a claimant must show to have the claim considered as one that alleges a violation of a "hybrid" right, if the claim is treated as hybrid, then it will be subjected to an elevated form of scrutiny.[173] So, the schoolboard in this example may have to show that the policy is no more restrictive than necessary to support a compelling government interest.

Such a policy should be at least a little easier for a local school board to justify compared to a similar law at the federal level (say, a policy that no federal funds will go toward any school district that allows certain religious groups to use its facilities). The decisions of the local school board affect only the community covered by that board's jurisdiction. That community's population may strongly favor avoiding giving public support to religious institutions. So, when faced with limited space and time with which to use that space, and the consequences of community backlash if the space is used by religious groups, perhaps a decision not to open school facilities to religious services is a more reasonable approach. In other words, the policy is less likely to be burdensome on a large number of individuals or groups, and there's not as likely to be an even-less-burdensome course of action than the one the school board chose (short of ending all non-student use of school facilities). Conversely, the federal policy sets the standard for a wide range of diverse communities across the nation. It therefore is more burdensome on religious interests overall because it mandates, or at least strongly encourages, all localities to prohibit religious groups from using school facilities, whether or not the people of that locality are generally in favor of such a policy. Similarly, the federal policy is, in a way, less narrowly tailored. It claims on behalf of all localities an interest of avoiding all affirmative support for religious interests, but only some of the localities' populaces actually support that interest.

This principle holds especially true when the motivation behind a government action that infringes on a hybrid right (like in the example above) is to avoid giving positive support to religion and thereby offending or causing other harm to people who object to such religious

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[172] These facts share some similarities with those of Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), and Good News Club v. Milford Central School, 533 U.S. 98 (2001).

[173] *See Smith*, 494 U.S. at 881.

interests.[174] A uniform federal policy toward such a goal mandates that policy everywhere, even in those localities where few to no one would be offended by government support for the exercise of the hybrid right. To put it in simple mathematical terms, a federal no-religious-aid policy perhaps hinders the interests of 10,000,000 religious people for the sake of 10,000,000 people who would be offended by government support for the religious exercise. But if localities were allowed to chart their own courses based on the preferences of their own more homogenous populaces, then a different result could emerge: perhaps the interests of only twenty percent of religious claimants are harmed for the sake of around eighty percent of people who would have been offended or otherwise harmed by a policy supporting those interests.[175] This at least goes to show that when the federal government acts in the interest of avoiding offense or other psychological harm to nonreligious people, it often acts too broadly; it could pursue its interest without inhibiting as many religious people if it provided for a system tailored by locality.[176]

Local governments have traditionally served the role of legislating for the health, safety, morals, and general welfare of the communities they govern. Because of their smaller size and greater homogeneity, they are able to take a more targeted approach towards pursuing those important ends. The federal government and state governments are not as institutionally equipped to make such judgment calls on divisive issues. So, when local governments are tasked with demonstrating that their action narrowly pursues an important interest, courts should

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[174] In both *Trinity Lutheran* and *Espinoza*, the Supreme Court appears to have communicated that, short of an Establishment Clause violation, establishment "concerns" are not compelling interests justifying an infringement on Free Exercise Clause rights. These statements should be limited to the facts of those cases, which involved apparent discrimination against entities based on religious status by a state agency.

[175] This may be the case because localities tend to be more homogenous than the nation as a whole. So, if the large majority of a localities' populace would be offended by a particular sort of government aid to a religious interest, that means a small minority would be in favor of such aid. If the local government acts in accordance with the wishes of the substantial majority, it gets a lot more "bang for its buck," harming far fewer and satisfying far more.

[176] This admittedly unconventional conception of narrow tailoring does not fit as neatly in cases where the claimant challenges a law that provides for a system of individualized exemptions. That's because when a government wants to justify not granting an exemption in those circumstances, it likely must show that its policy of not granting that particular exemption is narrowly tailored. In such cases, under existing doctrine at least, it would probably not be relevant whether the government's program is narrowly tailored in the broader sense discussed in this section.

assume that it is more likely the case than if a larger government was the primary actor.[177]

2. Establishment Clause Balancing

Even though the Supreme Court does not work under a tiered scrutiny framework when considering Establishment Clause challenges to government action,[178] it does operate under a vaguely defined collection of balancing tests. And under these tests, local governments should have an easier time justifying laws alleged to support an establishment of religion.

When, for example, courts consider Establishment Clause challenges to government funding of religious entities, they often apply a loose derivation of the *Lemon* Test, which considers the purpose and effect of the government action.[179] Such an approach is exemplified by the Supreme Court's decision in *Zelman v. Simmons-Harris*.[180] In that case, the Court considered a state program that provided school vouchers to students from lower-income families in a city school district.[181] The vouchers were redeemable at any private school, including religious schools, and ninety-six percent of the students in the program used the voucher to enroll in religious-affiliated schools.[182] The Court held that the program did not violate the Establishment Clause.[183] It applied a test that considered the purpose and effect of the program.[184] Even though the result of the program combined with the private personal choices of families was to support religious institutions much more than non-religious institutions, the program was constitutional because it

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[177] Under existing doctrine, the burden would still likely be on the government to prove a compelling interest and sufficiently narrow tailoring. Based on the arguments made in this Article and others, though, perhaps courts should consider flipping the burden to the claimant in some cases, requiring it to show either that the local government's interest is not sufficiently important or that its method of pursuing that interest is overly broad.

[178] Yet, perhaps it should. Richard Fallon has laid out a compelling case. Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59 (2017). *See also* Scott J. Ward, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L. J. 1739 (1989) (arguing that Establishment Clause claims should be evaluated like Free Exercise Clause claims on a broader scale).

[179] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (explaining that government actions must have a secular purpose, must have a primary effect that neither advances nor inhibits religion, and must not foster excessive entanglement between government and religion).

[180] 536 U.S. 639 (2002).

[181] *Id.* at 644–45.

[182] *Id.* at 644–45, 647.

[183] *Id.* at 644.

[184] *Id.* at 648–49.

had a secular purpose—educating children—and did not specifically incentivize people to support religious interests.[185] The Court's analysis thus appears to deviate from a traditional *Lemon* analysis in that under it, a government action could still be upheld even if every prong of the test is not precisely met (i.e., even if the program has the effect of substantially supporting religion). Importantly, it appears that the Court is willing to balance a variety of considerations when determining whether a government action violates the Establishment Clause, including whether the action is intended to support religion, whether it has the effect of doing so, and whether it encourages people to support religion by private choice.

Courts also balance a variety of factors when considering whether public displays and monuments conveying religious themes violate the Establishment Clause. In such cases, a court more or less simply considers whether the facts of the case make it appear as though the public display establishes a religion. Yet, even if the display does clearly communicate a religious message, it may still be permissible depending on the context. In *Cnty. of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*,[186] the Court held the solitary display of a crèche on courthouse steps was unconstitutional, but upheld the display of a menorah next to a large Christmas tree and a sign celebrating freedom.[187] Similarly, in *McCreary Cnty v. American Civil Liberties Union of Kentucky*,[188] the Court struck down a five-year-old solitary display of the Ten Commandments at a courthouse,[189] but in *Van Orden v. Perry*[190] the Court upheld a several-decades-old display of the Ten Commandments amidst other monuments on the grounds of a state capitol.[191] From these cases, among others, the Court gradually developed the "reasonable observer" or "endorsement" test, which asks whether a reasonable observer seeing the government-supported display would think the government was endorsing a particular religion over others, or religion over irreligion.[192]

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[185] *Id.* at 652–53.

[186] 492 U.S. 573 (1989).

[187] *Id.* at 601–02, 620–21.

[188] 545 U.S. 844 (2005).

[189] *Id.* at 851, 881 (2005).

[190] 545 U.S. 677 (2005).

[191] *Id.* at 681.

[192] *Cnty of Allegheny*, 492 U.S. at 620 ("Given all these considerations, it is not 'sufficiently likely' that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an 'endorsement' or 'disapproval . . . of their individual religious choices.' *Grand Rapids,* 473 U.S. at 390. While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish,

From a review of all of these Establishment Clause cases, it is clear that when courts are called on to decide whether a government action violates the Establishment Clause, they must consider a wide collection of factors. Depending on the factual context of the case, these factors could include the intent behind the government action, the degree to which the action encourages religious behavior, and the religious and cultural history of the jurisdiction.

Perhaps most importantly for the purposes of this Article, a proper application of the "reasonable observer" or "endorsement" test might demand consideration of the nature of the specific jurisdiction under the government at issue. It remains somewhat of an open question whether the "reasonable observer" is defined in relation to some sort of nationwide average, or by the citizens of the specific town. But it seems most likely that the answer should be something closer to the former. In *County of Allegheny*, the Court hinted that the reasonable observer is one who is familiar with the locality.[193] Moreover, Justice Breyer, the only justice voting with the majority in both *McCreary County* and *Van Orden* (which were decided on the same day), explained that one factor to consider is whether the display of the religious symbol had historically garnered divisiveness among people in that locality.[194] So, it appears that, under the endorsement test, the nature of the jurisdiction in which the display is erected matters.[195]

If that is so, then a locality might have a better chance of surviving an Establishment Clause challenge than, say, the federal government. Because the United States as a whole is more diverse than most

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as well as of those who adhere to either of these religions, *ibid.*, the constitutionality of its effect must also be judged according to the standard of a 'reasonable observer' . . . .").

[193] *See id.* (considering the impact the display would have on "residents of Pittsburgh" specifically).

[194] *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in the judgment) ("As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). And I am not aware of any evidence suggesting that this was due to a climate of intimidation. Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to 'engage in' any 'religious practic[e],' to 'compel' any 'religious practic[e],' or to 'work deterrence' of any 'religious belief.' *Schempp,* 374 U.S., at 305 (Goldberg, J., concurring).")

[195] The Supreme Court on one occasion identified this approach favored by Justice Breyer, but made a point to note (at least in a Free Exercise Clause context) that such an approach does not appear to hold precedential weight. *Espinoza*, 140 S. Ct. at 2259–60. So, at least in funding cases in which a religious entity claims improper anti-religious discrimination, the Court does not appear to be on the cusp of consistently adopting such an approach.

localities, a "reasonable observer," as defined only by a locality's populace, would be more attuned to the culture and history of the locality than a reasonable observer, as defined in reference to the populace of the entire United States, would be attuned to any single United States "culture" regarding religious symbols. So, an action of a government over a more culturally homogenous locality would less likely appear to be an improper establishment of religion than would the same action taken by the federal government, or even a state. Simply put, a nativity scene looks less like an establishment of religion when displayed in a public park in a town where eighty percent of households have their own nativity scenes, but looks more like an establishment of religion when placed on the National Mall in Washington, D.C., at the "center" of a nation that is more religiously diverse.

The Supreme Court's analysis in *Town of Greece* exemplifies this principle as well, even if unintentionally. There, the Court upheld a town's practice of opening town meetings with a prayer from local Christian clergy that was often sectarian in nature.[196] Among the reasons the Court gave for why this practice did not violate the Establishment Clause was that the religious makeup of the town itself was heavily Christian.[197] Because the town was so heavily Christian, the Court implied, the fact that the prayers were largely Christian did not establish a religion; it only reflected the town's demographics.[198] Presumably, then, the case might have turned out differently had it centered on the United States Congress opening sessions with only Christian prayers, because the United States overall is not as heavily Christian as the town of Greece.[199]

Here is the overall point: the way the Supreme Court has analyzed Establishment Clause challenges does not foreclose considering the nature of the government actor and relevant governed jurisdiction. Although the Court has not formally recognized such a consideration,

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[196] *Town of Greece*, 572 U.S. at 570.

[197] *Id.* at 585 ("The town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman who wished to give one. That nearly all of the congregations in town turned out to be Christian does not reflect an aversion or bias on the part of town leaders against minority faiths.").

[198] *Id.*

[199] The Court in *Town of Greece* did not signal that sectarian Christian prayers would be problematic even in Congress. But it did explain that Congress brings in ministers of various faiths to deliver prayers. *Id.* at 578–79. So, if Congress did what the town of Greece did and nearly all the prayers were specifically Christian, the analysis might be different.

such facts can (and I think must) factor into the Courts' analyses. Local governments are closer to the people they govern, and so, are generally more likely to reflect the cultural and religious mores of that populace than the national government or state governments. That being so, a local government action with religious significance is less likely to be a harmful "establishment" of religion contrary to the mores of the populace and more likely to reflect a culture that will at times express its deep convictions through the arm of government. So, to answer the question posed in the introduction—should a mayor's Thanksgiving Day proclamation that specifically gives thanks to Jesus be treated the same as a similar proclamation by the President of the United States?—probably not.

B. The Remedies-Based Remedy

Now that I have explained why the substance of the Supreme Court's religion jurisprudence does not foreclose an inquiry into the "level" of the government actor, I will next explain why Courts should also prefer certain remedies over others when considering challenges to local government action under the religion clauses, and how existing doctrine can support them in doing so. First, courts should adhere closely to the preference for as-applied challenges instead of facial challenges when a religion clause claim is brought against a local government. Second, in such situations courts should prefer individualized remedies over broader injunctions. By following both of these principles, courts could further the discretion of local governments over religion that this Article claims is desirable while adhering to the foundational principles of the law of remedies.

1. Favoring As-Applied Challenges

The Supreme Court has explained on several occasions that when a law is challenged on federal constitutional grounds, courts should tend toward resolving the lawsuit as an as-applied challenge instead of a facial challenge.[200] That directive should be followed vigorously when a local government action is the target of the constitutional challenge. Courts that do so respect the value of local government discretion while also securing the essential rights of citizens most harmed by local government actions that affect religion.

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[200] *See infra* note 207.

In many constitutional cases, the Roberts Court has emphasized its preference for as-applied challenges over facial challenges.[201] Whereas an as-applied challenge asks only whether a law or other government action improperly infringes on the constitutional rights of the individual claimant or claimants, a facial challenge typically contests the government action in all its possible applications.[202] A government action is therefore facially unconstitutional only if there is no conceivable application of that action that is permissible under the Constitution.[203] Such a showing is obviously more difficult for a claimant to make than a showing that the government action is unconstitutional as applied.[204] And courts, in their remedial discretion, may avoid even considering the facial validity of a government action when a plaintiff could succeed on the more limited as-applied theory.

The rationale behind this approach is somewhat similar to that of the constitutional-avoidance theory of statutory interpretation. Under that theory, or "canon," if a court is tasked with interpreting an ambiguous statutory provision and one permissible reading of the provision might make the statute unconstitutional, the court will gravitate toward another permissible reading of that provision that does not render the provision constitutionally problematic.[205] Such an approach, some would say, is one of judicial restraint. It allows as much action of the legislative branch to remain in place as possible, under the assumption that a legislature would prefer to have a potentially less-robust version of its statute stay on the books than have no valid statute at all.[206]

Likewise, the preference for as-applied challenges is an exercise of judicial restraint. It essentially says that courts should not decide more

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[201] Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 FORDHAM URB. L. J. 773, 775–83 (2009); Gonzales v. Carhart, 550 U.S. 124, 167 (2007); Ayotte v. Planned Parenthood of Northern New England, 546 U.S. 320, 328–29 (2006).

[202] Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL RTS. J. 657, 657 (2010).

[203] United States v. Salerno, 481 U.S. 739, 745 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.").

[204] *Id.*

[205] N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy,* 2 Cranch 64, 118, 2 L. Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

[206] *See, e.g.*, *id.* at 500–01 (explaining that the Court looks for a clear expression of Congress's intent before construing an ambiguous statutory provision in a way that would render the provision problematic under the Constitution).

than they need to decide.[207] Thus, if the dispute between the individual plaintiff and the government actor can be resolved by addressing only the effect of the government's action on that individual, then the court need not consider the effect of the government action on additional hypothetical individuals not before the court.

Assuming the presumption for as-applied challenges is warranted at least in some cases, it is especially warranted when the government action challenged was performed by a local government and implicates religion. Local government actions more likely reflect the preferences of a greater percentage of that jurisdiction's constituents than do actions of larger governments.[208] Again, consider an example like the one provided in Part I that involved Cities A, B, C, and D. Because of the greater diversity of the United States as a whole, a federal law striking a particular balance between the general public interest and the religious freedom of people of faith may only be in accordance with roughly half of the populace's preferences (if not less).[209] But because local populaces are often more homogenous based on a variety of characteristics, including convictions related to issues like religious exemptions, an action taken by local government officials will more likely satisfy a greater percentage of the local citizenry.[210]

That being so, a court decision invalidating an entire law or program at the local level is likely to be more counter-majoritarian than a similar decision related to a federal or state law or program. Although a decision holding, for example, that a federal government action is facially invalid may displease roughly half of citizens, a decision holding a local government decision facially invalid would likely displease a greater percentage of that populace. Compound that individual result with similar decisions against thousands of localities across the nation, and the overall result is significantly more counter-majoritarian on the whole than a decision invalidating a federal action.

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[207] Ayotte, 546 U.S. at 328–29 ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force . . ."); *see also* Kreit, *supra* note 202, at 658 (explaining that "the law strongly favors as-applied challenges on the grounds that they are more consistent with the goals of resolving concrete disputes and deferring as much as possible to the legislative process").

[208] This is true because, as explained in part II.B, *supra*, localities are typically more responsive to citizens' desires than larger governments, and local populations tend to be more homogenous. *See also* Blank, *supra* note 103, at 389–90.

[209] *See supra* part II.B.

[210] *See supra* part II.B.

Of course, the holders of the minority view on church-state matters within a particular locality should not be ignored. A preference for as-applied challenges indeed would not ignore such people. It would still address the liberty interest asserted by the people who bring a claim. From an economic standpoint, then, as-applied challenges are better approximations of "weighted preferences"—those who are most displeased or harmed by a local government action are those who are more likely to bring a suit challenging the action.[211] So, as-applied challenges can still provide relief to the individuals whose interests have been most harmed, all the while respecting local communities' ability to express their values through local government action.

It is not difficult to understand how the preference for as-applied challenges works when a claimant brings an action under the Free Exercise Clause. The court would prefer to consider whether the government action infringes on that claimant's right to freely exercise her religion, and avoid any unnecessary consideration of whether the government action infringes on religious exercise as a general rule.[212] But applying the preference for as-applied challenges is trickier with an Establishment Clause challenge. What does it mean to ask whether a government action improperly establishes religion as applied to the claimant? I will give what I think is the best answer available under existing doctrine.

The difficulty in answering whether and how an Establishment Clause challenge could be evaluated "as applied" lies in a longstanding debate centered around one important question: what government-caused harms should the Establishment Clause prevent?[213] By

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[211] Of course, this is not a perfect measure. Many people who are frustrated or harmed by a government action will not bring a lawsuit for a variety of personal reasons such as finances, time, and reputation.

[212] A request for a judicial exemption from a law is essentially an as-applied challenge.

[213] Some, like Justice Clarence Thomas, see the Establishment Clause as a protection for states to maintain their own establishments of religion without federal interference. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49 (2004) (Thomas, J., concurring in the judgment). The majority of scholars and commentators see the clause as a protector of individual liberty, but they disagree as to what harms it protects against. *See, e.g.*, Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN ST. L. REV. 77, 79 (2007) (explaining that one view holds that the Establishment Clause secures freedom of thought and expression for individuals); Fallon, *supra* note 178, at 90 (explaining that the Establishment Clause protects the right "(a) not to be taxed to support religion, (b) not to be classified and unreasonably disadvantaged on the basis of religion, (c) not to be symbolically demeaned or marginalized by governmental endorsement of religion, or coerced into participating in a religious exercise, and (d) not to be subjected to governmentally sponsored religious instruction or endorsement as an aspect of public education.").

incorporating the Establishment Clause against state and local governments, the Supreme Court has in effect declared that the Establishment Clause protects individual liberties in some way. As the predominant theory goes, it was incorporated through the Due Process Clause of the Fourteenth Amendment, a process generally reserved only for certain fundamental rights of individuals.[214] Although many did, and still do, question whether the framers of the Constitution would have thought of disestablishment as an individual right,[215] for the purposes of this Article I will treat the incorporation of that provision as a conclusive statement that it is indeed an individual-rights guarantee. But in what way? With what individual harm is the clause concerned? One potential answer is that an establishment of religion could harm the religious entities favored by the "establishing" action because that action entangles government with religion. But if that is the answer, then presumably such a religious entity would be the one bringing the suit, and that rarely is the case. Another possibility is that anyone who is not affiliated with the religious interests "established" by the government is harmed by being treated less favorably than others based on her religious beliefs (or lack thereof). But if that is the interest, then it is not clear how the claim would differ in structure from a Free Exercise Clause claim.[216] And if it is similar to a free-exercise claim, then addressing the claim as an as-applied challenge is more straightforward. Finally, perhaps the harm the Establishment Clause guards against is a conscience-based harm to taxpayers;[217] citizens may strenuously object to any of their tax dollars being used to support a religious interest or viewpoint with which they disagree. If that is the interest, then, again, the claim would operate similarly to a free exercise claim in structure, and it would be relatively easy for a court to address whether the government action violates a constitutional right as applied to the individual claimant or claimants.

So, although there are some conceptual ambiguities regarding how a court can prefer as-applied challenges even in Establishment Clause cases, it appears that doing so would not be entirely inconsistent with

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[214] McDonald v. City of Chicago, 561 U.S. 742, 759–60 (2010) (describing the process of selective incorporation of certain provisions of the Bill of Rights through the Due Process Clause of the Fourteenth Amendment).

[215] *See supra* note 213.

[216] Indeed, scholars have argued that the Establishment Clause constrains the relationship between governments and citizens in a substantially similar way to the Free Exercise Clause. *See, e.g.*, Ward, *supra* note 178, at 1739–40 (noting that the clauses could perhaps be treated as one, but favoring an approach that treats Establishment Clause challenges as class-action-form Free Exercise challenges).

[217] *See, e.g.*, Fallon, *supra* note 178, at 90.

the interests that clause aims to protect. All in all, courts that stick to such a preference when a religion-related claim is brought against a local government give more space to those governments to act for the public health, safety, morals, and general welfare while staying within federal constitutional bounds.

2. Favoring Narrow Individualized Remedies

Closely related to the preference for as-applied challenges is a preference for certain remedies that give targeted relief to a wronged claimant, but do not go further. To put it simply, this Article encourages courts considering challenges to local government actions under the religion clauses to favor narrower remedies like individualized exemptions or damages instead of broad remedies like complete invalidation of the relevant government action. Like with the preference for as-applied challenges, courts that favor narrower remedies give more space for local governments to chart their own community-tailored course. And the rationale behind these remedies supports such a preference.

This Article will focus on only a few categories of remedies: damages, injunctions against enforcing a law against a complaining party, and injunctions that invalidate a government action entirely. Courts should favor the first two sorts of remedies when considering free-exercise or establishment challenges to local government action.

In some types of free exercise cases,[218] courts already favor a narrow remedy that prevents enforcement of the government action against the claimant, also known as an "exemption." Picture a case in which a government enacts a law or policy that appears neutral on its face, but in its application might compel some people to act or not act contrary to what their religious convictions dictate. For example, the federal government might enact a law that generally requires certain employers to include coverage for contraceptives in the health care plan it provides to its employees; but some employers might claim that supporting certain forms of contraception violates their religious convictions.[219] Or perhaps a local government zones an entire region for residential use only, but a church that owns land in that area claims that the zoning regulation violates its right to freely exercise its religion because it does not allow it to host religious services and build and operate a religious school on that property.

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[218] By this I mean to include not only cases brought directly under the Free Exercise Clause, but also cases brought under statutes like RFRA and RLUIPA.

[219] Such a situation is similar to the facts that gave rise to *Burwell*, 573 U.S. at 682.

Let's assume that a court agrees with the claimant in either of these cases that the government action violates the claimant's rights (perhaps under a particular federal statute like RFRA or RLUIPA). The court most likely will grant the claimant an exemption—decide that the claimant has a right to not be subject to the government action. A narrow, party-specific remedy like this comports with the goal of allowing localities the discretion to chart their own policymaking course. If an exemption to a local law or policy is granted, the law or policy can still stand, and will continue to apply to anyone who does not raise a successful claim for an exemption.[220]

Once again, though, the analysis is more complicated for an Establishment Clause claim. Courts have long recognized the general rule that a wronged party is not entitled to an equitable remedy when an adequate remedy at law exists.[221] Remedies at law are inadequate if they, for example, will not prevent a claimant from being irreparably harmed. Carrying these principles to the issue at hand, damages should be the preferred remedy for local government Establishment Clause violations.

Picture that a city establishes a program that uses local property tax revenue to fund a voucher program that allows low-income households to send children to private schools, which in that city includes almost solely religious schools.[222] A family with no religious affiliation sues the city claiming the program is unconstitutional under the Establishment Clause because it disproportionately allocates tax dollars to religious institutions. Assuming a court agrees with the claimant that there is an Establishment Clause problem, what should the court do?

One option is to invalidate the entire program. This option has some intuitive appeal. If a program establishes religion, it establishes religion, end of story; why would it matter who is harmed to what degree?

That remedy is, in my view, more appropriate for problematic federal government actions than it is for local actions. The reasons for this distinction reflect the discussion in Part I.B. Action by the federal government affects far more people than a city program. And the

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[220] The issue of whether such a narrower remedy is generally appropriate against a federal or state government action, instead of a local action, is beyond the scope of this Article. This Article simply asserts that narrow remedies are especially appropriate when the government actor is a locality.

[221] Monsanto Co. v. Geerston Seed Farms, 561 U.S. 139, 156–57 (2010); Nat'l Private Truck Council, Inc. v. Oklahoma Tax Com'n, 515 U.S. 582, 588 (1995) (explaining that "Congress did not authorize injunctive or declaratory relief under § 1983 in state tax cases when there is an adequate remedy at law").

[222] This scenario is somewhat similar to the facts in *Zelman*, 536 U.S. at 639.

populace affected by a federal action is usually far larger and more diverse. So, typically, a claimant that successfully challenges a federal action will represent the interests of a much larger number and proportion of the population than a claimant successfully challenging a city action.

A court considering a remedy for a city's problematic school voucher program should think differently. If the injury the Establishment Clause protects against is that of a claimant's tax dollars supporting religious interests with which the claimant disagrees, then damages may be able to right the wrong. The locality could easily pay the claimant the value of that claimant's tax dollars that would have otherwise gone to the voucher program.

A court could approach the remedies issue in a similar way if faced with a city's problematic religious display (like a Ten Commandments display). If the city spends taxpayer dollars to erect or maintain the display, then a claimant who objects to the display on Establishment Clause grounds could be at least partially "made whole" by damages equal to the amount of that claimant's tax dollars that would have gone toward that end.

This approach does invite an objection: what if the interest the Establishment Clause protects is not only based on an objection to where a claimant's tax money is directed, but also based on the feeling of offense the claimant might experience because of the existence of the government program or display? Assuming a claimant has standing to bring a claim based on such a ground, damages may still be a reasonable remedial approach. In tort cases, for example, courts and juries often are tasked with approximating the value of non-economic harms, such as pain-and-suffering damages.[223] If such an approach can provide some meaningful compensation to a person who has gone through tort-induced trauma, then perhaps it could work for a constitutional harm too.

One might respond that these harms are meaningfully different in nature: a classic tort is a one-off deal—one past event determines the damages. But an active program or a standing display that supports religion is an ongoing harm—it continues to offend the claimant for as long as it exists. First, a court or jury could still provide damages for prospective pain and suffering.[224] They do so in tort cases in which a

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[223] C.V. Venters, Annotation, *Instructions Regarding Measurement of Damages for Pain and Suffering*, 85 A.L.R. 1010 (1933) (providing an overview of many jurisdictions that allow juries to calculate pain-and-suffering damages).

[224] C.S. Wheatley, Jr., *Future Pain and Suffering as Element of Damages for Physical Injury*, 81 A.L.R. 423 (1932) (explaining the general rule that future pain-and-suffering

plaintiff, for example, is faced with years ahead of living with a particular debilitating injury. If courts or juries can find a way to quantify the harm of not getting to play sports with friends for the next twenty years or more, it is not illogical to think they could also satisfactorily quantify the harm of, for example, being periodically reminded that a statue of Saint Peter indefinitely stands in the city park.

Second, remedial principles from property law could provide a helpful analytical framework that supports narrower remedies for local government action infringing on religion. Calabresi and Melamed's seminal article on entitlements and remedies in polluter cases explains that under a "property rule," a person harmed by another person's use of property, like a polluting activity, is entitled to a ceasing of the harmful activity; under a "liability rule," however, the offending party is merely entitled to damages, and the offending party may continue the conduct if it pays those damages.[225] A liability rule, Calabresi and Melamed's framework dictates, should govern when transaction costs are high.[226] In other words, if it would cost a lot of money to organize and gain approval from all persons potentially affected by a property owner's pollution, then the conflict should be resolved simply by a court assigning a value to the harm and compelling the polluting party to pay that amount to anyone injured.

I do not advocate for a system in which governments may always violate the rights of citizens if they give those citizens some money. But the rationale behind Calabresi and Melamed's framework at least carries some normative weight in the context of local government action that implicates religion. In such situations, transaction costs are probably high. To involve all potentially affected persons in a decision about whether to pursue a course of government action that may either help or hurt religious interests, a locality would probably at least have to hold a referendum on the action. And, because not every citizen will vote, it would probably have to expend even more effort and resources than that to make sure that everyone gives consent to the government action. A "liability rule" in the context of free-exercise and

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damages are appropriate when the party seeking relief shows that it is sufficiently probable she will experience such pain and suffering).

[225] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

[226] James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: the Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 451 (1995) (describing the "the familiar piece of conventional wisdom that amounts to virtual doctrine: [w]hen transaction costs are low, use property rules; when transaction costs are high, use liability rules").

establishment challenges serves as an easier proxy for gaining such approval from affected parties. Those who are most harmed by the government action are those who are more likely to bring a lawsuit and receive compensation.[227]

Indeed, the law regarding civil rights actions supports such a remedial approach when local government action is challenged. Although the Eleventh Amendment's protection of state sovereign immunity[228] somewhat insulates states and state agencies from damages actions, it does not similarly apply to insulate local governments.[229] Local governments' status as "persons" for certain purposes, including the increased capacity to commit a constitutional tort as if they were an individual and not state actor,[230] make them well-suited to pay damages in constitutional cases conceived through a liability rule lens.

Finally, in the context of religion, narrow remedies like damages or exemptions may also serve to avoid absurd or undesirable policy outcomes. Picture a city in which eighty percent of the residents favor, and twenty percent oppose, a school voucher program that may implicate the Establishment Clause. A person from the twenty percent minority then brings a claim challenging the government action under the Establishment Clause. If a judge holds for the plaintiff and invalidates the entire program, what happens if that plaintiff eventually moves to another town? The person potentially harmed by the government action could no longer be harmed by it, but the program is still dead. And the city could not resurrect it because of the past court ruling. Compound this individual result among thousands of localities, and the final picture is a network of bordering localities with substantially the same policies instead of self-determining cities and towns that can experiment with different solutions and express their local communities' unique mores.[231] But if, instead, the challenge was

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[227] That principle may apply just as strongly to larger government like state or federal governments. But, as this Article hopes to make clear, other policy reasons for applying the principle and thus favoring damages are more compelling with local governments than the others.

[228] U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[229] *See, e.g.*, *Lincoln Cty.*, 133 U.S. at 530–31.

[230] Local governments, unlike states, are considered "persons" able to be sued for constitutional torts under 42 U.S.C. § 1983. Monell v. Dept. of Social Servs. of City of New York, 436 U.S. 658, 688–90 (1978).

[231] *See* MCCONNELL, ET AL., *supra* note 17 and accompanying text.

evaluated as-applied and the remedy was damages, then the claimant's rights would be respected and the popular government program could continue.[232]

Indeed, and relatedly, such a compensatory system contributes toward a Tieboutian ideal because it makes it more financially feasible (even if minimally so) for the offended party to move elsewhere.[233] It turns the abstract offense felt by the claimant into a fungible resource, thus giving her a boost if she would rather live in the next town over where the government pursues more amenable goals. Opting for damages, and narrower remedies in general, instead of broad invalidation, thus directly serves at least two desirable ends: (1) allowing local governments to differ from each other, expressing community values and creating a mosaic of competing policy approaches, and (2) putting harmed citizens in a better position to choose a locality that suits their preferences. Courts' remedial discretion thus stands as a potential doctrinally justified way of affording localities more leeway over matters of religion than that afforded to their state and federal counterparts.

V. CONCLUSION

Governments asserting power over large geographic regions with diverse populaces are not well-equipped to cater to people's competing preferences on matters implicating religious convictions. Disagreements on whether and to what degree government should support, accommodate, or suppress religious interests in the public sphere are, as Professor Hills says, "reasonable and deep." But the United States is not only unique in its diversity; it also operates under a unique multi-tiered federalism. From the beginning of this nation and before, local governments served as special settings for democratic involvement and community expression. They exercised significant discretion and power over their small and relatively homogenous populaces. They were not simply arms of the state. Over time, American law largely forgot the inherent powers and advantages of these communities and their self-established governing bodies. From a misunderstanding of the roots of these entities' political power, states have come to exercise complete power over them.

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[232] This argument applies to other narrower remedies, like exemptions, as well. If a person brought a free-exercise claim successfully and the court thus invalidated the local law entirely, the law would be off the books even if the claimant moved elsewhere. Localities again would be less able to chart their own courses.

[233] *See* Tiebout, *supra* note 116.

Yet, that inappropriate and contra-historical subjugation of local governments need not flow through every vein of American law. At least as a matter of federal constitutional law, nothing is stopping courts from considering the nature of local governments when those governments' actions are challenged under the religion clauses. Unfortunately, courts from the Supreme Court on down have not explicitly allowed local governments discretion to exercise their institutional strengths on matters of religion. They should. Local governments are necessary avenues by which communities can identify and reinforce their values. And such entities, because they are close to their constituency, which is likely more homogenous than the nation as a whole, will more likely choose courses of action that do not infringe on the rights of citizens as severely as the actions of a government over a larger jurisdiction. If the courts allow localities some discretion to make such decisions, then a far greater portion of the nation's citizens will be governed by laws with which they agree. This could be a meaningful step toward accommodating those deep-seated, values-based disputes that seem to violently bubble to the surface every time the Supreme Court considers a case implicating church-state relations.

Not only is such a system desirable, but the first steps of it are immediately reachable. In many religion cases, courts apply a variety of balancing tests. Even though courts applying such tests do not directly discuss the significance of the type of government at issue, such consideration fits fairly comfortably alongside the sorts of considerations courts do sometimes weigh. And factoring in the local nature of the government actor pushes the balance toward a finding that the government action is less burdensome and more reasonable.

Beyond those substantive analyses in religion cases, courts also can and should favor a certain approach to assigning a remedy when the government actor is a locality. Specifically, when the challenged government conduct was performed by a local government, courts should strongly prefer as-applied challenges to facial challenges and prefer narrow individualized remedies to broad remedies like total invalidation of the government action. Following this approach respects the constitutional rights of those with minority viewpoints, but enables localities to maintain programs that generally serve the public good and reflect the preferences and mores of the communities they represent.

A wide network of geographically and culturally unique localities is a blessing to a massive and diverse nation. For church-state cases, courts can and should tap into that resource.