# The Religion Clauses of the First Amendment

## Guarantees of States' Rights?

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# Preface

The origin of this book is as follows. In 1990, the Supreme Court handed down a very controversial decision in the case of *Employment Division, Department of Human Resources of Oregon v. Smith*. The issue raised by that case was whether the free exercise clause of the First Amendment ("Congress shall make no law . . . prohibiting the free exercise [of religion] . . . .) guarantees religion-based exemptions from valid, secular laws. In other words, the issue was whether the clause gives individuals and groups the right to be excused from having to obey a law that is itself constitutional if its application to them would prohibit or burden the practice of their religion in some way. In the *Smith* case, the specific issue was whether the free exercise clause gives Native Americans the right to use an illegal drug during a religious ceremony. In a five to four decision, the Court held that they did not have such a right because the free exercise clause does not guarantee a general right to religion-based exemptions from valid, secular laws.

The Court's opinion in that case, written by Justice Antonin Scalia, was criticized, among other reasons, for failing to provide any evidence that the free exercise clause was originally not meant to guarantee religion-based exemptions. His failure to do so was not only questionable but ironic, because Scalia is noted for being an exponent of "originalism," a theory of constitutional adjudication and interpretation that says that courts should decide constitutional law cases on the basis of constitutional provisions *as they were originally understood by the people generally at the time they were ratified.* Moreover, many of Scalia's critics assumed that if he had looked at the historical evidence, he would have discovered that it did show that the free exercise clause was originally intended to guarantee a right to religion-based exemptions.

At that time, having already done some research on the original meaning of the free exercise clause, I was fairly confident that the historical evidence would support the Court's position that the clause does not guarantee a right to religion-based exemptions. I, therefore, decided to research and write a book on the original meaning of the free exercise clause, especially because at that time, and still today, no one had published such a book. A few scholars had published law review articles, but they disagreed on their conclusions. So I set out to resolve the issue.

After a few years and after writing a couple of chapters that were published as articles, in my reading I began to encounter references to a jurisdictional or states' rights interpretation of both religion clauses of the First Amendment. (The other religion clause is generally referred to as the establishment clause, which says, "Congress shall make no law respecting an establishment of religion . . . ."). From what I could gather from my initial but second-hand introduction to this interpretation of the religion clauses, its thesis is that the clauses were not intended to protect religious freedom, a natural right of individuals, but to protect the right of states to legislate on religion as they please.

At first, because this states' rights interpretation was so contrary to the traditional interpretation of the religion clauses, including the Supreme Court's, I simply ignored it—dismissed it out of hand. No decent, self-respecting scholar, I thought, could take it seriously. The more research I did for my book, however, the more I encountered references to the jurisdictional or states' right interpretation, references by generally respected scholars that implied, if not asserted, that it was credible and should be taken seriously. At a minimum, they said that the protection of state laws on religion from Congressional legislation was *one* of the original reasons for the establishment clause, if not both religion clauses.

At that point, I decided to read for myself some of the works that advocated this novel interpretation of the religion clauses. These included, among others, some law review articles by Kurt T. Lash and the book, *Foreordained Failure* (1995), by Steven D. Smith, both men being very reputable professors of law. After reading their works, I realized that I could no longer ignore the jurisdictional account of the religion clauses and, in fact, that I would have to address it in a separate chapter of my book on the original meaning of the free exercise clause. After all, according to Smith, Lash, and others, the free exercise clause was not intended to address issues like whether religious liberty entailed a right to religion-based exemptions from valid, secular laws. In fact, according to them, originally the religion clauses did not have anything at all to say about how government should treat religion. All that they did was to give jurisdiction over that question to the states. Before attempting, therefore, to explain the original meaning of the free exercise clause, *I first had to make sure and then demonstrate to my potential readers that the*

*clause had meaning of some sort*, other than that of giving the states jurisdiction over church-state issues.

I also realized another reason why it was so important to address the validity of the jurisdictional interpretation of the religion clauses. If it were correct, it would mean that it would be improper, even unconstitutional, for the Supreme Court to strike down state laws dealing with religion, even if those laws violated religious liberty or established a particular religion. If the original objective of the religion clauses was to protect states' rights—to prevent Congress or the federal courts from overturning state laws dealing with religion—then obviously those clauses could and should not be used by courts today to strike down such state laws. Doing such would be directly contrary to the original intent of the religion clauses. In short, if the jurisdictional interpretation of the religion clauses were correct and then to be accepted by the Supreme Court, it would have to overturn many of the decisions it has handed down during the last fifty plus years.

Upon deciding to include in my book a chapter assessing the merits of the states' rights reading of the religion clauses, I thought that it would be a relatively easy thing to demonstrate that it was without merit. Alas, the more I read and thought about the interpretation, it became more complicated and more difficult to refute. The proponents of the states' rights interpretation came up with all kinds of arguments that I was not anticipating. Some of them even attempted to show that Thomas Jefferson and James Madison subscribed to such an interpretation. Although I was not convinced by their arguments, I was certainly impressed with their ingenuity.

In any case, the result was that the chapter grew and grew in size and scope until it threatened to dwarf the rest of the book. What to do? I decided that the only feasible way of solving my problem without sacrificing the persuasiveness of what I wanted to say was not to include it in my book on the original meaning of the free exercise clause, but to reorganize, expand, and publish it as a separate book, which I have now done.

In brief, what is in this book? After explaining the jurisdictional or states' rights interpretation of the religion clauses, this book analyzes the logic of the arguments and the sufficiency of the historical evidence used to support the interpretation of the religion clauses. In doing the latter, it attempts to present all the relevant evidence—what the initial proponents of the religion clauses wanted and why, what happened at the First Congress that drafted them, and how early Americans understood the clauses after they were ratified. I have presented as much historical evidence as possible so that there will be no doubt in the reader's mind about the validity of my conclusion. Of course, I cannot claim to have included everything that should have been included, but if I have omitted a relevant piece of evidence, especially one that does not support my conclusion, it was not intentional, but simply because I never found it.

The book's main conclusion is that there is very little historical evidence to support the jurisdictional interpretation. It also shows that many of the arguments used to support it involve specious reasoning and unwarranted assumptions. Given this conclusion, the reader may have one of two reactions—either to wonder how the interpretation could ever have gained so much currency or to suspect that I have been unfair and one-sided. How could I be right and so many other scholars be wrong? Perhaps for this reason, some reviewers of my manuscript suggested I should "tone down" my criticism even though they did not disagree with it. All I can say is that I have tried to be as fair and gentle as possible in my criticism, without watering down or distorting what I believe the facts reveal. In my opinion, it is important for scholars to "call a spade a spade" even at the risk of being considered unfair or too harsh.

As for why so many respectable scholars have both advocated and accepted an interpretation of the religion clauses for which there is so little evidence, I cannot say, even though I have speculated on the question. Because of my desire to be fair and not unnecessarily critical, I have refrained from expressing my speculations. Nevertheless, I cannot refrain from saying that, in my opinion, much of what has been published to support the states' right interpretation and the extent to which scholars have accepted it as true does not reflect well on the field of American constitutional law/history. Although all interpretations of past events, including my own, are contestable, if something can be published and then accepted by other scholars as historical truth regardless of how much or little evidence supports it, then thoughtful persons cannot help but wonder what is going on.

One other point about the contents of this book—its original purpose was not to establish the original meaning of the religion clauses. Rather, it was to critically evaluate the states' right interpretation of those clauses—to see if it is supported by good arguments and sufficient historical evidence. The conclusion that it is not so supported, however, tells us only that the religion clauses were not intended to protect states' rights or state establishments of religion. It does not tell us what they were intended to do. Nevertheless, in the course of showing what the clauses were not intended to do, I necessarily suggest, if not show, what they *were* intended to do.

Most obviously and generally, they were meant to express a normative point about how the federal government should treat religion. More specifically, they were meant to protect religious liberty by prohibiting all laws of the sort associated with traditional European establishments of religion. I believe that the historical evidence shows that religious liberty and religious establishments were thought to be inversely related or polar opposites. The presence of one meant the absence of the other. In other words, the free exercise clause and establishment clause were originally understood as two different ways of saying the same thing.

Although I believe the historical evidence presented in this book shows this to have been the case, because I did not set out to show this to have been the case, I do not claim that I have conclusively shown it to be so. In order to do that, I would have to include evidence not included in this book; in short, I would have to write another book. Perhaps this is just a way of saying that I need to get back to work on my first intended book.

Now, I have a few suggestions for the reader, especially anyone who is not trained in constitutional law/history. This book was not written for members of the general public to read. Constitutional law, and thus constitutional history, is inherently complicated. It is full of legal jargon and all about making distinctions between this and that. I have tried to explain as much about the law as I could without getting side-tracked away from the main issues and arguments. Nevertheless, for many persons this book will be a challenging and slow read. Understanding that fact ahead of time, however, should help the reader get through the book. It should help one to resist putting this book aside on the assumption that it is her/his fault that s/he cannot understand what s/he is reading. If that happens, it may not be any person's fault, and hopefully that includes me. It may just be the nature of the subject matter. Even difficult passages, however, if read slowly and more than once, can be understood. So hang in there, dear reader, and do not give up without a fight.

The book also contains numerous citations at the end of each chapter. How much attention should be paid to them? On the one hand, ignoring them makes for an easier read. On the other hand, the more critical readers will want to check them out because they do contain some important points or comments, as well as sources.

More specifically, I want to warn the reader about one word—"federal" or "federalist"—that may be somewhat confusing because in this book it has at least three different meanings. At places "federal" means national, as in "federal government"; "Federalist" (with a capital F) refers to an early American who favored ratifying the Constitution of 1787 ( a person who did not was called an "Anti-federalist"); and "federalist" (with a small f) means "states' rights," as in "federalist interpretation of the religion clauses." (A person favoring such an interpretation might also be called a "federalist.") The reason for mentioning this here is to establish the fact that there is no historical or logical connection between "Federalist" and "federalist." In other words, an early American could have been a Federalist without favoring a federalist interpretation of the religion clauses. This also means that today one could be a federalist (favor such an interpretation of those clauses) without being a supporter of the federal government.

Finally, I wish to acknowledge and thank those who have made (or at least attempted to make) this a better book than it would have been without their help. First, there is the Earhart Foundation, which gave me a grant that

enabled me to get started on this project. I am also grateful to the following persons who at some point in its unfolding read and criticized my manuscript: Kurt T. Lash, John Dinan, and Mark McGarvie. Next, although he had nothing directly to do with this book, Douglas Laycock, one of this country's leading experts on the religion clauses, indirectly encouraged me to write it. Because he took seriously my previous publications and made use of them in his own writings, he increased my confidence in my scholarship and my desire to keep writing and publishing. I am also indebted to two persons at the University of Richmond: Beth Ann Howard, for all the technical word-processing assistance that she provided as I was getting my manuscript ready for the publisher, and my dean, Andy Newcomb, for his financial support. Last, but certainly not least, my wife, Phyllis, deserves my endless thanks for her patience and support throughout the entire process of writing this book.

# Contents

*Chapter One*

# Introduction

In America, religious freedom has often been referred to as the "first freedom,"[1] but for different reasons. Some believe it to be the most important or valuable of freedoms, and usually on the grounds that religion itself is the most important aspect of human life. After all, religion has traditionally been understood as a person or group's relationship with some kind of transcendent or supernatural power and source of meaning, and those who believe in the existence of such a reality would be very likely to consider their relationship with it to be their most important relationship. James Madison, for example, in making the case for religious freedom, wrote, "It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society."[2]



For others religious freedom is chronologically the "first freedom;" it was the first freedom in the course of Western civilization to be understood as a fundamental and universal natural or human right. As such, it opened the way for other freedoms, such as freedom of expression, to be identified as fundamental, universal "rights of man."[3] Being first in this sense does not imply that religious freedom is first in rank or value, but only that efforts to establish it preceded and led to the widespread belief in the idea of natural rights in general. Some persons, however, go further and argue that religious freedom is logically, as well as historically, prior to other freedoms; their establishment depends on its establishment.[4]

A third reason that religious freedom is often called the "first freedom" is because it is the first freedom to be mentioned and guaranteed in the Bill of Rights section (first ten amendments) of the United States Constitution. The First Amendment begins with these words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise there-

of. . . ."[5] These words are generally referred to as the religion clauses of the First Amendment. Moreover, during the course of American history most Americans have interpreted this language as protecting a very important natural or human right, i.e., the freedom of individuals, as Madison said, to render such homage to the ultimate source or ground of human existence as they believe is required of them.[6] This is certainly the way the Supreme Court of the United States has interpreted the religion clauses.[7]

In recent years, however, several constitutional law scholars have challenged this traditional interpretation of the religion clauses of the First Amendment. They argue that the rights protected by those clauses are those of states, not individuals. They contend that the clauses have no *substantive* meaning, i.e., have nothing to say about what the relationship between government and religion or government and individuals should be. Instead, the clauses are purely *jurisdictional* in nature, i.e., are simply statements that only the states, and not the national government, have the authority to determine what the relationship between government and religion should be. According to this interpretation, the religion clauses were not intended to and do not guarantee a basic, universal, natural right or express a normative principle of any sort.

This interpretation of the religion clauses has been most forcefully and influentially expressed by Steven Smith, a law professor and leading scholar in the area of religion and government, in the book, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom.*[8] He writes therein that "the religion clauses have nothing of substance to say on questions of religious freedom. The original meaning supplies us neither with concrete answers to particular legal questions nor with any general principle, norm, value, or theory that might serve as a basis for working out such answers." Smith explains that the clauses do not address such questions as "Should government establish one religion as the official state religion? Should the state subsidize a religion? Should it support all religions . . . on equal terms?" He concludes, "If we ask, therefore, what principle or theory of religious liberty the framers and ratifiers of the religion clauses adopted, the most accurate answer is 'None.'" Instead, the religion clauses, he says, are a declaration of states' rights, not individual rights. As such, they were intended to protect from federal legislation both the anti-establishment of religion policies of states like Virginia and the pro-establishment policies that still existed in some New England states.[9]

What is notable about Smith's states' rights or jurisdictional interpretation is that it applies to the free exercise clause as well as the establishment clause. Although some scholars have over the years argued that the sole purpose of the establishment clause was to protect states' rights, they have usually conceded that the free exercise clause has substantive meaning, i.e., was meant to prevent the federal government from passing laws that would

violate the citizens' religious freedom.[10] Others have posited an even narrower interpretation of the establishment clause, namely, that it was intended to protect from Congressional legislation not states' rights as such, but state establishments of religion, but they too have thought that the free exercise clause has normative meaning, i.e., was meant to protect the religious freedom of individuals. This, for example, is the position of Supreme Court Justice, Clarence Thomas, who contends that the establishment clause, unlike the free exercise clause, "does not protect any individual right," but "is a federalism provision intended to prevent Congress from interfering with state establishments [of religion]," and for this reason should not be used by the courts to strike down state laws on religion. Such laws can be struck down only if they are coercive and thus violate the free exercise clause.[11] This idea that the free exercise clause has normative meaning, i.e., protects religious freedom, whereas the establishment clause does not, but protects only states' rights or state religious establishments, Smith labels the dualistic view of the religion clauses.

Other scholars have taken a more complicated position. They have said that the free exercise clause has entirely substantive meaning and that the establishment clause has both substantive and federalist content, i.e., it was intended to prevent the federal government from both establishing (at the national level) and disestablishing (at the state level) a church or religion.[12] This also appears to be the position of Supreme Court Justice, Antonin Scalia.[13]

In contrast, Smith argues that the free exercise clause, as well as the establishment clause, is simply a declaration that the federal government has no jurisdiction over the subject of religion. He writes:

> . . . [T]his dualistic view of the religion clauses, although virtually ubiquitous, is nonetheless mistaken. The religion clauses were not a hybrid creation—part federalism, part substantive right. They were, rather, simply an assignment of jurisdiction over matters of religion to the states—no more, no less. Consequently, perverse though it seems, the religion clauses simply do not speak to the substantive questions of religious freedom.[14]

According to Smith, the main reason that the religion clauses are purely jurisdictional in nature is the fact that early Americans were so divided in their thinking on the proper relationship between government and religion that they could not possibly have agreed on a substantive principle to encase in the clauses. He writes, "The founders *did not* answer the religion question because they *could not* have done so."[15]

Smith, however, is not the first scholar to so interpret the religion clauses. In 1964, Wilber G. Katz, a distinguished professor of law at the University of Chicago, suggested that the clauses "embodied a principle of federalism" that precluded the federal government from legislating on religion because such a

power was reserved to the states. This meant, however, that the clauses did not prohibit it from legislating on religion "in areas beyond the authority of any state; for example, in the armed forces, the District of Columbia, and the territories." On the other hand, Katz speculated that the free exercise clause might have been meant to protect religious freedom from federal laws applicable *to those areas*. In all other areas, he said that the religion clauses protect only states' rights. [16](Although familiar with Katz's interpretation, Smith, for some reason, fails in his book to acknowledge it.)

Since its publication in 1995, Smith's interpretation of the religion clauses has been accepted by several other scholars. For example, Jay S. Bybee, a former law professor and now federal circuit court judge, writes:

> The Founders had their substantive views of church and state, of course, but they did not codify their views in the Bill of Rights. Thus, no coherent theory of the religious liberty or freedom of expression can be drawn from the text or the history of the First Amendment; such questions were deliberately deferred to the states. The First Amendment was the least common denominator; it was simply jurisdictional. [17]

Bybee states explicitly that the clauses neither "address church-state relations" nor guarantee "personal rights."[18] Professor of law, Daniel O. Conkle, appears to agree.[19] Kurt T. Lash, another law professor, not only agrees with, but goes beyond Smith, for he argues that the entire First Amendment was "hyper-Federalist," i.e., intended to protect "state autonomy to regulate matters like religion, speech, and press."[20]

Other scholars have accepted most, but not quite all, of Smith's thesis. Reluctant to concede that the religion clauses have *no* substantive content, they argue that they are "primarily" or "mainly" jurisdictional in meaning. Both clauses, in short, were intended primarily, if not entirely, to protect states' rights or the principle of federalism and not individuals' rights.[21] For example, Daniel Dreisbach, a leading church-state scholar, writes:

> The *principal* importance of . . . the First Amendment . . . is its clear demarcation of the legitimate jurisdictions of federal and state governments on religious matters. . . . The Bill of Rights embodied a principle of federalism; it was *essentially* a states' rights document. . . . '[T]he *principal* importance of the [First] Amendment lay in the separation which it effected between the respective jurisdictions of State and nation regarding religion, rather than in its bearing on the question of the Separation of Church and State.'. . . [T]he First Amendment, was *primarily* jurisdictional (or structural) in nature. . . [and] offered *little* in the way of a substantive right or universal principle of religious liberty. [22]

Less extreme, Arlin M. Adams and Charles J. Emmerich, whose widely used book, *A Nation Dedicated to Religious Liberty*, is an interpretation of the religion clauses, contend that there were three reasons for the religion clauses, only one of which was that the free exercise of religion was an

inalienable right that needed to be protected from the federal government. The other two reasons were jurisdictional in nature. "[C]ivil authority in religious affairs resided with the states, not the national government," and Congress needed to be prevented from interfering with existing state establishments of religion. This means that the framers/ratifiers of the religion clauses, while agreeing on the need for the clauses, may have done so for entirely different reasons. Adams and Emmerich, however, fail to discuss the relative importance or popularity of these different reasons.[23]

One sign of the extent of the influence of Smith, Bybee, Conkle, and others on contemporary thinking about the religion clauses is the following comment contained in an article published in 2003:

> Recent work on the development of the First Amendment . . . confirms that the traditional goals of legal analysis require serious rethinking. The best evidence indicates that the primary if not exclusive purpose of the First Amendment's religion clauses was procedural rather than substantive, to declare that the states and not the national government were responsible for questions of religion and religious liberty.[24]

An even more recent source says, "The observation that the Religion Clauses were originally jurisdictional is commonplace."[25] Even some scholars not inclined to accept such an interpretation of the establishment clause concede that it has "true salience" and, thus, "cannot be easily ignored."[26]

As a practical matter, what difference does it make whether the religion clauses were originally meant to protect the individual right of religious freedom or the states' right to decide for themselves how to treat religion? The resolution of this issue could have a major impact on the way the Supreme Court decides cases arising on the basis of the religion clauses, especially if Supreme Court justices' interpretation of those clauses is based on their original meaning, which traditionally they have claimed to be the case. Today, moreover, certain justices, most notably Justice Antonin Scalia, continue to affirm their commitment to originalism as an important component of constitutional adjudication and interpretation.[27] If such justices were to adopt and use a jurisdictional or states' right interpretation of the religion clauses, how would that be likely to affect the way they decide religion-clauses cases?

The answer depends on whether a case being decided by the Court involves a federal law or a state law. As a practical matter, a jurisdictional interpretation of the religion clauses would still prevent the *federal* government from doing more or less what it is presently prevented from doing on the basis of the Court's traditional, substantive interpretation of the religion clauses.[28] This is because the Court has essentially said that the religion clauses prohibit the government from passing laws that have a primarily religious purpose or effect, which is almost exactly what the proponents of a

jurisdictional interpretation of the clauses say that the clauses prohibit.[29] The only significant difference between the two interpretations of the clauses *as applied to the federal government* pertains not to the kind of law that the clauses prohibit, but to the reasons for their being prohibited. A substantive interpretation of the religion clauses says that federal laws dealing primarily with religion were originally prohibited in order to protect religious freedom, whereas a jurisdictional interpretation says they were prohibited in order to protect the freedom of states.

If, on the other hand, the cases being decided by the Supreme Court on the basis of the religion clauses involve *state laws* and the Court were to decide that those clauses have only jurisdictional meaning or content, then it would decide those cases in a way that would be significantly, even dramatically, different from the way it has traditionally decided them. It would not strike down state laws dealing with religion no matter what those laws said. A states' right interpretation of the clauses would allow state and local governments to pass any kind of law relating to religion that they wanted to pass. In contrast to the present situation, in which cases are decided on the basis of a substantive understanding of the religion clauses, states would be able to discriminate for or against specific religions, religious beliefs, or practices, or persons/groups because of their religion.

To understand how this could be, one must remember that originally the Bill of Rights applied only to the national government and not the state governments.[30] Thus, the First Amendment begins, "*Congress* shall make no law. . . ." It was not until the twentieth century that the Supreme Court began to apply certain provisions of the Bill of Rights to the states. The Court did this on the basis of the due process clause of the Fourteenth Amendment ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."),[31] which was added to the Constitution in 1868. Decades later, the Court decided that that clause had been added to prevent the states from violating certain substantive rights, including, but not limited to, some of those contained in the Bill of Rights, such as religious freedom. The rights in the Bill of Rights that the Court held were protected from state laws by the due process clause were said to be "incorporated" into that clause.[32] Thus, in 1940, it incorporated the free exercise clause into the clause and thereby applied it to the states, and in 1947 it did the same with the establishment clause.[33] Since then, the Supreme Court has struck down numerous state laws on the grounds that they violated the free exercise or establishment clause, as incorporated into the due process clause of the Fourteenth Amendment.

According to the proponents of a jurisdictional interpretation of the religion clauses, however, the Court's incorporating the religion clauses into the due process clause was a major mistake. If those clauses were originally intended to protect a states' right and not an individual right, then logically

they can not be (and should not have been) incorporated into the due process clause of the Fourteenth Amendment and applied to the *states*. If the clauses do not express substantive principles about the proper relationship between religion and government, there is simply nothing to be incorporated into the due process clause and applied to the states. Moreover, any attempt to interpret the clauses in a substantive way and then apply them to the states would be inconsistent with what Smith (and others) say is the original purpose of the establishment clause—to allow the state governments to decide for themselves what their relationship with religion will be.[34] Thus, Akhil Amar, a professor at Yale Law School, writes, ". . . [T]o apply the [establishment] clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right clearly confirmed by the establishment clause itself."[35]

Although the Supreme Court at this time is most unlikely to reverse its decision to incorporate the religion clauses into the due process clause of the Fourteenth Amendment,[36] to the extent that individual justices accept the jurisdictional interpretation of the religion clauses, they should and will be inclined to apply those clauses to state laws more leniently than they would apply them to laws of Congress. As explained by one scholar, "because the Framers intended, and the public originally understood, the Religion Clauses to be a federalist directive, federal courts achieve some of the desirable effects of originalism . . . by deferring to the states on close church-state questions."[37] Moreover, some scholars have recently argued in favor of the Court's doing just that, i.e., applying a relaxed version of the establishment clause to the states.[38]

Whether the religion clauses are substantive or jurisdictional in content matters for one other reason. If they are the latter, they arguably would preclude Congress from passing laws that have as their objective the *protection of religious freedom*—laws like the Religious Freedom Restoration Act of 1993,[39] which gives religious persons and groups a general right to be exempt from obeying valid, secular laws, including those passed by state and local governments.[40] Although the religion clauses, if given a jurisdictional interpretation, might not prevent the federal government from granting religion-based exemptions from its own laws,[41] it is reasonably clear that they would prohibit it from requiring the states to grant such exemptions from their laws.

In summary, if the Supreme Court were to officially endorse a jurisdictional or federalist interpretation of the religion clauses, that could have a profound effect on church-state law and practice, at least at the level of state and local governments, which is the level where most church-state cases have originated.[42] Essentially the states would be completely free to pass whatever laws regarding religion they wanted to pass, except insofar as their own constitutions and courts restrained them. Neither the United States Con-