Federalism and Separation of Powers

The Federalism Aspect of the Establishment Clause

*By William H. Hurd & William E. Thro**

Introduction

In the early 21st century, the generally accepted understanding of the Establishment Clause is largely defined by two characteristics.[1] First, despite the fact that it refers only to Congress, the Establishment Clause is generally regarded as limiting the States as well.[2] Second, and more significantly, the Establishment Clause is generally regarded as mandating "a freedom from laws instituting, supporting, or otherwise establishing religion."[3] In this sense, the Establishment Clause, as interpreted by the courts, has "tended to prohibit contact between religious and civil institutions."[4] This second characteristic of the general understanding constitutes the "Libertarian Aspect" of the Establishment Clause.[5]

Yet, there is another aspect of the Establishment Clause. This aspect, which we will here call the "Federalism Aspect," prohibits the National Government from interfering with the States' exercise of their sovereign authority to make religious policy in areas where government action is not precluded by the National Constitution. In other words, in the zone between what the Establishment Clause prohibits and what the Free Exercise Clause requires, the National Government must allow the States to make their own policy choices. The Federalism Aspect of the Establishment Clause differs from the Libertarian Aspect in two distinct ways. First, whereas the Libertarian Aspect limits both the States and the National Government, the Federalism Aspect limits only the National Government. Second, whereas the Libertarian Aspect is designed to preclude unwarranted government intrusion into the sphere of religion, the Federalism Aspect focuses only on the preservation of the States' sovereign authority.

The purpose of this Article is to examine briefly the Federalism Aspect of the Establishment Clause. This purpose is accomplished in three distinct sections. The first section explores the Federalism Aspect of the Establishment Clause at the Founding. The second section explains how the application of the Establishment Clause to the States has changed the sweep of its Libertarian Aspect, while leaving intact the Federalism Aspect. The third section details the continuing practical impact of the Federalism Aspect of the Establishment Clause.

I. The Federalism Aspect at the Founding

The adoption of the Constitution in 1788 brought about a transformation.[6] Although the People could have chosen to transfer all sovereignty from the States to the new National Government, they did not do so. Alternatively, the People could have chosen to retain all sovereignty in the States and, thus, make the United States nothing more than an inter-governmental compact; however, they did not choose this course, either. Instead, the People, for the first time in the history of government, divided sovereignty between two separate sovereigns.[7] As Justice Kennedy observed:

> The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[8]

Justice Kennedy's observation that power was divided between dual sovereigns is an accurate statement of original intent.[9] James Madison, writing in *The Federalist*, observed:

> In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each [is] subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.[10]

In other words, as the Court observed in 1992, "[T]he Constitution protects us from our own best intentions: *It divides power among sovereigns* . . . precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[11] Although

the People transferred many sovereign powers from the States to the new National Government, the States retained "a residuary and inviolable sovereignty."[12] The principle that the Constitution divides power between *dual sovereigns* is reflected throughout the Constitution's text, particularly in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones.[13] Thus, "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere."[14]

Among these sovereign powers retained by the States at the Founding was the power to make religious policy and even to establish a religion if the State so desired.[15] As one of America's leading constitutional historians observed:

> [A] widespread understanding existed in the states during the ratification controversy that the new central government would have no power whatever to legislate on the subject of religion. This by itself does not mean that any person or state understood an establishment of religion to mean government aid to any or all religions or churches. It meant rather that religion as a subject of legislation was reserved exclusively to the states.[16]

Thus, when the Establishment Clause was adopted in 1791, it was intended to serve two distinct objectives. The first objective was to protect the *People* of the United States by forbidding the Congress from establishing a national religion, however "establishment" might be defined. The second objective was to protect the *States*—and their citizens—against any federal efforts to interfere with their own religious policies, whatever those policies might be.[17] As Justice Thomas recently noted, "[t]he text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments."[18] Moreover, in his classic *Commentaries on the Constitution of the United States,* Justice Story stated that the Religion Clauses were intended "to exclude from the national government *all power* to act upon the subject [of religion]."[19] Indeed, "[t]he *whole power* over the subject of religion is left *exclusively* to the state governments, to be acted upon according to their own sense of justice, and the state constitutions."[20] Similarly, Professor Schrager has explained:

> [T]he Religion Clauses emerged from the Founding Congress as local-protecting; the clauses were specifically meant to prevent the national Congress from legislating religious affairs while leaving local regulations of religion not only untouched by, but also protected from, national encroachment.[21]

In other words, except as they might be limited by their own constitutions, State governments were free to adopt any religious policy they wished, free from federal oversight or limitation.[22]

II. The Federalism Aspect After Incorporation

With ratification of the Fourteenth Amendment in 1868, federal law prohibited the States from depriving any person of "life, liberty, or property, without due process of law."[23] Even so, for several decades, this restriction was not regarded as having any affect on state religious policy. Then, in 1940, the Supreme Court decided *Cantwell v. Connecticut*, construing the Fourteenth Amendment to make the Free Exercise Clause applicable to the States.[24] In 1947, the Court decided *Everson v. Board of Education,*[25] making the Establishment Clause applicable to the States. As the result of these two decisions, the sovereign authority of the States to make religious policies was severely curtailed.[26] However, that authority was not wholly eliminated.[27] As the Supreme Court has repeatedly recognized, there is "play in the joints" between what the Establishment Clause prohibits and what the Free Exercise Clause requires.[28] It is here where the States retain authority to adopt policies regarding religion.

A few examples illustrate the point:

Suppose that a professor at a state university requires students to attend every lecture. A Jewish student requests to be excused so that he may observe Yom Kippur. Because the professor's attendance policy is generally applicable and is not intended to discriminate against religion, the Free Exercise Clause does not require the professor to excuse the student.[29] However, if the professor allows the Jewish student to be excused on what the student regards as the holiest day of the year, the Establishment Clause is not offended. This is so even though the professor does not excuse the absence of another student who wishes to take off the day to attend another First Amendment activity, a Bruce Springsteen concert.

Similarly, suppose that a police department requires all officers to wear pants as part of their uni-

form. A female officer, who is a Jehovah's Witness, has a religious scruple against wearing such historically male attire. She asks permission to wear a skirt instead. Because the policy is applicable to everyone, the department could refuse the request without violating the Free Exercise Clause.[30] Yet, it need not be so unbending. The department could also grant the request and not offend the Establishment Clause. This is so even though the department continued to enforce the policy for female officers who simply found the required attire to be objectionable for aesthetic reasons.

Or, suppose that a public school cafeteria serves ham for lunch every Friday. A Muslim student asks for an alternative meal, noting that the consumption of pork is prohibited by his faith. Because the policy of serving ham is generally applicable and not intended to single out a particular religious belief, the school could probably refuse the Muslim's request.[31] At the same time, the school could provide the Muslim a different meal and not offend the Establishment Clause. This is so even though similar accommodations were not made for students who object to pork based on its taste.

Finally, suppose that a State wishes to implement a college grant program to enable students to obtain undergraduate degrees. The program could include grants to students wishing to study for the ministry, or it could exclude such a course of study from funding by the program. The Establishment Clause does not prevent the former,[32] but neither does the Free Exercise Clause (or Free Speech Clause) preclude the latter.[33]

In all four examples, the State is not required to accommodate or support the religious interest, but it may choose to do so. Even though the Free Exercise Clause and the Establishment Clause apply to the States, there remains a small but important zone in which States retain discretion to make religious policy.

Within this zone of discretion, the Federalism Aspect of the Establishment Clause still holds sway to protect state authority from federal encroachment. The incorporation of the Religion Clauses imposed additional restraints upon the States; however, it did not expand the power of the National Government by authorizing it to dictate the religious policies of the States.[34] To the extent that the States retain sovereign authority to make religious policy, the National Government is still prohibited from interfering with the exercise of that authority, just as it was when the Bill of Rights was first adopted.[35] In other words, in 1791, when the Bill of Rights served only as a restraint against the National Government, the Federalism Aspect of the Establishment Clause prevented Congress from telling the States whether to establish a religion or even whether to accommodate religion. Today, the same Federalism Aspect still precludes Congress from telling States whether to accommodate religion. So long as a State's decision whether to accommodate religion falls within the constitutionally permissible zone of discretion, Congress may not interfere.

III. The Practical Effects of the Federalism Aspect

Although it is clear that the Framers intended for the Establishment Clause to have a Federalism Aspect, and although it is clear that incorporation did not wholly abolish the States' sovereign authority to make religious policy, the practical implications of the Federalism Aspect may not be immediately clear. After all, the National Government, which is already limited by the Libertarian Aspect, rarely makes religious policy, much less tries to make religious policy for the States. Thus, one must wonder whether the Federalism Aspect of the Establishment Clause is one of those rare constitutional principles that, like the Republican Form of Government Clause or the Equal Footing Doctrine, have little practical impact on governmental decision-making.

The answer to this question is two-fold. First, while it is true that the National Government generally has not interfered with the States' sovereign authority to make religious policy, it is easy to imagine circumstances in which the National Government might attempt to do so. For example, Congress might declare that if a State has a school choice program, it must include—or must not include—religious schools. Similarly, Congress might mandate that a State provide—or not provide—financial assistance to college students studying for the ministry. Congress might also seek to ensure that the States provide—or withhold—certain state tax benefits to members of the clergy. All of these actions, Congress might seek to justify by its already-expansive reading of the Spending Clause and Commerce Clause.

Second, Congress has recently passed a statute that represents a clear attempt to interfere with the States' sovereign authority to set religious policy within the zone of discretion between the two Religion Clauses. It is known as the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[36] Found within RLUIPA is a set of "Prison Provisions," which

mandate that, if a State receives federal funds for correctional purposes, the State must implement the prison religious accommodation policy favored by Congress—a policy different from the policies that many States have chosen to adopt on their own.[37] Specifically, these "Prison Provisions" of RLUIPA mandate that, whenever the State's policies of general applicability impose a "substantial burden" on religion, the State must accommodate the religious exercise unless it can demonstrate that its interests are compelling and that its interests cannot be achieved through less intrusive means.[38] Thus, the Prison Provisions have the effect of subjecting the denial of religious accommodation to strict scrutiny, the most demanding standard known to our constitutional jurisprudence. As a practical matter, this means, that, in the prison context, the State can rarely, if ever, exercise its discretion to grant or deny an accommodation of religion.

To illustrate, suppose that a prison has a policy that inmates may not wear hats or other head coverings because prisoners might use them to hide weapons or other contraband. A Sikh prisoner says that his religious beliefs require him to wear a turban. Because the policy is one of general applicability, the Constitution does not compel the State to provide accommodation.[39] Yet, the Prison Provisions require the State to accommodate the request unless the State can show that the denial satisfies the burden imposed by strict scrutiny.

Of course, policy makers might debate whether a State should accommodate requests to wear a head covering. Yet, it is the States' prerogative to make those policy choices. Within the zone of discretion, the Constitution protects the authority of the States to accommodate or not as they see fit. When the Federal Government takes away that religious policy discretion, as it has with the Prison Provisions, then the Federal Government violates the Establishment Clause.

By enacting the Prison Provisions, Congress has violated the Federalism Aspect of the Establishment Clause because it has interfered with States' discretion to fill "the play in the joints" as they deem best. Though the Prison Provisions *favor* the accommodation of religion, they interfere with State sovereignty no less than if Congress had *prohibited* such accommodation. If Congress may constitutionally enact the Prison Provisions, it is difficult to imagine how the Constitution could protect the States against a future Congress bent on using that same power for a contrary purpose.

Conclusion

As originally envisioned by the Framers, the Establishment Clause had both a Libertarian Aspect and a Federalism Aspect. The Libertarian Aspect protected the People from the National Government. The Federalism Aspect ensured that the States would be able to exercise their sovereign authority to make religious policy subject only to the restriction imposed by their own constitutions. Although the adoption of the Fourteenth Amendment and resulting incorporation of the Religion Clauses severely limited the sovereign authority of the States to make religious policy, these developments did not wholly abolish the State's authority. Nor did they alter the Federalism Aspect of the Establishment Clause. As a result, the Establishment Clause continues to limit the power of the National Government to interfere with the States' religious policy choices within the zone of discretion between the two Religion Clauses.

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Footnotes

[1] As Professor Leonard W. Levy observed, "Establishment Clause cases rarely concern acts of the national Government. The usual case involves an act of state, and the usual decision restricts religion in the public schools or government aid to sectarian schools." Leonard W. Levy, The Establishment Clause 165 (1986).

[2] The Establishment Clause reads: "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

[3] Phillip Hamburger, Separation of Church and State 2 (2003).

[4] *Id.* at 3.

[5] Although it is clear that the Framers intended for the Establishment Clause to have a Libertarian Aspect, the nature of the Libertarian Aspect has been transmogrified so as to preclude a much wider range of government activity than was contemplated by the Framers. In his monumental work, Professor Hamburger explains that the Framers intended for the Libertarian Aspect simply to prohibit the National Government from providing benefits to a particular denomination or from discriminating against the members of particular sects. However, for a variety of reasons, including a desire to limit the power of the Roman Catholic Church and increasingly secularized social attitudes, this value of Disestablishment was transformed into the very different value summarized by the phrase, "Separation of Church and State." *See generally* HAMBURGER, *supra* note 3. As such, the Establishment Clause has been sometimes used to strike down state activity impinging very little—if at all—on the individual "liberty" that, under the Fourteenth Amendment, is the ostensible basis for judicial action in this area. Such an expansive use of the Establishment Clause is, however, a topic beyond the scope of this paper.

[6] Under the terms of the Constitution, it went into effect when nine of the thirteen States ratified it, but only for the ratifying States. U.S. CONST. art. VII. In June of 1788, New Hampshire became the ninth state to ratify the document. Virginia and New York—prominent States necessary for the success of the new government—ratified in the summer of 1788. North Carolina ratified late in 1789 and Rhode Island consented in 1790.

[7] As the Court has explained:

> Although the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document "*specifically recognizes the States as sovereign entities*." Various textual provisions of the Constitution assume the States' continued existence and active participation in the fundamental processes of governance. The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design. Any doubt regarding the constitutional role of the States as *sovereign entities* is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Alden v. Maine, 527 U.S. 706, 713-14 (1999) (citations omitted) (emphasis added).

[8] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

[9] The idea of divided sovereignty has roots in efforts by the Colonists to reach a political accommodation with their kinsmen in Britain. As early as 1768, John Dickinson, in *The Letters from a Pennsylvania Farmer*, suggested that sovereignty was divided between the British Parliament and the Colonial Legislatures. *See* 1 ALFRED H. KELLY ET AL., THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT 46-47 (1991).

[10] THE FEDERALIST NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 39, at 256 (James Madison) (Jacob E. Cooke ed., 1961) ("[T]he proposed Government cannot be deemed a *national* one; since its jurisdiction extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable sovereignty over all other objects."); THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of state governments; and these will have the same disposition towards the General Government.").

[11] New York v. United States, 505 U.S. 144, 187 (1992) (emphasis added).

[12] Printz v. United States, 521 U.S. 898, 919 (1997) (quoting James Madison in *The Federalist No. 39*).

[13] *See id.* at 919.

[14] Gregory v. Ashcroft, 501 U.S. 452, 461 (1991). Moreover, because "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom," United States v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., joined by O'Connor, J., concurring), the Court has developed certain rules to preserve the delicate equilibrium that is dual sovereignty. For example, the Court required that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" Will v. Mich. Dep't of State Police, 491 U.S. 58, 65 (1989) (citations omitted); *see also Gregory,* 501 U.S. at 460-61 (holding that a clear statement is required to dictate qualifications for state officials); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (holding that there is no abrogation of sovereign immunity without a clear statement); Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981) (Pennhurst I) (holding that a clear statement is required to impose conditions on the receipt of federal funds). In other words, the sovereignty of the States is far too important to be undermined by inference or implication. Rather, the sovereignty of the States can only be diminished by a clear expression of congressional intent within the statutory text.

[15] For a comprehensive review of the individual States policies toward religions, see generally LEVY, *supra* note 1, at 25-62.

[16] *Id*. at 74.

[17] Indeed, as Professor Hamburger has noted, some scholars have suggested that the *only* purpose of the Establishment Clause was to protect the States' policy choices regarding the establishment of religion. *See* HAMBURGER, *supra* note 3, at 106 n.40.

[18] Newdow v. Elk Grove Unified Sch. Dist., 124 S. Ct. 2301, 2330 (2004) (Thomas, J., concurring).

[19] 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (1833) (available at www.constitution.org/js/js_000.htm) (emphasis added). Of course, Justice Story's monumental work has long been regarded as a leading authority on original intent.

[20] *Id.* (emphasis added).

[21] Richard C. Schrager, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1823 (2004) (citing AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 32-42 (1998)).

[22] *See* Barron v. Mayor & City Council of Balt., 32 U.S. (7 Pet.) 243, 250 (1833) (holding that no provision of the Bill of Rights is applicable to the States); *see also* Lee v. Weisman, 505 U.S. 577, 641 (1992) (Scalia, J., joined by Rehnquist, C.J., White, & Thomas J.J., dissenting) (noting that the Establishment Clause was adopted, in part, "to protect state establishments of religion from federal interference").

[23] U.S. CONST. amend. XIV.

[24] 310 U.S. 296, 303 (1940).

[25] 330 U.S. 1, 15-16 (1947).

[26] *See, e.g.,* Wisconsin v. Yoder*,* 406 U.S. 205, 214-15 (1972) (finding that the Free Exercise Clause allows parents to refuse to send children to school beyond the age of thirteen); Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 224-25 (1963) (holding that the Establishment Clause prohibits the practice of daily Bible readings in the public schools, even where students are allowed to absent themselves upon parental request).

[27] At least one Justice believes that the Libertarian Aspect of the Establishment Clause does not curtail state authority at all. Justice Thomas recently stated:

> Quite simply, the Establishment Clause is best understood as a federalism provision—it protects state establishments from federal interference but does not protect any individual right. These two features independently make incorporation of the Clause difficult to understand. The best argument in favor of incorporation would be that, by disabling Congress from establishing a national religion, the Clause protected an individual right, enforceable against the Federal Government, to be free from coercive federal establishments. Incorporation of this individual right, the argument goes, makes sense. I have alluded to this possibility before.
>
> But even assuming that the Establishment Clause precludes the Federal Government from establishing a national religion, it does not follow that the Clause created or protects any individual right. For the reasons discussed above, it is more likely that States and only States were the direct beneficiaries. Moreover, incorporation of this putative individual right leads to a peculiar outcome: It would prohibit precisely what the Establishment Clause was intended to protect—*state* establishments of religion. Nevertheless, the potential right against federal establishments is the only candidate for incorporation.

Newdow v. Elk Grove Unified Sch. Dist., 124 S. Ct. 2301, 2331 (2004) (Thomas, J., concurring) (citations omitted).

[28] Locke v. Davey, 124 S. Ct. 1307, 1311 (2004); *see also* Texas Monthly, Inc. v. Bullock*,* 489 U.S. 1, 18 n.8 (1989) ("[W]e in no way suggest that *all* benefits conferred exclusively upon religious groups or upon individuals on account of their religious beliefs are forbidden by the Establishment Clause unless they are mandated by the Free Exercise Clause."); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 334 (1987) ("'This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' It is well established, too, that 'the limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.'") (citations omitted).

[29] *See* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990).

[30] *See id.*

[31] *See id*.

[32] Witters v. Wash. Dep't of Servs. for the Blind, 474 U.S. 481 (1986).

[33] *Locke*, 124 S. Ct. at 1307.

[34] In some extraordinary circumstances, Congress may be able to dictate how the States exercise their discretion with respect to religion. Section 5 of the Fourteenth Amendment empowers Congress to enforce the Establishment Clause and the Free Exercise Clause when it can be demonstrated that the States have engaged in unconstitutional conduct and when the resulting legislation is proportionate to the constitutional violations. City of Boerne v. Flores, 521 U.S. 507 (1997). In determining whether legislation is proportionate in contexts other than the Religion Clauses, the Supreme Court has upheld prophylactic measures that require or prohibit more than mere adherence to parameters imposed directly by the Constitution. *See, e.g.,* Tennessee v. Lane, 124 S. Ct. 1978, 1985 (2004). Assuming that Section 5 allows Congress to act in a similar fashion in the area of religion, and assuming that the other prerequisites of Section 5 are met, then a congressional mandate for States to exercise their discretion in a particular manner would not violate the Establishment Clause.

[35] Obviously, this means that the Establishment Clause applies against the National Government in ways for which there is no comparable application against the States. However, such a difference in application is mandated by the historical purposes of the Establishment Clause. *See* Zelman v. Simmons-Harris*,* 536 U.S. 639, 678-79 (2002) (Thomas, J., concurring) ("[I]n the context of the Establishment Clause, it may well be that state action should be evaluated on different terms than similar action by the Federal Government. 'States, while bound to observe strict neutrality, should be freer to experiment with involvement [in religion]—on a neutral basis—than the Federal Government.' Thus, while the Federal Government may 'make no law respecting an establishment of religion,' the States may pass laws that include or touch on religious matters so long as these laws do not impede free exercise rights or any other individual religious liberty interest. By considering the particular religious liberty right alleged to be invaded by a State, federal courts can strike a proper balance between the demands of the Fourteenth Amendment on the one hand and the federalism prerogatives of States on the other.") (citation omitted); *see also* Roth v. United States, 354 U.S. 476, 503-504 (1957) (Harlan, J, dissenting) ("The Constitution differentiates between those areas of human conduct subject to the regulation of the States and those subject to the powers of the Federal Government. The substantive powers of the two governments, in many instances, are distinct. And in every case where we are called upon to balance the interest in free expression against other interests, it seems to me important that we should keep in the forefront the question of whether those other interests are state or federal."); Beauharnais v. Illinois, 343 U.S. 250, 294 (1952) (Jackson, J., dissenting) ("The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms.").

[36] 42 U.S.C. §§ 2000cc through 2000cc-5.

[37] Specifically, the Prison Provisions state:

> Protection of religious exercise of institutionalized persons
>
> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> (b) Scope of application
>
> This section applies in any case in which—
>
> (1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
>
> (2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes

42 U.S.C. § 2000cc-1. RLUIPA also has another part, which primarily affects local governments, requiring that religious organizations be given preferential treatment with respect to local planning and zoning laws. *See* 42 U.S.C. § 2000cc ("Land Use Provisions").

[38] 42 U.S.C. § 2000cc-1(a).

[39] *See* Employment Div. v. Smith, 494 U.S. 872, 878-79 (1990). Even before the 1990 decision in *Smith*, strict scrutiny was not the operative standard by which the courts evaluated limitations on the religious rights of prisoners. Instead, a rational relationship standard was prescribed. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Turner v. Safley, 482 U.S. 78 (1987). After *Smith*, it is not clear whether prisoner religious rights are now governed by the standard that case prescribes for other contexts or by the *Turner/O'Lone* standard; however, under either approach, prison officials could forbid the wearing of turbans, as part of a general ban on headgear, without violating the Constitution. *See, e.g.,* Hines v. S.C. Dep't of Corrections, 148 F.3d 353, 357 (4th Cir. 1998) (declining to resolve which standard governed prison grooming policy, but upholding policy under either approach).