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The Jurisdiction Establishment Clause: A Reappraisal

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THE JURISDICTIONAL ESTABLISHMENT CLAUSE: A REAPPRAISAL

*Steven D. Smith**

INTRODUCTION

For decades, scholars and citizens—and Justices—have supposed that the First Amendment's Establishment Clause was enacted in order to constitutionalize some right or principle of religious freedom, and they have argued strenuously about just what this right or principle was. So "separationists" of various shapes and sizes have squared off against an assortment of "accommodationists" and "nonpreferentialists": the arguments are familiar. In the last decade or so, however, an altogether different (though not exactly new[1]) kind of interpretation has commanded increasing attention. The basic idea is that the Framers of the Establishment Clause did not intend to adopt *any* particular right or principle of religious freedom, but rather intended simply to reconfirm in writing the jurisdictional arrangement that preexisted the Constitution and that no one wanted to alter: this was an arrangement in which religion was a subject within the domain of the states, not the national government.

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1 This interpretation, though it has gained support of late, is not new. It was advocated by scholars such as Joseph Snee shortly after *Everson v. Board of Education*, 330 U.S. 1 (1947), was decided. *See* Joseph M. Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U. L.Q. 371, 373. And of course, if the proponents of the construction are right, then this understanding was also held by the Framers themselves. *See* DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 62 (2002) (asserting that "this jurisdictional (or structural) view [of the wall of separation] . . . was virtually unchallenged in the founding era").

The jurisdictional interpretation of the Establishment Clause has been advocated in one or another version by prominent scholars including Akhil Amar[2] and Philip Hamburger[3] and also, recently, by Justice Clarence Thomas.[4] But it has been opposed by other prominent scholars, including Douglas Laycock,[5] Kent Greenawalt,[6] Noah Feldman,[7] and Steven Green.[8] And of course it has not been accepted by the Supreme Court as a whole.

My own position in this debate is slightly awkward. Just over a decade ago, I argued at length for a jurisdictional interpretation of the Establishment Clause (and, for that matter, of the Free Exercise Clause, as well).[9] Other contributions to the debate often list me as a defender of that construction.[10] And I have to confess that despite both specific criticisms of that construction and also familiar challenges to the idea of "original intention" in general, I continue to find the jurisdictional interpretation persuasive—*as an account of the original purpose and understanding*, that is. At the same time, when I read the criticisms made by Laycock, Greenawalt, Feldman, and Green, I find that I agree with ninety percent—well, . . . maybe something more like seventy-five percent—of what they say, as well.

So, how to account for this peculiar situation? Mental mushiness is an obvious possibility. Bracketing that explanation, though, it seems to me that although there is some genuine disagreement here, much of the debate reflects misunderstandings about what the juris-

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2 AKHIL REED AMAR, THE BILL OF RIGHTS 32–42 (1998).

3 PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 101–07 (2002). Hamburger describes the First Amendment as imposing on the national government a "non-cognizance" restriction toward religion. *Id.* at 101.

4 Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 49–50 (2004) (Thomas, J., concurring in the judgment). For other notable supporting scholarship, see DREISBACH, *supra* note 1, at 55–70; Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1130–35 (1988); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1089–99 (1995).

5 Douglas Laycock, *The Supreme Court, 2003 Term—Comment: Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 241–43 (2004).

6 Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479 (2006).

7 *See, e.g.*, NOAH FELDMAN, DIVIDED BY GOD 46–50 (2005).

8 Steven K. Green, *Federalism and the Establishment Clause: A Reassessment*, 38 CREIGHTON L. REV. 761, 767–68 (2005).

9 STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM 17–54 (1995). On the Free Exercise Clause, see *infra* notes 134 and 141.

10 *See, e.g.*, Laycock, *supra* note 5, at 241 n.545.

dictional interpretation actually holds. At least some of those misunderstandings may trace back to slipperiness in the very concept of "jurisdiction." So in this Article I want to review the debate, explaining why I think the jurisdictional interpretation is persuasive, and to explore some of the difficulties generated by the concept of jurisdiction. Part I lays out the basic case for the interpretation. Part II considers two common objections and explains why they are not decisive. Part III considers another common objection, which leads into a discussion of the elusive concept of "jurisdiction."

I. THE PRIMA FACIE CASE FOR THE JURISDICTIONAL INTERPRETATION

This Part explains what the jurisdictional interpretation is, summarizes the evidence and the principal arguments favoring it, and notices some ambiguities that, while interesting, do not affect the interpretation's basic claim.

A. The Jurisdictional Story

Before becoming mired in the pros and cons of evidence and argument, it will be helpful to lay out the basic story supporting the jurisdictional interpretation of the Establishment Clause. As with any story or history, there is a question about where to begin. A natural starting point, though, might be the Philadelphia Convention in which Madison, Washington, Franklin, Wilson, and other luminaries met to draft the Constitution itself. As most students of the subject know, the delegates to the Philadelphia Convention discussed whether to attach a bill of rights to the document they would shortly be sending to the states for ratification, but they decided against doing this—largely because they believed (or at least *said* they believed) that since the national government would have only those delegated or enumerated powers given to it in the Constitution, there was no need to set out a list of rights qualifying powers not possessed by the government in the first place.[11] Indeed, as Publius later emphasized, it might even be dangerous to list such rights, because such a list would imply that the national government's powers would otherwise be expansive enough to threaten such rights: and this was an inference that the delegates wanted to forestall.[12]

So there was initially no bill of rights—and hence no provision recognizing any right of citizens to religious freedom. The Constitu-

11 For a more careful discussion of the point, see STEVEN D. SMITH, THE CONSTITUTION AND THE PRIDE OF REASON 31–47 (1998).

12 THE FEDERALIST NO. 84, at 481–82 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

tion *did* contain a provision forbidding the imposition of religious tests as a qualification for holding office in the national government.[13] That provision would have seemed apt, because of course national offices would be created and qualifications would be imposed, and political offices in this country had often carried religious qualifications of one sort or another: so if the delegates didn't want religion to be one of those qualifications, it would be prudent to say so.[14] But since it was assumed that the national government's powers did not extend to regulating religion, there seemed to be no need to adopt any right or principle of religious freedom.

When the delegates were sufficiently satisfied with the Constitution they had drafted, they sent it on to the states, where the subjects—of a bill of rights, and of religious freedom in particular—came up again. The supporters of the Constitution took the same position they had taken in the Philadelphia Convention: no bill of rights and no explicit protection of religious freedom were necessary because the delegated powers of the national government did not extend to religion, anyway. In this spirit, James Madison assured the Virginia ratifying convention that "[t]here is not a shadow of right in the general government to intermeddle with religion. Its least interference with it would be a most flagrant usurpation."[15] In the same vein, Richard Dobbs Spaight told the North Carolina convention that "[a]s to the subject of religion, ... [n]o power is given to the general government to interfere with it at all. Any act of Congress on this subject would be a usurpation."[16]

Opponents of the Constitution remained skeptical; they thought (presciently, as it soon turned out) that under a notion of implied powers or perhaps under the Necessary and Proper Clause, the national government might be able to do all manner of things for which no explicit textual authorization could be cited. Partly in response to this criticism, and to forestall efforts to convene a second constitutional convention, and under Jefferson's influence, and perhaps also

13 U.S. CONST. art. VI. For an insightful discussion of this provision, see Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. RES. L. REV. 674 (1987).

14 Madison gave essentially this explanation in correspondence with Edmund Randolph. For a discussion, see Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understandings, Modern Misreadings*, 43 VILL. L. REV. 17, 94–95 (1998).

15 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 330 (William S. Hein & Co. 1996) (2d ed. 1891) [hereinafter ELLIOT'S DEBATES].

16 4 *id.* at 208.

as a necessary concession to secure the support of Baptists whose votes he needed to beat out James Monroe for a congressional seat, James Madison was eventually persuaded to support the addition of a bill of rights to the Constitution.[17]

Many of his congressional allies and colleagues remained unconvinced, however. And given the formidable task they faced of setting up a whole new government more or less from scratch, they expressed impatience when Madison, fulfilling a campaign promise, introduced such a measure in the House of Representatives.[18] One representative declaimed on "the inexpediency of taking up the subject at the present moment, . . . while matters of the greatest importance and of immediate consequence were lying unfinished."[19] Madison's response was conciliatory, almost apologetic. Perhaps the critics were correct in saying that a bill of rights was superfluous, but some citizens and some states had demanded one, and he had become persuaded that adding a bill of rights could do no harm and might do some good. Madison assured his congressional colleagues that his proposal contained nothing in any way controversial—specific provisions would be limited to those that would "meet with unanimous approbation"[20]—so that the whole business of a bill of rights might be taken care of "if Congress will devote but one day to this subject."[21]

The prediction proved to be overly optimistic—but not by much. So various rights and protections that have since generated libraries of analysis and interpretation were proposed and passed with just a few minutes of lackluster discussion. The congressional complacency is almost palpable in the record. Consider in this respect the Cruel and Unusual Punishment Clause—about which scholars and death penalty opponents and proponents have since written volumes of articles and legal briefs. After the provision was read to the House on August 17, 1789, two people spoke. William Smith of South Carolina objected to the words as "being too indefinite."[22] Samuel Livermore of New Hampshire agreed: the provision sounded humane, Livermore conceded, but who could tell whether it might preclude punishments such as whipping or cutting off of ears—punishments that are "some-

17 For a discussion of Madison's change of heart on the subject, see Paul Finkelman, *The Ten Amendments as a Declaration of Rights*, 16 S. ILL. U. L.J. 351, 382–85 (1992).

18 1 ANNALS OF CONGRESS 424–31 (Joseph Gales ed., 1789).

19 *Id.* at 424–25 (statement of Rep. William L. Smith).

20 *Id.* at 424 (statement of Rep. James Madison).

21 *Id.* at 431.

22 *Id.* at 754 (statement of Rep. William L. Smith).

times necessary."[23] No one so much as bothered to answer these objections: the record merely reports that after Livermore's remarks "[t]he question was put on the clause, and it was agreed to by a considerable majority."[24]

Although representatives may have taken little interest in provisions like the Cruel and Unusual Punishment Clause, however, one might have supposed that they would necessarily have engaged more carefully with provisions dealing with religion. In the preceding centuries, after all, religious differences had produced long and bloody wars in Europe and, in England, a destructive civil war. And religion had been heavily regulated by European governments. Many of the "freedom-loving colonials" (as Justice Black quaintly described them in *Everson v. Board of Education*[25]) resented this sort of interference, and indeed many had come to this country, as we recall each Thanksgiving, to escape such impediments to the practice of their religion. But in due course, religion had been closely regulated here as well, and such regulation had been the source of recurring controversies on these shores. Within the decade just preceding the adoption of the Bill of Rights, for example, the leading states of Virginia and Massachusetts had adopted or modified state provisions dealing with the subject—these states had reached radically different conclusions, by the way—and in both cases these measures had generated wide-ranging argument and disagreement.[26] The subject was thus very much on people's diversely-oriented minds.

So it might seem that religion would be one matter that the Bill of Rights-drafting Congress would be unable to deal with casually. And yet it did. Leonard Levy describes the overall deliberation:

> The debate was sometimes irrelevant, usually apathetic and unclear. Ambiguity, brevity, and imprecision in thought and expression characterize the comments of the few members who spoke. That the House understood the debate, cared deeply about its outcome, or shared a common understanding of the finished amendment seems doubtful.
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> Not even Madison himself, dutifully carrying out his pledge to secure amendments, seems to have troubled to do more than was

23 *Id.* (statement of Rep. Samuel Livermore).

24 *Id.*

25 330 U.S. 1, 11 (1947).

26 *See* LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE 58–75 (1994) (discussing the relevant Virginia provisions and the public's reaction thereto); *id.* at 29–42 (discussing the relevant Massachusetts provisions and the public's reaction thereto).

> necessary to get something adopted in order to satisfy the popular clamor for a bill of rights. . . .[27]

So, what should we make of this apathetic performance? If we suppose that Congress was adopting a religious freedom provision—one intended to govern the nation on this important subject for generations to come—then Congress's complacency seems inexcusable (as the tone of Levy's observation implies); but more than that, it seems almost inexplicable. How *could* a measure governing a matter so momentous, and about which so many Americans cared so passionately, slip through both houses of Congress with only a few minutes of desultory discussion? Or, even if we can somehow account for this curious development, we would expect the measure to generate fierce debate when it was submitted to the various states for ratification. But it didn't: it was approved in the states with apparently as little interest as it seems to have provoked in Congress.[28] So it would be as if, after decades of passionate debate on abortion, someone today were to propose in Congress some substantive resolution of the whole issue, and this measure were to sail through both the House and the Senate while receiving only the most casual attention, and then to be greeted with yawns in the ratifying states. If a movie director were to try to pass off that sort of story, he would surely get "two thumbs down" for overburdening the audience's credulity.

The jurisdictional version of the story unfolds differently. In this account, as we have seen, virtually everyone in the country—supporters and opponents of the Constitution alike—agreed from the outset that religion had been and should continue to be a matter within the domain of the states: it should not be transferred to the jurisdiction of the national government. The Constitution's supporters had argued that the unamended Constitution already left this jurisdictional arrangement intact—by not including religion among the powers delegated to Congress. Opponents were understandably distrustful, because they doubted that the strategy of enumerating powers could limit national power as effectively as supporters sanguinely promised; they foresaw what now seems inevitable—that implied powers would enlarge the national jurisdiction. So the Constitution's supporters agreed to put the limitation in writing: they added a provision *expressly declaring* that "Congress shall make no law . . . ."[29] and so forth: we will

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27 *Id.* at 99.

28 For a summary of the ratification process in the states, see THOMAS J. CURRY, THE FIRST FREEDOMS 215–16 (1986).

29 U.S. CONST. amend. I.

need to look at the particular language of the disclaimer more closely later.

In this respect, the Establishment Clause (and the First Amendment generally) are importantly different from the provisions in Amendments two through eight. Those provisions appear to set forth restrictions on powers that Congress *did* have (or at least *might* turn out to have); often they did this by listing substantive rights that the national government and (since "incorporation") the states are not supposed to infringe. It may be, as opponents of the jurisdictional construction sometimes contend, that those provisions were adopted on what the Framers thought to be the counterfactual supposition that the national government did, or might, otherwise have power ample enough to threaten those rights[30] (although in fact it is hard to see how this supposition could have been thought to be counterfactual in the case of, say, the Cruel and Unusual Punishment Clause[31]). So those provisions might be regarded as manifestations of a sort of "fallback strategy": the primary protection for rights was supposed to be the enumerated powers strategy that would limit national power so that it would not threaten rights in the first place, but just in case that strategy should prove insufficient some of the most important rights would be explicitly listed, anyway.

The First Amendment worked differently, as its distinctive wording suggests: it *reenforced* the strategy of limiting governmental power by explicitly declaring that Congress—and hence, in those days of innocent or at least professed faith in the efficacy of separation of powers, the national government as a whole[32]—lacked power over particular subjects. "*Congress shall make no law . . . .*"[33] The ultimate purpose, to be sure, might be to protect rights; indeed, this was argua-

30 *See* Laycock, *supra* note 5, at 242 ("The Bill of Rights was debated on the *assumption* that without it, Congress could use its delegated powers in ways that interfered with the rights to be protected.").

31 Since the Constitution surely did authorize Congress to enact criminal laws on subjects within its jurisdiction, and hence to prescribe punishments for violations of those laws, it is hard to understand how anyone could have supposed that, absent some constraint, Congress simply had "no power" to impose punishments that might be cruel and unusual punishments.

32 The understanding is reflected in a sentence that Jefferson initially included in his famous "wall of separation" letter to the Danbury Baptist Association: "Congress thus inhibited from acts respecting religion, and the Executive authorised only to execute their acts, I have refrained from prescribing even occasional performances of devotion." Letter from Thomas Jefferson, President of the United States, to Danbury Baptist Association (Jan. 1, 1802), *in* DREISBACH, *supra* note 1, at 144, 144.

33 U.S. CONST. amend. I (emphasis added).

bly the ultimate purpose of the Constitution as a whole.[34] But the method for achieving that purpose was to adopt an express limitation on national jurisdiction.

B. Arguments and Evidence

At least in the abstract, this is a plausible story, I think. But then not every story that is plausible is in fact true (and some stories that are true may not seem very plausible). What are the arguments, and what is the evidence, showing that the Framers in fact understood the Establishment Clause as a jurisdictional provision?[35] The principal arguments, I think, can be summarized under three headings: the consensus/dissensus argument, the argument from complacency, and the textual argument.[36]

1. The Consensus/Dissensus Argument[37]

This argument works from the intuitively sensible premise that a legislature—and especially a legislature facing the immense challenges that confronted the First Congress—will prefer to adopt provisions that are supported by a consensus, and to avoid trying to legislate on questions about which substantial disagreement exists. At the time of the Founding, as suggested, citizens holding a variety of

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34 *See* SMITH, *supra* note 11, at 33.

35 This wording of the question is "intentionalist" rather than "textualist." I have argued elsewhere that for practical purposes there is little difference between these approaches, *see* STEVEN D. SMITH, LAW'S QUANDARY 144–45 (2004), but I try to notice where a practical difference arises. *See infra* notes 69–72 and accompanying text.

36 Post-enactment interpretations of the Clause may provide additional persuasive support for the jurisdictional interpretation, as Kurt Lash has argued at some length. Lash, *supra* note 4, at 1092–99; *see also* DREISBACH, *supra* note 1, at 55-70 (analyzing Jefferson's "wall of separation" metaphor). And I have argued elsewhere that Congress's contemporaneous and post-enactment behavior—its approval of legislative chaplains, for example, of Thanksgiving proclamations, and of assistance to religion in the territories and on Indian reservations—is most consistent with the jurisdictional interpretation. SMITH, *supra* note 9, at 29–30. I do not rely on that argument here. It still seems that congressional behavior of the time was *inconsistent* with "strict separationist" and "nonpreferentialist" interpretations of the Clause, and was *consistent* with a jurisdictional interpretation. But as many scholars have pointed out, it is always possible to explain away apparent inconsistencies by supposing that Congress did not fully grasp the implications of a newly-adopted principle, *see, e.g.*, Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 WM. & MARY L. REV. 875, 913 (1986), and this possibility is especially apparent with respect to a somewhat nebulous concept like "establishment of religion."

37 For a lengthier development of this argument, see Conkle, *supra* note 4, at 1132–35.

religious and political views—Christians and deists, Federalists and Anti-Federalists—could agree that religion had all along been within the domain of the states. In addition, the sorts of problems that had prompted so many Americans to want to establish a new and stronger national government had been political and economic in nature; a desire to regularize the treatment of religion had *not* provided the impetus for the creation of that new government. Hence, virtually all citizens could concur in supporting the jurisdictional arrangement under which religion remained within the domain of the states, rather than being transferred to the national government.

Conversely, on the question of the proper relation between religion and government, opinions differed substantially. One view, supported by centuries of tradition, defended jealously especially in the New England states, and recently reaffirmed in the Massachusetts Constitution of 1780,[38] held that the state had a responsibility to support religion—financially, symbolically and ceremonially, and through prohibitions on practices inconsistent with religion such as blasphemy and Sabbath-breaking.[39] A more daring and novel view, recently adopted after a contentious political struggle in Virginia, urged a greater separation between government and religion. With benefit of hindsight, it may seem clear to us that this more novel view was destined for ascendancy, but in 1789 such questions were very much in dispute: Virginians viewed their innovation as a "lively experiment."[40]

In this situation, it was only natural and sensible for Congress, and the states, to address the question of religion by affirming what everyone agreed on—namely, that religion was within the jurisdiction of the states, not the national government—and to avoid trying to resolve the issue about which believers of various sorts had been fighting for centuries, and on which prospects of real substantive agreement were small. Not surprisingly, that is just what the Framers of the Establishment Clause did.

The conclusion is nicely expressed by one of the leading critics of the jurisdictional construction. "There was not yet a consensus for disestablishment," Douglas Laycock explains, "which suggests that the

38 MASS. CONST. art. II.

39 For a helpful description of the Massachusetts system, see generally John Witte Jr., *One Public Religion, Many Private Religions: John Adams and the 1780 Massachusetts Constitution*, *in* THE FOUNDERS ON GOD AND GOVERNMENT 23 (Daniel L. Dreisbach et al. eds., 2004).

40 *See generally* SIDNEY E. MEAD, THE LIVELY EXPERIMENT 59–60 (1963) (describing the incorporation of religious freedom within the new government as an experiment, with an uncertain future).

Founders might not have been able to agree on a substantive understanding of the Establishment Clause. But they did not have to agree on disestablishment; they had to agree only on what powers they were denying to the federal government."[41] Indeed, Daniel Dreisbach marshals persuasive evidence that even Jefferson, the patron saint of strict separationists, in fact understood the Establishment Clause (and the "wall of separation") in this way.[42] "Jefferson," Dreisbach argues, "in short, acknowledged state sovereignty, rather than federal supremacy, in matters of religious liberty and establishment."[43] "Although Jefferson, no doubt, desired each state through its respective constitutions and laws to protect the natural rights of citizens, it is unlikely that he thought the First Amendment, with its 'wall of separation,' was the appropriate device to achieve this goal."[44]

What I am calling the consensus/dissensus argument has been directly challenged by scholars including Noah Feldman and Steven Green. I will return to that challenge in a moment. First, let us look at the other leading arguments in favor.

2. The Argument from Complacency

The jurisdictional interpretation also makes sense of a fact that scholars have sometimes found disconcerting, and that I have already suggested is on other interpretations puzzling. As noted, in drafting the Establishment Clause, members of Congress appear to have been profoundly apathetic about the measure. Their complacency is apparent, as noted, in their brief, lackluster discussions. But it is apparent as well in the way they altered and amended the particular words of what became the Establishment Clause.

Thus, some of the proposed drafts were worded in what appear to be equality terms: Congress should not make laws *preferring* one religion over another.[45] Other drafts lack this sort of language. In twentieth-century debates between "separationists" and "nonpreferentialists," advocates of the latter interpretation have sometimes made much of the first sort of proposals, arguing that their "no preference"

41 Laycock, *supra* note 5, at 241–42; *cf.* Conkle, *supra* note 4, at 1135 ("As a statement of general principle, the Establishment Clause would not have been enacted. As a statement of federalism, it was widely supported.").

42 DREISBACH, *supra* note 1, at 55–70.

43 *Id.* at 64.

44 *Id.* at 64–65.

45 Rodney K. Smith, *Nonpreferentialism in Establishment Clause Analysis: A Response to Professor Laycock*, 65 ST. JOHN'S L. REV. 245, 251 (1991) (quoting Laycock, *supra* note 36, at 879).

language reveals what Congress really had in mind.[46] Opponents of this interpretation, such as Laycock, draw just the opposite conclusion: the fact that such language was available but was not ultimately adopted shows that the Framers *rejected* the "no preference" position in favor of a more far-reaching measure.[47] But in fact the historical record saps confidence in either interpretation, because what it seems to reveal is a group of people bouncing around from one wording to another quite casually and without any clear sense of there being an important divide separating what would later be seen as antagonistic substantive positions.[48]

Consider, for example, the unexplained shift in the House from Samuel Livermore's proposal, which provided that "Congress shall make no laws *touching religion*"[49] and was adopted (in committee of the whole) by a vote of thirty to twenty-one, to the language that without explanation was later substituted for it: "Congress shall make no law *establishing religion* or to prohibit the free exercise thereof, or to infringe the rights of conscience."[50] Livermore's "no touching" version may seem *to us* much more unqualified and encompassing—modern separationists might fondly wish that Livermore's language had been retained—so we might expect that the shift to what seems a much narrower version must have been the result of considerable debate, and that it should have provoked much disagreement. But in fact there is no evidence of such debate or disagreement, and no indication that anyone in Congress cared much about the change. For that matter, there was virtually no debate *before* the approval of Livermore's apparently far-reaching measure; even in offering it Livermore emphasized that it probably had the same meaning as other versions and that "he did not wish them to dwell long on the subject."[51]

So, what should we make of this complacency? My suggestion is that this aspect of the legislative history, which might seem deeply puzzling or distressing, becomes quite understandable once we recognize that the Framers did not see themselves as doing the sort of thing we suppose they did or should have done—that is, as formulating for adoption into the Constitution some particular right or principle of religious freedom. *That* task would indeed have required more delib-

46 *See, e.g.*, *id.* at 254–58.

47 *See, e.g.*, Laycock, *supra* note 36, at 879–80.

48 *See* CURRY, *supra* note 28, at 207–15.

49 1 ANNALS OF CONGRESS 731 (Joseph Gales ed., 1789) (statement of Rep. Samuel Livermore).

50 *Id.* at 766 (statement of Rep. Fisher Ames).

51 *Id.* at 731 (statement of Rep. Samuel Livermore).

eration and debate, and it almost certainly would have provoked much greater controversy (as it did when it came up on the state level). But if the Framers saw themselves as merely putting into writing a jurisdictional allocation on which virtually everyone agreed anyway (and that was already implicit, most of them believed, in the original Constitution), then it is understandable that they did not see the need to waste words or thought on the measure. Thus, Thomas Curry explains that "[b]ecause it was making explicit the non-existence of a power, not regulating or curbing one that existed, Congress approached the subject in a somewhat hasty and absentminded manner."[52]

It is true, as I have noted, that there wasn't much discussion of other provisions, either—even of provisions that seem unmistakably to have recognized or created substantive rights. We might imagine that if the Framers could have foreseen debates over the Cruel and Unusual Punishment Clause, for example, or if they had anticipated what modern courts would do with, say, the provisions governing police interrogations or searches and seizures, they might have spent a bit more time considering and refining those provisions, as well. This fact may seem to reduce the force of the argument from complacency: it was not only jurisdictional measures that were treated casually.

But then that is not exactly the argument anyway. Recall Madison's promise that his proposed amendments would steer clear of anything controversial; they would include only measures that would "meet with unanimous approbation."[53] The distinction between "uncontroversial" and "controversial" hardly lines up cleanly with the distinction between jurisdictional measures and nonjurisdictional rights or principles: some jurisdictional measures might well have been highly controversial, while some substantive rights and principles might not have been. Thus, the paucity of discussion regarding some provisions in the Bill of Rights—the Cruel and Unusual Punishment Clause, for example—can be explained by noting that the Framers were approving venerable rights already long established in English law.[54] Such rights were not novelties—both their value and their meaning were supported by a long history—and so the Framers could in essence simply incorporate that history by reference (even

52 CURRY, *supra* note 28, at 216.

53 1 ANNALS OF CONGRESS 424 (Joseph Gales ed., 1789) (statement of Rep. James Madison).

54 *See* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 124–27 (2004).

without going to the trouble of carefully familiarizing themselves with that history).

The same surely could not be said of any sort of anti-establishment principle: such a principle would have gone *against* the flow of centuries of history. What was familiar and uncontroversial in *this* particular provision, rather, was the jurisdictional arrangement whereby religion was a matter for the states.[55] The Framers' complacency in this context is consistent with the hypothesis that this arrangement is what they were ratifying in the Constitution.

3. The Textual Argument

The jurisdictional interpretation is further strengthened by the actual text that the Framers ultimately adopted to express their decision. As noted, the language of the First Amendment is distinctive: it begins with the declaration that "Congress shall make no law." Such language seems nicely calculated to express a denial of legislative jurisdiction over a subject.

Akhil Amar perceptively observes that this wording seems to have been chosen as an explicit contrast to and qualification of the Necessary and Proper Clause—which, as Madison acknowledged, was the clause that opponents of the Constitution feared might support implied powers over subjects including religion:

> The First Amendment intentionally inverted the language of the Necessary and Proper Clause, which stated that "Congress shall have Power To . . . make all Laws which shall be necessary and proper . . . ." Note how the First Amendment, which read unlike any other, tracked and reversed this language: "Congress shall make no law . . .," meaning that Congress simply had no enumerated power over either speech or religion.[56]

Kent Greenawalt finds Amar's textual argument "not powerful," and he contends that "[m]uch of the rest of the Bill of Rights concerns evils that may occur without legislation, particularly in the administration of courts. That is an obvious reason why they are not

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55 *Cf.* CURRY, *supra* note 28, at 204 ("On the matter of the violation of the rights of conscience, Madison would clearly have agreed with the New England Baptists, but equally clearly he did not intend that his proposed amendments make any alteration in the relationship between the federal government and the states. Repeatedly, in his correspondence, as well as in his speeches, he asserted that he sought achievable amendments that would eschew controversy and gain ratification of three-fourths of the states, and that he would oppose any proposal that altered the Constitution.").

56 Akhil Reed Amar, *Anti-Federalists,* The Federalist Papers, *and the Big Argument for Union,* 16 HARV. J.L. & PUB. POL'Y 111, 115 (1993) (footnotes omitted).

framed explicitly in terms of restraints on Congress."[57] This is an intriguing suggestion, but I am not sure how persuasive it is. *Today*, of course, the distinction proposed by Greenawalt would be wholly untenable, because the sorts of "evils" thought to violate the Establishment Clause may also easily "occur without legislation." Suppose a judge decides to place a large monument of the Ten Commandments on the courthouse grounds. Or a school district decides to require students to read the Bible or recite the Lord's Prayer each day.

I suppose Greenawalt's claim must be that at the time of the Founding, *the Framers would have supposed* that the evils targeted by the Establishment Clause could occur only pursuant to legislation, and that the evils targeted by other provisions could occur without legislation. Maybe. For myself, though, it is hardly obvious that the Framers would have supposed either of these things. Would it have seemed clear that only legislatures could bring about the evils associated with establishment—that neither judges nor executive officials could bring about such evils?[58] Or that the evils with which other provisions were concerned (cruel and unusual punishments, for instance, or takings of private property) were likely to occur *without* legislative authorization? I don't know.

Even if the Framers did suppose these things, moreover, Greenawalt's conjecture does not supply any reason why the Framers *needed* to use the "Congress shall make no law" language that does not appear in the other amendments. Congress could have just stated the substantive right or principle, anyway, as it did in the other amendments, even if it supposed that threats to such a right or principle would likely come only from Congress. And indeed, the "Congress shall make no law" language was an adaptation of earlier drafts that read, for example, "nor shall any national religion be established."[59] Following the form used in other provisions might seem the more natural course, so the Framers' eventual choice of a distinctive form for the First Amendment still seems suggestive of some distinctive intent or character.

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57 Greenawalt, *supra* note 6, at 490.

58 Greenawalt's nonjurisdictional explanation of the First Amendment's distinctive "Congress shall make no law" language would need to assume as well that the Framers would have supposed that neither judges nor executive officials could threaten the other values covered by the amendment—freedom of speech and of the press—without legislative authorization.

59 1 ANNALS OF CONGRESS 434 (Joseph Gales ed., 1789) (statement of Rep. James Madison).

In any case, Amar's central point is that the language of "shall make no law" sounds like a denial of power—of jurisdiction.[60] That point is not dependent upon any claim of distinctiveness. The absence of similar language in other provisions is relevant only because the contrast serves to underscore the jurisdictional character of the First Amendment's text. Even if Greenawalt's conjecture is correct, it does not negate that character.

C. *Two Refinements*

Having summarized the basic jurisdictional story and the principal arguments supporting that story, I should now consider two more refined questions that I have thus far deferred. We will then be able to proceed to consider the major criticisms of the jurisdictional interpretation.

1. Jurisdictional or Federalist?

Is it better to refer to the interpretation proposed here as a "jurisdictional" interpretation or a "federalist" interpretation? Both labels have been used, and for the most part, in this context, they seem interchangeable. The basic idea, once again, is that Congress and the states added the Establishment Clause to the Constitution to confirm in writing the *federalist* arrangement in which religion was within the *jurisdiction* of the states, not of the national government. You could use either term—federalist or jurisdictional—to describe that idea. Indeed, there is nothing magical about the term "jurisdiction." People of the founding period expressed the basic idea in various locutions—no "power," no "cognizance," no "authority," no "right" in the general government to regulate. The text of the Constitution usually uses the terms "Power" or "Powers" to convey the basic idea, as in the assignments of legislative, executive, and judicial jurisdiction in Articles I, II, and III.[61] Modern scholars also differ in the labels they use to designate the different meanings.[62] The differing vocabulary can be—and has been—a source of some confusion. But in the end, nothing much should turn on which label we use.

So for most purposes either term—"federalist" or "jurisdictional"—is acceptable. But as Kent Greenawalt shows in a careful dis-

60 Amar, *supra* note 56, at 115.

61 U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

62 For example, Greenawalt uses the label "jurisdictional" to describe an interpretation that I think might better be called "federalist"; what I am here calling the "jurisdictional" interpretation, Greenawalt calls the "no power" interpretation. Greenawalt, *supra* note 6, at 487.

cussion, a difference may arise if we consider the question of Congress's power over religion in federally controlled areas, such as the territories or the District of Columbia.[63] In these areas, the national government essentially occupies the position that the state governments occupy in their own domains. So here what I would call the "federalist" and "jurisdictional" interpretations subtly diverge. If the Establishment Clause was truly and merely "federalist," in other words, then it might logically follow that in federally controlled areas, the national government continued to possess whatever powers the state governments admittedly retained within their own domains—power to establish a church, for example.[64] Conversely, if the Establishment Clause was "jurisdictional" in the sense that it deprived Congress and the national government of power over religion, then no such national power would exist—even in federally controlled areas. "No law," as Justice Black might say, means "no law"![65]

So here we have a choice. Which is it: "federalist" or "jurisdictional"? It is important to note that, so far as I know, there is no evidence that the Framers of the Establishment Clause addressed or perhaps even thought about this question. Recall Madison's response to objections at the Virginia ratifying convention, offered at a time when the First Amendment did not yet exist. We needn't worry about national involvement with religion, Madison urged, because "[t]here is not a shadow of a right in the general government to intermeddle with [it]."[66] From our vantage point, and instructed by discussions such as Greenawalt's, we might say that Madison was simply wrong: surely under the unamended Constitution the national government *would* have had power to regulate religion in the territories. But his opponents did not correct Madison on this point, it seems, because like him, they just weren't worrying about the territories—not in that particular conversation, anyway.

Later, essentially the same exchange occurred in the congressional discussion of the Establishment Clause. Objecting to any provision on the subject of religion, Roger Sherman insisted that "the amendment [is] altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution, to make

63 *Id.* at 484–90.

64 As noted, Greenawalt uses the term "jurisdictional" to describe this position. *See supra* note 62.

65 Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring) (emphasis omitted).

66 3 ELLIOT'S DEBATES, *supra* note 15, at 330.

religious establishments."[67] Madison conceivably might have responded that Sherman was mistaken because, absent some disclaimer, Congress *would* have power to establish religion in the territories, where its power would be more plenary. But he didn't say this—among other reasons, probably, because such a response would have seemed a mere distraction. In that particular context, people weren't worrying about the territories. So instead, Madison responded by conceding that Sherman might be right but that it wouldn't hurt to appease the suspicious by putting this understanding in writing.[68]

So then, what should we conclude from these exchanges? Given the Framers' inattention to the particular question, is the Establishment Clause best construed as "federalist," or "jurisdictional"?

It is an interesting question, though likely one for which no definitive answer is possible. For present purposes, in any case, the crucial point is that either answer is perfectly compatible with the basic position being argued for here. Thus, Greenawalt argues that it is most sensible to construe the Establishment Clause as restricting Congress's powers even in the territories.[69] He may be right. As Greenawalt emphasizes, the Clause's wording offers strong support to his view. The text *says,* flatly, "Congress shall make no law"[70]: there is no qualification or exception for federally controlled areas.[71]

But the other conclusion is also possible. Suppose—we can leave it to creative deconstructionists to fill in the fictional details—that we are back in 1819, say, and that some national consensus develops that regards it as urgent to establish the Methodist Church as the official church for, say, the territory of Kansas. A few lonely dissenters object that the First Amendment forbids this: the Amendment says that "Congress shall make no law,"[72] and it doesn't contain any exception for federally controlled territories. Under the pressing weight of our consensus, I expect it would be easy enough for us, and the courts, to dismiss this objection, probably quite peremptorily. "The provision

67 1 ANNALS OF CONGRESS 730 (Joseph Gales ed., 1789) (statement of Rep. Roger Sherman).

68 *Id.* at 730.

69 Greenawalt, *supra* note 6, at 486.

70 U.S. CONST. amend. I.

71 *See* Greenawalt, *supra* note 6, at 484–85; *cf.* Thomas C. Berg, *Religion Clause Anti-Theories,* 72 NOTRE DAME L. REV. 693, 717 (1997) ("But the notion that Congress would be entirely unconstrained in making laws in the territories—that it could with impunity establish a religion or prohibit religious belief—however accurate as an interpretation of the historical record, is simply too inconsistent with the text, which says 'Congress shall make *no* law,' to serve as a legal standard." (quoting U.S. CONST. amend. I)).

72 U.S. CONST. amend. I.

surely doesn't mean *that*," we would say (and, as properly attuned, right-thinking people, we would *believe*). "Obviously, we mustn't be too literalistic in these matters. True, there's no *express* exception. But we know perfectly well that the enactors weren't thinking about the territories: it was only Congress's powers vis-à-vis the states that they were addressing. That the Framers meant to deprive Congress of a necessary power when it was *acting in the role of a state*—a power that the Constitution carefully left undisturbed in the states themselves—is an opinion too extravagant to be maintained."

Of course, the circumstances that would make this response seem reasonable or even compelling do not in fact exist at present, and so perhaps the most attractive course is to construe the Establishment Clause as having limited Congress's power even in federally controlled areas, as Greenawalt does. For present purposes I am happy to acquiesce in Greenawalt's view, and I would suggest that this construction is best expressed by calling the interpretation preferred here a "jurisdictional" interpretation. But if you favor the other alternative and hence prefer to say that the Establishment Clause was a "federalist" provision, that is alright, too. The live issue is whether the Establishment Clause was meant to constrain the national government, even in the domain in which it *did* have authority to act, by adopting some right or principle of religious freedom or whether, conversely, the provision was merely intended to deprive the national government of jurisdiction over the subject (either categorically or vis-à-vis the states). Both the "jurisdictional" and "federalist" interpretations are versions of the latter alternative.

2. Complete or Limited Disclaimer of Jurisdiction?

The argument thus far has suggested that the Establishment Clause was intended as a disclaimer of national jurisdiction. But jurisdiction *over what?* The obvious answer is: "jurisdiction *over religion.*" But was the disclaimer of national power over religion total, or merely partial?

As we have seen already, supporters of the Constitution sometimes talked as if the national government had no power over religion, period. Recall again Madison's statement to the Virginia convention: "[t]here [was] no shadow of a right in the national government to intermeddle with religion."[73] And at one point, as also noted, the House adopted a draft that seemed to say that Congress would have no power whatsoever over religion: "congress shall make

73 3 ELLIOT'S DEBATES, *supra* note 15, at 330; *see supra* note 15 and accompanying text.

no laws *touching* religion."[74] The later and final versions seem to retreat from that more categorical denial, though, and this might lead us to suppose that in the end, Congress decided in favor of a partial renunciation of jurisdiction. The disclaimer of national power applied not to "religion" as a whole (whatever that is), but only to laws "*respecting an establishment of religion*, or prohibiting the free exercise thereof" (whatever those things might mean[75]).

This seems a plausible conclusion. Once again, I don't think we can have absolute confidence, in part because it is not clear that the Framers ever really focused on the differences between, say, Livermore's "no touching" version and those that replaced it.

In retrospect, however, I think we *can* say two things with some confidence. First, we can see, and hence say, that it would have been impossible for the national government to exercise "*no* power" over religion in any very literal or absolute sense of the phrase. Consider, for example, David Steinberg's objection.[76] Suppose that under its delegated powers, Congress enacts a military conscription law. The law either *will* exempt religious objectors or it *will not* exempt them: either way, the law will "touch" and affect religion.[77] But, second, we can also see, and hence say, that the Framers may have overlooked this impossibility—through inattention or perhaps through calculation—and so tried or purported to do something that they could not actually have done. We can understand, that is, that it might have seemed possible, or at least convenient for supporters of the Constitution to *say*, that the national government would have *no* power, period, over religion. After all, even today, with the benefit of two centuries of hindsight, people still say similar things—quite often, actually—about both national and state governments.

So, what do these observations add up to? It might be that the enactors of the Establishment Clause actually intended to deny *all*

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74 1 ANNALS OF CONGRESS 731 (Joseph Gales ed., 1789); *see supra* note 49 and accompanying text.

75 To argue for a jurisdictional interpretation of the Establishment Clause is not to propose any answer to the question of what an "establishment of religion" was. Douglas Smith argues that for the founding generation, to "establish" religion meant to give a special corporate charter to a church. Douglas G. Smith, *The Establishment Clause: Corollary of Eighteenth-Century Corporate Law?*, 98 NW. U. L. REV. 239, 240 (2003). Others have obviously understood the term more broadly. *See, e.g.*, Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 339 (1996).

76 David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 NOTRE DAME L. REV. 987 (1999).

77 *Id.* at 1005. Steffen Johnson uses the same example to make the same point. Steffen N. Johnson, 14 CONST. COMMENT. 365, 369 (1997) (reviewing SMITH, *supra* note 9).

power over religion to the national government: they intended to do this, perhaps, but they (inevitably) failed. It is also possible, though, and more charitable to suppose, that the Framers realized that a categorical disclaimer of power over "religion" would be in vain, and they accordingly withdrew from the national government only the power to make laws "respecting an establishment of religion, or prohibiting the free exercise thereof."[78] Once again, either choice is compatible with the basic claim of the jurisdictional interpretation.

II. Two Objections

Having laid out the prima facie case for the jurisdictional interpretation and acknowledged some of its ambiguities (which may be irresolveable as a purely historical matter but are not crucial to the jurisdictional interpretation's central claim), we can proceed to consider objections. I have described the major arguments in support of that interpretation under three main headings. The main objections can be placed under three headings, as well: with apologies for their awkwardness, I will call these the "substantive content" objection, the "consensus in principle" objection, and the "more than state establishments" objection.

Perhaps the most common and influential objection simply points to the undeniable fact that the Establishment Clause *did* have substantive content and *did* impose substantive limits on the national government. The quick answer to that objection is "of course," but the objection raises issues that are complicated and hence that I will defer for more leisurely discussion in the next Part. In this Part we can look at two other common objections that I believe can be addressed more summarily—by, for the most part, agreeing with them.

A. The "Consensus in Principle" Objection

One of the main arguments for the jurisdictional interpretation, as discussed, asserts that at the time of the Founding there was a general consensus that religion should be within the domain of the states, but there was substantial disagreement about the proper relation between religion and government.[79] Some critics—Noah Feldman[80] and Steven Green,[81] in particular—directly challenge this argument, . . . or at least half of it, or at least a quarter of it. So far as I can

78 U.S. Const. amend. I. Some critics seem to assume that a disclaimer of jurisdiction would have to be total, not partial. The question is discussed *infra* Part III.B.1.

79 *See supra* Part I.A.

80 Feldman, *supra* note 7, at 46–50.

81 Green, *supra* note 8, at 767–68.

tell, none of the participants in this debate denies that most Americans agreed that religion was properly within the domain of the states. These critics thus concede, I think, that the Establishment Clause had a jurisdictional dimension, and that it confirmed the pre-constitutional jurisdiction of the states over most matters of religion.[82] Nor do the critics deny the existence of significant disagreements about the proper relation between government and religion. But these critics argue that above (or would it be beneath?) the disagreements there was also substantial consensus on certain general principles; and these principles, they argue, could have been—and were—adopted in the First Amendment.

The most common and compelling claim asserts that Founding-era Americans agreed in approving a principle of freedom of conscience.[83] Other scholars make an essentially similar point by asserting a generally shared view favoring "voluntarism" in religion.[84] This claim is probably correct. I suspect, that is, that if Americans had been asked in 1789 whether they believed that "freedom of conscience" should be respected or that religion should be "voluntary," most of them would have said, "Yes, of course I believe that. Who doesn't?"[85]

To be sure, Americans differed substantially on what freedom of conscience meant, and many of them favored measures that today would typically be regarded as blatantly inconsistent with freedom of conscience—the criminalization of blasphemy, for example. But they *said*—and they *thought* they believed—that freedom of conscience in itself was a good thing. I further concede that Feldman and Green are correct in observing that the enactors of the First Amendment wanted to protect the free exercise of religion against possible infringements by the national government.[86] And they supposed that by denying federal jurisdiction over the subject they had done just that: it is perfectly possible, as we will discuss later, to protect a right against

82 Indeed, Steven Green provides considerably more evidence supporting the jurisdictional interpretation than I have done here. *See id.* at 768–73.

83 FELDMAN, *supra* note 7, at 27–33. For Feldman's more developed argument, see Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346 (2002). *See also* Green, *supra* note 8, at 775 ("Moreover, Americans throughout the fourteen nascent states agreed that freedom of religious conscience was an essential right.").

84 *See, e.g.*, Berg, *supra* note 71, at 709; Steinberg, *supra* note 76, at 1020–21.

85 In fact, for what it is worth (not much), I would go farther along this road than the critics do: I happen to think that if the questions were framed carefully, most educated people throughout the immediately preceding centuries would have given much the same answer to that question posed in the abstract.

86 FELDMAN, *supra* note 7, at 47; Green, *supra* note 8, at 763.

possible intrusions from a particular institution by denying that institution jurisdiction over the right.[87]

So there was consensus, at some level of abstraction, about freedom of conscience, or about the voluntary character of religion.[88] What follows?

If the only argument for the jurisdictional interpretation were the argument from consensus/dissensus, then I suppose that the identification of some area of consensus would count heavily against that interpretation. Even then, the identification of an area of consensus would show only that the Framers *could have* adopted a nonjurisdictional provision, not that they actually did so: "could have," "might have," and even "ought to have" do not add up to "*did*." The critics' concession that the Establishment Clause placed the central questions of religion beyond the jurisdiction of the national government suggests that the Framers would not have seen any pressing *need* to submit themselves to any such open-ended right or principle, or to the vagaries of future interpretations of such a right or principle. Still, the demonstration of consensus would at least undermine one major argument for the jurisdictional interpretation.

As discussed, however, the consensus/dissensus argument is far from being the only one favoring the jurisdictional interpretation. That interpretation is supported as well by the argument from complacency,[89] and by the text itself, and possibly (though I have not developed the argument here) by contemporary congressional behavior or contemporary explications of the Clause's meaning.[90] So it seems to me that the challenge is turned around. Suppose that there was in the Founding period, at some level, a consensus about the value of freedom of conscience. What evidence is there that the Framers thought they were *enacting that principle into the Establishment Clause*?

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87 On the protection of a "right" through a jurisdictional means, see *infra* Part III.A.

88 Indeed, given our modern experience in manipulating the "levels of generality" in framing constitutional "principles," I think we can be virtually certain a priori that Founding-era Americans can be described as having generally agreed on *some* principle or set of principles concerning the relation between government and religion. If the consensus you want to hypothesize regarding some particular principle runs into difficulties in the historical record, all you need to do is adjust the principle to escape the uncooperative evidence.

89 Even if contending parties agree "in principle," that is, given the obvious fact of severe disagreement about what the principle means, one would not expect them blithely to enact the "principle" into binding, fundamental law without a little more discussion and more careful attention to wording.

90 *See supra* note 36.

At this point, proponents of the consensus argument face two obstacles. First, it has to count as an embarrassment to Feldman's view, I think, that despite their ostensible agreement in favor of freedom of conscience, in the end the Framers did not even put the term "freedom of conscience" into the text they adopted. The term *was* used in drafts that Congress considered, but in the end the enactors chose not to adopt those drafts. For reasons discussed earlier, I agree with Feldman that we cannot infer from this behavior (as Michael McConnell seems to do,[91] for example) that Congress considered and consciously *rejected* a right of freedom of conscience except insofar as conscience was grounded in religion. Still, the absence of the phrase in the final product hardly inspires confidence that the Framers were in fact adopting this right as a substantive matter, and just neglecting (or even self-consciously *declining*) to say so.

Second, even if the Framers were enacting a substantive and nonjurisdictional right to freedom of conscience, it seems most plausible to suppose that they put that right into *the Free Exercise Clause.* Free exercise of religion and freedom of conscience may have seemed (to them more than to us[92]) almost interchangeable concepts. But how does agreement over freedom of conscience get us to a nonjurisdictional interpretation of *the Establishment Clause*?

So far as I can see, Feldman tries to construct the bridge from a consensus on freedom of conscience to a nonjurisdictional Establishment Clause in two main ways.[93] First, he suggests that Founding-era Americans converged in believing that the use of tax dollars to sup-

91 *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1495 (1990).

92 *See* Steven D. Smith, *What Does Religion Have To Do with Freedom of Conscience?*, 76 U. COLO. L. REV. 911 (2005).

93 At times Feldman also seems to make the connection by begging the question. Thus, he argues that even though the Framers dropped "freedom of conscience" language from the Amendment, we have no reason to believe that they abandoned their belief in freedom of conscience, and since they did not articulate any "new theory of why establishment was wrong," they *must* have assumed that freedom of conscience was included in the Establishment Clause (even as they acted to delete language that would have said so). Feldman, *supra* note 83, at 404. But this suggestion merely assumes as a premise precisely what is in controversy—namely, that the Framers meant the Establishment Clause to embody some substantive principle or right of religious freedom—and then restates that premise as if it were now a conclusion. Conversely, if the Establishment Clause were a jurisdictional provision, then it would be perfectly understandable that the enactors might decide not to mention freedom of conscience without articulating any "new theory of why establishment was wrong": the enactors were not attempting to resolve the contentious question of *whether establishment was "wrong,"* but were merely making clear that this was not the national government's business.

port religion, a practice characteristic of "establishment," violated taxpayers' freedom of conscience; hence, a commitment to freedom of conscience as a substantive constitutional value entailed and required a commitment to nonestablishment as a substantive constitutional value.[94] But this claim can be readily rejected, because although *some* Americans (Jefferson, for example) asserted that public subsidies for religion violated the freedom of conscience of taxpayers, it seems clear that many other Americans disagreed.

After all, one major fact about the period that can scarcely be denied is that some states—Massachusetts and Connecticut, for example—continued to provide public financial support to religion until well into the nineteenth century, and they did so self-consciously and over the protests of dissenters like the Baptists.[95] So it seems that scholars like Feldman face a dilemma: either they must concede that there was no consensus connecting freedom of conscience to no-aid nonestablishment, or else they must relinquish their claim that freedom of conscience itself enjoyed the support of a consensus. Either way, the assertion that a consensus existed for a substantive, nonjurisdictional nonestablishment commitment fails.[96]

Second, Feldman and Green argue that, freedom of conscience aside, Founding-era Americans agreed that "establishment of religion" was a bad thing.[97] Americans disagreed dramatically, the argument goes, about whether the sorts of arrangements for supporting religion maintained in Massachusetts and Connecticut actually *were* "establishments" of religion: critics said yes and supporters said no. But Americans agreed that "establishment," whatever it was, was a bad thing. "For everyone," Feldman argues, "establishment" was a dirty word.[98]

Feldman's phrasing here—establishment was a "dirty word"—seems unhappily apt, because if this description were correct as a historical matter, it would seem to depict consensus not so much on any substantive "principle" as on a *word.* But in fact the description is highly dubious. Thus, in a study of the period, Laura Underkuffler-Freund reports "the common beliefs that religious establishments were necessary for the survival of both religion and "state," and she observes that "[a]lthough the belief that government establishment was necessary for the promotion (and even survival) of religion was

94 FELDMAN, *supra* note 7, at 33–42.

95 Green, *supra* note 8, at 778.

96 For further elaboration, see Steven D. Smith, *Taxes, Conscience, and the Constitution* 11–12 (Univ. of San Diego Sch. of Law, Working Paper No. 07-12, 2005), *available at* http://ssrn.com/abstract=803544.

97 Green, *supra* note 8, at 777–78; *see also* FELDMAN, *supra* note 7, at 42.

98 FELDMAN, *supra* note 7, at 42.

clearly not universal, it is found throughout the writings of this era."[99] Nor did supporters of such arrangement necessarily shy away even from the *word* "establishment." Thus, even much later, we find Theophilus Parsons, a delegate to the Constitutional Convention but now speaking as Chief Justice of the Massachusetts Supreme Court, defending the Massachusetts "establishment" of religion—with no apologies offered for the repeated use of the term.[100] And on the basis of the brief discussion in the First Congress, it is hard to reconcile Representative Benjamin Huntington's critically sarcastic commentary on Rhode Island's supposed provision that "no religion could be established by law,"[101] with the claim that all actors agreed in opposing the idea of "establishment."

It is true, as Feldman and Green point out, that even defenders of the New England church-state partnerships sometimes *said* that these were not really even "establishments."[102] In heated political debates, people often make a range of arguments, or plead in the alternative. And the term "establishment" has, and had, no single or fixed meaning. So we should not be surprised to find that, faced with antiestablishment opposition, New England traditionalists did just this. "State-established religion is proper and necessary," they might say; "and in any case our own arrangements are 'mild and equitable' or 'slender' establishments:[103] in fact, they aren't exactly 'establishments' at all (at least in the bad sense of the term)."[104] Given the New Englanders' obvious support for state-maintained religion on various levels, to assert on the basis of such "in the alternative" rhetoric that traditional-

99 Laura Underkuffler-Freund, *The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory*, 36 WM. & MARY L. REV. 837, 934–35 (1995).

100 *See* Barnes v. First Parish, 6 Mass. (5 Tyng) 400, 406 (1810).

101 Huntington observed that "[b]y the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it." 1 ANNALS OF CONGRESS 730 (Joseph Gales ed., 1789) (statement of Rep. Benjamin Huntington). Given Rhode Island's reputation for disorderliness, the sarcasm in Huntington's comment is palpable.

102 FELDMAN, *supra* note 7, at 41; Green, *supra* note 8, at 778.

103 Green quotes John Adams's defense of the Massachusetts arrangement as a "slender" establishment. Green, *supra* note 8, at 782 (quoting Isaac Backus, *A History of New England (1774–75), reprinted in* 5 THE FOUNDER'S CONSTITUTION 65 (Philip Kurland & Ralph Lerner eds., 1987)).

104 *See* Underkuffler-Freund, *supra* note 99, at 930 (quoting Adams's statement that "the laws of Massachusetts were the most mild and equitable establishment of religion that was known in the world, if indeed they could be called an establishment").

ists agreed on some principle or idea of nonestablishment seems to me law office history of a tendentious sort.

Both Feldman and Green cite Thomas Curry's history of the period in support of their claim that virtually everyone in the Founding generation agreed in opposing "establishments" of religion.[105] And Curry does sometimes make this assertion.[106] But it is difficult to square that claim with evidence that Curry himself provides,[107] much less with Chief Justice Parson's unapologetic defense of religious "establishment" in *Barnes v. First Parish.*[108]

Indeed, though Curry's treatment of the issues is on the whole admirable, in this respect it appears that the dynamics of argument have pushed him into internal contradictions. In arguing against nonpreferentialists who claim that the Constitution's ban on a national establishment of religion applied only to more rigid or "exclusive establishments," not to "multiple establishments" such as those of Massachusetts or Connecticut, Curry argues that the founding generation did not make this distinction: for them, both kinds of arrangements *were* "establishments" and hence both kinds were prohibited (at the national level).[109] But in arguing intermittently against federalist interpretations,[110] Curry sometimes reverses himself and suggests that even their supporters did *not* consider the New England arrangements to be "establishments" of religion, and hence by inference that they *did* distinguish between the New England arrangements and other more exclusive and rigorous "establishments" of religion.[111] Thus, Curry seems inclined to give flatly inconsistent characterizations of the nineteenth century view and usage, depending on the demands of the particular argument he is making.

In sum, even if the Founding generation shared a consensus favoring freedom of conscience (as seems likely), and even if they chose to enact that commitment into a nonjurisdictional right contained in *the Free Exercise Clause* (a more contestable point), consensus theorists such as Feldman and Green do not persuasively connect up these claims to their conclusion that *the Establishment Clause* was

105 CURRY, *supra* note 28.

106 *See id.* at 210.

107 *See, e.g., id.* at 203 ("Congregationalists in [Connecticut] . . . generally assumed that their religion was established.").

108 6 Mass. (5 Tyng) 400, 406–18 (1810).

109 CURRY, *supra* note 28, at 209–13.

110 As noted, Curry at least sometimes seems squarely to support the jurisdictional interpretation. *See supra* note 55 and accompanying text.

111 CURRY, *supra* note 28, at 210; *see also* THOMAS J. CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA 128–29 n.25 (2001).

adopted to constitutionalize a nonjurisdictional constraint on government.

B. The "More Than State Establishments" Objection

Critics sometimes appear to equate the jurisdictional interpretation with the position that the purpose of the Establishment Clause was mainly or solely to protect state establishments of religion, and they then conclude that by discrediting that position—by showing that the Amendment did more than merely protect state establishments—they have disposed of the jurisdictional interpretation itself.[112] I find this objection puzzling, in part because I do not know of anyone who takes the position that these critics refute and I do not think that position is even remotely plausible. So this objection seems to me to be attacking a straw person.

Nonetheless, we should try to sort out the various possible arguments here more carefully to see if there is any disagreement of substance. The jurisdictional interpretation, at least as I understand it, holds that the core purpose of the Establishment Clause was to confirm that jurisdiction over religion—or at least over the central concerns of religious establishment and free exercise of religion—would remain with the states. One consequence of this jurisdictional division (though not the only one) would be that Congress would be prevented from interfering with state establishments of religion. As has often been noted, the Clause's language forbidding laws "*respecting* an establishment of religion" seems nicely calculated to achieve this objective, because any law disestablishing or interfering with, say, the Massachusetts religious establishment would be a "law respecting an establishment of religion."[113] Moreover, there is evidence that at least *some* political actors were concerned to protect state establishments against national interference;[114] that concern gave them a reason to

112 Steven Green's article on the subject is perhaps the outstanding example. *See* Green, *supra* note 8.

113 *See, e.g.*, AMAR, *supra* note 2, at 32; *see also* Greenawalt, *supra* note 6, at 485–86 ("But when one considers that about half the states then had regimes that some people regarded as establishing religion, the word 'respecting' seems also to have *some* content that protected state establishments; a federal law that interfered with a state establishment of religion would, in any ordinary sense, be a law 'respecting' an establishment of religion." (footnote omitted)); Lash, *supra* note 4, at 1091 ("This wording simultaneously forbids the federal government from establishing a religion at the federal level, or attempting to disestablish religion at the state level. Either attempt would be a law 'respecting an establishment of religion.'" (emphasis omitted)).

114 Green, *supra* note 8, at 781–82, 784. Such a concern is apparent in the House discussion in Connecticut Representative Benjamin Huntington's expressed concern

support a constitutional provision that would operate to prevent such interference.[115]

With perhaps the exception of Feldman,[116] supporters and opponents of the jurisdictional interpretation do not seem to disagree on these points. So then where is the divergence? What is it that critics of that interpretation find objectionable in this respect? So far as I can tell, the critics might be making one or more of three points.

First, they sometimes seem to be asserting that although the Establishment Clause admittedly prevented the national government from interfering with state establishments, it did more than that: most importantly, it also prevented the national government from setting up a church at the national level.[117] But surely there is no disagreement here. It is not only consistent with but indeed central to the jurisdictional interpretation that by denying to the national government jurisdiction over establishments of religion, the Establishment Clause operated to prevent the creation of a national church.[118] The Clause's "respecting" language seems calculated to do this as well. Did anyone ever suggest otherwise?

Someone might answer my question with "Yes. *You* did." And it seems that, perhaps due to an enigmatic footnote in Philip Hamburger's important book, I am sometimes cited as a supporter of

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that the Establishment Clause itself, as it was then worded, might be "extremely hurtful to the cause of religion" by preventing legal enforcement of the compulsory financial support for churches in New England states. *Id.* at 788 (quoting 1 ANNALS OF CONGRESS 758 (Joseph Gales ed., 1789)). *See* CURRY, *supra* note 28, at 203 ("[Huntington] feared the amendment might give Congress power to interfere with existing arrangements in the individual states."). For Feldman's contrary interpretation of Huntington's statement, see Feldman, *supra* note 83, at 408–10.

115 *Cf.* Greenawalt, *supra* note 6, at 494 (footnotes omitted):

> At the time of the Bill of Rights, seven states retained what we now consider establishments of some variety. At the time, there was much disagreement about exactly what forms of support to religion were enough to constitute an establishment. Enough people criticized arrangements within these seven states as establishment, so that members of Congress from these states would have hesitated to accept a provision that was purely *anti*establishment, and legislatures in those states would have hesitated to approve such a provision. We need to understand the clause as one that people with opposing views about establishment could have endorsed. A clause that forbade establishment of a national religion *and* forbade the interference with state establishments meets this criterion.

116 *See infra* note 121.

117 Laycock, for example, insists on this (correct) point. Laycock, *supra* note 5, at 241–43.

118 As discussed earlier, the Clause is arguably more ambiguous in this respect for federally controlled areas.

the wildly implausible view that the Establishment Clause was limited to preventing national interference with state establishments and hence did not prevent the national government from establishing a national church.[119] In all honesty, though, I don't think I can take responsibility for this misconception, since in my book I explicitly asserted just the opposite position.[120] But in any case, insofar as the objection merely asserts that the Establishment Clause not only insulated state establishments from national interference but also restricted the national government in other ways—in particular by forbidding a national church—there is no disagreement. The jurisdictional interpretation is strengthened, not weakened, by that irresistible conclusion.

A second claim that critics may be making is that a desire to protect state establishments from national interference was not the only, or perhaps not anything close to the primary, motive for enactment of the Establishment Clause: Americans of the time were much more concerned about the possibility of a national church than about national interference with state establishments. Once again, I don't think there needs to be any disagreement of consequence here. Suppose that for purposes of argument we accept the critics' claim in its strongest form, which would assert that *no* Americans were concerned *at all* about protecting state establishments against possible national interference. In fact, this strong claim is implausible, I think: even Steven Green, who has developed this criticism most fully, seems to concede that some citizens desired to protect state establishments against national interference.[121] And as noted, the language of the

119 HAMBURGER, *supra* note 3, at 106 n.40; *see* Mark D. Rosen, *Establishment, Expressivism, and Federalism*, 78 CHI.-KENT L. REV. 669, 670 n.5 (2003) ("Some scholars have suggested that the founders did not intend the Establishment Clause to proscribe the establishment of a national church, but believed that it disabled the federal government from interfering with established state churches." (citing SMITH, *supra* note 9, at 22–26)).

120 *See, e.g.*, SMITH, *supra* note 9, at 23 ("Those clauses surely prevented the national government from establishing an official national church . . . .").

121 *See* Green, *supra* note 8, at 768–73; *supra* note 82 and accompanying text. Feldman *may* be making the strong claim (I cannot tell for sure), Feldman, *supra* note 83 at 406–10, but if so, his arguments for it seem highly tenuous. He argues that "[f]irst, there is no evidence in the debates that the last-minute change of language to 'respecting an establishment of religion' was intended to protect existing state establishments." *Id.* at 407. The observation is correct but misleading, because of course the change was made in conference committee and there *is* no record of those discussions. The claim is merely that the language is nicely calculated both to protect state establishments and to prevent a national establishment. Absent any record of the debates, the text itself is the most probative evidence available. *See* Greenawalt, *supra* note 6, at 495–96. Feldman also argues that "[s]econd, and more importantly, it is

provision would naturally have that effect. But suppose we treat the strong claim as true, and thus conclude that preventing a national establishment of religion was the sole purpose of the Clause. Even this (implausible) conclusion would be fully consistent with the jurisdictional interpretation: it would merely alter our understanding of the motives that led to that denial of jurisdiction.

On a more plausible reading of the history, a desire to prevent national interference with religion at the state level, was part of the political mix. Perhaps it was a minor part. From our distant vantage point it is hard to know for sure, and in any case I cannot see how it matters just how powerful this particular motive may have been in comparison with other motives.

But Green seemingly makes a somewhat different point when he denies that the Establishment Clause was intended "to *protect* and *preserve* the existing state establishments."[122] We need to be cautious here. If Green means to suggest that the Clause was not calculated to insulate and in that sense "protect" state establishments against national interference, then it seems that he is simply wrong. As noted, the Clause's wording clearly seems calculated to have that effect, and nearly all scholars on all sides of these debates have acknowledged as much.

But perhaps there is a more charitable reading of Green's contention. He might mean that the Establishment Clause did not of its own force somehow work to "preserve" state establishments. Suppose, for example, that a state that maintained a religious establishment at the time of the Founding later decided to dissolve it (as in fact eventually happened in New England states, of course): Green might mean that nothing in the First Amendment prevented the state from doing so. The Establishment Clause *did not* do for religious establishments, in other words, what the Republican Form of Government Clause *did* for republican government, operating to prevent states from moving away from such arrangements and in that way "protecting and preserving" them.

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unlikely that anyone discussing the Clause believed Congress would have the power to interfere with state religious affairs through normal legislation. No part of the Constitution conferred such a power." Feldman, *supra* note 83, at 408. But of course the same observation could be made of *any* interpretation of the Establishment Clause, including Feldman's. Supporters of the Constitution had repeatedly said, as noted, that the measure was unnecessary because the national government had no power to regulate or meddle with religion at all. But the Clause was proposed and adopted on the assumption that Congress might turn out to have greater powers than its proponents promised.

122 Green, *supra* note 8, at 774.

If this is what Green means, then he is surely correct. He is so obviously correct, in fact, that it is quite unclear why he sees any need to make this claim, or who he conceives his target to be. I at least have never encountered the argument that the Establishment Clause operated to "protect and preserve" state establishments in the sense that Green seems to disavow, and it is hard to imagine what plausible argument could be made in support of such a construction.

In any case, once again, Green's point is wholly consistent with the jurisdictional interpretation. Indeed, it would be the construction Green opposes here that, by interfering with states' control over their own establishments, would be in tension with the federalist purpose reflected in the jurisdictional Establishment Clause.

In the end, therefore, there seems to be no important disagreement here. Everyone should be able to—and it seems that nearly everyone *does*—agree that the Establishment Clause operated to protect state establishments against national interference (by, to be sure, reinforcing and making explicit limits that many believed implicit in the Constitution, anyway), and everyone should and seemingly does also agree that this purpose did not exhaust the Clause's scope. Most obviously, the Establishment Clause also (and primarily, if you like) operated to prevent the establishment of a national church. This conclusion is utterly friendly to the jurisdictional interpretation of the amendment.

III. SUBSTANCE VERSUS JURISDICTION?

In the previous Part I have discussed two common objections to the jurisdictional interpretation. Probably the *most* common objection, however, is more straightforward. The objection simply asserts that the Establishment Clause had substantive content and imposed substantive limitations on the national government, and it concludes that the Clause was therefore not "purely jurisdictional." I have already suggested that the quick response to this common argument would be "*Of course* the Clause had substantive content.[123] And your point is . . . ?" But this response would be *too* quick, because in fact the argument from substantive content raises difficult and subtle questions that require closer attention—and that I am quite sure, alas, that *I* cannot fully answer.[124]

123 My own previous work was explicit from the outset in asserting that a jurisdictional provision will have substantive content and will impose substantive restrictions. *See* SMITH, *supra* note 9, at 21–26.

124 I cannot answer these questions, among other reasons, because I think that the concept of "jurisdiction" becomes more elusive the more closely we consider it, and

In considering these questions, it will be helpful to distinguish between two forms of the argument from substantive content. We can call these the "simple" argument and the "sophisticated" argument.

A. The Simple Argument from Substantive Content

The simple argument seems to operate on the assumption that there is a fundamental or categorical distinction between "substantive" measures and "jurisdictional" measures; so if the Establishment Clause has substantive content, it therefore cannot be jurisdictional—or at least not "purely jurisdictional." Perhaps the argument is prompted by language used by proponents of the jurisdictional interpretation, such as myself. "*You* say," the critics might propose, "that the Establishment Clause was 'purely jurisdictional.' But it plainly has substantive content. So you are wrong, and the Clause is not *purely* jurisdictional."

I am not certain that any of the critics wants to make exactly this argument. But they *seem* to make it. Thus, Douglas Laycock insists that "the Establishment Clause had to impose some substantive restriction on the federal government,"[125] and he offers this observation as if it counted against the jurisdictional interpretation. Kent Greenawalt points to what he (rightly) takes to be clear substantive content in the

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also because I suspect—it is only a suspicion—that a more complete account of "rights" as they were understood in the eighteenth century (and as they are still popularly understood today to a large extent) would show that they also have a jurisdictional character. *See* John H. Garvey, *The Powers and Duties of Government*, 26 SAN DIEGO L. REV. 209, 209–13 (1989) (describing the eighteenth-century view that rights under the First and Fourteenth Amendments derived from state or federal governments' lack of authority to act). By contrast, in constitutional thinking today it is quite unclear what it even means to say that there is a "right" . . . to freedom of religion or freedom of speech or whatever. Often the assertion seems to entail only a weighting of some interests among the array of interests at stake in an imagined "balancing" exercise, or else a prohibition on particular kinds of governmental motives or purposes. If all "rights" were understood to be jurisdictional in character, then the contrast between the "jurisdictional" First Amendment and the "substantive rights" in other provisions would seemingly need to be revised—though rather than making the Establishment Clause "more substantive," the revision would likely make the other rights "more jurisdictional," so to speak. For an insightful discussion of what I think is substantially the same issue (though in a different vocabulary), see Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1110–13 (2003). In any case, I am not prepared (and do not expect *ever* to be prepared) to offer any such complete account of "jurisdiction" or "rights," so I will do my best with the vocabulary and concepts currently in use.

125 Laycock, *supra* note 5, at 242.

religion clauses, and he concludes that the clauses could not have been "purely jurisdictional."[126]

Whether or not the critics mean to make this argument, however, the simple argument is easily answered. To be sure, proponents of the jurisdictional interpretation contend that the Establishment Clause did not adopt any *substantive right or principle of religious freedom.* But they do not thereby deny—and *could not* sensibly deny—that the Clause had *substantive content,* or that it imposed *substantive limits* on the national government. They could not deny this because even a "purely jurisdictional" limitation, in order to achieve its purely jurisdictional purpose, would have to specify the *substance* of whatever it is over which it is assigning or denying jurisdiction.[127] Moreover, if the agent or institution to which jurisdiction is denied—Congress, in this case—later purported to act within that forbidden area, its actions would presumably be invalid: this would amount to a substantive limitation on its powers. But the substantive limitation would take the form of a jurisdictional denial, not a substantive *right* or a substantive *principle* restricting the exercise of powers that have in fact been conferred.

Take the most familiar kind of example. Suppose a statute provides that "the court of common pleas shall have jurisdiction over civil cases but shall not have jurisdiction over criminal cases." This is obviously a "jurisdictional" provision. But equally obviously, the provision has "substantive" content, in the sense that it specifies what substantive matters the court of common pleas is and is not authorized to adjudicate. The provision thus imposes "substantive" limitations: if the prosecutor files a criminal case in the court of common pleas, the court is supposed to dismiss the case—not on the merits, but for lack of jurisdiction. And the provision has substantive consequences: for example, if the court proceeds to consider a criminal case despite the restriction, a conviction may be deemed void. In all sorts of ways, the provision is "substantive." Even so, we would not hesitate to classify this statute as a "jurisdictional" provision.

Critics of the jurisdictional interpretation of the Establishment Clause sometimes appear to overlook this subtle but essential distinction between the different ways in which a measure can have "substantive" content, or between what we might describe as *jurisdictional* and

126 Greenawalt, *supra* note 6, at 484–85.

127 Steffen Johnson makes a similar point, offering it, however, as a criticism of the jurisdictional interpretation. *See* Johnson, *supra* note 77, at 368 ("Smith's argument nonetheless invites certain responses. First, it is hard to deny that the decision to leave substantive matters to the states was *itself* a substantive decision.").

nonjurisdictional substantive constraints. Consider an example that Laycock offers and seems to think damaging to the jurisdictional interpretation. "At the very least," Laycock contends,

> the Establishment Clause forbids Congress to use its taxing and spending powers to impose an earmarked tax on every citizen to support the clergy—a live issue at the state level in the late-eighteenth century. A taxpayer objecting to such a tax would be asserting a claim of individual right under the Establishment Clause. That right is a privilege or immunity of citizens of the United States . . . .[128]

At least for argument's sake, let us concede Laycock's first claim—that the Establishment Clause forbids Congress to tax citizens specifically to support the clergy.[129] So the Clause does indeed impose a substantive restriction. But when Laycock goes on to infer that an objecting taxpayer "would be asserting a claim of individual right," he begs the question at issue. The objecting taxpayer *might be* asserting an individual right. Conversely, he or she might be contending that the statute was *ultra vires* because Congress acted beyond its jurisdiction: that sort of objection would not be a "claim of individual right" (at least in any non-question-begging sense).[130] As an analogy, suppose the State of California purports to impose a tax on property located in New York (or, if you like, in Mexico, or India, or China).[131] An objecting property owner *might* try to formulate a claim of individual right in the form of some sort of privilege or immunity, but she

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128 Laycock, *supra* note 5, at 242 (footnote omitted). In arguing against what he calls the "jurisdictional" and "no power" interpretations, Greenawalt makes a similar claim:

> The argument in favor of substantive content relies on text and history. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" reads like a substantive limit on what Congress may do. Whatever authority it might otherwise have had under the Necessary and Proper Clause to implement a delegated power, Congress could not prohibit the free exercise of religion or make a law respecting its establishment.

Greenawalt, *supra* note 6, at 483 (quoting U.S. CONST. amend. I).

129 Though Laycock's claim seems correct to me, the logic of a nonpreferentialist position might suggest that the tax would be constitutional so long as it did not discriminate among clergy by sect.

130 Of course, one *can* frame any claim in terms of a "right"—by asserting, for example, that citizens have a "right not to be subjected to *ultra vires* laws." But that move would simply stipulate the current issue out of existence by defining "rights" so broadly that every infraction of a law is necessarily a violation of a "right."

131 California might try to collect the tax in various ways—by, for example, executing on New York or Mexican or Chinese or Indian property owners when they happen to be traveling to Disneyland or Yosemite.

surely would not need to do this: her most obvious and strongest argument would simply be that California lacks any authority—lacks jurisdiction, in other words—to impose this particular tax. *That* objection would be available even if California attempted to impose its tax on residents of a foreign country whose law recognized no privileges, immunities, or "rights" at all.

So a jurisdictional provision will have substantive content. Indeed, we can concede even more: the substantive content that a jurisdictional provision will necessarily contain might well consist of a reference to some substantive "right." And the jurisdictional provision might be adopted for the purpose of protecting that right against interference from the agent or institution that is denied jurisdiction over the right. The right over which jurisdiction is denied might well be (to pick an example not entirely at random) the right to, say, the free exercise of religion. The fact that a provision disclaimed jurisdiction over a substantive right—and that it did so for the conscious purpose of protecting that right against outside interference—need not negate the provision's jurisdictional character.

Abstractly stated, this point may seem confusing; and, coming from a proponent of the jurisdictional interpretation, it may also seem like a piece of backsliding. But consider an example. Suppose that with the help of some new appointments the Supreme Court overrules *Roe v. Wade*,[132] so that the subject of abortion once again becomes one on which states are free to legislate. We can suppose that under their own statutes or constitutions, some states recognize or create a right to abortion; others repudiate any such right. Movements then arise to regularize the situation, but in different directions: one coalition agitates for a federal statute ("The Freedom of Procreative Choice" statute) that purports to create a right to abortion for citizens of all states, while a different coalition lobbies for a different federal statute ("The Right to Life" statute) that purports to invalidate any state laws recognizing a right to abortion. In reaction to both coalitions, moderates and "states' rights" advocates succeed in passing a constitutional amendment, which simply reads, "Abortion being a subject within the proper jurisdiction of the states, Congress shall make no law respecting a right to abortion."

The declared and manifest purpose of this measure is to leave the subject of abortion and abortion rights within the state domain. The measure is thus jurisdictional in both purpose and content. Nonetheless, it has substantive content and substantive consequences. And, most importantly, its substantive content consists of a reference to a

132 410 U.S. 113 (1973).

"right"—a right that may or may not be recognized under state law, and that is left for the states to acknowledge or not and to define or regulate as they choose. The amendment not only *refers to* a "right"; in an important sense it *protects* a right. It might even be adopted with the motive or *for the purpose* of protecting that right:[133] pro-life agitators will, after all, be prevented by it from interfering with the right to abortion in states that recognize such a right. Despite all this, the amendment's reference to and protection of this right in no way deprive it of its "purely jurisdictional" character.

So jurisdictional measures will have substantive content. What then do proponents like myself mean when we say that the Establishment Clause was "purely" jurisdictional, or similar things? The point, I think, is simply to distinguish the Establishment Clause[134] from other provisions (such as, once again, the right against cruel and unusual punishment) that, though originally applicable only to the national government, nonetheless took the form of substantive rights that were not essentially jurisdictional in character. Like the religion provisions, of course, and indeed like any provision of positive law, these provisions also had force only within the jurisdiction by and for which they were enacted: in that sense they had a jurisdictional dimension (as all positive law does). But they were essentially substantive in character, and they operated to place substantive limits on national power even in areas where the national government did have power to act (by establishing criminal penalties for federal offenses, for example). The claim is that the Establishment Clause was different: It did nothing more than disclaim national jurisdiction. In that sense it was "purely jurisdictional." But of course it disclaimed jurisdiction over *something*—something that was inevitably "substantive."

In sum, substantive content does not negate, but rather is necessary to, a jurisdictional disclaimer. So the simple argument from substantive content reflects a simple misunderstanding of what the jurisdictional interpretation claims.

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133 Suppose, for example, that pro-choice supporters seem to have the momentum at the state level, but that a pro-life faction has strong support in Congress and the White House: In these circumstances it might be accurate as a factual matter to say that although the primary, immediate, and official purpose of the amendment is to assign the question of abortion rights to the states, the underlying motivation for this jurisdictional assignment was to protect the right to abortion.

134 The claim may or may not be limited to the Establishment Clause. My own view, as noted, is that the Free Exercise Clause was also jurisdictional. The argument might easily be extended to other provisions in the First Amendment—to all matters, that is, introduced by "Congress shall make no law . . . ." U.S. CONST. amend. I; *see* AMAR, *supra* note 2, at 36–37.

Even so, the objection provokes other, more troublesome questions. How can we tell whether a provision that imposes substantive limits on government operates by enacting a substantive right or principle or, instead, by imposing a jurisdictional limitation? And if both kinds of limitations impose substantive restrictions on government, or even operate to protect substantive rights, is the distinction as real or as important as it may have seemed? Or is the whole debate an elaborate exercise in conceptual hair-splitting?

These are hard questions. Before considering them, however, it will be helpful to examine the more sophisticated version of the "argument from substantive content."

B. The Sophisticated Argument from Substantive Content

The more sophisticated argument would acknowledge that "substance" and "jurisdiction" do not compose a simple dichotomy and that even a "purely jurisdictional" provision can have—indeed, *must* have—"substantive" content. Even so, the argument proceeds, there are *some kinds* of substantive restrictions that cannot properly be viewed as limitations on jurisdiction. So if a constitutional provision contains *this kind* of substance, then it cannot plausibly be viewed as "purely jurisdictional" in character. I am again not certain that the critics mean to make this sort of argument. But it seems to me to be the most powerful form of the argument from substantive content, and it also seems that at least Greenawalt's discussion can plausibly be read as making this objection.

But what kind of substantive restrictions on government *could not* be regarded as jurisdictional in character?

1. Partial Denials of Jurisdiction?

One superficially tempting claim might suggest that a *partial* restriction—one that is less than complete and categorical—could not be viewed as a "jurisdictional" restriction. If the legislature or court can still act within some domain, then it has not been deprived of "jurisdiction." Right? Thus, critics sometimes point to facts suggesting that in fact (and probably inevitably), Congress retained *some* power over religion, and go on to infer that the Establishment Clause could not have been a purely jurisdictional measure.[135] If this reasoning were cogent, then the jurisdictional interpretation would indeed be doomed. That is because, as suggested in the previous section, the

135 *See, e.g.*, Steinberg, *supra* note 76, at 1005–07.

Establishment Clause is most plausibly read as imposing something that was not a *complete* denial of jurisdiction over religion.

But I think this argument cannot withstand reflection, because there is simply no apparent reason why a jurisdictional limitation has to be an all-or-nothing affair. Indeed, it is not clear what such a claim could even mean. The distinction between "complete" and "partial" denials of jurisdiction seems to presuppose that the potential subjects of jurisdiction come in discrete natural packages, so that a given law can be said to apply to a "whole" package or to only "part" of a package. In reality, though, the human affairs that are potentially subjects of government control—of "jurisdiction"—plainly do not come to us in such orderly, prearranged packages. "Commerce," "crime," "property," "religion": these are not natural kinds like gold or copper. Rather, these legal categories are artificial constructions (which is not of course to say that their construction is merely arbitrary or irrational), and their content can shift with different contexts and purposes. The Supreme Court's varying construals of categories like "property," "commerce," and "religion" ought to be sufficient proof of this shiftiness. But if jurisdictional categories are constructed, not natural and preordained, then it follows that *any* assignment or denial of jurisdiction can be considered to be either *total* (if we focus only on what is within the scope of the assignment or denial) or *partial* (if we consider it in relation to some broader potential category that could have been adopted).

2. "One-way" Denials of Jurisdiction?

So the argument that partial restrictions cannot be "jurisdictional" is unpersuasive. But another candidate seems more promising. What about what we might call "tilted" or "one-way" restrictions? In other words, what about a restriction that purports to deny a governmental institution power to deal with a particular kind of issue in one way but allows it to address the matter in an opposite way? Is the label of "jurisdictional" fundamentally or inherently inapplicable to this sort of restriction?

Greenawalt points to the most salient case—the Free Exercise Clause. That Clause is "distinctly one-sided,"[136] Greenawalt observes: it provides that "Congress shall make no law . . . *prohibiting* the free exercise [of religion],"[137] but it does not forbid Congress to do things *facilitating* or *promoting* or *protecting* the free exercise of religion. Congress is thus permitted to participate in the substantive domain de-

136 Greenawalt, *supra* note 6, at 483.

137 U.S. CONST. amend. I. (emphasis added).

scribed as "the free exercise of religion" so long as it works *for* the cause, not against it. Consequently, Greenawalt appears to infer, the substantive restriction imposed by the Free Exercise Clause cannot be considered "jurisdictional" in character.[138]

To be sure, even if Greenawalt's argument is correct for the Free Exercise Clause, its application to the Establishment Clause would remain doubtful. After all, as Greenawalt himself points out, the Establishment Clause's language—"no law *respecting* an establishment of religion"[139]—seems to be the exact opposite of one-directional: it applies to laws either favoring or disfavoring, promoting or resisting, such establishments.[140] Still, the close connection between the Clauses might suggest that if one of the Clauses is substantive and not purely jurisdictional, the other Clause should be understood in a similar way.[141] This conclusion would follow *a fortiori* if we consider them, as some scholars do, to be not two Clauses but rather a single Clause.[142]

So we should examine Greenawalt's apparent premise more closely. *Is* a one-way restriction on power—you are empowered to travel north on the road but not south, to go up the stairs but not down—disqualified from being a "jurisdictional" restriction?

The most familiar limitations on jurisdiction do seem to run more than one way, so to speak. If a court has no jurisdiction over criminal cases, say, or copyright cases, then we assume it has no au-

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138 Greenawalt, *supra* note 6, at 482–83.

139 U.S. CONST. amend. I. (emphasis added).

140 Greenawalt, *supra* note 6, at 484–85.

141 Though my view seems to be a minority one even among proponents of a jurisdictional construction of the Establishment Clause, I believe that the connection suggested by Greenawalt is a strong one, and hence that a convincing demonstration that the Free Exercise Clause is not jurisdictional would count against such an interpretation of the Establishment Clause. Most of the arguments that support the jurisdictional interpretation—the argument from complacency and the textual argument (though *perhaps* not the consensus/dissensus argument)—apply to both Clauses. Scholars who draw the opposite conclusion seem beguiled by the language "free exercise of religion," which looks more substantive, or more like the kind of language that could refer to a "right." As discussed above, though, the fact that the amendment had substantive content—necessarily so—is wholly consistent with its being "jurisdictional" in character. However, as Eric Claeys points out to me, if one sees the word "respecting" rather than "shall make no law" as the crucial jurisdictional language, then it is possible to read the First Amendment to make only the Establishment Clause jurisdictional. *But see infra* note 157 (suggesting that for the Free Exercise Clause, the distinction between a jurisdictional and a nonjurisdictional interpretation may be inconsequential).

142 *See, e.g.*, Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 678–81 (1992).

thority to acquit *or* convict, to rule *in favor of* alleged copyright infringers or *against* them. We would think it odd, perhaps, if a statute purported to give a court jurisdiction to acquit criminal defendants but not to convict them.

Odd—but hardly inconceivable. As a purely verbal matter, there is nothing to prevent a legislature from enacting such a statute. And we might even imagine scenarios in which there would be plausible practical reasons for adopting such a scheme.[143] Nor are tilted or one-way denials of jurisdiction merely imaginary. Under Article III, for example, Congress has been thought to have power to deprive federal courts of jurisdiction over particular categories of cases but not to tell the courts how to decide cases that *are* within their jurisdiction.[144] Acting upon and in response to this distinction and limitation, members of Congress have often attempted to enact legislation that did not deprive courts of jurisdiction altogether over a category of cases, but that purported to deny jurisdiction to decide cases in particular ways, or to issue particular remedies.

Consider a measure that was introduced in the Senate in the aftermath of *Miranda v. Arizona*,[145] which would have deprived all federal courts of jurisdiction "'to review or to reverse, vacate, modify, or disturb in any way, a rule of any trial court of any State in any criminal prosecution admitting in evidence as voluntarily made an admission or confession of any accused.'"[146] Under this wording, it seems, federal courts would have jurisdiction to *affirm* or at least accept trial court rulings admitting confessions but not to *reverse* rulings admitting

143 For example, on the traditional premise that it is better for a hundred guilty persons to go free than for one innocent person to be convicted, we can imagine a system structured to streamline acquittals, and to promote more careful deliberation in cases leading to conviction. So the system might require prosecutions to be brought initially in level-one courts, which would have power to issue binding acquittals. If at the end of a prosecution a level-one court was unable to acquit, however, it would thereupon lose jurisdiction over the case; dismissal might be treated as creating no inference either of guilt or of innocence and would lack any sort of res judicata effect. Prosecutors would then be free to bring the prosecution again in a level-two court possessing jurisdiction either to acquit or convict.

144 "It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements . . . ." Yakus v. United States, 321 U.S. 414, 468 (1944) (Rutledge, J., dissenting).

145 384 U.S. 436 (1966).

146 The measure is quoted and discussed in ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.1, at 170–71 (4th ed. 2003) (quoting GERALD GUNTHER, CONSTITUTIONAL LAW 47 (11th ed. 1985)); *see* S. REP. No. 90-1097, at 52 (1968).

this evidence.[147] So the denial of jurisdiction would be manifestly tilted, or one-way. Similarly tilted measures have been proposed in Congress in response to controversial judicial decisions on abortion, school prayer, and other matters.[148]

But of course these measures did not actually pass, and if they had passed they might have been ruled unconstitutional. In other instances, however, tilted jurisdictional measures have actually been enacted—and have been upheld by the courts.[149] Consider an ancient instance whose pedigree and respectability seem beyond reproach—the Judiciary Act of 1789.[150] Section 25 of that statute gave the United States Supreme Court appellate jurisdiction over state court cases in which federal treaties or statutes had been *ruled unconstitutional* or in which federal challenges to state laws had been *rejected*.[151] But the section did not confer appellate jurisdiction over cases in which federal law had been ruled valid as against constitutional challenges or in which state law had been invalidated on federal law grounds. This conferral of jurisdiction was plainly slanted (and for obvious reasons) in favor of upholding federal law and claims over state law. It was not thereby rendered constitutionally suspect.

In sum, it seems that grants and restrictions of power can be—and sometimes *are*—tilted or "one-way" and can still be "jurisdictional" in character.[152]

But that conclusion may add urgency to the more general doubts noted earlier. Suppose we acknowledge that one-way restrictions *can* be viewed as "jurisdictional" in character. Indeed, suppose we go further and acknowledge that there are no natural or inherent limits on what kinds of substantive restrictions on government can be classified as "jurisdictional": any sort of limit *can* be "jurisdictional" if we (or Congress, or the Supreme Court) choose to label it in that way. The

147 The statute would also seem to authorize courts to reverse rulings excluding such evidence.

148 CHEMERINSKY, *supra* note 146, § 3.1, at 170.

149 During World War II, for example, the Emergency Price Control Act of 1942, Pub. L. No. 77-421, § 204(d), 56 Stat. 23, 33 (repealed 1947), denied federal courts jurisdiction to consider some constitutional challenges to the Act; so in effect these courts were given jurisdiction to treat the act as constitutional and enforce it, but not to consider it unconstitutional. These jurisdictional restrictions were upheld. *See, e.g., Yakus*, 321 U.S. at 435; CHEMERINSKY, *supra* note 146, § 3.3, at 195.

150 Ch. 20, 1 Stat. 73.

151 § 25, 1 Stat. at 85–87.

152 This is a conclusion that I did not acknowledge or defend in my earlier arguments for the jurisdictional interpretation; indeed, I did not even consider the issue of one-way jurisdictional provisions until prompted to do so by Greenawalt's discussion.

suspicion begins to grow that the distinction between restrictions that are purely "substantive" and those that are "jurisdictional" is slipping away. Perhaps this is a distinction without a difference? Perhaps the whole "substantive/jurisdictional" debate is just an elaborate and deceptive word game that legal advocates play as they try to advance their various purposes?

Are these doubts justified? And if so, how do they bear upon the question we started with—namely, the proper interpretation of the Establishment Clause? To address these questions, we need to reflect a bit more closely on what we mean by "jurisdiction"—or "no jurisdiction."

C. To Be or Not To Be "Jurisdictional"?

The concept of "jurisdiction" is pervasive in law—and seemingly important in its consequences—so it would be rash to conclude too casually that the concept is illusory or purely verbal. But what do we mean when we say that a court, or a legislature, or a government, does or does not have "jurisdiction"?

In addressing this question, it will be helpful to return to basics and reflect on the valuable function that the kinds of distinctions we denote with the term "jurisdiction" can perform. Probably the original or focal context for appreciating the concept is the situation in which a "principal" of some sort—an employer, a government institution, a constitutional convention—needs to direct an agent or subordinate institution of some sort in his, or her, or its responsibilities. We can notice three subtly different sorts of directives that the principal might want or need to give.

What we can call a type-one directive tells the agent *what his tasks or functions are,* or what matters he has responsibility for. ("Your job is to take the goods to the market and sell them.") A related but distinguishable kind of instructive—call it a type-two directive—would explain the *criteria* that the agent should use in making the judgments he must make in the performance of his functions. These criteria might be positive in character, or negative, or both. ("Sell the goods for the highest price you can get. And sell for cash; try to avoid selling on credit or taking any IOUs.")

A third kind of directive—one that might sometimes be implicit in the first kind but that a principal might also want to separate out and make explicit—would indicate to the agent that he should *not* undertake particular functions, or should not pay attention to or take responsibility for particular kinds of matters. Put crudely, this kind of type-three directive would tell the agent that particular subjects are

"not your business." "Once you've sold the goods and have the money in hand," the principal might say, "you are to bring it back to me. What to do with the money thereafter—whether to save it, or invest it, or spend it—is none of your business."

As a purely logical matter, this sort of directive might seem superfluous: after all, investment decisions were never placed within the agent's responsibility in the first place. Even so, the directive might serve to clarify the scope of the assignment and perhaps also to fend off misinterpretations by either the obtuse or the particularly enterprising or zealous agent. "The boss told me to sell the goods for the highest price. She didn't specifically say what to do with the money once I'd received it. But she didn't say *not* to invest the proceeds. It seems clear that the purpose of this operation is to make a profit. And I can further that purpose by sinking the proceeds into this very promising investment opportunity." The type-three "not your business" kind of directive seeks to prevent this sort of overreaching.

So it appears that each of these kinds of directives can serve an important function. And these functions are distinguishable—conceptually, and in some contexts (though perhaps not in others) practically. The first kind of directive, we can now say, assigns *jurisdiction*; the second kind of directive provides the *criteria* (positive or negative) that govern the exercise of jurisdiction; and the third kind (which we can, if we like, regard as qualifying or elaborating on or making explicit what may have been implicit in the first kind of directive) specifies matters that are *not* within the agent's jurisdiction. Deprived of the possibility of giving these different kinds of directives, the principal's ability to direct the agent would be impaired.

Although these directives and their functions are distinguishable and potentially important, we can also appreciate that in practice the boundaries between them *may* not be sharp—or practically significant. In particular, the second kind of directive that specifies "negative" criteria ("Don't do X") and the third kind of directive that removes certain matters from the agent's jurisdiction ("Don't worry about X; it isn't your business") may blur into each other. "Don't sell on credit, even if the buyer promises to repay with interest" and "It's not your business to invest the proceeds" may in some contexts amount to basically the same thing. So such directives might not neatly sort themselves into type-two (negative criteria) or type-three (no jurisdiction) directives. Moreover, the violation of either kind of directive might be described in similar terms—the agent acted "contrary to his directives," or did what he was told not to do.

Should we then conclude that the distinction between these types of directives is illusory, or purely verbal—a distinction without a differ-

ence? It is true that for many practical purposes, any difference between them *might* be unimportant. But then again, in other contexts the difference might matter a great deal. And in any case, the distinction itself is not merely verbal. It reflects real differences in directives a principal may want to give to an agent. "These are among the criteria that you *are* to consider in performing your function, counting them as negative factors" is not the same as "Disregard those matters; they're none of your business." In addition, the consequences of breaches of different kinds of directives might be different. "Agents who perform their assigned functions badly will be *reprimanded* and *sanctioned*," a principal might say, "but agents who interfere in matters not assigned to them will be *fired*." So the agent who ill-advisedly takes payment on credit might be demoted, while the agent who contrary to directives invests the proceeds in a mutual fund might be discharged.

Once again, the familiar example of judicial jurisdiction provides an illustrative case. Provisions depriving a court of jurisdiction over particular matters serve a different function than provisions specifying the criteria a court should use to decide cases within its jurisdiction. In some cases, of course, the result of these different sorts of provisions may seem similar—dismissal of the case. But even in these cases the consequences will be different: dismissal on the merits may have various res judicata and collateral estoppel effects that dismissal for lack of jurisdiction will not have.

Given these potential differences in meaning and consequences between type-two "criteria" and type-three "no jurisdiction" directives, there might be no choice in a given case but to try to figure out what kind of directive is at issue. To be sure, in some cases this task might be hopeless: the principal simply gave no thought to the distinction, or did not care about it, or gave a directive so unclear that it defies classification. In such situations, debates about the proper classification might well degenerate into mere word games, to be manipulated by the different players to suit their purposes. The labels might be purely arbitrary. Desired conclusions might drive the classifications, rather than vice versa. Perhaps the directive that an agent violated is equally susceptible of being described as either a type-two or type-three directive: so if the principal wants only to reprimand the agent, she can choose the type-two (criteria) label, and if she wants to discharge the agent, she will choose the type-three (no jurisdiction) label. Congressional power to control the jurisdiction of the federal courts might present this sort of situation of complete manipulability: thankfully, I need not opine on that question here.

The fact that a distinction *might be* unuseable or meaningless or wholly manipulable in some contexts, however, does not discredit the

distinction itself. In other contexts, the distinction—the distinction, basically, between jurisdictional and nonjurisdictional directives—will be both meaningful and important: it will allow principals to direct agents in more intelligent and nuanced ways that would be impossible if the distinction were obliterated.[153]

In sum, although the distinction between jurisdictional and nonjurisdictional directives *can* be invisible or practically unimportant or purely verbal in some situations, the distinction can also be vital in permitting the relations among principals and agents to be structured in different ways that will better serve the purposes of the enterprises in which principals and agents are involved. So we should consider

153 In this light, we might consider again whether there is anything inherent in the concept of "jurisdiction" that precludes tilted or one-way assignments or denials of jurisdiction. On first reflection, it might seem that even while using the word "jurisdiction," a one-way directive is necessarily a disguised directive about criteria. "You have jurisdiction to go north on the highway, but you do not have jurisdiction to go south" might seem to be merely a confusing directive that should be broken down in this way: "(1) You have jurisdiction to travel on the road. (2) In exercising that jurisdiction, you should treat 'north' as a positive criterion and 'south' as a negative criterion."

But *must* the one-way directive be construed in this way? Consider what we might call "stop-go" situations, or "some, but not too much" situations. There are human concerns, in other words, in which contrary needs or impulses are both valid and important and need to be balanced against each other. We want the economy (or the law school, or the family) to grow, but also to have stability and continuity. We want the children to enjoy themselves, but also to do their chores. The countryside needs rain—but not so much rain that floods result. Such situations implicate what we might call a "go" function, but also a "stop" function.

In these situations, a principal *might* want to assign both of the contrary functions to the same agent. But then again, she might not: she might think the best overall balance will be achieved by dividing responsibility among different agents—allowing each agent to concentrate his or her efforts on one of the competing functions. A car needs to be able both to "go" and to "stop," but it works best to have one instrument (the accelerator pedal) whose sole function is "go" and another (the brake) whose sole function is "stop." In this way, a car's separate function pedals are unlike the volume control pedal on an organ, which can make the sound either louder or softer.

In a similar way, an adversarial legal system conceivably might be structured so that one class of advocates (prosecutors) is solely responsible for making arguments showing guilt while a different class of advocates (defense attorneys) is solely responsible for making arguments pointing to innocence. And an entertainment establishment such as a casino or nightclub might operate best by having some agents (advertisers, promoters) whose sole function is to attract customers to the establishment, and other agents (bouncers) whose sole function is to throw the inappropriate people out. That arrangement might be implemented by giving "one-way" jurisdictional directives. So we might tell the bouncer: "Your job is to throw the rowdy people out. Don't worry about bringing people in, or letting them in: that's someone else's job, not yours."

again the Establishment Clause to see what this conclusion may imply for the interpretation of that clause.

D. The Establishment Clause Reconsidered

So consider the phrase, "Congress shall make no law respecting an establishment of religion."[154] We can readily imagine situations in which it would make no difference whether this phrase was understood to be a nonjurisdictional type-two directive describing a negative criterion governing Congress's exercise of power or, conversely, a jurisdictional type-three directive indicating that "establishments of religion" are simply none of Congress's business. Imagine a simple, one-level constitutional community in which all legislation emanates from a single legislative body, called "Congress." Imagine further that in this simple, one-level community, everyone agrees (a) on exactly what an "establishment of religion" is and (b) on the undesirability of establishments of religion. In this community, to be sure, this particular constitutional language might seem odd: why not just say "Congress shall make no law establishing religion," or better yet, "Congress shall not establish a religion," or perhaps "Religious establishments are prohibited"? Still, if the constitution happens to have this phrase, its meaning should not present any great difficulty. We can agree that the provision forbids Congress to establish a religion; and it makes little difference whether we view the restriction as a nonjurisdictional negative criterion governing the exercise of congressional power or as a denial of jurisdiction to establish a religion. If in a hair-splitting mood someone raised the question, the likely response would be: "Who knows? Who cares? What difference does it make?"

Even in this one-level community, though, other factors *might* work to make the distinction important. Suppose, for example, that there is complete agreement about the undesirability of an "establishment of religion" but less than complete agreement about what such an "establishment" is. In particular, some people think a school voucher program that includes religious schools *is* an objectionable "establishment of religion," while other people disagree.[155] Suppose also that there is a judicial practice of rigorously policing jurisdictional limits on Congress's powers but of giving considerable deference to Congress when it is exercising its acknowledged powers, even when

154 U.S. CONST. amend. I.

155 *Compare, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 662–63 (2002) (rejecting an Establishment Clause challenge to such a program), *with id.* at 686 (Souter, J., dissenting) (calling it a "hard case," but arguing that the program violates the Establishment Clause).

Congress has arguably paid insufficient respect to some nonjurisdictional substantive criterion: the courts refer to this deference, we can imagine, as a "presumption of constitutionality."

In response to some perceived crisis in the educational system, Congress enacts a voucher program including religious schools, and opponents challenge the program's constitutionality. *Now* it might make a large difference whether the Constitution's "Establishment Clause" is regarded as jurisdictional or not. If it is, a court might be inclined to say to Congress, "We're sorry, but even though the program you've enacted has done 'so much good, and little if any harm,'[156] you simply don't have the power to enact such a program. 'No law' means 'no law.'" Conversely, if the Establishment Clause is thought of as a nonjurisdictional substantive criterion, and if the substantive debate presents a close case, the deference-supporting "presumption of constitutionality" might call for upholding the program.

But now let us further complicate the case. Instead of a one-level system, the community has two principal levels of government and a variety of quasi-independent political units; so there is a national legislature (called "Congress") but also a legislature for each of the smaller political units. Suppose also that instead of agreement, the community now displays substantial disagreement, both over what an "establishment of religion" is and over whether such establishments are undesirable: though some units have concluded that religious establishments are undesirable, other units think they are permissible or even indispensable to public order and civic virtue. As it happens, however, virtually everyone thinks this question should be addressed and answered on a unit-by-unit basis rather than resolved for the whole community at the national level.

Under these circumstances, someone proposes that the constitution ought to say something about "establishments of religion." In this situation, the distinction between type-two substantive "criteria" provisions and type-three "no jurisdiction" provisions becomes crucial: it allows the community to address the issue in a way that would be impossible if it were forced to adopt a substantive criterion governing the issue. There is no likelihood that the community *could* agree on any such criterion; even if it could, the task would likely be time-consuming, exhausting, and deeply divisive. Conversely, if the community has the option of adopting a jurisdictional provision—one

156 *Cf.* Aguilar v. Felton, 473 U.S. 402, 415 (1985) (Powell, J., concurring) (striking down a program that aided religious schools even though the program had concededly done "so much good and little, if any, detectable harm").

acceptable both to pro-establishment and anti-establishment citizens and units—a mutually satisfactory solution may easily be reached.

So we would expect the community to adopt this jurisdictional solution. The community might count itself fortunate that such an option is available to it—that it has the possibility, that is, of adopting a type-three "no jurisdiction" solution for a problem for which a more purely substantive type-two solution would be difficult or impossible to achieve.[157] And the community might be expected to be resentful of obstructionists who would deprive it of that option—perhaps even of future-generation obstructionists who would negate the option ex post facto by denying that a particular decision could have been "purely jurisdictional," and thereby foisting onto the community a substantive commitment that it never in fact made.

In complicating the case, of course, I have narrowed and, I think, eliminated the difference between this hypothetical political community and our actual political community as it was at the time of the Founding, and between the fictional constitution and the actual Constitution. More generally, the purpose of arguing for the jurisdictional interpretation of the Establishment Clause is to protest against our attributing to the Framers commitments substantive rights or principles of religious freedom that may (or may not) be admirable or attractive, but that the Framers never chose to put into the Constitution.

CONCLUSION

To say that the Framers didn't intend to put these substantive rights and principles into the Constitution is not to say, of course, that *we* should not put them into our constitutional law. After all is said and done, I suspect that much of the resistance to the jurisdictional interpretation results less from genuine disagreement about what the Framers *did* than from the fear that admitting the meager and merely jurisdictional character of the original Establishment Clause would have the effect of licensing arrangements between church and state that almost none of us today would find attractive. We might call this the "What would happen in Utah?" objection.[158] But this fear seems

157 Conversely, where there *is* in fact consensus about a substantive right or principle that a community would be willing to constitutionalize, the difference between a type-two substantive directive and a type-three jurisdictional measure may become unimportant, and we might expect both enactors and interpreters to pay little or no attention to the distinction. The Free Exercise Clause arguably presents a case in point.

158 In my experience, outsiders often surmise that absent constitutional constraints, Utah would quickly move to establish the Latter-Day Saint religion. *See, e.g.*,

misplaced: we can acknowledge what the Framers chose to do under the circumstances that they faced without embracing the same jurisdictional arrangement for our circumstances. I would go farther: a return to the federalist jurisdictional arrangement for religion that the First Amendment originally contemplated is not only undesirable, but impossible. It simply is not going to happen.

And of course there are all sorts of ways of rejecting that outcome, and of rationalizing the rejection. Most of these avoidance routes are perfectly familiar. We can suppose ourselves to be under a "living Constitution" whose meaning changes with changing times and needs. Or we can talk about a "common law" Constitution[159] in which ongoing "tradition" is a more important source of guidance than one-time, two-centuries old decisions: I myself have argued for this approach in this area of the law.[160] Or, if we are more originalist and positivist in our jurisprudential leanings, we can get the Fourteenth Amendment to do creative work in transforming the more purely jurisdictional measure that the First Congress had in mind into something more suitable for our purposes.[161]

Recalling the route by which nonestablishment entered modern constitutional law suggests another, somewhat more imaginative, possibility. Remember that in the "incorporation" battles of the mid-twentieth century, the Supreme Court never held flatly that the Fourteenth Amendment incorporated the Bill of Rights per se. Rather, the Court held that the Fourteenth Amendment incorporated those rights that were fundamental—"implicit in the concept of ordered liberty,"[162] or "deeply rooted in this Nation's history and tradition."[163] Under this approach, the Court in essence treated various provisions of the Bill of Rights as authoritative statements of particular rights that were in fact fundamental. Through this convoluted process, the Establishment Clause got itself into the Fourteenth Amendment. And the Supreme Court also summarily declared that the Establishment

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CASS SUNSTEIN, RADICALS IN ROBES 2 (2005) (proposing the hypothetical that if the Establishment Clause were interpreted to "prohibit Congress from interfering with States' efforts to aid religion," Utah would allocate a "large chunk" of its state budget to the support of "the Mormon Church, its schools and its missionary programs"). The question is necessarily conjectural, but for what it is worth, my own judgment (as one who was born in and has spent many years in Utah) is that this view is far-fetched and ill-informed.

159 *See* David Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 880–91 (1996).

160 Steven D. Smith, *Separation as a Tradition*, 18 J.L. & POL. 215 (2002).

161 *See, e.g.*, Lash, *supra* note 4, at 1088.

162 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

163 Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977).

Clause had been intended by its enactors to have the same content as Jefferson's Virginia Statute for Religious Liberty[164]: this last claim was perhaps the most indefensible proposition in a generally dubious but seminal opinion.

In retrospect, though, that claim was not only implausible; it was also, arguably, gratuitous. Why not just skip the middle man—namely, the First Amendment—and declare that Jefferson's celebrated statute itself was (or at least *became*) the authoritative expression of a fundamental right? In other words, the "fundamental rights" logic of incorporation would seemingly allow the Virginia statute to be "incorporated" in its own right, without the implausible attachment of the statute onto the Establishment Clause.[165]

So there are plenty of more or less creative ways of avoiding the unfortunate practical conclusions that critics of the jurisdictional interpretation of the Establishment Clause sometimes seem to fear. Acceptance of that interpretation *as a historical matter* need not have any catastrophic consequences.

Still, widespread and open acceptance of the jurisdictional interpretation would have one important consequence for our contemporary constitutional rhetoric. Namely, we would be forced to relinquish the fiction—one that has run through so much constitutional law and argument in this field from *Everson* on—that in opposing school voucher programs or invalidating Ten Commandments monuments or the words "under God" in the Pledge of Allegiance, advocates and judges are merely faithfully carrying out a command of the Framers, or interpreting a substantive "principle" that the Framers themselves only dimly perceived but nonetheless put into the First Amendment so that future generations could elaborate and expand upon it.

In short, if the jurisdictional interpretation came to be generally accepted, you and I could still argue for whatever contemporary doctrines or principles or specific results we happen to fancy. But our arguments would need to earn their own way; we would no longer be able to piggyback them onto a supposed commitment that the Framers never made.

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164 Everson v. Bd. of Educ., 330 U.S. 1, 13 (1947).

165 Of course, it is understandable that Justice Black, author of the majority opinion in *Everson*, would not have found this argument attractive, because Black was famously the champion of the view that the Fourteenth Amendment directly incorporated the Bill of Rights, no more and no less. But that view did not achieve majority support on the Court.