State Constitutional Religion Clauses: Lessons from the New Judicial Federalism

Robert F. Williams

Follow this and additional works at: http://ir.stthomas.edu/ustjlpp

Part of the Constitutional Law Commons

Bluebook Citation

This Article is brought to you for free and open access by UST Research Online and the University of St. Thomas Journal of Law and Public Policy. For more information, please contact Editor-in-Chief Patrick O’Neill.
STATE CONSTITUTIONAL RELIGION
CLAUSES: LESSONS FROM THE NEW
JUDICIAL FEDERALISM

ROBERT F. WILLIAMS*

After Smith, it is malpractice for an attorney to file a claim under the Religion Clauses of the federal Constitution without also pleading the state constitution. At the moment plaintiffs have a far better chance of success with the state constitutions than with the federal. Some state courts will do no better than the federal courts, but some will do much better.

Douglas Laycock¹

INTRODUCTION: THE NEW JUDICIAL FEDERALISM

The Editors of the University of St. Thomas Journal of Law & Public Policy have made a wise decision to focus on state constitutional religion provisions. The various religion provisions in state constitutions have been, since the earliest state constitutions up until the present, central features not only of the rights guarantees contained in such constitutions, but also of the provisions limiting state and local government.²

The New Judicial Federalism (NJF) refers to the phenomenon beginning in earnest in the 1970s where state courts, interpreting their state constitutions, recognized rights greater than the rights protected by the United States Supreme Court under the federal constitution.³ A study of state constitutional religion provisions provides a perfect lens through which to

---

² See generally EDD DOERR & ALBERT J. MENENDEZ, RELIGIOUS LIBERTY AND STATE CONSTITUTIONS (1993); CHESTER J. ANTEAU, PHILLIP M. CARROLL & THOMAS C. BURKE, RELIGION UNDER STATE CONSTITUTIONS (1965).
assess the larger lessons that we have learned to date from the NJF. As I have observed, “Supreme Court federal constitutional interpretations represent the middle of an evolving process of constitutional decisionmaking in our federal system.”

In 1986, United States Supreme Court Justice William J. Brennan, Jr. noted, “rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions... is probably the most important development in constitutional jurisprudence of our times.”

If the Supreme Court upholds the federal challenge (striking down the state policy), the decision establishes a minimum national standard applicable in every state. But if the Court rejects the asserted federal challenge (upholding the state policy), the decision now triggers a series of “second looks” at the question by state-level decision makers, including the courts, based on state legal and policy arguments.

The United States Supreme Court’s 1990 decision in Employment Division v. Smith, referred to by Douglas Laycock in the above quote, is an excellent example of this paradigm. References to that decision, and the state constitutional reactions after it, constitute a major theme in this Symposium.

Of course, until the First Amendment religion clauses to the United States Constitution were incorporated into the Due Process Clause of the Fourteenth Amendment in the 1940s, there really was no judicial federalism because the First Amendment did not apply to the states. It was only after the Supreme Court’s incorporation decisions that we achieved the “double source” of both federal and state constitutional religion protections with which we are now so familiar. It is in this modern constitutional milieu that the “separationists” battle the “accommodationists.”

6. Such pronouncements about federal constitutional rights actually often leave much leeway for state courts to interpret and apply vague or multi-factor tests in such a way as to be below the federal standard, with little chance of correction by the Supreme Court. See Marc L. Miller & Ronald F. Wright, Leaky Floors: State Law Below Federal Constitutional Limits, 50 ARIZ. L. REV. 227 (2008).
7. WILLIAMS, supra note 3, at 115, 136.
9. See infra notes 15, 31-33, and accompanying text.
12. Id. at 75.
THE DIFFERING STATE CONSTITUTIONAL RELIGION CLAUSES

Virtually all of the state constitutions have more than one clause concerning religion. These clauses represent both guarantees of individual rights and limitations on state and local government. I have noted that there are a variety of different types of state constitutional rights provisions, in contrast with the more familiar federal constitutional rights. For example, state constitutional rights provisions are substantially different from their federal counterparts. Some of the best examples of these kinds of provisions are the free speech guarantees that are often stated affirmatively and the variety of religion clauses that are much more detailed than the First Amendment.13

In addition, by contrast to the First Amendment, which has remained unchanged, state constitutional religion provisions have evolved over time. As Dr. Alan Tarr has observed:

Many states' constitutional provisions dealing with religion developed over time, largely in response to specific conflicts. Characteristically they reflect their origins in these disputes, displaying greater specificity and detail than do the analogous provisions of the federal Constitution. In many instances, the state provisions also reveal a different perspective on the relationship between church and state than is found in the federal Bill of Rights.14

Paul Linton's article in this Symposium gives an exhaustive survey of the states' constitutional provisions and their judicial interpretation.15 For my part, I will take a fairly shallow dive into the state constitutional religion provisions themselves, with a slightly deeper look at the NJF lessons they illustrate.

---


14. TARR, supra note 11, at 76. Dr. Tarr further noted:
Thus the language found in state constitutions tends to be considerably more concrete and more specific than that found in the federal document. Furthermore, because they have roots in particular disputes, the state provisions have characteristically been phrased in language aimed at the specific evils, which brought them forth. This accounts, for example, for the emphasis on "no aid" and on freedom of worship in the states' early religion guarantees. Moreover, because of their origins in concrete disputes, state provisions represent considered constitutional judgments about contentious church-state issues and, as such, should lend themselves to direct application with only minimal interpretation. Id. at 94.

LESSONS FROM THE NEW JUDICIAL FEDERALISM

As mentioned earlier, state constitutional religion provisions provide an excellent lens through which to view the lessons we have learned about the NJF. The forgoing sections are intended, in summary fashion, to highlight the key elements of what Justice William J. Brennan, Jr. referred to as "[t]he most important development in constitutional jurisprudence of our times."

A. State constitutional religion clauses predated the federal constitution's Bill of Rights.

As early as the Declaration of Independence itself, the states began writing constitutions that included religion guarantees. Of course, many of the original states actually had established churches. Further, as pointed out by Dr. Christopher Hammons in this Symposium, these early state constitutions contained many references to God, and many of those references remain today. Even states such as New Jersey, which did not have a separate declaration or catalog of rights, included religious protection (albeit only for Protestants) in the body of their early constitutions. In fact, many of these early state constitutional provisions on religion form the basis for, or even remain the same in, the current state constitutions.

B. The state constitutional religion provisions influenced the drafting of the First Amendment.

It is quite clear that the state constitutional declarations of rights drafted during the "Founding Decade," prior to the adoption of the federal constitution and the Bill of Rights, were a major influence on James Madison's thought processes. Specifically, the religion provisions served as important models in the drafting and consideration of the federal Bill of Rights. According to Bernard Schwartz, "[i]f we look at the rights protected by the Federal Bill of Rights, we find that virtually all were protected in the state constitutions and bills of rights adopted during the Revolutionary period. . . ."
C. One of the focal points of the admission of new states was the religion clauses in their state constitutions.

During the process of admitting new states to the Union, before the adoption of the new federal Constitution, Congress was concerned with, among other things, the guarantee of religious liberty in the new states. For example, this was an element of the Northwest Ordinance. According to Eric Biber, "[t]he Ordinance was sweeping in its scope in shaping the new territorial governments: the territorial government had to respect religious liberty, protect habeas corpus and trial by jury, representative government, bail, prevent cruel and unusual punishments, compensate private property that was taken for public use, and provide public education."22

While not all states entered the Union under an Enabling Act, those that did were invariably required to respect religious freedom. For example, the 1889 Enabling Act, which permitted the admission of the two Dakotas, Montana and Washington, imposed the following requirements:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

****

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.23

These provisions have influenced modern interpretations of state constitutional religion clauses, such as those in the state of Washington.24 Eric


An examination of the state bills of rights written between 1776 and 1787 shows that Madison effectively extracted the least common denominator from them as the basis for his proposed list of amendments, excepting those rights which might reduce the power of the national government. Almost every one of the twenty-six rights in the U.S. Bill of Rights could be found in two or three state documents, and most of them in five or more. Id. at 258.

Biber further identified a pattern in the conditions imposed by Congress on the admission of new states:

The common theme revealed by the legislative history and the broader history of the states and territories in question - is a fear by Congress that the people of the territory about to be admitted could not be trusted with self-government because they were not "American" enough. Conditions were part of a larger process used by Congress to shape a territory's society and government so that it would be loyal, democratic, and more homogenous with respect to the rest of American society.25

D. State constitutional religion clauses read quite differently from the First Amendment.

The texts of state constitutional religion provisions, as noted earlier, are substantially different from the more familiar First Amendment. For example, one of Washington's state constitutional religion clauses reflects Tarr's observation about such provisions' attention to specific matters over time:

Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: provided, however, that this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion.


nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. 26

Once again, Linton’s article in this Symposium provides excellent coverage of the types of state constitutional religion provisions. 27

E. Many state constitutional religion clauses are affirmative in nature rather than negative

State constitutional religion clauses recognize and protect the affirmative individual rights of citizens, while the First Amendment places negative limits on the power of government. This is a very important distinction in the area of free speech under state constitutions. 28 One of the most important consequences of the distinction between affirmative and negative rights protection is that affirmative rights carry the possibility of applying to non-state actors, while negative rights do not. 29 This may become a very important matter under state constitutional religion guarantees. 30

F. State constitutional religion clauses may be interpreted to be more protective than the United States Supreme Court’s interpretations of the First Amendment.

This lesson, of course, represents the central tenet of the NJF. Although this phenomenon was certainly occurring to some extent prior to the United States Supreme Court’s decision in Smith, 31 such examples of independent state constitutional interpretation accelerated after that decision. In this respect, Chief Justice Christine Durham of the Utah Supreme Court observed that “[s]oon after Smith, however, scholars began to turn to state constitutions, with their expansive textual protections of religious liberty, as potentially viable alternatives to Smith’s restrictive federal doctrine.” 32 She

27. Linton, supra note 15; TARR, supra note 11, at 94-95. See also Linda S. Wendtland, Beyond the Establishment Clause: Enforcing Separation of Church and State Through State Constitutional Provisions, 71 VA. L. REV. 625, 631-34, 638 (1985) (noting that the state religion clauses are more specific and detailed and can be described in five categories that produce different degrees of state activism).
28. See, e.g., New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 760 (N.J. 1994); Jennifer H. Klear, Comparison of the Federal Courts’ and the New Jersey Supreme Court’s Treatments of Free Speech on Private Property: Where Won’t We Have the Freedom to Speak Next?, 33 RUTGERS L.J. 589, 595 (2002) (noting that the states determine whether their constitutions are interpreted more broadly than the Federal Constitution and that the New Jersey Constitution, for example, contains both negative and affirmative rights).
29. WILLIAMS, supra note 3, at 188-90.
31. 494 U.S. at 872.
32. Christine M. Durham, What Goes Around Comes Around: The New Relevancy of State
further noted that “opposition to Smith in the legal community was ‘thunderous.’”

In the 2000 decision Humphrey v. Lane, the Ohio State Supreme Court provided a good example of an independent state judicial interpretation of its religion clause. This was a case involving an incarcerated Native American who challenged the state’s limitation on his long hair. The relevant Ohio constitutional provision, Article I, Section 7, is also a long, detailed, affirmative guarantee of religious freedom. In rejecting the United States Supreme Court’s test in Smith, the Ohio Supreme Court concluded that the state did have a compelling interest in the subject matter, but that it had not chosen the least restrictive alternative to protect that interest. Still again, Linton’s article in this Symposium reviews the states’ decisions on whether to diverge from the United States Supreme Court’s interpretations of the First Amendment and to provide greater protection for rights (or limitations on state and local government) under their own state constitutions.

G. State constitutional religion clauses are often interpreted in lockstep with interpretations of the First Amendment.

Despite the textual and historical differences in state constitutional religion clauses and the First Amendment, many state courts interpret their constitutional provisions in “lockstep” with federal constitutional religion doctrines. These approaches can take at least two forms. The first is a case-by-case, reflective approach where the state court is fully aware that it may


33. Durham, supra note 32 at 365 (quoting Daniel A. Crane, Beyond RFRA: Free Exercise of Religion Comes of Age in the State Courts, 10 ST. THOMAS L. REV. 235, 236 (1998)).
34. 728 N.E. 2d 1039 (Ohio 2000).
35. Id. at 1041-42.
36. Id. at 1047. See Robert F. Williams, The New Judicial Federalism in Ohio: The First Decade, 51 CLEV. ST. L. REV. 415, 426-27 (2004) (discussing the decision in Humphrey v. Lane). See also State v. Miller, 549 N.W. 2d 235 (Wis. 1996) (holding that it is unconstitutional to require members of Old Order Amish to display red and orange triangular slow-moving vehicle emblems on horse-drawn buggies because it was not the least restrictive means to satisfy the State’s interest in traffic safety).
37. Linton, supra note 15. See also Durham, supra note 32.
38. See generally WILLIAMS, supra note 3, at 193-232.
interpret its religion clauses to be more protective than First Amendment doctrines, but after careful analysis of the state constitutional arguments, concludes that it should "follow" the United States Supreme Court's decisions on the same or similar issues. Interestingly, after the Supreme Court's decision in Sherbert v. Verner, a number of state courts interpreted their state religion guarantees in lockstep. Another Ohio case presents a good illustration. Here the Ohio Supreme Court upheld a school voucher statute in reliance on the federal Lemon test, noting that the federal and state provisions were "the approximate equivalent," but did not commit to follow federal doctrine in the future.

Other state courts, however, follow a second approach through engaging in the much less legitimate practice of "prospective lockstepping." Here, the court announces that the federal and state clauses will be interpreted the same way in the immediate case and in future cases. I have argued that such statements are dicta and cannot be considered binding precedent for methodology in future cases. This tendency towards lockstepping fails to understand the significant textual and historical differences between federal and state constitutional religion clauses. This is somewhat understandable, though, given the dominance of federal constitutional law in our country. Further, "path dependence" and resource limitations in state courts can result in old habits hanging on.

H. State constitutional religion clauses, may be less protective than the United States Supreme Court's interpretations of the First Amendment.

Although this possibility is not always acknowledged, state constitutional religion clauses can be less protective than the First Amendment either textually or as they are interpreted by state supreme courts. The New Jersey Supreme Court, for example, has observed that the New Jersey state constitution's protection of freedom of religion is "less pervasive, literally, than the Federal provision." The Supreme Court of

39. See Sherbert v. Verner, 374 U.S. 398 (1963) (holding that the Free Exercise Clause of the First Amendment requires the showing of a compelling government interest before denying an individual unemployment compensation after the individual's job was terminated because it conflicted with his or her religion).
40. Durham, supra note 32, at 370 n.122. For an interesting judicial discussion about whether to lockstep the state constitutional religion guarantee with the First Amendment, see Gingerich v. Comm., 382 S.W.3d 835 (Ky. 2012).
41. Simmons-Harris v. Goff, 711 N.E. 2d 203 (Ohio 1999); WILLIAMS, supra note 3, at 200.
42. Simmons-Harris, 711 N.E. 2d at 211-12; WILLIAMS, supra note 3, at 200.
45. Resnick v. E. Brunswick Bd. of Educ., 389 A.2d 944, 952 (N.J. 1978). See also TARR,
North Carolina noted, in a different context:

Strictly speaking, however, a state may still construe a provision of its constitution as providing less rights than are guaranteed by a parallel federal provision. Nevertheless, because the United States Constitution is binding on the states, the rights it guarantees must be applied to every citizen by the courts of North Carolina, so no citizen will be “accorded lesser rights” no matter how we construe the state Constitution.\(^46\)

This is not only an academic point, however. For example, if, after the 1963 rights-protective decision by the United States Supreme Court in *Sherbert*,\(^47\) a state constitutional text or judicial interpretation had been “less protective” than the Supreme Court’s formulation, that approach might have been resurrected by the later decision cutting back on protection of religion in *Smith*.\(^48\)

I. State constitutional religion clauses, or their judicial interpretation, can violate the federal Constitution.

An important current debate is taking place concerning the “Blaine Amendments” contained in many state constitutions.\(^49\) Serious questions have been raised about state Blaine Amendments based on arguments that they reflected anti-Catholic bias when they were adopted.\(^50\) Professor Mary Jane Morrison’s article in this Symposium provides an up-to-date treatment of the Blaine amendment controversy.\(^51\)

In a case that might have raised the Blaine amendment issue, Washington education officials interpreted Article I, Section 11 (quoted above)\(^52\) to

\(\textit{supra} \text{ note 11, at 79; Williams, supra note 19, at 63.} \)

46. State v. Jackson, 503 S.E. 2d 101, 103 (N.C. 1998). Some state constitutions contain provisions requiring officeholders to acknowledge the existence of a “Supreme Being” or other religious test. Such provisions have been held to violate the First Amendment to the Federal Constitution. See, e.g., Silverman v. Campbell, 486 S.E. 2d 1 (S.C. 1997).
47. 374 U.S. 398.
48. 494 U.S. at 872.
prohibit the use of state-financed scholarships for university religious studies. This was upheld against a First Amendment Free Exercise challenge in *Locke v. Davey*.51 The Court noted that the challenged provision of the Washington state constitution was not a “Blaine Amendment.”54

J. *A too-expansive interpretation of a state constitutional right to free exercise of religion might possibly violate the First Amendment’s ban on state establishment of religion.*

As perceptively pointed out by Professor Kent Greenawalt:

There is yet a further complexity I have thus far avoided. In some instances, what the state might regard as appropriate free exercise protection, might actually constitute a violation of the federal establishment clause. Or what the state might regard as a forbidden establishment of religion might be guaranteed protection as free exercise or free speech.55

K. *Judicial interpretations of state constitutional religion clauses may be “overturned” by state constitutional amendments.*

Dr. John Dinan has referred to amendments to state constitutions that overturn judicial interpretations of their provisions as “court constraining” amendments.56 Dinan provided an early example, a provision in the New Jersey Constitution of 1947, which authorized the legislature to provide transportation for children in both public and parochial schools, even though the courts had prohibited such involvement.57 He continued to explain that:

Several decades later, Wisconsin adopted a pair of court-overturning amendments as well as a court-preempting amendment. A 1967 Wisconsin amendment overturned a 1962 state court ruling prohibiting the use of public funds for transportation of children to religious schools. A 1972 amendment then overturned a 1950 state court ruling prohibiting the use by religious groups of public school

54. *Locke*, 540 U.S. at 723 n.7 (noting that the Alaska Supreme Court also struck down state aid to religious colleges in Sheldon Jackson College v. State, 599 P.2d 127 (Alaska 1979)).
56. John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983, 1003 (2007) (“These court-constraining amendments regarding religious establishment mostly took the form of court-overturning amendments, though a few were preemptive in nature.”).
57. *Id.*
buildings during non-school hours. Another 1972 amendment sought to insulate from state constitutional challenge legislative efforts to provide for released time programs (where public school students were released for religious instruction during school hours). 58

Tarr identified another example of this phenomenon in Massachusetts in 1913, where the judiciary upheld aid to sectarian colleges and universities, and was “promptly overturned by a constitutional amendment outlawing such aid.” 59

L. State courts are often directly involved in the procedures for amending state constitutional religion clauses.

Tarr has pointed out that, in contrast to federal constitutional law, states’ judiciaries are often drawn into litigation over the processes of amending the state constitution. 60 A recent example has been unfolding in the state of Florida, where a proposal to delete the Blaine Amendment from the constitution has been enmeshed in litigation. Florida’s Taxation and Budget Reform Commission, created in the state constitution itself, meets periodically to propose changes in the state’s tax laws and budgetary processes. It proposed amendments not only to repeal the Blaine Amendment, but also to modify the public education clause to permit school vouchers for religious schools. 61 The Florida Supreme Court struck these proposals from the ballot before a vote. 62

CONCLUSION

These brief thoughts are intended to introduce the richness of analysis of state constitutional religion clauses in the larger context of the renewed focus on state constitutions in the New Judicial Federalism. These provisions, both enumerating individual rights, as well as establishing limits on state and local governments, must be considered on their own terms, independent of what is more widely understood about the First Amendment to the United States Constitution.

59. Tarr, supra note 11, at 96.
60. G. Alan Tarr, Understanding State Constitutions 28 (1998); Williams, supra note 3 at 401-10.
62. Ford v. Browning, 992 So. 2d 132 (Fla. 2008); Williams, supra note 3, at 408.