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PART I

“ORIGINALIST” JURISPRUDENCE
OF THE RELIGION CLAUSES IN THE
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I

The Establishment Clause and the “Problem of the Church”

Steven D. Smith

It turns out – who would have guessed? – that Thomas Jefferson got it right after all: The establishment clause *was* intended to erect a “wall of separation between church and state.”¹ Less metaphorically, the clause was a response to what we can call “the problem of the church,” and it responded to that problem, primarily, by denying the national government power over the church. Moreover, a recovery of that truth might help redirect religion clause jurisprudence in a way that could make constitutional law not only more faithful to original meaning but also potentially more coherent and more congruent with our political traditions and culture.

Or so I argue. This argument should provide no comfort, however, to those – Justice Souter, for example – who are wont to invoke the authority of Jefferson;² indeed, it is the self-styled acolytes of Jefferson who as much as anyone have misunderstood, distorted, or ignored his crucial insight.

In this chapter, I try to explain how this is so. I also discuss the relevance of what our topic asks us to take as “given,” namely that the founders built an “implicit Protestant establishment.”

RELIGION AND “THE CHURCH”

My claim requires some initial reflection on the difference between *religion* and a *church*, and on what a church has meant to those who believe

¹ Thomas Jefferson, letter to the Danbury Baptist Association (January 1, 1802), reprinted in Philip B. Kurland and Ralph Lerner, eds., *The Founders’ Constitution*, vol. 5 (Chicago: University of Chicago Press, 1987), 96.

² See notes below and accompanying text.

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in or belong to it. (I use the indefinite article for now – *a* church – although later I will explain why I think the definite article is in some respects more appropriate.) A church is clearly a manifestation of religion, but, also clearly, it is not the same thing as religion. “Religion,” although notoriously difficult to define,³ typically refers to a body of beliefs, practices, ways of talking, ways of living, usually with an orientation to God or some transcendent reality. A church, by contrast, is a manifestation of religion, but it is something more than that. Over the centuries, the subject has stimulated a vast amount of reflection and articulation,⁴ and I will not pretend to offer any adequate account here. But three typical features are important for my argument.

First, at the most mundane level, a church is an association or fellowship of religious believers.⁵ So it is religion in a corporate or collective form. Second, a church has typically been formed and conceived as a sort of polity – a polity with a formal or informal constitution of some sort and a structure of offices and roles and that claims authority to pronounce doctrines, resolve disputes, and discipline transgressing members.⁶

These two features, however – the features of being an association of believers and of having the form of a sort of polity – do not yet express what may be the most essential feature, which is this: The members of a church typically believe that their association is in some sense divinely instituted⁷ and indeed that it is a this-worldly manifestation of a divine reality. Conceptions of church have often had a sort of Platonic quality, in which the observable organization and its workings may be described as

³ For a discussion of some of the difficulties, see Kent Greenawalt, *Religion and the Constitution: Free Exercise and Fairness*, vol. 1 (Princeton: Princeton University Press, 2006), 124–56.

⁴ For helpful overviews, see Brad Harper and Paul Louis Metzger, *Exploring Ecclesiology: An Evangelical and Ecumenical Introduction* (Grand Rapids, MI: Brazos Press, 2009); Veli-Matti Karkkainen, *An Introduction to Ecclesiology: Ecumenical, Historical and Global Perspectives* (Downers Grove, IL: InterVarsity Press, 2002); Avery Dulles, *Models of the Church* (Garden City, NY: Image Books, 1987); Joseph Cardinal Ratzinger, *Called to Communion: Understanding the Church Today* (San Francisco, CA: Ignatius Press, 1996).

⁵ See, e.g., Karkkainen, *Introduction to Ecclesiology*, 58–67, discussing conception of the church as a “fellowship of believers”; Ratzinger, *Called to Communion*, 24: “The Church is a communion united principally on the basis of prayer.”

⁶ See, e.g., Dulles, *Models of the Church*, 39, discussing a “juridicist” view that “conceives of authority in the Church rather closely on the pattern of jurisdiction in the secular state, and greatly amplifies the place of law and penalties.”

⁷ See, e.g., Ratzinger, *Called to Communion*, 43: “The origin of the Church is not the decision of men; she is not the product of human willing but a creature of the Spirit of God.”

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a “visible” manifestation or embodiment of what is sometimes called “the invisible church.”⁸ This third feature is more elusive or mystical than the first two.⁹ But it is what makes a “church” fundamentally different from a host of other associations – even religious associations – formed by human beings for shared purposes and having a particular organization or structure. Thus, Christians may sometimes unite to form associations with particular organizational structures and for particular purposes – Bible study, charitable service – without regarding such associations as churches, much less as *the church*. It is the absence of this third, more mystical feature, I suggest, that makes such organizations seem to be mere religious associations, not *the church*.

It may be – I am not sure – that “church” is a distinctively Christian notion. Devotees of other religions often associate together, of course, for worship and other purposes. These associations have some of the features that Christians have typically associated with “the church,” but they are also importantly different; in particular, they may not have either the polity-like character or the more mystical or Platonic quality that I have just referred to. Or so scholars tell us,¹⁰ although nothing in what I will say here depends on the point.

The fact that many religions do not give rise to churches, and that many religious believers (including many believers in Christianity) do not affiliate with any church, demonstrates the distinction between religion and church. Indeed, many religious believers are suspicious of, or even overtly hostile to, “the church.”¹¹ Conversely, the fact that at least the Christian religion *does* frequently issue in the formation of churches that have the character of specialized polities gives rise to a question – or a complicated set of questions – that has challenged believers and governments throughout Western history. What is the relation between the polity that is the church and other polities with which the church may come into contact – in particular, the state? Over the centuries, this question has generated vast amounts of theorizing, arguing, and politicking – and

⁸ See Karkkainen, *Introduction to Ecclesiology*, 51–53, 168–69.

⁹ In this vein, Avery Dulles discusses the conceptions of the church as a “mystical communion,” as the “Body of Christ,” and as a “sacrament.” Dulles, *Models of the Church*, 47–75.

¹⁰ See, e.g., Milton Steinberger, *Basic Judaism* (New York: Harcourt, Brace, Jovanovich, 1975), 150–58; Sachiko Murata and William C. Chittick, *The Vision of Islam* (New York: Paragon House, 1994), xxxiv: “Islam has neither churches nor priests.”

¹¹ See, by way of comparison, Karkkainen, *Introduction to Ecclesiology*, 7, observing that “the term *church* for better or worse reasons has been loaded with so many unfortunate connotations from authoritarianism to coercion to antiquarianism.”

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sometimes violent conflict. Let us call this multifaceted question about the relation of church and state the “problem of the church.” (I hasten to add that I do not intend “problem” to be a pejorative term here, and I do not regard the church only or primarily as a “problem.”)

I will suggest that the First Amendment’s religion clauses can be viewed (with an important qualification that I will notice) as a response by the American founders to this perennial question – to “the problem of the church.” But because the First Amendment was in a sense a relatively late chapter in the story, we need to notice some important episodes or phases of the story that preceded the American chapter.

BJM: BEFORE JEFFERSON AND MADISON

Two developments in particular need to be recalled. One crucial phase was the struggle during the Middle Ages for “freedom of the church.” Popes like Gregory VII and bishops like Anselm and Beckett had struggled to keep the church free from the control of emperors and kings – of rulers whom we can describe with the perilous term “secular.” Conversely, secular rulers like the German king Henry IV and Phillip IV of France had exerted themselves to maintain influence within the church and to resist what they viewed as overreaching by the church.¹²

We can understand this struggle as an effort to define and maintain a “separation of church and state.” It was emphatically *not* a struggle to keep a “secular” public sphere free from “religion.”¹³ Here the term “secular” is apt to mislead us. Classically, “secular” did not mean, as it often does today, “not religious”; rather it referred to this life and this world,¹⁴ which themselves were understood to be, as Nomi Stolzenberg puts it, a “specialized area of God’s domain.”¹⁵ In that sense, clergy who served in a parish – in the world – as opposed to retreating to a monastery were the “secular clergy.” In a similar sense, “secular” rulers could and did view

¹² See generally Brian Tierney, *The Crisis of Church and State* (Englewood Cliffs, NJ: Prentice-Hall, 1964), 1050–1300.

¹³ Much of what follows in this section is distilled from a longer treatment in Steven D. Smith, *The Disenchantment of Secular Discourse* (Cambridge, MA: Harvard University Press, 2010), 107–150.

¹⁴ See, by way of comparison, John Ayto, *Dictionary of Word Origins* (New York: Arcade Publishers, 1991), 465: “secular Latin *saeculum*, a word of uncertain origin, meant ‘generation, age.’ It was used in early Christian texts for the “temporal world” (as opposed to the “spiritual world”) The more familiar modern English meaning “non-religious” emerged in the 16th century.”

¹⁵ Nomi Stolzenberg, “The Profanity of Law,” in *Law and the Sacred*, ed. Austin Sarat (Stanford: Stanford University Press, 2007), 51.

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themselves as God’s ordained servants with responsibility to do God’s will within that specialized area.

The medieval effort to demarcate the jurisdictional lines between the church and the “specialized area of God’s domain” that was entrusted to the “secular” ruler was thus essentially a theological struggle. Popes and princes agreed that within God’s overarching order, the church and the state were responsible for distinct jurisdictions,¹⁶ and both argued about the proper allocation of jurisdiction mainly in religious terms.

The second historical phase important for our purposes involved the fragmentation and subjugation of the church that followed the Catholic-Protestant split. European Christians separated into Catholic, Lutheran, Reformed, Anabaptist, and Anglican associations. Often, of course, these divisions were a source of social and political conflict, and secular rulers accordingly felt called upon to intervene and to declare which of the various claimants would be *the* church of the realm. Such intervention led to an arrangement sometimes described as “Erastian.” José Casanova explains that following the Reformation, “the churches attempted to reproduce the model of Christendom at the national level, but all the territorial national churches, Anglican as well as Lutheran, Catholic as well as Orthodox, fell under caesaropapist control of the absolutist state.”¹⁷

The revolution in England by which King Henry VIII was declared to be the head of the church reflects the radical change. In the Middle Ages, secular rulers had sometimes claimed a role in the governance of the church. And they had sometimes fought with the church and pushed it around, sometimes to the point of effectively deposing popes and replacing them with other popes.¹⁸ But even in their most aggressively officious campaigns, these rulers had not treated the church as merely a subdivision of the state, and they had not declared themselves to *be* the head of the church. The Erastian subjection of the church thus reflected a radically expanded claim of authority by the state over the church. Let us call this “the Erastian claim.”¹⁹

¹⁶ See Charles Taylor, “Modes of Secularism,” in *Secularism and Its Critics*, ed. Rajeev Bhargava (New York: Oxford University Press, 1998), 31–32: “There were through the mediaeval centuries great overlap and great conflict between Church and state, but in all versions, and on all sides, it was axiomatic that there had to be a separation of spheres.”

¹⁷ José Casanova, *Public Religions in the Modern World*, (Chicago: University of Chicago Press, 1994), 22.

¹⁸ Various instances are described in Tierney, *Crisis of Church and State*.

¹⁹ See Owen Chadwick, *The Reformation* (Baltimore, MD: Penguin Books, 1964), 395: “The momentous change in the Reformation idea of the State appeared to be a legal change – the subjection of clerical legislation to the secular.”

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Because different rulers recognized different churches as the official church of the realm, and because eventually they also allowed for the possibility of dissenting churches, it might now seem anachronistic to speak of “*the church*,” in the singular; there are now many churches. And yet the singular usage did not disappear. Christians continued, and still continue, to refer to *the church*. What does this usage imply?

At least two things, I think. First, many Christians believed, and many still believe, that although there are various associations that can be described as “churches,” one of them in particular is still “the *true church*”; the others are, we might say, imitators or pretenders.²⁰ Second, as noted, Christians have often thought of “the church” in almost Platonic terms as a sort of mystical body – the “invisible church” – of which the “visible church” is an observable, this-worldly embodiment. According to this view, even when churches divide and proliferate, it is possible to think of the various *churches* as particular manifestations or local chapters of *the church*, so to speak.²¹ These usages may overlap, because insofar as the various churches differ in doctrine and structure, each church may still regard itself as a more full and faithful embodiment of *the church*. Nonetheless, even in the midst of a host of “churches,” it is still possible to talk of “the church.” Hence it is still possible to speak of “the problem of the church.”

Of course, many Americans of the Colonial and founding periods were Christians of one sort or another. Many were churchgoers.²² And so the founders of the American republic were faced with the problem of the church.

How did they respond to that problem? The short answer, I suggest, is that at least with respect to the national government, they renounced the Erastian claim, thereby disclaiming power over the church and in effect acknowledging the “freedom of the church” for which medieval popes and bishops had campaigned. The First Amendment’s establishment clause was an expression of this acknowledgment. Before explaining why

²⁰ See Dulles, *Models of the Church*, 124: “The problem of false churches is as old as Christianity itself.”

²¹ See, by way of comparison, Harper and Metzger, *Exploring Ecclesiology*, 12: “No one church constitutes the whole church. Just as there are many parts to Christ’s body, so there are many churches that form the one true church.” Dulles, *Models of the Church*, 121–60 discusses a variety of perspectives on the idea that “there are many churches but there is only one true Church” – an idea that is more congenial to some theological perspectives than others. See Dulles, 150: “The extent to which any given church sacramentally embodies the true Church varies from place to place and from time to time.”

²² See generally Mark A. Noll, *A History of Christianity in the United States and Canada* (Grand Rapids, MI: Eerdmans, 1992), 7–162.

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this interpretation seems persuasive, however, I need to notice a major complication.

JURISDICTION AND SUBSTANCE

I have argued at length elsewhere that the First Amendment’s religion clauses were understood by their enactors to be a purely jurisdictional measure.²³ The reason the establishment clause generated so little discussion in Congress and the ratifying states, I think, is that it was intended and understood to be nothing more than written confirmation of the already existing arrangement whereby jurisdiction over questions involving the establishment of religion belonged to the states, not the national government. Thus, the establishment clause was about the allocation of *jurisdiction* – jurisdiction not, as in the classical context, between the spiritual and temporal authorities, but rather between the state and national governments. The clause did not constitutionalize any particular *substantive principle* of religious freedom or nonestablishment.

That jurisdictional arrangement has long since been repudiated, however, and there is no realistic possibility, I think, that it could be restored. Ironically, modern decisions like *Everson v. Board of Education*²⁴ that purported to “incorporate” and extend the establishment clause in effect repudiated it, at least in its original meaning. The original understanding was that the federal government would leave matters concerning the establishment of religion to the states; “incorporation,” conversely, meant that the federal government, or at least the federal courts, would *not* leave such matters to the states, but would instead exercise an active, intrusive supervisory role over both the federal and state governments in the area of religion.²⁵ But even if we can identify this historical blunder, it does not follow that we can, or would want to, undo it. In my view, “incorporation” is too long and deeply entrenched, and the structure and functions of government in this country have changed too much, to permit any return to the jurisdictional arrangement contemplated by the founders.

A conclusion that one might plausibly draw from these reflections – and that I have in the past been inclined to draw – is that “original

²³ Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995), 17–54. I defend this interpretation against objections in Steven D. Smith, “The Jurisdictional Establishment Clause: A Reappraisal,” *Notre Dame Law Review* 81 (2006): 1843.

²⁴ *Everson v. Bd. of Education*, 330 U.S. 1 (1947).

²⁵ For discussion, see Smith, *Foreordained Failure*, 45–50.

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meaning” is simply irrelevant to modern establishment-clause jurisprudence. Partly in response to the assigned topic, however, this chapter is an effort to see whether something of relevance can be salvaged from the original meaning. In this constructive spirit, it seems fair to observe that even if the establishment clause was intended to be merely a denial of jurisdiction, it was still a denial of jurisdiction over *something* – something that the enactors denominated with the term “establishment of religion.” In an originalist vein, we would still have to ask what that disavowal of authority or jurisdiction referred to. My suggestion is that it referred to power over “the church.”

On this interpretation, we would not be able say that the establishment clause represented a decision embracing nonestablishment, or “separation of church and state,” as the *true substantive principle*. Individual enactors surely differed in their views, but as a body they remained collectively noncommittal about religious establishments at the state level. Indeed, the establishment clause worked to protect religious establishments at the state level against national interference.²⁶ Even if its motivation and substance were jurisdictional, however, the clause did deny the national government power over the church. That denial might, in principle, serve as a basis for an originalist jurisprudence.

More specifically, despite the clause’s jurisdictional purpose, we will still be telling the truth – or at least we may be, if the evidence is supportive – in saying that the establishment clause expressed a disavowal at the national level of the Erastian claim to power over the church. That proposition conceivably might provide us with the raw material for constructing a jurisprudence faithful to at least this aspect of the enactors’ understanding.

THE ESTABLISHMENT CLAUSE’S CORE MEANING: NO POWER OVER THE CHURCH

But *is* the evidence supportive? The interpretation I propose can be presented in two steps. The first step is well supported by the historical evidence, I think, but the second step involves more complexities.

The first step is to observe that the enactors of the establishment clause surely understood it to mean at least that the national government could not set up any official or preferred church. Thus, during discussions in the House of Representatives regarding what became the establishment

²⁶ For discussion, see Smith, *Reappraisal*, 1870–74.