

## WHAT IS “AN ESTABLISHMENT OF RELIGION”?

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There is an archaic expression in the first clause of the first amendment that makes the whole clause much less straightforward than one might wish. The whole provides:

Congress shall make no law respecting *an establishment of religion*, or prohibiting the free exercise thereof; . . .

One does not stumble over the first six words; it is the final four that give one a severe pause.<sup>1</sup> Granted that Congress is to make no law at all respecting an establishment of religion, to what does “an establishment of religion” refer?

In this brief effort to parse the critical phrase, we shall take no recourse to the Supreme Court’s famous “three prong” establishment clause test.<sup>2</sup> However useful the test may or may not be in tracking the modern case law, it is not directed to the curiosity one may have in the locution of the clause as such. Nor shall we review the nearly sixty cases decided pursuant to this clause during the forty years since the Supreme Court’s first serious address to the question, in 1947<sup>3</sup>—much less would I impose the tedium of that review here. And neither will we try even to sort out the principal differences within the principal lines of passionate academic scholarship on the establishment clause, a scholarship at once dense, formidable, and exceedingly rich.<sup>4</sup> Rather, I mean only to parse the four word phrase of the establishment clause itself in a willfully informal manner

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1. It is unavoidable for a person from Duke, as part of a symposium at the University of North Carolina, to note that UNC seems to have its hardest time with the final four.

2. Known in the trade as the “Lemon” test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the rubbery three prong test is essentially as follows. To survive a litigant’s challenge under the establishment clause, a law must satisfy each of these criteria: (1) it must reflect a secular (as distinct from a religious) purpose; (2) its primary effect must neither advance nor inhibit religion; and (3) it must not involve undue entanglements of government and religion. The test’s first two parts are taken from *School District v. Schempp*, 374 U.S. 203 (1963); the third part is taken from *Walz v. Tax Comm’n*, 397 U.S. 664 (1970). Sometimes, it is not followed at all, *see, e.g.*, *Mueller v. Allen*, 463 U.S. 388 (1983). And the Chief Justice of the United States does not subscribe to it, *see, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting).

3. *See* *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

4. The barest surface scratching turns up a number of highly impressive, mutually disagreeable books within the past three years alone. The enumeration of law review symposia would be even longer; the listing of substantial law review notes and independent articles, longer still. For those interested even in a glance at just some of the most recent literature, *see, e.g.*, R. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* (1982); T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* (1986); L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* (1986); W. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1985); R. SMITH, *PUBLIC PRAYER AND THE CONSTITUTION* (1987); J. SWOMLEY, *RELIGIOUS LIBERTY AND THE SECULAR STATE* (1987); Symposium Issue, *Religion and the State*, 27 WM. & MARY L. REV. 833 (1986).

I hope you may nonetheless find freshly interesting, in this bicentennial constitutional year. What this brief review may lead to, if all goes well, may be an easy three part surprise, a mnemonic device for categories of first amendment analysis tied to the words of the clause. In any case, here is how it goes.

A SURPRISING FIRST POSSIBILITY: THE ESTABLISHMENT CLAUSE AS A  
SOURCE OF PROTECTION FOR STATE ESTABLISHED CHURCHES  
AND STATE ESTABLISHED RELIGIONS<sup>5</sup>

As of 1787, when the Constitution was proposed, a number of states maintained established religions, i.e., specific churches and ministries officially favored by state government, religions thus themselves “established” by state law. A leading example of such a state was Massachusetts. Rockbound and determinedly Protestant Massachusetts mingled church support, claims of good government, and of Christian virtue indivisibly. It treated them not as Virginia had done (by 1785), for instance, but quite differently, as a joint enterprise of good government and good religion together. Its constitution provided for compulsory tax support “for the institution of the public worship of God and maintenance of public Protestant teachers of piety, religion, and morality.”<sup>6</sup> Not until 1833 did the last of these state establishments of religion disappear.

In brief, while disestablishment (the termination of state religious supports) had occurred in Virginia in 1785, practices elsewhere among the other twelve states differed widely when the new national constitution was under consideration, between 1787 and 1789. Each state had its own way, each state composed its own church-state choice. Moreover, the locution of “established” churches and state-established religions was itself understood in just this sense quite widely. Indeed, so thoroughly was this true that, for a time, the longest word in American dictionaries reflected the differences and struggles within the several states on the proper disposition of state establishments of religion. Those seeking the discontinuance of state religious establishment laws were identified by their ideology of church-state separation, i.e., their “ism,” their political commitment to disestablishmentarianism. And those opposed to this trend were identified quite oppositely (what else?)—as supporters of antidisestablishmentarianism, of course.

One’s refreshed recollection of these “states’ rights” disestablishment struggles may affect one’s thinking about the puzzling, archaic wording of the first amendment. One plausible reading of the first amendment might thus be the following one in particular. It makes a great deal of straightforward, unobscure sense: that Congress would have no power to interfere with any state’s religious establishment laws, whatever they might be. Rather, the continuation or the abatement of state establishments of religion would be reserved from any possibility of national interference; it is this guarantee of states’ rights (i.e., state pluralism) that the opening clause of the first amendment crisply declares.

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5. This involves a glimpse of the establishment clause as a guarantee of the right reserved to each state to establish such religions as each might see fit to establish under its own laws.

6. See L. LEVY, *supra* note 4, at 26-27; see also *id.* at 25-62; T. CURRY, *supra* note 4, *passim*.

An “establishment of religion” may be nothing other than a reference to “state religious establishment laws” in this view. If so, the clause is of no contemporary significance at all. For, by stipulation, as long as an act of Congress does not bear on any state’s own internal constitutional church-state policy as such, it would be unaffected by this clause. In turn, so long as an act of Congress does not “prohibit” the free exercise of religion, it would be unaffected by the balance of the full clause as well.

Consistent with this view, however, note that *neither* part of the full clause would restrict Congress from providing such affirmative support for religion overall, or even such affirmative support for particular religions, as were deemed by Congress most conducive to the common good. So long as such national supports as Congress might vote did not interfere with state establishment laws in any way, they would be untrammelled (*i.e.*, unprohibited) by anything in this clause. Such separate affirmative congressional supports would not affect any state’s own independent establishment policies, nor would they “prohibit” the free exercise of such religions as Congress might not think worthy of affirmative national support—but which Congress nonetheless would not presume to prohibit from being sustained by private or by state support.

It is certainly true that this view of the clause would be highly unsettling to our conventional assumptions. Note, nonetheless, how it makes its own sense of the quaintly odd words of the first amendment. In brief, disturbing to one’s mind as it may be, this version cannot simply be dismissed. But, having acknowledged as much, perhaps we ought to move on: possibly the clause is partly driven by the purpose just suggested, but possibly this (correct) understanding does not exhaust the clause.

A SECOND POSSIBILITY: AN AFFIRMATIVE DENIAL OF POWER IN  
CONGRESS TO LEGISLATE IN RESPECT TO  
ESTABLISHMENTS OF RELIGION

A different manner of understanding the four word phrase we are examining would take it in a more conventional usage than the one just tentatively proposed above. It also fits very neatly with the free exercise clause, however, and may—in that connection—make a great deal of suggestive sense.

In this usage of the four word phrase, “an establishment of religion” is just what it suggests even to modern ears, *i.e.*, it is a reference to establishments of religion—such as churches and other kinds of ecclesiastical organizations and any auxiliary body operating under religious auspices—and not just to *state* establishments of religion or state religious-establishment laws. And what the clause does is exactly what it says: Congress shall make no law respecting an establishment of religion, *i.e.*, NO law at all, just as the balance of the clause forbids Congress to prohibit the free exercise of religion—the whole subject is taken from Congress as an express limit on its enumerated powers. It is left entirely to the disposition of each state alone. The emphasis is still a “federalism” emphasis, but it is an emphasis of greater scope.

The principle that emerges draws nearer to the conventional wisdom of the

clause. The principle is that Congress may neither prohibit the free exercise of religion nor make any law respecting an establishment of religion, including one of financial support. Congress, in short, is to keep hands off. Each religious establishment is on its own, subject to how well or ill it may fare under the different state constitutions, but not subject to Congress in any way. How well each succeeds, just as much as how each is organized, how each operates, to whom each appeals, etc., all aspects of establishments of religion are removed from congressional power of any and all kinds. This interpretation, too, has a degree of plausibility, equally with the first possibility just examined.

Religions, even in 1787, were already numerous and varied, not merely among numerous sects of Protestantism, but among nonprotestant faiths as well, e.g., Catholicism and a number of nonchristian groups, including Jewish, even Muslim and Hindu religious communities and some few Buddhist centers too. Deism, hardly a religion at all (its "theology" was little more than the positing of a grand watchmaker who set things in motion) was the view of part of the American intellectual class. Within Protestantism, some sects were organized by congregation, others were administered by presbyters, others more heirarchically, some loosely or hardly organized at all. Each religion *established* its own liturgy; each *established* its own articles of faith; each religion *established* its own scriptures; all were *establishments* of distinctive, separate communities of faith.

Accordingly the degree of toleration and/or support of different (and differing) religions might still be dependent heavily on each *state's* own internal policy—the first amendment left such matters totally unaffected—but it was readily understood that Congress would have *no* role of its own to play. How well each religious community (*i.e.*, each religious establishment) might do, how it conducted itself, what theism it might or might not hold, etc., were matters of *no* national laws at all.

This perspective works a substantial modification of our first review, but it does so by extension alone. The first amendment leaves state laws unaffected. It forbids *Congress* any role—"NO law respecting"—no law in respect to establishments of religion; no preferential congressional support, no across-the-board support, and likewise no prohibition (by Congress) of the free exercise of religion.

In a very small nutshell, incidentally, note how virtually indistinguishable this view is from Jefferson's own metaphor in his description of the first amendment, in his letter to the Danbury Baptists, heartily approving the first amendment as erecting "a wall of separation" between church and (national) state. The separation is of the *national* government from *all* establishments of religion. It also conforms quite closely to both Madison's and Jefferson's general conduct in office as Presidents of the United States.<sup>7</sup> It is very close to the original posi-

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7. As President, Jefferson declined to issue a call for a day of national thanksgiving pursuant to Congress's precatory request.

"I do not think myself authorized to comply . . . I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no

tion reflected in Justice Black's opinion for the Supreme Court in *Everson*, in 1947, as well.<sup>8</sup>

A THIRD POSSIBILITY: NO NATIONAL LAWS RESPECTING THAT WHICH IS  
ESTABLISHED BY RELIGION—A CIVIL GOVERNMENT OF *CIVIL*  
EQUALS, CONDUCTED UNDER *CIVIL* AUSPICES.

The preceding possibilities still leave unconsidered at least two large issues, namely these. The first is the obvious issue of *state* laws and *state* practices (plainly utterly unaffected by the first amendment); second is the issue of governmental practices of the national government when not directed to state establishments of religion or to religious establishments as such.

The first of these issues is wholly a problem directed to the fourteenth amendment, adopted in 1868. I do not presume to address it here at all. (Suffice it to say that the Supreme Court has regarded the fourteenth amendment as having enacted the first amendment within itself, rendering the first amendment identically constraining on the states. The contestable correctness of that view is the burden of Mr. Curtis' paper in this symposium, not mine.)<sup>9</sup> The other problem is a problem of the national government's own conduct and practices, however, and it does deserve some additional brief treatment here.

What is that problem? It is the question of religion *in* government itself; the piecemeal installation (or establishment) of religion within the operation of the government. The tendency of government to cultivate an official religiosity, virtually claiming to establish itself under God. We return to the four word phrase

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law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. . . .

*I am aware that the practice of my predecessors may be quoted. But I have ever believed, that the example of State executives led to the assumption of that authority by the General Government, without due examination, which would have discovered that what might be a right in a State government, was a violation of that right when assumed by another."*

Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall—A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770, 775 (emphasis added) (quoting a letter from Thomas Jefferson to Rev. Samuel Miller (Jan. 23, 1808)). For additional examples and references, see *id.* at 774-78.

8. In *Everson*, Justice Black stated:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state [this is an error—Justice Black is referring to his view of the effect of the fourteenth amendment] nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."

*Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947).

9. See M. CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* (1986).

one more time.<sup>10</sup> One may think of this discussion, if one likes, as A Note on the Civil Public Square.<sup>11</sup>

A law "*respecting an establishment of religion*" is a law respecting that which is established by religion, *i.e.*, that which is established by religion rather than by the state. In this view of the establishment clause, the clause disallows civil government to *appropriate* that which is established by religion, to take it over or otherwise to plagiarize it, to mix it with the secular as an instrument of state policy; the first amendment forbids the assimilative absorption or installation under claim of secular authority of that which belongs to religion and which (by this clause—the establishment clause) is reserved from the government's appropriate and misappropriate use.

The impropriety of government uses of religion—the state's tendency toward the temporal commingling of the sacred and the civil—is disallowed on several grounds:

First, it profanes religion for any secular authority to trade on its practices for its (the state's) civil or secular ends, *i.e.*, it is a trespass on religion by the state; the state has no right to take things from the voluntary communities of faith and entangle them as instruments in the conduct of civil affairs.

Second, it is an act of civil hubris for government to seek religious purchase on ordinary civil loyalty, *i.e.*, it confuses the consensual and the democratic with the divine. The coupling of the civil order with religious forms or arrangements of church support was the usual first device of kings claiming divine right for rule. The tendency of the modern civil order to associate itself with religious forms, practices, or creeds, is a similar act of secular supererogation the first amendment unqualifiedly forbids.

Third, religions succumbing to the temporal temptation of symbiosis with the state (*e.g.*, in the installation of their faith within the public square) are inevitably compromised; their integrity is lost even in that which seems merely flattering.

Last, but by no means least, it is devastating for one's own government to imply distinctions of superior and inferior citizenship according to one's association or disassociation with the religion of The Public Square; it is a denial of equal respect and an insinuation of unequal worth.

Every act by the state that appropriates from religion is necessarily profane. The very word, "profane," conveys the essential idea. It means "outside the temple," from "*pro*" [before] and from "*fanus*" [the temple], from which the state has taken and thus made profane by its relocation and its secularly ensconced use. So, as an example, one may be offended by state appropriate uses of the Latin cross: when taken outside the church and made a part of the civil state's own equipment, the cross is by that act, profaned. So, too, with govern-

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10. Article VI of the United States Constitution also contains the express prohibition that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

11. *Cf.* R. NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

ment prescribed religious services (e.g., state teacher-conducted school prayer). The act of profanation lies in the presumption of secular succession to, and/or state appropriation of, things belonging to the separate voluntary community of faith.

The notion of the Public Square is itself a strong metaphor of the civil commonwealth. The Public Square is always *civil*, e.g., it is not sacred, it does not attempt to hallow itself or the state. And it does not profane religion by misappropriating from establishments of religion. It is, rather, the place where a polity's citizens meet on terms of common need and mutual regard under civil auspices for such debate, discourse, and exchange as they have occasion to pursue under civil auspices. And the public square is not "naked" in being a civil place, *i.e.*, it need not be aluminumized, austere, unaesthetic, or cold. But it is laid out unobtrusively, and it is always conducted appropriately, without disregard or implied distinction among all citizens; it is conducted with the carefulness of equal and mutual civil regard.

Unlike a closed (or temple) community, a special community—one appropriately limited to the faithful—it is a public polity of civil equals. It does not claim to be a church, it does not function as a church. It does not try to hallow public ground. It is the civil public square that represents a civil polity of many citizens, all of whom come and who are treated on equal and on mutually reassuring terms.

The sense of this natural distinction, in the conduct of open civil government, is famously captured in James Madison's own Memorial and Remonstrance, written during the spring of 1785. "[T]he Civil Magistrate," wrote Madison, may *not* "employ Religion as an engine of Civil policy"; to do so is both "an arrogant pretension," and an "unhallowed perversion of the means of salvation." It "degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." It likewise has a "tendency to banish our Citizens," he observed.<sup>12</sup> Virtually all four of the previously noted points are eloquently compressed in these few spare phrases from the longer essay Madison composed in his powerful (and successful) appeal.

The state that appropriates the sacred (*i.e.*, Latin crosses, invocations, religious mottos, icons, chaplains, hymns, or even the purposeful simulation of distinctly religious architecture), disregards Madison's pleas for civil restraint. It does assert "an arrogant pretension," and it is an "unhallowed perversion of the means of salvation." It does "degrade from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." It likewise tends to "banish" those thus made to feel their difference or their alienation within this place. This iconographic, self-sanctifying state is not equally each citizen's own civil, accessible government. Rather, in its insinuating simulation of some sort of religious establishment, it is an example of the overbearing state.

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12. See W. MILLER, *THE FIRST LIBERTY* 359-64 (1986).

Following Madison's Memorial and Remonstrance (which was drawn in the form of a Petition, signed by several thousand Virginians, and was successful in defeating certain proposals previously pending in the Virginia General Assembly), the Virginia General Assembly turned around and enacted a Bill for Establishing Religious Freedom. The Bill provided:

No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, or shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.<sup>13</sup>

If one relates this passage to the history of religious freedom in America (as surely we may do), it, too, tends strongly to reinforce the disentanglement of the common auspices of civil government from that which is established by and reserved to the voluntarism of religious faiths. It completes the definition that one identifies to the establishment clause itself.

In summary, to piggyback on I Corinthians, there are, then these three strands in unraveling the four word phrase; that Congress shall make:

1. No law respecting each state's singular or multiple establishment laws, *i.e.*, no law respecting what each state decides pursuant to its own nationally-unfettered choice; and
2. No law respecting establishments of religion, *i.e.*, no law directing their articles of faith, modes of worship or ecclesiastical affairs, no national interference with the voluntarism of religion; and
3. No law respecting that which is established by religion, *i.e.*, no secular (mis)appropriation from the communities of religious faith, no borrowing—no confusion of the national civil polity of a free and diverse citizenry with the divine or the sacred—no self-sanctifying religious insinuation in a government deriving its just powers from consent.

There are strong common themes of federalism, freedom, diversity, and respect bound into this trinity of definitions which are themselves, the "faith, hope, and charity" of the first amendment's first clause. Whether they are always reflected in actual government practice I cannot presume to vouch for. But I believe they fit philosophically together, in a bicentennial review.

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13. *Id.* at 357-58.