

## *The Establishment Clause*

Compiled by Alexis Ernst-Treutel, May 2014

[www.legis.wisconsin.gov/lrb/pubs/tapthepower.htm](http://www.legis.wisconsin.gov/lrb/pubs/tapthepower.htm)

The Establishment Clause is part of the First Amendment to the United States Constitution. It states that “Congress shall make no law respecting an establishment of religion...”. Within this broad framework are debates over government imposing religious practices upon individuals. As religion and public policy continue to intersect, the Establishment Clause will continue to be a topic of discussion and a challenge for government.

- Albert, Richard. “The Constitutional Politics of the Establishment Clause.” *Chicago-Kent Law Review* 87, no. 1 (2012): 867-897. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1954809](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954809).  
A historical look at the development of the Establishment Clause, interpretation by the courts, and the use of taxpayer standing in Establishment Clause cases.
- Barron, Jerome A., and C. Thomas Dienes. *First Amendment Law in a Nutshell*. 4<sup>th</sup> edition. St. Paul, MN: Thomson/West, 2008. (342.41/B27)  
An overview of the First Amendment including the religion clauses and discussion of a wide variety of current issues on these topics.
- Billitteri, Thomas J. “Government and Religion: Was the United States Founded as a ‘Christian Nation’?” *CQ Researcher* 20, no. 2 (January 15, 2010): 25-48. (200/C761s)  
This edition discusses court decisions, the Establishment Clause, current debates, and lists a chronology of major events and court cases.
- Brouger, Cynthia. *Application of Religious Law in U.S. Courts: Selected Legal Issues*. Washington DC: Library of Congress, Congressional Research Service, 2012. (200/X5/2012) [http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R41824\\_01112012.pdf](http://www.law.umaryland.edu/marshall/crsreports/crsdocuments/R41824_01112012.pdf).  
This paper includes an appendix with descriptions of selected proposed state legislation prohibiting the application of religious law in court.
- Brouger, Cynthia. *Legal Standing Under the First Amendment’s Establishment Clause*. Washington DC: Library of Congress, Congressional Research Service, 2009. (200/X4) <http://www.fas.org/spp/crs/misc/R40825.pdf>.  
This report discusses the doctrine and various types of legal standing, application of these rules to Establishment Clause cases, the implication of *Hein v. Freedom From Religions Foundation* decision and issues involved in *Salazar v. Buono*.
- Esbeck, Carl H. “Differentiating the Free Exercise and Establishment Clauses.” *Journal of Church & State* 42, no. 2 (Spring 2000): 311-334.  
In addition to this article, full text of articles 1990 to the present with a 12-month delay are available via [www.badgerlink.net](http://www.badgerlink.net). *The Journal of Church & State* publishes studies, court decisions and government legislation from around the world.
- Haynes, Charles C., and Oliver Thomas. *Finding Common Ground: A First Amendment Guide to Religion and Public Schools*. Nashville, TN: First Amendment Center, 2007. (370.5/H33)  
<http://www.firstamendmentcenter.org/madison/wp-content/uploads/2011/03/FCGcomplete.pdf>.  
Topics in this book include student religious clubs and practices, holidays in public schools, character education and religion in public school curriculum. In addition, a Frequently Asked Questions and sample school district policies are provided.
- Hurley, Peggy. “Wisconsin Constitution Article I, Section 18, The Establishment Clause.” *Constitutional Highlights*. Madison, WI: Wisconsin Legislative Reference Bureau, 2005. (LRB/c) <http://legis.wisconsin.gov/lrb/pubs/consthi/05consthiV2.htm>.  
An audio summary is also available under the heading “Wisconsin Constitution.” <http://legis.wisconsin.gov/lrb/podcasts/index.htm>.
- Johnson, Michelle. “Religious Repression: Should U.S. Support of Religious Freedom Be Stronger?” *CQ Researcher* 23, no. 39 (November 1, 2013): 933-956. (200/C761w)  
Among the ways religious freedom can be repressed is the targeting of citizens for not practicing the accepted religion of the state.
- Larsen, Brett B. “No Closer to Clarity: The Establishment Clause and the Supreme Stumble in *Van Orden v. Perry*.” *Marquette Law Review* 90, no. 1 (Fall 2006):155-171. (328/M34)  
The *Van Orden* decision upheld a display of the Ten Commandments on the Texas State Capitol grounds as constitutional. “In doing so, the Court confused an already complex area of law by failing to adopt a consistent test or overrule old ones.”
- McConnell, Michael W. “Religion and Its Relation to Limited Government.” *Harvard Journal of Law & Public Policy* 33, no. 3 (Summer 2010): 943-952. Available via [www.badgerlink.net](http://www.badgerlink.net).  
This article “asserts that the Establishment Clause is more closely related to the Free Press Clause than to secularization or anti-religiosity. It also discusses how the establishment of religion functioned historically, specifically on the issue of theocracy.” From the abstract.
- Ruan, Nantiya. “Accommodating Respectful Religious Expression in the Workplace.” *Marquette Law Review* 92, no. 1 (Fall 2008):1-32. (328/M34)  
“This article makes the case for judicial recognition of respectful religious expression in the workplace as more consistent with the Court’s Establishment Clause jurisprudence and also more true to the legislative intent of the religious accommodation provisions of Title VII [of the Civil Rights Act of 1964].”

# The Establishment Clause

## Continued

- Sisk, Gregory C., and Michael Heise. "Ideology 'All The Way Down'? An Empirical Study of Establishment Clause Decisions in the Federal Courts." *Michigan Law Review* 110, no. 7 (May 2012): 1201-1263. Available via [www.badgerlink.net](http://www.badgerlink.net).  
Using Establishment Clause cases from 1996 through 2005, this paper analyzes the role of ideology in influencing decisions by the Federal Courts and provides an in depth discussion about the challenges of ruling using clear rule of law guidelines instead of judicial discretion.
- VanSant, Cameron A. "From Opportunity to Right: Constitutional Change and the Establishment Clause." *Yale Journal of Law & the Humanities* 25, no. 1 (2013): 148-180. <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1406&context=yjlh>.  
This Note examines the inclusion of the Establishment Clause in state constitutions and change of the "constitutional culture" with the addition of the Fourteenth Amendment to the United States Constitution.
- Wald, Kenneth D., and Allison Calhoun-Brown. *Religion and Politics in the United States*. 7<sup>th</sup> edition. Lenham, MD: Rowman & Littlefield Publishers, Inc. 2014. (200/W14)  
"Now in its seventh edition, Religion and Politics in the United States includes analyses of the nation's most pressing political matters regarding religious freedom, and the ways in which that essential constitutional freedom situates itself within modern America." From the publisher.
- Xiang, Jun. "The Confusion of Fusion: Inconsistent Application of the Establishment Clause Nondelegation Rule in State Courts." *Columbia Law Review* 113, no. 3 (April 2013): 777-816. <http://columbialawreview.org/the-confusion-of-fusion-inconsistent-application-of-the-establishment-clause-nondelegation-rule-in-state-courts/>.  
The nondelegation rule was a product of *Larkin v. Grendel's Den, Inc.* and determined that giving governmental powers to religious institutions was prohibited under the Establishment Clause. This article describes the development of this doctrine, the confusion it has created in state courts, and argues for a stoppage of its application in Establishment Clause cases.
- Related Web Sites**
- American Civil Liberties Union (ACLU).  
The mission of the ACLU is to defend and preserve the individual's rights and liberties that the Constitution and laws of the United States guarantee everyone in this country.
- *Religion and Belief*. Accessed April 16, 2014. <https://www.aclu.org/religion-belief>.
  - *Defense of Religious Practice and Expression*. Accessed April 16, 2014. <https://www.aclu.org/aclu-defense-religious-practice-and-expression>.
- Bill of Rights Institute. *Religious Liberty: Establishment Clause*. Accessed April 16, 2014. <http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/establishment-clause/>.  
This nonprofit organization provides educational materials and lists major court cases.
- First Amendment Center. Accessed April 9, 2014. <http://www.firstamendmentcenter.org/category/religion>.  
The center features daily updates on news about First Amendment-related developments, as well as detailed reports about U.S. Supreme Court cases involving the First Amendment, and commentary, analysis and special reports on free expression, press freedom and religious-liberty issues.
- Library of Congress. *Information Bulletin*. "Wall of Separation." Accessed April 23, 2014. <http://www.loc.gov/loc/lcib/9806/danbury.html>.  
Thomas Jefferson's letter to the Danbury Baptists is the origin of the phrase "a wall of separation between church and state". This page has commentary about the document and links to Jefferson's unedited and final texts.
- Pew Research Religion and Public Life Project. *Church-State Law*. Accessed April 7, 2014. <http://www.pewforum.org/topics/church-state-law/>.
- United States Department of Justice. *Religious Freedom Restoration*. Accessed April 7, 2014. [http://www.justice.gov/jmd/ls/legislative\\_histories/pl103-141/pl103-141.html](http://www.justice.gov/jmd/ls/legislative_histories/pl103-141/pl103-141.html).  
Links to bills, speeches, hearing documents and reports related to the legislative history of the Religious Freedom Restoration Act of 1993.
- United States Equal Employment Opportunity Commission. *Religious Discrimination*. Accessed April 17, 2014. <http://www.eeoc.gov/laws/types/religion.cfm>.  
Information related to Title VII of the Civil Rights Act of 1964.
- United States National Archive and Records Administration. *Bill of Rights*. Accessed April 25, 2014. [http://www.archives.gov/exhibits/charters/bill\\_of\\_rights\\_transcript.html](http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html).  
Links to a transcription of the Bill of Rights, high resolution images, and other resources.
- United States Supreme Court Media. OYEZ. ITT Chicago-Kent College of Law.  
The Oyez Project at Chicago-Kent is a multimedia archive devoted to the Supreme Court of the United States and its work. It aims to be a complete and authoritative source for all audio recorded in the Court since the installation of a recording system in October 1955.
- *Lemon v. Kurtzman*. Accessed April 16, 2014. [http://www.oyez.org/cases/1970-1979/1970/1970\\_89](http://www.oyez.org/cases/1970-1979/1970/1970_89).
  - *Agostini v. Felton*. Accessed April 16, 2014. [http://www.oyez.org/cases/1990-1999/1996/1996\\_552](http://www.oyez.org/cases/1990-1999/1996/1996_552).
- Vanderbilt University. Government Information. *Religion and State: Issues and Groups*. Accessed April 16, 2014. <http://diglib.library.vanderbilt.edu/ginfo-pubpol.pl?searchtext=Religion&Type=LTR&Resource=DB&Website=GOVTINFO>.  
This web portal from the University of Virginia library provides links to a wide range of organization and government Web sites.

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