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The Establishment Clause: How Separate Are Church and State?

BACKGROUND ESSAY

How would you feel if all your classmates, no matter what religion, had to start every day with a reading from the Koran? Once you graduate, can you imagine having to sign a statement that you believe in God in order to vote? Today Americans think of “freedom of religion” as essential to daily life. The notion of the “separation of church and state”—the idea that government and religion should be kept separate—is the basis of many Americans’ beliefs about religious freedom. What does freedom of religion mean?

What Did the Founders Intend?

Many early colonists left England so they could practice their own religion freely. Most colonies did not give this freedom to all settlers, however, and soon religious discrimination [treating people differently based on their religion] began in many of the colonies.

Nearly all of the Founders practiced some form of Christianity. They agreed, however, that the federal government and religious institutions should be kept separate. The Founders wished to keep the national government from interfering in both individual and state religious freedom. Many of the Founders believed that religious belief would help strengthen and support republican [representative] government. Therefore,

most states had official, state-sponsored [supported by the state government], and taxpayer-supported religions.

A few Founders believed that only Protestants should be government officials, but the majority wanted opportunities open to all people of good character. Article VI of the Constitution states that there should be “no religious test” for holding federal office. When the First Amendment was added to the Constitution, there was little debate about the protections it provided for religious liberty.

None of the Founders believed in the complete and total separation of religion and government. The phrase many Americans use to describe religious freedom, “separation of church and state” is not found in either the Constitution or the Bill of Rights. It comes from an 1802 letter by President Thomas Jefferson. As president, he allowed buildings used by the War and Treasury departments to be used for religious services (the Capitol and Supreme Court chambers were used as well), yet he described the First Amendment as building “a wall of separation between church and state.” In the twentieth century, this phrase became a type of “test” for whether or not legislation violated the First Amendment. Over time, the

courts have created several similar tests. Some scholars think that Jefferson's "wall" is meant as a separation between the federal government and churches at the state/local level. They do not believe Jefferson wanted a separation between all levels of government and all individual religious practices.

What Does the Establishment Clause Protect?

The beginning of the First Amendment reads: "Congress shall make no law respecting an establishment of religion." This is called the Establishment Clause. Originally, it did two things: it banned a national church and kept the government out of existing state churches. Individuals were protected from a national government imposing a specific set of religious beliefs. The Establishment Clause keeps the government from establishing an official religion or supporting a specific religion.

During the eighteenth and nineteenth centuries, there were few questions about the meaning of the Establishment Clause, since it applied only to the actions of the federal government. However, as more and more constitutional principles were applied to state and local governments (as a result of the Fourteenth Amendment), more questions about the Establishment Clause were raised. Today, the Clause is understood to protect Americans against any law, policy, or regulation from any level of government (or



The First Amendment protects against an established national religion.

government official) that could lead to an establishment of religion. The meaning of "establishment," however, is still debated. Some argue that the Establishment Clause means that the government should not endorse any specific religion. Others believe that the government can support religious groups as long as all religions are treated equally. Others think that government can extend to religious groups the same courtesies it does to other community organizations. For example, if a town allows the Boy Scouts to make use of public land, then it should allow access to religious groups on the same terms. Still others think that displays of faith should not be allowed on government property.

How Has the Supreme Court Interpreted the Establishment Clause?

The first important Supreme Court case involving the Establishment Clause came in 1947. The case was *Everson v. Board of Education*. A New Jersey school district was using public money to pay for Catholic school students' costs of getting to and from school. The Court voted 5-4 that the policy was constitutional since it applied to both public and private schools. Since the policy was beneficial to the children in the school district and it did not benefit a specific religion, the policy passed constitutional review.



A law does not violate the Establishment Clause if it has a non-religious purpose, according to the Supreme Court.

In the twentieth century, the Supreme Court devised a series of “tests” to determine Establishment Clause violations. In *Everson v. Board of Education* (1947), Justice Hugo Black cited Jefferson’s “wall of separation” principle. In *Lemon v. Kurtzman* (1971), the Court developed the “Lemon Test” and said that a law does not violate the Establishment Clause if: 1) it has a non-religious purpose; 2) its main effect neither helps nor hurts a religion; and 3) government and religion are not mixed too much. In the 1984 case of *Lynch v. Donnelly*, the Court created the “Endorsement Test”: government cannot endorse (support or publicly approve) or even appear to endorse any one religion. Finally, in *Lee v. Weisman* (1992), the Court announced the “Coercion Test”: a government practice that forces a person to participate in a religious ceremony (in this case, rabbi-led prayer at a middle school graduation) is unconstitutional. None of these “tests” have been applied to any cases since 1997, creating uncertainty as to how the Court currently determines violations of the Establishment Clause.

Can There Be Religion in Public Schools?

Since local, state, and federal governments fund public schools, many Establishment Clause cases deal with the question: how much can religion and public schools mix? In most cases, the Court has answered, “Very little.”

The Court ruled that all school-sponsored prayer is unlawful in *Engel v. Vitale* in 1962. A year later, the Court struck down a Pennsylvania law that said each school day must begin with a Bible reading (*Abington School District v. Schempp*, 1963). In 1980, the Court overturned state laws that forced teachers to display the Ten Commandments in their classrooms (*Stone v. Graham*, 1980). Setting aside a minute for “voluntary prayer” was also struck down (*Wallace v. Jaffree*, 1985). In 2000, the Court struck down a Texas policy of letting high school students vote on whether or not a prayer should be read at sporting events (*Santa Fe Independent School District v. Doe*, 2000).

The Court places fewer limits on voluntary student religious groups. Public high schools must give religious clubs the same right to use facilities as other groups (*Board of Education of Westside Community Schools v. Mergens*, 1990). In 2001, the Court held that an elementary school violated a religious club’s free speech rights when it did not allow the group to meet on school property after classes, even though it allowed all non-religious groups to do so (*Good News Club v. Milford Central School*, 2001).

Can Public Money Go to Religious Schools?

Can tax money, which everyone pays, go to schools that are funded by religious and other private groups? In the first case dealing with this issue

(*Mitchell v. Helms*, 2000), the Court allowed the government to pay for computer equipment for public, private, and religious schools. In *Zelman v. Harris* (2002), the Court held that a voucher system [parents are given a fixed amount of public money and then are able to pay for a religious or public school of their choice] does not violate the Establishment Clause because the voucher system has a non-religious goal: the better education of children.

Can the Government Use Religious Symbols?

When, if ever, can the government use religious symbols? The Court has ruled that states may open lawmaking sessions with a prayer (*Marsh v. Chambers*, 1983). The Court has also issued rulings about religious displays on public property. In *Lynch v. Donnelly* (1984), the Court ruled that communities can celebrate Christmas with a “sufficiently secular” public nativity display. In *Allegheny County v. Greater Pittsburgh ACLU* (1989), the Court said that a display with a Christmas tree and a menorah was constitutional.

In 2004, the Supreme Court heard the case of *Elk Grove Unified School District v. Newdow*. The issue was whether making students say the Pledge of Allegiance, which contains the phrase “under God,” was an unconstitutional endorsement of religion. While the Supreme Court did not rule on the issue, the case was reheard by a lower federal court which ruled 2-1 that saying

the pledge was not a violation of the Establishment Clause.

The Ten Commandments are considered by many to be an important part of our legal history. Others see them as religious rules. On June 27, 2005, the Court issued two seemingly-contradictory decisions about the Ten Commandments. In *Van Orden v. Perry* (2005), the Court ruled that a 6-foot monument displaying the Ten Commandments—placed with other monuments on the property of the Texas State Capitol—did not have a religious purpose and so the monument did not violate the Establishment Clause. In *McCreary County v. ACLU* (2005), the Court ruled that large framed copies of the Ten Commandments in Kentucky courthouses did violate the Establishment Clause.

Erecting a cross on public lands has also been reviewed by the Court. In *Salazar v. Buono* (2010), the Court ruled that a large cross erected on public land and intended to honor the dead of World War I was constitutional since it was primarily a patriotic symbol. Yet, in 2012, the Court—by refusing to hear a case—let stand a ruling that another cross as part of another war memorial did violate the Establishment Clause.

Does Anyone Besides the Supreme Court Make Decisions About the Separation of Church and State?

While many disputes about the Establishment Clause are brought to the Supreme Court, its decision is not always the last word on the subject. Local government and school districts make policies that meet their community's expectation of religious liberty.

The Office of Faith-Based and Neighborhood Partnerships, a part of the Executive Branch, works with religious groups to provide social services [services which benefit the community, like homeless shelters or youth programs] in local communities. Some scholars think that the Establishment Clause creates a “picket fence”—not a wall—between religion and government. A wall between church and state suggests that the two should be completely separate. A picket fence, which is only waist high and features gaps between the vertical boards, suggests that the First Amendment does not aim to remove religion from public spaces and political discussion. This relationship will continue to be a topic of great debate.



Critical Thinking Questions

1. What did the Founders believe the Establishment Clause would prevent? What would it allow?
2. What are the “tests” the Supreme Court uses to decide if laws or policies violate the Establishment Clause?
3. Keeping the Establishment Clause in mind: With which Supreme Court decisions in the Background Essay do you agree? With which decisions do you disagree?
4. When you have children, would you support a voucher system allowing you to give tax-payer money to whichever school you chose for your child? Why or why not? How do you think James Madison would have decided this question and why?
5. Which of these best describes the Founders’ view of the Establishment Clause? A) the clause provides a “wall of separation” between church and state; or B) the clause provides a “picket fence” between church and state? Why does it matter which view you have when thinking about these issues?