

ADVANCED CONSTITUTIONAL LAW – THE RELIGION CLAUSES

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“Congress shall make no law respecting an Establishment of Religion or prohibiting the free exercise thereof...”

1. Indicia of Original Intent – and Otherwise

- A Bill Establishing a Provision for Teachers of the Christian Religion
- Memorial and Remonstrance Against Religious Assessment
- Virginia Act for Religious Freedom (Virginia Code § 57-1)
- George Washington Thanksgiving Day Proclamation, 1789
- Jefferson’s Letter to the Danbury Baptists
- Joseph Story, *Commentaries on the Constitution of the United States* (1833) §§1863-73
- *Marsh v. Chambers*,
463 U.S. 783 (1983)

2. Do the Religion Clauses Apply to the States? Why?

- *Barron v. Baltimore*
32 U.S. 243 (1833)
- *Permoli v. New Orleans*
44 U.S. 589 (1945)
- *Cantwell v. Connecticut*,
310 U.S. 296 (1940)
- *Everson v. Board of Educ.*,
330 U.S. 1 (1947)
- *Illinois v. Board of Education*,
333 U.S. 203 (1948)

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- *Jaffree v. Board of School Comm'rs*,
554 Supp. 1104 (S.D. Ala. 1983)
- *Elk Grove Unified Sch. Dist. v. Newdow*,
524 U.S. 1 (2004) (Thomas, J., concurring in the judgment)
- *Van Orden v. Perry*,
545 U.S. 677 (2005) (Stevens, J. joined by Ginsburg, J.,
dissenting)

3. What Does Free Exercise Mean?

a. Pre-*Smith* Cases

- *Reynolds v. United States*,
98 U.S. 145 (1879)
- *Minersville School Dist. v. Gobitis*,
310 U.S. 586 (1940)
- *West Virginia State Bd. of Educ. v. Barnette*,
319 U.S. 624 (1943)
- *Wisconsin v. Yoder*,
406 U.S. 205 (1972)
- *Sherbert v Verner*,
374 U.S. 398 (1963)
- *Thomas v. Review Bd. of Indiana Employment Security Div.*,
50 U.S. 707 (1981)
- *Hobbie v. Unemployment Appeals Com.*,
480 U.S. 136 (1986)

b. *Smith*

- *Employment Div. v. Smith*,
494 U.S. 872 (1990)

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c. **Post-Smith Cases**

- *Church of Lukumi Babalu Aye v. City of Hialeah*,
508 U.S. 520 (1993)
- *City of Boerne v. Flores*,
521 U.S. 507 (1997)
- *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*,
546 U.S. 418 (2006)

4. **What is an Establishment of Religion?**

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

a. **Empowerment**

- *Larkin v. Grendel's Den*,
459 U.S. 116 (1982)

b. **Neutrality**

- *Larson v. Valente*,
456 U.S. 228 (1982)
- *Fairfax Covenant Church v. Fairfax County Sch. Bd.*,
17 F.3d 703 (4th Cir.1994)
- *Good News Club v. Milford Cent. Sch.*,
533 U.S. 98 (2001)
- *Widmar v. Vincent*,
454 U.S. 263 (1981)
- *Rosenberger v. Rector & Visitors of the Univ. of Va.*,
515 U.S. 819 (1995)
- *Board of Educ. v. Grumet*,
512 U.S. 687 (1994)

c. **Lemon Test**

- *Lemon v. Kurtzman*,
403 U.S. 602 (1971)

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d. Coercion

- *Lee v. Weisman*,
505 U.S. 577 (1992)
- *Santa Fe Indep. Sch. Dist. v. Doe*,
530 U.S. 290 (2000)
- *Newdow v. United States Cong.*,
292 F.3d 597 (9th Cir. 2002)
- *Elk Grove Unified Sch. Dist. v. Newdow*,
542 U.S. 1 (2004)

e. Endorsement

- *Lamb's Chapel v. Center Moriches Union Free School Dist.*,
508 U.S. 384 (1993)
- *Capital Square Review Bd. v. Pinette*,
515 U.S. 753 (1995)

5. Who Has Standing to Complain?

- *Flast v. Cohen*,
392 U.S. 83, 93 (1968)
- *Hein v. Freedom from Religion Found., Inc.*,
127 S. Ct. 2553 (2007)
- *Winkler v. Gates*,
481 F.3d 977 (7th Cir. 2007)

6. Play in the Joints

a. Accommodation or No

- *Corporation of the Presiding Bishop v. Amos*,
483 U.S. 327 (1987)
- *Estate of Thornton v. Caldor*,
472 U.S. 703 (1985)
- *Texas Monthly, Inc. v. Bullock*,
489 U.S. 1 (1989)

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- *Walz v. Tax Commissioner*,
397 U.S. 664 (1970)
- *Cutter v. Wilkinson*,
544 U.S. 707 (2005)

b. Support or No

- *Witters v. Washington Dep't of Servs. For Blind*,
474 U.S. 481 (1986)
- *Locke v. Davey*,
540 U.S. 712 (2004)

7. Religion in the Government's Schools

- *Engel v. Vitale*,
370 U.S. 421 (1962)
- *Abington Sch. Dist. v. Schempp*,
374 U.S. 203 (1966)
- *Chaudhuri v. State of Tennessee*,
130 F.3d 232 (6th Cir. 1997)
- *Tanford v. Brand*,
104 F.3d 982 (7th Cir. 1997)
- *Wallace v. Jaffree*,
472 U.S. 38 (1985)
- *Brown v. Gilmore*,
258 F.3d 265 (4th Cir. 2001)
- [Virginia] Board of Education Guidelines Concerning Religious Activity in the Public Schools
- *Edwards v. Aguillard*,
482 U.S. 578 (1987)
- *Stone v. Graham*,
449 U.S. 39 (1980)

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8. Government in the Religious Schools

- *Zorach v. Clauson*,
343 U.S. 306 (1952)
- *Tilton v. Richardson*,
403 U.S. 672 (1971)
- *Hunt v. McNair*,
413 U.S. 734 (1973)
- *Columbia Union College v. Clarke*,
159 F.3d 151 (4th Cir. 1998)
- *Comm. for Public Educ. & Religious Liberty v. Nyquist*,
413 U.S. 756 (1973)
- *Mueller v. Allen*,
463 U.S. 388 (1983)
- *Board of Education v. Allen*,
392 U.S. 236 (1968)
- *Aguilar v. Felton*,
473 U.S. 402 (1985)
- *Agostini v. Felton*,
521 U.S. 203 (1997)
- *Mitchell v. Helms*,
530 U.S. 793 (2000)
- *Zelman v. Simmons-Harris*,
536 U.S. 639 (2002)

9. Government Involvement in Religious Disputes

- *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*,
344 U.S. 94 (1952)
- *Serbian E. Orthodox Diocese v. Milivojevich*,
426 U.S. 696 (1976)
- *Jones v. Wolfe*,
443 U.S. 595 (1979)

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- *In Re: Multi-Circuit Episcopal Church Litigation*,
(Fairfax County Cir. Ct. Case No. 2007-248724) (decision
June 27, 2008)
- *Falwell v. Miller*,
203 F. Supp. 2d 624 (W.D.Va. 2002)

10. Religion in Other Government Settings

a. Legislative Prayer

- *Marsh v. Chambers*,
463 U.S. 783 (1983)
- *Wynne v. Town of Great Falls*,
376 F.3d 292 (4th Cir. 2004)
- *Simpson v. Chesterfield County*,
404 F.3d 276 (4th Cir. 2005)
- *Hinrichs v. Speaker of the House of Representatives*,
506 F.3d 584 (7th Cir. 2007)
- *Doe v. Tangipahoa Parish Sch. Bd.*,
494 F.3d 494 (5th Cir. 2007)
- *North Carolina Civil Liberties Union v. Constangy*,
947 F.2d 1145 (4th Cir. 1991)

b. “Ceremonial Deism”

- *Zorach v. Clauson*,
343 U.S. 306 (1952) (Douglas)
- *Allegheny v. ACLU*,
492 U.S. 573 (1989)
- *Lynch v. Donnelly*,
465 U.S. 668 (1984)

c. Holiday Displays and Ten Commandments

- *Allegheny v. ACLU*,
492 U.S. 573 (1989)

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- *Lynch v. Donnelly*,
465 U.S. 668 (1984)
- *McCreary County v. ACLU*,
545 U.S. 844 (2005)
- *Van Orden v. Perry*,
545 U.S. 677 (2005)

d. “Faith-Based” Initiatives

- *Bowen v. Kendrick*,
487 U.S. 589 (1988)

e. Prisons and the Military

- *Cutter v. Wilkinson*,
544 U.S. 709 (2005)
- *Turner v. Safley*,
482 U.S. 78 (1987)
- *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987)
- *Americans United for Separation of Church and State v. Prison Fellowship Ministries, et al.*;
2007 U.S. App. LEXIS 27928 (8th Cir. Iowa 2007)
- *Goldman v. Weinberger*,
475 U.S. 503 (1986)
- *Laird v. Anderson*,
466 F.2d 283 (D.C. Cir. 1972)