

ASPEN CASEBOOK SERIES

RELIGION AND THE CONSTITUTION

Third Edition

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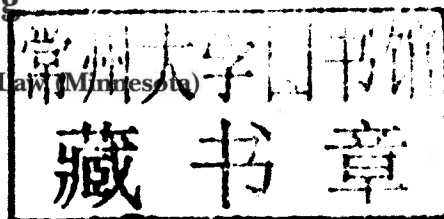
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**RELIGION
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PREFACE

The subject of religion and the state has unquestionably come of age in recent years. There is now a large enough body of court decisions on the First Amendment's religion provisions to support a full-length casebook—indeed, more than one. And the relationship of religion to government and public life has doubtless provoked even greater interest since the September 2001 terrorist attacks, which were inspired by a religious view radically opposed to the modern Western arrangement of religious liberty.

This casebook on religion and the U.S. Constitution reflects the authors' thinking on the subject over the period of a number of years. It reflects several premises about how to teach and understand the relations between government and religion.

The heart of the book is organized according to three fundamental ways in which government interacts with religion:

- the regulation of religious activity (Part III),
- the funding of religious activity (Part IV), and
- the treatment of religion in government's culture-shaping activities such as public schools (Part V).

Each of these ties together a number of sections—a structure that is designed to help students see logical relationships between cases that may involve quite different sets of facts. In each of these three major areas, we examine doctrines under both components of the First Amendment's religion provision:

- free exercise of religion and
- nonestablishment of religion.

One of the chief reasons why the Supreme Court's case law on religion has been so inconsistent and shifting is that for years the Court treated these two First Amendment concepts in isolation from each other, labeling cases as "Free Exercise Clause cases" or "Establishment Clause cases." The structure of this casebook—with free exercise rulings immediately followed by nonestablishment rulings in the same area, and vice versa—is designed to help teachers and students think about the two clauses together, to consider the implications of

nonestablishment in every free exercise dispute, and vice versa. The interaction of these two clauses is the key point of Part I; it continues to be emphasized throughout the text. In this third edition, we have also added comparative materials about religion and government in other countries, particularly Europe and the Islamic world.

This casebook seeks throughout to integrate current issues concerning religion and the state with historical and theoretical perspectives on those issues. One of the great rewards of studying church-state relations is the rich history of reflection and debate on the subject that extends back for centuries. The questions that underlie today's debates—for example, how to maintain a moral framework for society and at the same time respect the rights of conscientious dissenters—are truly perennial questions, even though they may take different forms in different times and places. Accordingly, Part II of the book provides a concentrated historical background on the development of religious liberty in America from the established churches of the colonial era up through the enactment of the First Amendment. Subsequently, each of the three largest parts of the book (III through V listed above) begins with a historically oriented section, and the text returns to historical and theoretical materials throughout.

To make possible the integration of these rich historical and theoretical perspectives, the casebook relies on fairly significant notes following the leading cases. It is difficult to make sense of the Supreme Court's case law under the Religion Clauses, which is so shifting and inconsistent taken on its own terms, without understanding that there are various historical and theoretical tensions that pull the Justices in different directions. The notes following the cases aim to help students by summarizing the holding and rationale of the case before delving into its complications and variations.

The authors have worked hard to include questions on both sides of the issues. People who look through the book will find citations to a wide range of authors. For example, see the material on Charitable Choice (in Part IV, the very last section). It includes several quotes from Carl Esbeck, a proponent of charitable choice; but following it are two or three notes that raise constitutional objections, including quotes from Alan Brownstein, the leading academic critic of charitable choice.

The richness of the subject of religion and the state means that it is difficult to cover every page of these materials in one course. Different emphases are possible: basic Religion Clause doctrines, the historical background of current issues, the legal problems faced by religious organizations, and so forth. The Teacher's Manual accompanying the book provides instructors with suggested syllabi for these varying emphases.

New developments following the publication of this edition, such as Supreme Court decisions and significant lower court decisions and scholarly commentary, will be posted on the supplemental website at <http://www.bc.edu/ReligionAndTheConstitution>.

A word about editing style. Another advantage of a subject as focused as religion and the Constitution is that students can read opinions in something resembling their actual form, without the need for constant severe editing. Therefore, a number of the cases here are lightly edited. We have, however, tried to streamline the reading by eliminating reported citations within excerpts. (The case citation almost always appears somewhere else in the materials.) We

have indicated the editing out of text within an excerpt by ellipses, but we have not indicated where citations or footnotes have been dropped.

Finally, as with the first two editions, we welcome comments from teachers and readers on all aspects of the book.

Michael W. McConnell

John H. Garvey

Thomas C. Berg

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**RELIGION
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