

Separation of Church and State
Wesley Advocates
Trinity United Methodist Church

Location: Zoom

Dates: Sundays, 13 December through 14 February

Time: 10:45 a.m. to 11:45 a.m.

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Introduction

Most of us recognize the phrase “separation of church and state.” Many of us interpret that to mean the church stays out of the state’s business and the state stays out of the church’s business. But you will not find the phrase “separation of church and state” anywhere in the Constitution. Thomas Jefferson originally coined that phrase in a letter to the Danbury Baptists on 1 January 1802 to assuage Baptists’ fears. He told them that a “wall” had been erected to protect them. At the time, Jefferson and others used the metaphor to refer exclusively to keeping the state out of the church’s business, not to keeping the church out of the state’s business. Since then, however, the metaphor and the law itself evolved to take on new and more complex meanings.

This class will examine philosophical, constitutional, and political questions pertaining to matters of church, state, and American constitutionalism, including: Do individuals and institutions have a right to religious liberty? If so, what are its philosophical foundations? How does the American Constitution protect and limit religious freedom? Is religion necessary, good, or bad for liberal democracy? What is the proper relationship between church and state?

We will primarily use two texts: *Separation of Church and State* by Jonathan A. Wright and *Constitutional Law - The Religion Clauses* (Turning Point Series) by Daniel Conkle. You will only need to purchase the Conkle book since I will provide texts from Wright’s book as PDFs/handouts. These two books will examine classical, medieval, and modern political philosophy; leading cases of American constitutional law; and contemporary legal and political thought. I will also distribute pertinent Supreme Court cases as PDFs/handouts.

1. Historical Roots of Our Church-State Relationship

- “From Constantine to the Reformation: Historical Context,” excerpt from *Separation of Church and State* by Jonathan A. Wright
- “17th-Century Tumult,” excerpt from *Separation of Church and State* by Jonathan A. Wright
- “18th-Century Discontent,” excerpt from *Separation of Church and State* by Jonathan A. Wright

2. The Founders and Original American Understanding

- “Jefferson and Madison,” excerpt from *Separation of Church and State* by Jonathan A. Wright
- Chapters 1 and 2 from Conkle’s *Constitutional Law - The Religion Clauses*

- These chapters will cover (1) the “Virginia Understanding,” (2) federalism, and (3) Fourteenth Amendment “Incorporation.”
- Consider these questions: What would those voting on the Bill of Rights have understood them to mean? Does the drafting history from the First Congress inform that inquiry? How was the role of religion viewed in the States versus the federal government? Why were the Religion Clauses included in the First Amendment with other rights about free speech and freedom of the press?

3. **Embedded and Evolving Constitutional Values**

- Chapter 3 from Conkle’s *Constitutional Law - The Religion Clauses*
- This chapter will cover (1) a brief history of American religious liberty, (2) contemporary Constitutional values, and (3) Constitutional interpretation
- Speech by Atty General Edwin Meese III before the American Bar Association (1985)
- Speech by Justice William J. Brennan Jr. at Georgetown University (1985)

4. **Interpreting the Religion Clauses: Doctrinal Fundamentals**

- Chapter 4 from Conkle’s *Constitutional Law - The Religion Clauses*
- This chapter will cover (1) impermissible burdens and benefits, (2) general nondiscrimination principles, (3) defining “religion,” (4) the content and sincerity of religious beliefs, and (5) doctrinal fundamentals.

5. **The Free Exercise Clause, Part I**

- Chapter 5 from Conkle’s *Constitutional Law - The Religion Clauses*
- This chapter will cover (1) freedom of belief (and freedom of speech), (2) religious conduct and substantial burdens. (3) nondiscriminatory burdens on religious conduct, (4) discriminatory burdens on religious conduct, (5) free exercise protection even in the absence of formal or deliberate discrimination, (6) legislative responses to the Supreme Court’s Restrictive Constitutional Doctrine, and (7) Constitutional values and the Free Exercise Clause.

6. **The Free Exercise Clause, Part II**

- We will spend this week continuing discussion of issues from Conkle’s chapter 5 and examine the Court’s most recent Free Exercise/Non-discrimination cases.
- *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* (2018)
- *Kennedy v. Bremerton School District* (2019)
- *Espinoza v. Montana Department of Revenue* (2020)

7. **The Establishment Clause, Part I**

- Chapter 6 from Conkle’s *Constitutional Law - The Religion Clauses*
- This chapter will cover (1) discriminatory and nondiscriminatory benefits to religion, (2) general doctrinal tests and concepts, (3) religion and public schools, (4) religious symbolism outside the public school context, (5) public aid to religion, and (6) Constitutional values and the Establishment Clause.

- Consider these questions: Does incorporation of the Establishment Clause against the States make sense in light of its purpose and the Founders' views? Who was the Establishment Clause designed to protect? Where did the Court derive the "neutrality" principle from in *Everson*? Where did the Court derive the *Lemon* test?

8. **The Establishment Clause, Part II**

- This week we will focus on Supreme Court cases addressing the concept of coercion, particularly in the school context.
- *Engel v. Vitale* (1962)
- *Wallace v. Jaffree* (1985)
- *Lee v. Weisman* (1992)
- *Santa Fe Independent School Dist. v. Doe* (2000)
- *Elk Grove Unified School District v. Newdow* (2004)

9. **The Establishment Clause, Part III**

- Plan to discuss how the Court's doctrine has developed under the Establishment Clause with respect to financial aid.
- *Walz v. Tax Comm'n of City of New York* (1970)
- *Zelman v. Simmons-Harris* (2002)
- *Locke v. Davey* (2004)
- *Trinity Lutheran Church of Columbia v. Comer* (2017)
- Douglas Laycock, *Why the Supreme Court Changed Its Mind About Government Aid to Religious Institutions*, 2008 Brigham Young Law Review 275 (skim)
- *Gaylor v. Mnuchin* (Cir. 7th 2019) (skim)
- Consider the following questions: What test should apply to public benefits? After *Zelman*, what is the test for determining neutrality? Have the lower courts been given clear guidance on how to evaluate these claims? Why do plaintiffs have "taxpayer" standing at all?

10. **Symbols and Spaces**

- Plan to discuss how the Court has addressed various public symbols, public spaces, legislative prayer, and endorsement.
- *Marsh v. Chambers* (1983)
- *Lynch v. Donnelly* (1984)
- *Van Orden v. Perry* (2005)
- *McCreary County v. ACLU* (2005)
- *Town of Greece v. Galloway* (2014)
- *American Legion v. American Humanist Society* (2019)
- Consider these questions: If you are counsel to the city of Evansville, what practical steps do you advise your client to take if it wishes to display a religious symbol? What is the governing standard after *American Legion*? How would you analyze a newly constructed religious symbol on public property?