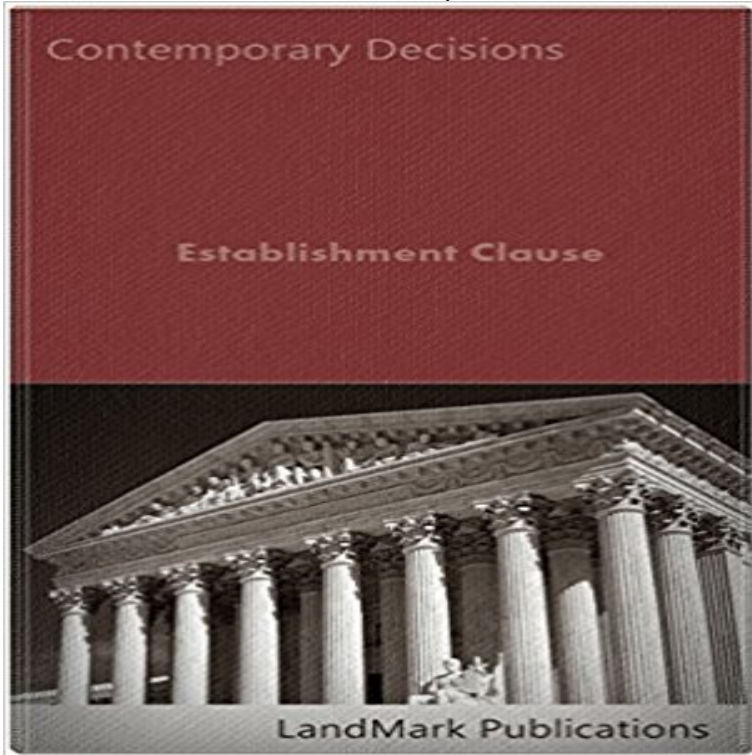


Establishment Clause (Constitutional Law Series)



THIS CASEBOOK contains a selection of 143 U. S. Court of Appeals decisions that analyze, discuss and interpret the First Amendment's Establishment Clause. The selection of decisions spans from 2002 to the date of publication. Although much criticized, the Lemon test still governs cases alleging violations of the Establishment Clause. *Am. Atheists, Inc. v. Port Auth. of N.Y. & N.J.*, 760 F.3d 227, 238 n. 12 (2d Cir.2014). Under Lemon, for government action to satisfy the neutrality principle of the Establishment Clause, it must (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion. *Id.* at 238 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971)) (internal ellipses omitted). *Jewish People of Westhampton Beach V. Village*, 778 F. 3d 390 (2nd Cir. 2015).

* * * In cases construing the Establishment Clause, courts have frequently employed the reasonable-observer test to discern whether a reasonable observer, aware of the history and context of the community in which the conduct occurs, would view the practice as communicating a message of government endorsement or disapproval of religion. *Bauchman ex rel. Bauchman v. W. High Sch.*, 132 F.3d 542, 551-52 (10th Cir.1997); accord *Green v. Haskell Cty. Bd. of Commrs*, 568 F.3d 784, 799 (10th Cir. 2009). At least at first blush, the reasonable-observer test would appear to be congruent with symbolic-speech jurisprudence; in that area, courts have focused on whether a display communicates a message that is identifiable by reasonable persons. See *Johnson*, 491 U.S. at 409, 109 S.Ct. 2533 (assaying the perspective of the reasonable onlooker); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294, 104

S.Ct. 3065, 82 L.Ed.2d 221 (1984) (describing expressive conduct as that which, in context, would reasonably be understood by the viewer to be communicative); Holloman, 370 F.3d at 1270 (noting that the expressiveness of an appellants conduct is determined from the viewpoint of a reasonable person); see also Spence, 418 U.S. at 410, 94 S.Ct. 2727 (looking to the perspective of the great majority of citizens viewing the display); cf. Walker, 135 S.Ct. at 2251 (considering observers reasonable interpretation of the messages conveyed by specialty license plates). *Cressman v. Thompson*, 798 F. 3d 938 (10th Cir. 2015).

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