

Ever since the Establishment Clause¹ was incorporated against the states,² courts have relied on it to find a range of state conduct unconstitutional.³

¹ **U.S. Const.** amend. I ("Congress shall not make any law respecting an establishment of religion").

² See Everson v. Bd. of Educ., 330 U.S. 1, 5 (1947) (holding that the Establishment Clause applies to the states, as well as to the federal government). Some people think such incorporation was incorrect.

See, e.g., Michael W. McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 **Harv. L. Rev.** 1409, 1484 (1990) (observing that Madison did not suggest that the Establishment Clause apply to the states); Linda Greenhouse, The Current Court, **N.Y. Times**, Feb. 21, 2005, at A1 (explaining the belief of Justice Clarence Thomas that, though incorporation of the Free Exercise Clause may be proper, incorporation of the Establishment Clause is not). But see Steven Bryce, **Basics of Constitutional Law** 496 (2003) ("The vast majority of legal thinkers . . . agree with the Court's incorporation of the Establishment Clause.").

³ See, e.g., *ACLU v. Rollins*, 212 F.2d 434, 447-49 (2d Cir. 1984)

(holding that a New York statute calling for a moment of silence for voluntary prayer at the beginning of the public school day violated the Establishment Clause); *Drinker v. Flagstaff Sch. Dist.*, 120 P.2d 231, 236 (Ariz. Ct. App. 1995) ("Supplementing parochial school teachers' salaries with public dollars is inconsistent with the Establishment Clause"); cf. *Sherman v. Nettles*, 145 N.W.2d 32, 41 (Mich. 1982) (finding that state-funded scholarships for seminary students violates a Michigan constitutional provision identical to the U.S. Constitution's Establishment Clause).