Standards for Interpreting the Establishment Clause

*Lemon v. Kurtzman* (1971)

The First Amendment of the U.S. Constitution states, “Congress shall make no law respecting an establishment of religion....” Americans have always agreed that this “establishment clause” prohibits the government from establishing or promoting a national religion. However, since the earliest years of the republic, Americans have disagreed about whether the establishment clause bans all government involvement with religion. Does the First Amendment require strict separation of church and state, with no involvement or accommodation between the government and religion? Or does the establishment clause permit certain kinds of interaction, cooperation, and accommodation between religious institutions and the government?

Thomas Jefferson, author of the Virginia Statute for Religious Freedom as well as the Declaration of Independence, favored strict separation of religion from government. Jefferson expressed this viewpoint in an 1802 letter to the Baptist Association of Danbury, Connecticut: “I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between Church & State.”

More than 145 years after Jefferson wrote his letter to the Danbury Baptists, the Supreme Court explicitly acknowledged his view of the First Amendment’s establishment clause in response to *Everson v. Board of Education of Ewing Township* (1947). Writing for the Court, Justice Hugo Black said,

[N]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion....In the words of Thomas Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”

In *Everson*, however, the Court permitted a modest accommodation between church and state within the same opinion that incorporated Jefferson’s interpretation of the establishment clause. The Court upheld as constitutional a New Jersey statute that provided for publicly funded transportation of students to Catholic parochial schools. This kind of accommodation between church and state was acceptable, said the Court, because the state government law was neutral in regard to religion. Further, the state provided a public ser-
vice for the common good, which primarily benefited children and only indi-
rectly helped the religious schools, but did not promote religious doctrine.

Although the Court’s Everson opinion permitted the use of public funds to
transport students to a church-affiliated school, it also strongly endorsed Jeff-
ferson’s opinion on church-state relations: “The First Amendment has erected
a wall between church and state. This wall must be kept high and impregnable.
We could not approve the slightest breach.”

Thomas Jefferson’s “wall of separation” metaphor, as rendered by Justi-
court’s decision in several
subsequent cases, including two cases prohibiting state-sanctioned prayers or
readings from the Bible in public schools, Engel v. Vitale (1962) and Abington

However, the Court earlier had expressed a slight disagreement with Jef-
ferson’s view of church-state relations in Zorach v. Clausen (1952), when it
approved a program whereby public school students could be released during
school hours to receive religious instruction in church-owned facilities. Writing
for the Court in Zorach, Justice William O. Douglas said that the First Amend-
ment “does not say that in every and all respects there shall be a separation of
Church and State.” In that case, the Court clearly supported an accommoda-
tion between government and religion under certain limited conditions.

Throughout American history, there have been examples of accommodation
between government and religion, such as the traditional tax exemptions pro-
vided to religious institutions and the employment of chaplains by the federal
government to serve the U.S. military forces. Furthermore, in Board of Educa-
tion of Central School District No. 1 v. Allen (1968) the Court had upheld a New
York State program that provided textbooks on secular subjects to students in
private, sectarian, or religious, schools. And, in Walz v. Tax Commission of the
City of New York (1970), the Court upheld property tax exemptions provided to
churches.

The Allen decision encouraged state governments in several states to pass
laws that provided funds to Catholic parochial schools. Rhode Island, for ex-
ample, enacted a statute in 1969 that allocated public funds to supplement the
salaries of Catholic schoolteachers. And Pennsylvania’s Non-Public Elementary
and Secondary Education Act of 1968 permitted the state to support salaries of
teachers who provided instruction on nonreligious subjects in church-run
schools, such as Roman Catholic parochial schools. The Pennsylvania law also
permitted the state government to reimburse the church-run schools for their
purchase of textbooks and other instructional materials used to teach secular
subjects. The Pennsylvania law, however, did require sectarian schools receiv-
ing state financial aid to keep records, which government inspectors could audit,
to demonstrate nonreligious uses of public money.

Both the Rhode Island and Pennsylvania programs of public aid to private
parochial schools were challenged as unconstitutional violations of the First
Amendment’s establishment clause. Joan DiCenso successfully filed suit to stop
the Rhode Island programs in two related cases that came to the U.S. Supreme
Court in 1971, Early v. DiCenso and Robinson v. DiCenso. And, in Pennsylvania,
Alton Lemon filed suit against David H. Kurtzman, the state’s superintendent of
public instruction, to halt the provision of state funds to church-related schools.
Lemon appealed the Pennsylvania case, Lemon v. Kurtzman, to the Supreme
Court in 1971 after the lower court ruled against him. Because the constitutional
issues in the two DiCenso cases and the Lemon case were practically the same, the Court considered all three cases simultaneously.

In the DiCenso cases and in Lemon, the Court decided that the state programs at issue were unconstitutional. Writing for the Court, Chief Justice Burger constructed a three-part “Lemon Test” named for the petitioner in the Pennsylvania case, Alton Lemon. In order for a statute to be constitutional and not in violation of the First Amendment’s establishment clause, it had to meet the three standards of this test. First, it must have a secular or nonreligious purpose. Second, it must neither promote nor restrict religion in its primary effects. Third, it must not bring about an excessive entanglement of government with religion. By these standards, the Court struck down the Rhode Island and Pennsylvania laws that provided payments by the state government to supplement the salaries of parochial-school teachers providing instruction in secular subjects. In particular, the Court found the involvement of state government auditors in monitoring the use of public funds in parochial schools to be an excessive entanglement of the government with church-run schools. Further, the Pennsylvania law was found unconstitutional because financial aid from the state was given directly to the church-related schools. In the Everson and Allen cases, by contrast, the state aid was constitutional because it went to students and parents and it was not used to promote religious doctrine.

Although the Court had maintained a barrier between church and state in the Lemon decision, Chief Justice Burger noted: “Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable.” Referring to Jefferson’s phrase, Burger maintained that the state-church separation was “far from being a wall.” Burger argued that the separation of church and state is “a blurred, indistinct, and a variable barrier depending on all the circumstances of a particular relationship.”

Chief Justice Burger recognized the value of Roman Catholic and other sectarian schools and their significant contributions to education and the common good. He wrote, “[N]othing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous.” Burger emphasized that the Court’s decision was based entirely upon the constitutional issues related to the establishment clause. He concluded:

Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

In the DiCenso cases, the Court affirmed the judgment of the Rhode Island District Court in its ruling that the state program of aid to sectarian schools violated the Constitution’s establishment clause. In the Lemon case, the Court reversed the judgment of the Pennsylvania District Court and the case was remanded, or sent back, to the district court to be reconsidered in light of the Court’s ruling.

On remand, the Pennsylvania District Court terminated the state’s Non-Public Elementary and Secondary Education Act of 1968 and prohibited payments
to church-related schools made under this statute. The judge, however, approved the state government’s payments to the church-related schools that had been made before June 28, 1971, when the Supreme Court announced its decision in Lemon v Kurtzman.

Alton Lemon objected to the district court’s ruling that allowed state payments to the parochial schools prior to the Supreme Court’s decision. He wanted the church-related schools to reimburse the state government for money paid to them before the Supreme Court’s decision in Lemon v. Kurtzman. His complaint brought about another Supreme Court case known as Lemon II (Lemon v. Kurtzman, 411, U.S. 192, 1973). But this time Lemon was the loser, as the Court upheld the Pennsylvania District Court’s decision that money already spent by the schools did not have to be paid back to the state government.

The most important legacy of Lemon I has been the “Lemon test” that Chief Justice Warren Burger constructed in his opinion for the Court in the 1971 case. However, these guidelines for interpreting the meaning of the First Amendment’s establishment clause were a synthetic product, not an original creation. Burger acknowledged that his three-pronged test was the result of “cumulative criteria developed by the Court over many years.”

The first prong, or standard requiring that “the statute must have a secular legislative purpose,” can be traced to the Supreme Court’s opinions in Everson (1947), Abington (1963), and Walz (1970). Justice Brennan’s opinion for the Court in Walz v. Tax Commission of the City of New York includes these words relevant to the Lemon test’s first standard: “The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion.”

The second prong of the Lemon test, requiring that the statute’s “principal or primary effect must be one that neither advances nor inhibits religion,” was derived from the Court’s opinions in Everson and Abington. Justice Tom Clark, in his opinion for the Court in Abington School District v. Schempp (1963), expressed the key idea of the Lemon test’s second standard, “that to withstand the strictures of the Establishment Clause there must be a...primary effect that neither advances nor inhibits religion.”

The Lemon test’s third prong, which says, “The statute must not foster an excessive government entanglement with religion,” is taken from the Court’s opinion in the Walz decision of 1970. Chief Justice Burger’s words mirror those of Justice Brennan in Walz: “We must...be sure that the end result—the effect—is not an excessive government entanglement with religion.”

Public response to the Court’s Lemon decision was mostly positive. Editorials in the nation’s leading newspapers, such as the New York Times and Washington Post, were favorable. The Lemon test acknowledged the principle of church-state separation, but not strictly because it permitted accommodation between government and religion under some conditions.

Since its construction in 1971, the Court has continued to apply the Lemon test to most, if not all, of its decisions about establishment clause issues. One notable exception was Marsh v Chambers (1983), in which the Court upheld the right of the Nebraska state legislature to open its sessions with a traditional prayer recitation led by a Christian minister. A lower court had used the Lemon test to strike down the prayer ceremony as a violation of the establishment clause. Writing for the Court, Chief Justice Burger said that this case was an exception to the Lemon test because the practice at issue was a tradition deeply rooted in the history and culture of the United States and therefore permissible.
Antonin Scalia presented a mixed review of the Lemon test in his concurring opinion in *Lamb’s Chapel v. Center Moriches Union Free School District* (1993). This case involved a dispute between a Christian church group and a public school district about the use of school facilities to show and discuss films that provided a religious viewpoint on raising children. The Court used the First Amendment guarantee of free speech to decide that public schools must open their facilities, during after-school hours, to religious organizations on equal terms with other, nonreligious, civic groups. The Court also used the Lemon test to justify equal access of religious groups to public school facilities.

In his concurring opinion, Justice Scalia both criticized and recognized the worth of the Lemon test. He wrote,

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried. Lemon stalks our Establishment Clause jurisprudence once again. . . The secret of the Lemon test’s survival, I think, is that it is so easy to kill. It is there to scare us...when we wish it to do so, but we can command it to return to the tomb at will....When we wish to strike down a practice it forbids we invoke it; . . when we wish to uphold a practice it forbids, we ignore it entirely. . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Scalia’s colleagues on the Court provided this rejoinder to his commentary on the Lemon test. “While we are somewhat diverted by Justice Scalia’s evening at the cinema,...we return to the reality that there is a proper way to inter an established decision, and *Lemon*, however frightening it might be to some, has not been overruled.”

In *Agostini v. Felton* (1997), the Lemon test was invoked to approve the use of public funds in New York City to provide remedial education for disadvantaged students in private, religiously affiliated schools. In making this decision, the Court elaborated upon the second prong of the Lemon test: the act at issue must neither promote nor restrict religion in its primary effects. The Court attempted to clarify this second prong of the Lemon test and its relationship with the third prong about excessive entanglement of government with religion with these questions. Does the program of government aid provided to a sectarian school result in religious indoctrination? Does it define the recipients of government aid by reference to religion? If the answers to these questions are negative, then there is no primary effect of promoting religion and there is no excessive entanglement of government with a religious institution. So, the statute at issue is constitutional.

The Court’s ruling in *Agostini v. Felton* (1997) reversed its 1985 decision in *Aguilar v. Felton*. In the *Aguilar* case, a slim 5 to 4 majority used the Lemon test to prohibit the New York City public schools from providing federally funded remedial education to students and Roman Catholic church–affiliated schools. The Lemon test, as originally constructed and applied, had guided the Court in its *Aguilar* decision to strike down a program of government-supported remedial education for parochial school children, because it brought about an excessive entanglement of church and state. However, a change in the Court’s membership brought a new perspective, and in *Zobrest v. Catalina School District* (1993) the Court undermined its *Aguilar* decision by allowing a government-funded program in Tucson, Arizona, to fund remedial instruction for a physically handi-
capped child attending a religious school. The Court explained that this kind of public aid directly helps students and not the religiously affiliated school or the church that sponsors them. Thus, it does not violate the First Amendment’s establishment clause.

The Lemon test standards were cited in support of another decision, Zelman v. Simmons-Harris (2002). In this case, the Court approved a school voucher program that provided public funds to parents who could then choose to send their children to a religiously affiliated school, because the program did not directly support church-run schools. Writing for the Court, Chief Justice William Rehnquist also used the principles of “private choice” and “neutrality” to support the Ohio State government’s voucher program. Rehnquist wrote, “The Ohio program is neutral with respect to religion.” And it is a program of “true private choice, in which aid reaches religious schools only as a result of the genuine and independent choice of private individuals.” Although the Zelman decision allows state voucher programs under certain conditions, many state governments throughout the United States, unlike the Ohio State government, are prohibited from enacting such programs because their state constitution explicitly restricts any kind of public support for a church-affiliated school.

Despite criticisms from various detractors, and modifications in its use by the Court, the Lemon test is still good law. This three-pronged set of standards has endured, even though it has not been the Court’s exclusive or definitive guide to every one of its establishment clause decisions.
A Newspaper Editorial Endorses the “Lemon Test”

The Supreme Court’s 1971 decision in Lemon v. Kurtzman and two related cases involved construction of the three-part Lemon test. In response, there were numerous commentaries in newspapers and other media, pro and con, throughout the country. The Washington Post, for example, published a laudatory editorial titled “Safeguarding Religious Freedom” on June 30, 1971.

The Supreme Court’s decisions forbidding state financial support of church-related parochial schools should be recognized for what they really are—a strengthening of the traditional wall of separation which shields religion in America from governmental intrusion. No doubt these decisions will seem disappointing and perhaps even hostile to many conscientious Catholics who sincerely believe that the valuable contribution their parochial schools have made to public education in this country deserves recompense; no doubt these decisions will be painful to Catholics who believe that their extensive school system will be doomed if state and federal tax money is not made available to sustain it. Nevertheless, the decisions serve the cause of church independence and of the freedom of men of every faith to worship as they wish.

Catholics need only ask themselves why they want their children in parish schools separate from the community’s public schools in order to understand why the use of public money to pay their teachers or to support their courses involves what the Chief Justice called an “excessive entanglement between government and religion.” The reason they want their children in parish schools is simply that they want schools in which prayer will play a part and in which the doctrines of the church will be stressed. These are entirely legitimate aims; and the right to pursue them is indisputable. But there is simply no gainsaying the truth of Mr. Justice Douglas’s observation that “the raison d’etre of parochial schools is the propagation of a religious faith.” That is precisely the kind of propagation which the First Amendment was designed to prohibit government from undertaking.

The English experience, from which so many of the authors of the constitution drew their knowledge and inspiration, was an experience in which Protestants were persecuted when a Catholic monarch was on the throne and Catholics were persecuted in turn when Henry VIII and his successors established a national church over which they ruled. The Crown was forever meddling in modes of worship, in the designation of religious orthodoxy and in preferment of clerics. The aim of the First Amendment was to keep Americans free from that kind of interference.

If parochial schools were to receive public funds, a rigorous auditing of their accounts and an extensive supervision of their classroom practices would be necessary; indeed, there was provision for these in the Rhode Island and Pennsylvania laws which came under the court’s scrutiny.

Independence is costly. But it is the fundamental condition of religious liberty. In denying the Catholic Church a government subsidy, the court has assured it unrestricted control over its own destiny.