

Establishment Notes – The Three Tests

Research by Jim Allison from the Separation of Church and State web site

The *Lemon* test was formulated by Chief Justice Warren Burger in the majority opinion in *Lemon v. Kurtzman* (1971). *Lemon* dealt with Rhode Island and Pennsylvania programs that supplemented the salaries of teachers in religiously based, private schools for teaching secular subjects. The Court struck down both programs as violating the establishment clause.

The purpose of the *Lemon* test is to determine when a law has the effect of establishing religion. The test has served as the foundation for many of the Court's post-1971 establishment clause rulings. As articulated by Chief Justice Burger, the test has three parts:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

According to separationist scholars Barry Lynn, Marc Stern, and Oliver Thomas, the fact that a law may have a "religious purpose or be motivated by religion does not mean it is unconstitutional as long as it also has a bona fide secular or civic purpose" (*The Right to Religious Liberty*, p. 3). Similarly, "a law that has a remote or incidental effect of advancing religion is not unconstitutional as long as the effect is not a 'primary' effect" (p. 3). Finally, the Court has allowed some entanglement between church and state, as long as this entanglement is not "excessive" (p. 3). Hence, the Court has built some leeway into the test so as not to invalidate laws that have only remote connections to religious practice. This is not, in other words, the work of a Court that was hostile to religion. On the contrary, Justice Burger, a Nixon appointee, is generally reckoned as a conservative on social issues.

We note also that the *Lemon* test is squarely grounded on the principles articulated in *Everson v. Board of Education*. Accommodationist legal scholar Stephen Monsma, for example, notes that Burger's opinion is:

Deeply embedded in...the sacred-secular distinction and the Supreme Court's evaluation of the state's attempts to separate out the two and subsidize only the latter. His opinion noted that at the trial-court level several teachers had testified "they did not inject religion into their secular classes." And the District Court found that religious values did not necessarily affect the content of secular instruction. Burger agreed, but made the additional, crucial observation that "the potential for impermissible fostering of religion is present." He then went on to conclude that under such circumstances state attempts to assure a strict separation of the sacred and the secular would require continuing state administrative supervision and surveillance, resulting in state entanglement with religion (*When Sacred and Secular Mix: Religious Non-Profit Organizations and Public Money*, pp. 32-33)

The *Lemon* test has not escaped criticism. Many scholars (including separationists Leonard Levy and Donald Laycock) have argued that the test is unduly subjective and internally inconsistent, and its usefulness has been questioned by a majority of the sitting Justices. Still, as noted by Monsma,

...[the test] has not been formally overruled and the basic principles on which it rests--no-aid- to-religion and the sacred-secular distinction--still form the core of what is the dominant line of reasoning dealing with public funds going to religious nonprofit organizations (p. 33)

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Church and State: How the Court Decides

The Constitutional guarantee for separation of church and state is provided for in the "Establishment Clause" of the [First Amendment](#):

"Congress shall make no law respecting an establishment of religion,"

Over many years and many cases mainly involving religion in public schools, the Supreme Court has developed three "tests" to be applied to religious practices for determining their constitutionality under the Establishment Clause.

The Lemon Test

Based on the 1971 case of *Lemon v. Kurtzman*, [403 U.S. 602, 612-13](#), the Court will rule a practice unconstitutional if:

1. It lacks any secular purpose. That is, if the practice lacks any non-religious purpose.
2. The practice either promotes or inhibits religion.
3. Or the practice excessively (in the Court's opinion) involves government with a religion.

The Coercion Test

Based on the 1992 case of *Lee v. Weisman*, [505 U.S. 577](#) the religious practice is examined to see to what extent, if any, pressure is applied to force or coerce individuals to participate.

The Court has defined that "Unconstitutional coercion occurs when: (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors."

The Endorsement Test

Finally, drawing from the 1989 case of *Allegheny County v. ACLU*, [492 U.S. 573](#), the practice is examined to see if it unconstitutionally endorses religion by conveying "a message that religion is 'favored,' 'preferred,' or 'promoted' over other beliefs."