

Establishment clause

The first of the First Amendment's two religion clauses reads: "Congress shall make no law respecting an establishment of religion" Note that the clause is absolute. It allows *no* law. It is also noteworthy that the clause forbids more than the establishment of religion by the government. It forbids even laws *respecting* an establishment of religion. The establishment clause sets up a line of demarcation between the functions and operations of the institutions of religion and government in our society. It does so because the framers of the First Amendment recognized that when the roles of the government and religion are intertwined, the result too often has been bloodshed or oppression.

For the first 150 years of our nation's history, there were very few occasions for the courts to interpret the establishment clause because the First Amendment had not yet been applied to the states. As written, the First Amendment applied only to Congress and the federal government. In the wake of the Civil War, however, the 14th Amendment was adopted. It reads in part that "no state shall ... deprive any person of life, liberty or property without due process of law... ." In 1947 the Supreme Court held in *Everson v. Board of Education* that the establishment clause is one of the "liberties" protected by the due-process clause. From that point on, all government action, whether at the federal, state, or local level, must abide by the restrictions of the establishment clause.

Establishment

There is much debate about the meaning of the term "establishment of religion." Although judges rely on history, the framers' other writings and prior judicial precedent, they sometimes disagree. Some, including Chief Justice William Rehnquist, argue that the term was intended to prohibit only the establishment of a single national church or the preference of one religious sect over another. Others, including a majority of the justices of the current Supreme Court, believe the term prohibits the government from promoting religion in general as well as the preference of one religion over another. In the words of the Court in *Everson*:

"The establishment of religion clause means at least this: Neither a state nor the federal government may set up a church. Neither can pass laws that aid one religion, aid all religions, or prefer one religion over another. Neither can force a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion... . Neither a state or the federal government may, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"

To help interpret the establishment clause, the Court uses several tests, including the *Lemon*, coercion, endorsement and neutrality tests.

Lemon test

The first of these tests is a three-part assessment sometimes referred to as the *Lemon*

test. The test derives its name from the 1971 decision *Lemon v. Kurtzman*, in which the Court struck down a state program providing aid to religious elementary and secondary schools. Using the *Lemon* test, a court must first determine whether the law or government action in question has a bona fide secular purpose. This prong is based on the idea that government should only concern itself in civil matters, leaving religion to the conscience of the individual. Second, a court would ask whether the state action has the primary effect of advancing or inhibiting religion. Finally, the court would consider whether the action excessively entangles religion and government. While religion and government must interact at some points while co-existing in society, the concern here is that they do not so overlap and intertwine that people have difficulty differentiating between the two.

Although the test has come under fire from several Supreme Court justices, courts continue to use this test in most establishment-clause cases.

***Lemon* test redux**

In its 1997 decision *Agostini v. Felton*, the Supreme Court modified the *Lemon* test. By combining the last two elements, the Court now used only the “purpose” prong and a modified version of the “effects” prong. The Court in *Agostini* identified three primary criteria for determining whether a government action has a primary effect of advancing religion: 1) government indoctrination, 2) defining the recipients of government benefits based on religion, and 3) excessive entanglement between government and religion.

Coercion test

Some justices propose allowing more government support for religion than the *Lemon* test allows. These justices support the adoption of a test outlined by Justice Anthony Kennedy in his dissent in *Allegheny County v. ACLU* and known as the “coercion test.” Under this test the government does not violate the establishment clause unless it (1) provides direct aid to religion in a way that would tend to establish a state church, or (2) coerces people to support or participate in religion against their will. Under such a test, the government would be permitted to erect such religious symbols as a Nativity scene standing alone in a public school or other public building at Christmas. But even the coercion test is subject to varying interpretations, as illustrated in *Lee v. Weisman*, the 1992 Rhode Island graduation-prayer decision in which Justices Kennedy and Antonin Scalia, applying the same test, reached different results.

Endorsement test

The endorsement test, proposed by Justice Sandra Day O’Connor, asks whether a particular government action amounts to an endorsement of religion. According to O’Connor, a government action is invalid if it creates a perception in the mind of a reasonable observer that the government is either endorsing or disapproving of religion. She expressed her understanding of the establishment clause in the 1984 case of *Lynch v. Donnelly*, in which she states, “The Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.” Her fundamental concern was whether the particular government action conveys “a message to non-adherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” O’Connor’s “endorsement test” has, on occasion, been subsumed into the *Lemon* test. The justices have simply

incorporated it into the first two prongs of *Lemon* by asking if the challenged government act has the purpose or effect of advancing or endorsing religion.

The endorsement test is often invoked in situations where the government is engaged in expressive activities. Therefore, situations involving such things as graduation prayers, religious signs on government property, religion in the curriculum, etc., will usually be examined in light of this test.

Neutrality

While the Court looks to the endorsement test in matters of expression, questions involving use of government funds are increasingly determined under the rubric of neutrality. Under neutrality, the government would treat religious groups the same as other similarly situated groups. This treatment allows religious schools to participate in a generally available voucher program, allows states to provide computers to both religious and public schools, and allows states to provide reading teachers to low-performing students, even if they attend a religious school. (See *Zelman v. Simmons-Harris*, 2002, and *Mitchell v. Helms*, 2000.) It also indicates that the faith-based initiatives proposed by President Bush might be found constitutional, if structured appropriately.

The concept of neutrality in establishment-clause decisions evolved through the years. Cited first as a guiding principle in *Everson*, neutrality meant government was neither ally nor adversary of religion. “Neutral aid” referred to the qualitative property of the aid, such as the funding going to the parent for a secular service such as busing. The rationale in *Everson* looked to the benefit to the parent, not to the religious school relieved of the responsibility of providing busing for its students.

Later cases recognized that all aid is in some way fungible; i.e., if a religious school receives free math texts from the state, then the money the school would have spent on secular texts can now be spent on religious material. This refocused the Court’s attention not on the kind of aid that was provided, but who received and controlled the aid. Decisions involving vocational training scholarships and providing activity-fee monies to a college religious newspaper on the same basis as other student groups showed the Court focused on the individual’s control over the funds and equal treatment between religious and non-religious groups.

In *Zelman v. Simmons-Harris*, the plurality decision clearly defines neutrality as evenhandedness in terms of who may receive aid. A majority of the Court continues to find direct aid to religious institutions for use in religious activities unconstitutional, but indirect aid to a religious group appears constitutional, as long as it is part of a neutrally applied program that directs the money through a parent or other third party who ultimately controls the destination of the funds.

While many find this approach intuitively fair, others are dissatisfied. Various conservative religious groups raise concerns over diminishing the special place religion has historically played in constitutional law by treating religious freedom the same as every other kind of speech or discrimination claim. Strict separationist groups argue that providing government funds to religious groups violates the consciences of taxpayers whose faith may conflict with the religious missions of some groups who are eligible to receive funding using an “even-handed” approach.

Conclusion

Although the Court's interpretation of the establishment clause is in flux, it is likely that for the foreseeable future a majority of the justices will continue to view government neutrality toward religion as the guiding principle. Neutrality means not favoring one religion over another, not favoring religion over non-religion and vice versa.