

When *Lemons* Are Not Enough: An Analysis of the *Lemon* Test
In Establishment Clause Cases

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The *Lemon* Test, established by Chief Justice Warren Burger in the majority opinion of *Lemon v. Kurtzman* (1971), has gotten criticized from the beginning and needs to implement changes in order to be effective.¹ The tests' purpose is to determine when the law has the effect of establishing religion, and analyzes such cases under a three-prong approach.² First, the test examines whether the law has a secular purpose.³ If it has one, then the law is questioned as to whether its primary effect is to either advance or inhibit any religion.⁴ Lastly, the law is scrutinized under the question of whether it fosters an excessive governmental entanglement with religion.⁵ If any of these requirements are not met, the law violates the Establishment Clause of the Constitution, and is therefore unconstitutional.⁶ In *Lemon*, the Rhode Island's Salary Supplement Act, mandated a maximum fifteen percent salary supplement for teachers of secular subjects in nonpublic elementary schools.⁷ When the trial began, all of the teachers who had applied for benefits were employees of the Roman Catholic Church, which made up ninety-five percent of the nonpublic schools in the state.⁸ In order to establish whether the statute was constitutional under the Establishment Clause, the Supreme Court looked to opinions in *Board of Education v. Allen* and *Walz v. Tax Commission*.⁹ In *Allen*, the Court found a secular purpose for local authorities to lend textbooks free of charge to all students in grades seven through twelve in public or private schools while also finding that there was no advance of any religion, therefore

¹ *Lemon v. Kurtzman*, 403 U.S. 602, 611 (1971).

² The *Lemon* Test, (Apr. 27, 2015, 10:24 AM), law2.umkc.edu/faculty/projects/ftrials/conlaw/lemonest.html.

³ *Lemon v. Kurtzman*, U.S. 602 at 605.

⁴ *Id.*

⁵ *Id.*

⁶ *Windmar v. Vincent*, 454 U.S. 263, 272 (1981).

⁷ Michael Barnes, *The Lemon Test and the Establishment Clause: Proposal for Modification*, Golden Gate Univ. L. R., 20/2, 369 (2010).

⁸ *Id.* at 370.

⁹ *Board of Education v. Allen*, 392 U.S. 236 (1968). *Walz v. Tax Commission*, 397 U.S. 664 (1970).

in alignment with the Constitution.¹⁰ In *Walz*, a realty owner wanted to prevent the New York City Tax Commission from granting property tax exemptions for facilities used solely for religious purposes, however, the state provision was not found to establish, sponsor, or support religion.¹¹ The *Lemon* Test incorporated two aspects of these cases; first being that the “purpose and primary effect” focus was taken from *Allen*, while the *Walz* approach on governmental involvement became the last “entanglement” prong in *Lemon*.¹² Though this test has been used for many years, there have always been critics of the approach and opinions as to what other tests are more effective as well as what modifications may enhance the use of the Test.

Criticism first comes from those who believe the *Lemon* Test is not strict enough and does not have clearly defined criteria to base the analyses on. Some who are supporters of the *Lemon* Test claim 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.”¹³ This calls for concern because the Test is not defining in what circumstances may a law be constitutional with a religious purpose. In addition, “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.”¹⁴ The Court has allowed some entanglement between church and state, as long as the entanglement is not “excessive.”¹⁵ The separation of Church and State in this instance is becoming blurred and the scrutiny is lowered in many of these cases.

The source of much confusion within the *Lemon* test may be attributed to the first prong, or the purpose prong. The Court in *Edwards v. Aguillard* used the *Lemon* Test to assess the

¹⁰ *Id.*

¹¹ *Walz*, 397 U.S. 664 at 686.

¹² Barnes, supra note 7, p.375.

¹³ *Id.* supra note 2.

¹⁴ *Id.*

¹⁵ *Id.*

constitutionality of a Louisiana statute mandating that if either creationism or evolutionary theory were to be taught, the other must be taught equally within the curriculum.¹⁶ Though the Act seemed equal, Justice Brennan found it unconstitutional because there was no clear secular purpose and the Act had a primary effect of promoting creation science while inhibiting evolutionary theory in its provisions.¹⁷ It was later found after looking deeper into the legislative history that the belief of humankind being created by a supernatural being was found to be a central principle of those who enacted the bill.¹⁸ Therefore, the legislative intent “was to restructure the science curriculum to conform to a particular religious viewpoint.”¹⁹ Justice Scalia and Chief Justice Rehnquist’s dissent attacked the purpose prong of *Lemon* in addition to questioning the practicality of the prong.²⁰ There was a consensus that some indication of religious purpose is permissible, according to the majority opinion, and Scalia asserted “the majority’s invalidation of the Balanced Treatment Act is defensible only if the record indicates that the Louisiana had *no* secular purpose.”²¹ There is no room for the courts to give any leeway in allowing some cases to have even a slight religious purpose because if that occurs then the Establishment Clause is violated and the protection of religious freedom from government is derailed.

The purpose prong of the *Lemon* test did not have clearly defined criteria at its inception and makes the analysis more confusing for the courts.²² The *Lemon* Court cited *Board of*

¹⁶ *Edwards v. Aguillard*, 107 S. Ct. 2573, 2574 (1987).

¹⁷ *Id.* at 2577

¹⁸ *Id.* at 2581.

¹⁹ *Id.* at 2582.

²⁰ *Id.* at 2588.

²¹ *Id.* at 2594.

²² Barnes, *supra* note 7, p. 378.

Education v. Allen as the authority for the purpose and primary effect prongs.²³ In *Allen*, secular purpose was found to exist because there was nothing shown to the contrary of the stated purpose, therefore not clearly defining how to constitute a secular purpose and primary effect.²⁴ Though the purpose prong of the *Lemon* test is cited to often along with the other two prongs, it is rarely used to dispose of an issue.²⁵ In addition, courts have often given little consideration to the purpose prong, showing that a secular purpose analysis is unnecessary to the resolution of the Establishment Clause issues presented. The main problem in purpose prong analysis is resorting to a breakdown of effects in order to test the constitutionality of purpose.²⁶ Another issue with the purpose prong is that courts lack a clearly defined and judicially manageable test for secular or religious purpose.²⁷ This misidentification can turn the wrong way if courts start to speculate as to what the governmental motives are in the making of a statute or provision. Therefore, the purpose prong is ultimately not useful and should be eliminated from the *Lemon* test as it is not used and it is confused within many cases.²⁸ The purpose prong ultimately undermines the Establishment Clause of the Constitution by importing too much subjectivity into an area of law that needs to be scrutinized more.

Some critics of the *Lemon* Test claim that it's effectiveness adversely affect religious freedom.²⁹ The Free Exercise Clause of the First Amendment prohibits the government from interfering with the free exercise of religion. Within this prohibition, the clause also imposes the

²³ *Allen*, supra note 9.

²⁴ Barnes, supra note 7 at 377.

²⁵ *Id.* at 380.

²⁶ *Id.*

²⁷ *Id.* at 382.

²⁸ *Id.*

²⁹ *The Lemon Test Adversely Affects Religious Freedom*, (May 11, 2015, 11:00 AM), http://www.belcherfoundation.org/lemon_test.htm

burden on the government to facilitate the free exercise of religion.³⁰ Critics claim that in a sense the government is then promoting a religious purpose and if the *Lemon* Test was used and the first two prongs were fulfilled, then the Free Exercise Clause would necessarily fall because the government would not be pursuing a secular purpose and the primary effect would be to advance religion.³¹ In 1985, the Supreme Court, using the *Lemon* Test, struck down an Alabama statute authorizing a period of silence in all public schools in order to meditate or for voluntary prayer, because the majority held that the established purpose was to endorse religion, and the enactment was not motivated by any secular purpose.³² However, Chief Justice Warren Burger exclaimed in his dissent:

“The Court’s extended treatment of the ‘test’ of *Lemon v. Kurtzman*, suggests a naïve pre-occupation with an easy, bright-line approach for addressing constitutional issues. We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide ‘signposts...’ [O]ur responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion.”³³

Chief Justice Burger went on within the dissent to claim that the statute “affirmatively furthers the values of religious freedom and tolerance that the Establishment Clause was designed to protect.”³⁴ Effectively, the statute in Burger’s opinion should have been upheld because it only ‘endorses’ religion in the sense that it encourages school children to be tolerant of others’ beliefs and accommodate them where possible.³⁵ Burger stated at the end of his dissent, “if the government may not accommodate religious needs when it does so in a wholly neutral and non-

³⁰ *Id.*

³¹ *Roberts v. Madigan*, 921 F. 2d 1047, 1063-1064 (10th Cir. 1990) (Barrett, Senior Circuit Judge, dissenting)

³² *Wallace v. Jaffree*, 472 U.S. 38, 105 (1985).

³³ *Wallace v. Jaffree*, 472 U.S. 38 at 56.

³⁴ *Id.*

³⁵ *The Lemon Test Adversely Affects Religious Freedom*, supra note 10.

coercive manner, the ‘benevolent neutrality’ that we have long considered the correct constitutional standard will quickly translate into the ‘callous indifference’ that the Court has consistently held the Establishment Clause does not require.”³⁶ In essence, the *Lemon* Test undermines the Establishment Clause of the First Amendment and makes even neutral ways of accommodating religion unconstitutional.

The Court in the past has confused ‘respecting’ and ‘establishing’ a religion with the usage of the *Lemon* Test. ‘Respecting’ is considered a lower standard than ‘establishing’, however, both can violate the Establishment Clause.³⁷ Therefore, laws may be construed to be unconstitutional under the Establishment Clause even if it does not actually establish a state religion, but if it can be speculated that it someday might do so.³⁸ Some laws may not actually establish a state religion but may be respecting one and therefore may be a step away from establishing one.³⁹ Justice Burger’s dissent in *Lemon v. Kurtzman* claims that “our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense.”⁴⁰ The Test is also subjective in a way that makes it difficult to decide whether a statute is entangling the church and state.⁴¹ This subjectivity leads to the entanglement of the government because the constitutionality of the issue may have to be revisited more than once. With the issue of *Lemon* in mind, the Court would have to consider that there needs to be more surveillance of public schools in order to ensure that they are not fostering religion, therefore leading to potential entanglement. Another opinion was shown in *Walz*, where it was argued that a tax exemption for religious worship places would lead to the establishment of state churches

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Kurtzman*, 602 U.S. at 615.

⁴¹ *The Lemon Test Adversely Affects Religious Freedom*, supra note 10.

and state religion.⁴² However, Chief Judge Burger claims that the Test established in *Lemon* “proved to be the first step in an inevitable progression” later infringing on religious freedom.⁴³

In order to improve the functionality of the *Lemon* test, the prongs need to be well defined and scrutinized within its usage. The separation between church and state will be a constant blur and the line between them will be redefined constantly, therefore a standard that is functional for the judicial system must be made in order to assess cases involving the Establishment Clause. There need not be subjectivity within the application of a test in this area, as it is especially vulnerable. The purpose prong of the *Lemon* Test may not be a factor that needs consideration, as it is constantly construed in different manners by courts and has too much subjectivity attached to its analysis. By eliminating the purpose prong, the conversation may turn to what is really important, whether the government advanced, inhibited or involved itself in religion.⁴⁴

There are three other test options when considering how to analyze Establishment Clause questions of law. The first is the Establishment Clause Test, pulled together by Justice Hugo Black in *Everson v. Board of Education*.⁴⁵ Justice Black detailed the importance of the Establishment Clause by stating that prior to the Fourteenth Amendment,

“some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church

⁴² *Walz v. Tax Comsn. Of City of New York*, 397 U.S. 664 (1970).

⁴³ *The Lemon Test Adversely Affects Religious Freedom*, supra note 10.

⁴⁴ Barnes, Supra note 7 at 384.

⁴⁵ *Everson v. Board of Education*,

schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect.”⁴⁶

Justice Black expressed in the majority opinion that the Establishment Clause meant that neither a state nor the federal government can set up a church, neither can pass laws which aid one religion, aid all religions nor prefer one religion over another, neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion, no person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance, no tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion, and lastly neither a state nor the federal government can openly or secretly participate in the affairs of any religious organization or groups and vice versa.⁴⁷ This test was created before any others, and has not been consistently used since 1971, however, it may be a test worth looking at once more as there are more defined aspects to it than in other tests. The second criteria within the Establishment Clause Test, stating that neither a state nor the federal government can pass laws which aid one religion, aid all religions nor prefer one religion over another is more detailed and descriptive than the second prong of the *Lemon* test stating that the law may not have a primary effect of advancing nor inhibiting religion. Every rule of the Establishment Clause Test is clear as to what the state and federal government may not do, and regressing to this test may not be the worst idea for the courts. By having more criteria to analyze cases with, the courts will have an easier time deciding whether or not a law is crossing the line between church and state.

⁴⁶ First Amendment Center, *Tests Used by the Supreme Court in Establishment Clause Cases*, First Amendment Schools, (Apr. 27, 2015, 11:50 AM), www.firstamendmentschools.org/resources/handoutla.aspx?id=14077

⁴⁷ *Id.*

Justice Sandra Day O'Connor proposed another test in the *Lynch v. Donnelly* concurring opinion.⁴⁸ This test, labeled the Endorsement Test, asks for whether the challenged law or governmental action has either the purpose or effect of endorsing religion or disapproving of religion in the eyes of community members, focusing solely on the last prong of the *Lemon* Test.⁴⁹ According to O'Connor, endorsement within a community makes the people who do not comply feel as though they are outsiders and does not enhance community. Though this is a very important aspect to look at when it comes to laws regarding religion, as there should be no reason to single out any member of a community for their beliefs through any mandate, this test is not thorough enough to fully establish whether a law is violating the Establishment Clause. Lastly, the Coercion Test was proposed by Justice Anthony Kennedy in his dissent of *Allegheny County v. ACLU*.⁵⁰ This test supported allowing more leeway to the government to support religion than the *Lemon* test allowed.⁵¹ Under this test the government does not violate the establishment clause unless it provides direct aid to religion in a way that would tend to establish a state church, or if it coerces people to support or participate in religion against their will.⁵² Within this test the government would be able to involve church and state in "small" ways that do not directly discriminating against anyone for their religious beliefs. This test may be even more destructive than the *Lemon* Test and should not be applied in any cases as there is too much freedom to allow the government to overstep its bounds.

In recent years the justices of the Supreme Court have given deference to looking at the neutrality of a law when analyzing whether it violates the Establishment Clause, especially in the

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Tests Used by the Supreme Court in Establishment Clause Cases*, supra note 46.

⁵¹ First Amendment, *Establishment clause overview*, (May 15, 2015, 11:41 PM), <http://www.firstamendmentcenter.org/establishment-clause>

⁵² *Id.*

cases concerning government funds.⁵³ Basically under neutrality, the government attempts to treat religious groups the same as other similarly situated groups, however, this concept is not strict enough on the government and does not show the full scope as to government entanglement. If one religious group retains governmental funding while another one does not, it may be argued that they were not similarly situated for any reason and therefore it would be deemed constitutional. Also the question arises as to whether or not government funds should ever be given to a religious cause because subsequently there is no neutrality. The most efficient way to assess whether a law is unconstitutional on grounds of the Establishment Clause is to either eliminate the purpose prong of the *Lemon* Test while restructuring the test to give clearly defined criteria or to regress back to the Establishment Clause Test. Only when there is a structure to a test that may be universally applied to all religious cases will there be neutrality and fairness while not crossing the line between church and state.

⁵³ *Id.*