

THE SOUR SPECTER OF THE FIRST AMENDMENT

The History, Legacy, and Zest of *Lemon v. Kurtzman*

“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, frightening the little children and school attorneys of Center Moriches Union Free School District.”

-- Justice Antonin Scalia
Concurring Opinion
Lamb's Chapel v. Center Moriches School District

The Cases

In 1971, the United States Supreme Court ruled in several cases dealing with the constitutionality of state aid to church-related elementary and secondary schools. Known collectively as the *Lemon* decision, the Court considered the cases of *Alton J. Lemon, et al. v. David H. Kurtzman, Superintendent of Public Instruction of Pennsylvania, et al.*; *John R. Earley, et al. v. John DiCenso, et al.* *Lemon* and *DiCenso* were argued before the Supreme Court the same day and decided in the same opinion, and for the purposes of this report, a reference to the *Lemon* decision as a whole refers to both cases.

In *Lemon*, the Supreme Court examined the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968. The statute allowed the Pennsylvania Superintendent of Public Instruction to “purchase specified ‘secular educational services’ from nonpublic schools (*Lemon*). These “educational services” included “teachers’ salaries, textbooks, and instructional materials” pertaining to the “secular subjects of mathematics, modern foreign languages, physical science, and physical education” (*Lemon*). The Act also set out several significant restrictions on this education aid. First, schools applying for aid must maintain their financial records in such a way as to distinguish “secular education services” from other expenditures and agree to state audits of these records at any time. Second, schools could only receive compensation for the prescribed “secular education services” if they agreed to only use textbooks and other educational materials approved by the Pennsylvania Department of Public Instruction (*Lemon*). At the time of the *Lemon* decision, reimbursements had been given to over 1000 schools (mostly Roman Catholic) under the Act, and were estimated to have benefited more than 20% of the total number of students in the state (*Lemon*).

Lemon reached the Supreme Court on appeal from the Pennsylvania Federal District Court, which ruled that Nonpublic Education Act violated neither the Establishment or Free Exercise Clause of the Constitution. (*Lemon*). The main appellant in the case, Alton Lemon, had filed suit as a taxpayer against the state of Pennsylvania, represented by David H. Kurtzman, Superintendent of Public Instruction of Pennsylvania, and had argued that the statute was unconstitutional because it gave direct state aid to a sectarian institution (Kurland 127). A three judge panel dismissed the case on the grounds that, under the precedent set by the Supreme Court in the *Allen* decision, government aid to religious institutions was permissible so long as the “primary effect” of the aid was not the advancement of religion (Kurland 127). Writing in his article “*Lemon and Tilton: the Bitter and the Sweet of Church-State Entanglement*” Donald Giannella notes that Chief Judge Hastie dissented in the Pennsylvania District Court’s decision and found the statute unconstitutional on face value because of the “excessive entanglement” required by the “administrative and judicial monitoring of the parochial school system to insure that the courses financed by the state were taught in a secular manner” (Kurland 128). This concept of “excessive entanglement,” prominent in both Hastie’s dissent and the Supreme Court’s own decision in *Walz v. Tax Commission*, would go on to form the second prong of the Lemon Test.

In *DiCenso*, the Court examined the Rhode Island Salary Supplement Act of 1969. Like the Pennsylvania Nonpublic Education Act the Court considered in *Lemon*, the Rhode Island statute allowed the state to provide public funds for nonpublic education by authorizing state officials to “supplement the salaries of teachers of secular subjects in nonpublic elementary

schools by paying directly to a teacher an amount not in excess of 15% of his current annual salary” (*Lemon*). As with the Pennsylvania program, the Rhode Island program placed strict limits on the amount and nature of aid given and the eligibility requirements for recipients of the aid, and also mandated state surveillance of the financial records of participating schools. Teachers could only qualify for a salary supplement if they worked “in a nonpublic school at which the average per-pupil expenditure on secular education” was “less than the average in the State’s public schools” (*Lemon*), a stipulation which required that schools account for the funding of secular and religious education separately. The Salary Supplement Act also required that teachers receiving the supplement could only teach subjects offered at public schools, use only materials and textbooks approved for use at public schools, obtain a state teaching certificate, and agree “not to teach a course in religion so long as or during such time as he or she received an salary supplements” (*Lemon*). At the time of the *Lemon* decision, about 250 teachers had applied for salary supplements under the Act, all of them employed by Roman Catholic schools (*Lemon*).

Unlike the Pennsylvania statute, the Rhode Island law was struck down at its first appearance in federal court, and this decision was later upheld by the Supreme Court. A three judge panel of the Rhode Island District Court ruled the Salary Supplement Act unconstitutional because it violated the Establishment Clause and “fostered ‘excessive entanglement’ between government and religion” (*Lemon*). Writing for the Court, Chief Justice Berger noted that, in addition to this finding, two of the federal judges felt that that Act “had the impermissible effect of “giving aid to a religious enterprise” (*Lemon*). State officials charged with the implementation of the law, represented by the Superintendent of Public Instruction for the State of Rhode Island John R. Earley, appealed the decision against John DiCenso et. al, who, like Alston Lemon in the Pennsylvania case, had originally brought suit as taxpayers of their respective states. State officials were joined by private school teachers eligible for salary supplements and by parents with children at schools where teachers had received salary supplements in appealing the District Court’s decision.

The lower court’s decision to strike down the Salary Supplement Act was important because it was later affirmed by the Supreme Court, but, more importantly, because some of the District Court’s judicial findings about the nature of religious and secular education provided the basis for the Supreme Court’s subsequent application of the entanglement test (Kurland 129).

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was “an integral part of the religious mission of the Catholic Church.” (*Lemon*)

Giannella notes that, in addition to this entanglement of secular and religious education, the lower court also identified entanglement resulting from the “increased intrusion by the state into the free operation of the parochial schools” (Kurland 129). Both types of “excessive entanglement” would be addressed by the Supreme Court in its final decision in both *Lemon* and *DiCenso*.

The Decision

By votes of 8-0 and 8-1, the Supreme Court held that both the Pennsylvania Nonpublic Elementary and Secondary Education Act at issue in *Lemon* and the Rhode Island Salary Supplement Act at issue in *DiCenso* “are unconstitutional under the Religion Clauses of the First Amendment, as the cumulative impact of the entire relationship arising under the statutes involves excessive entanglement between government and religion” (*Lemon*). While the overwhelming majorities in both cases indicate the unanimity of the Court’s opinion and its certainty as to the constitutionality of the laws in question, Chief Justice Burger, writing for the majority, begins his opinion with acknowledgement that “we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law” (*Lemon*). He continues:

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be “no law respecting an establishment of religion.” A law may be one “respecting” the forbidden objective while falling short of its total realization. A law “respecting” the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment. (*Lemon*)

Given the exceptionally complex and controversial nature of the constitutional issues in question, Justice Burger proceeds to outline a new, 3-pronged test to determine the proper relationship between church and state as defined by the Establishment Clause, relying heavily on precedent:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster “an excessive government entanglement with religion.” *Walz*, *supra*, at 674. (*Lemon*)

The origin of these tests begins with the Court’s decision in *Everson v. Board of Education*. In his concurring opinion in *Lemon*, Justice Douglas points to the crux of the Court’s decision in the 1947 case, which dealt with the constitutionality of state-sponsored transportation being provided to students at nonpublic schools. “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” (qtd. in *Lemon*). Despite this clear separation of government and religious activity, the Court allowed a law providing free transport to parochial school students to stand, because the state aid was provided to individual families, not to religious institutions (Dry 243). Next came the 1963 case *Abington Township School District v. Schempp*, in which “Justice Clark’s Court opinion referred to the constitutional goal of ‘wholesome neutrality’ and then offered this test: ‘what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the

scope of legislative power as circumscribed by the Constitution” (Dry 245). The Court reaffirmed the “purpose and effect” test in *Board of Education v. Allen* (1968) and upheld the constitutionality of a law allowing the state to furnish textbooks to nonpublic school students, and more importantly, determined that the secular and religious instruction in the context of a parochial school is, in fact, define and separable (Kurland 122), a finding which would later impact the Court’s decision in *Lemon*. Justice Burger lastly applies the Court’s decision in *Walz v. Tax Commission of the City of New York* to add the last prong to the Lemon Test. Justice Douglas, in his concurring opinion in *Lemon*, notes that *Walz* added entanglement to the traditional measures of church-state relations:

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result -- the effect -- is not an excessive government entanglement with religion. (*Lemon*)

As distinguished legal scholar Erwin Chemerinsky notes, the lasting impact of the *Lemon* decision is not the development of a new criterion in examining the relationship of church and state, but instead, the consolidation of several traditional criteria and years of Court precedent into a single, overarching test (Chemerinsky).

Having defined the Establishment Clause standard that would become to be known as the Lemon Test, Justice Burger proceeds to examine the constitutional issues in question in *Lemon* and *DiCenso* with the newly formed 3 part test. Beginning with the issue of “secular purpose,” Justice Burger concludes that an “inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion” and that “as in *Allen*, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference” (*Lemon*). The Pennsylvania Nonpublic Elementary and Secondary Education Act and the Rhode Island Salary Supplement Act passed the first part of the Lemon Test.

Concerning the “purpose and effect” portion of the Lemon Test, Justice Burger notes that the state legislatures of Pennsylvania and Rhode Island recognized the “significant religions mission” of parochial schools when they created the programs in question, and therefore took steps to “guarantee the separation between secular and religious educational functions, and to ensure that State financial aid supports only the former” (*Lemon*). The opinion continues that, given the restrictions placed on these programs, it is clear to the Court that “these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses” (*Lemon*). Yet the Court stops short of determining the exact “purpose and effect” of the laws in question, and therefore avoids the second prong of the Lemon Test, in favor of rendering a firm and unwavering judgment using the third and final prong:

We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion. (*Lemon*)

The Chief Justice goes on to define the test for determining at which point entanglement of church and state becomes excessive as an examination of “character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority” (*Lemon*). He then addresses each of the cases in turn, and describes, in some detail, the circumstances in both the Rhode Island and Pennsylvania programs, which, in sum and in the opinion of the Court, result in a degree of entanglement prohibited by the Establishment Clause.

Turning first to the Rhode Island program, Justice Burger repeats the “extensive findings” of the District Court “on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act” (*Lemon*). These included findings that “religious authority necessarily pervades the school system” and that the schools, via their religious atmospheres, sectarian instruction, close ties to parish churches, and largely clerical faculties, are “powerful vehicle[s] for transmitting the Catholic faith to the next generation” (*Lemon*). Justice Burger also addresses the ability of teachers employed at these schools to separate secular classroom instruction from their greater role as a member of a religious community, and concludes that, however well meaning a teacher may be in attempting to respect the boundaries of secular and religious instruction as prescribed by the salary supplement program, “inevitably, some of a teacher’s responsibilities hover on the border between secular and religious orientation” and that the only method to ensure compliance by the teachers in question is “a comprehensive, discriminating, and continuing state surveillance”—the very type of excessive entanglement that the First Amendment forbids (*Lemon*). This surveillance, combined with the financial oversight required by the state “to determine how much of [the school’s] total expenditures is attributable to secular education and how much is to religious activity” is, in the opinion of the Court “fraught with the sort of entanglement that the Constitution forbids” (*Lemon*).

The Court reaches much the same conclusion when examining the Pennsylvania program. As in Pennsylvania, the schools in Rhode Island receiving state aid were overwhelming Roman Catholic, and therefore displayed the same religious control and sectarian atmosphere as their Rhode Island counterparts. The Pennsylvania program also provided state aid on much the same basis as the Rhode Island program, and enforced similar restrictions. Justice Burger does note, however, that “the Pennsylvanian statute...has the further defect of providing state financial aid directly to the church related school” (*Lemon*). In both *Everson* and *Allen*, the Court made clear that the state aid in question was, at least in part, permissible because it benefited individual students or families, not church-related schools themselves (*Lemon*). This direct payment of public funds to a religious institution, in addition to entanglements of required government surveillance and the inherently religious nature of the parochial schools, combined to form, in the opinion of the Court, “an intimate and continuing relationship between church and state” and one which offends the Constitution (*Lemon*).

Having detailed the specifics of the impermissible entanglement in both the Pennsylvania and Rhode Island aid programs, Justice Burger turns his attention to a “boarder base of entanglement” represented by “the diverse political potential of these state programs: (*Lemon*). According to Donald Giannella, “since both the Rhode Island and Pennsylvania programs involved foreseeably permanent annual appropriations, the Court anticipated continuing and

intensifying political fragmentation and divisiveness, particularly as the demands for aid were apt to increase in time” (Kurland 133). While the Court acknowledges that “political debates and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government,” Justice Burger still warns that “political division along religious lines was one of the principal evils against which the First Amendment was intended to protect” (*Lemon*). Giannella notes further that, while this “broader base of entanglement” was a chief concern of the Court in its decision in *Lemon*, the vague pronouncement of a general impermissible relationship between church and state “must be tied to some other principal or concept to provide a workable judicial standard” (Kurland 134). In the end, it is a combination of this “broad base” of entanglement, along with the specific relationships in the Pennsylvania and Rhode Island programs, and the other tests of the Lemon Test that lead the Supreme Court to its decision in both *Lemon* and *DiCenso*.

The Legacy

The importance of the *Lemon* decision to American life and law in the years since 1971 is such that the significance of its decision was not even lost on the Court itself. Writing for the majority, Chief Justice Burger warns of a political climate fraught with religious division, and describes a national consciousness that is eerily similar to the so called culture wars of the 1990s:

To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. (*Lemon*).

Given the dangers a majority of the Court foresaw in a society so dominated by issues of church-state relations and other issues traditionally dealt with in the private sphere, the final declaration in *Lemon* is neither surprising nor earth-shattering:

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. (*Lemon*)

According to noted legal scholar Erwin Chemerinsky, *Lemon*'s lasting legacy deals squarely with where to draw the lines between the church and state:

The Lemon Test has been the controlling test of the Establishment Clause for 37 years. It has been the rule of constitutional law in one of the most divisive and controversial areas of constitutional law. The Lemon Test is reviled by conservatives who believe that there should be no wall of separation between church and state. It is the bulwark of separation

of church and state for those who want it to be there ever since. It is an enormously important case, and a very important symbol too. (Chemerinsky)

It is an irony of history that, by attempting to place some restrictions on the relationship between government and religion in an attempt to prevent issues of church and state from dominating the national political scene, the Court may have done just the opposite. Ever since the Court's decision in *Lemon*, constitutional challenges to government policies dealing with religious influence in public life have increased dramatically. According to Chemerinsky, scores of cases have come before the Court in recent years dealing with the separation of church and state, and the Supreme Court has applied the Lemon Test to many of them (Chemerinsky). He cites *Stone v. Graham* as one such case, in which the Court invalidated a Kentucky law requiring the posting of the 10 Commandments in public school classrooms using the first ("secular purpose") prong of the Lemon Test (Chemerinsky). The Court also used the Lemon Test to strike down a Louisiana law requiring that creation science be taught along with evolution in *Edwards v. Aguillard* on the grounds that the law violated all three prongs of the test (Chemerinsky). Returning to the "primary effect" element of the Test, the Court declared unconstitutional a law requiring employers to give everyone their Sabbath day off in *Estate of Thornton v. Calder* (Chemerinsky). Lastly, Chemerinsky points to the Court's 2005 decision in *McCreary County v. ACLU of Kentucky*, which held that the display of the 10 Commandments in several Kentucky schools and courthouses was unconstitutional (Chemerinsky).

Despite the large number of cases in which the Court has applied the Lemon Test in the past four decades, some legal scholars have called into question *Lemon*'s standing as the controlling test of the Establishment Clause, and have attempted to declare the case and its eponymous test dead and gone. Chemerinsky however, rejects that description of *Lemon* as "premature" and notes that "it hasn't happened yet" (Chemerinsky). He does however, acknowledge that, since the 2005 case *McCreary County v. ACLU of Kentucky* (the last case in which the Supreme Court explicitly used the Lemon Test), the appointment of Justices Roberts and Alito to the Court may have finally tipped the balance in favor of those who would overturn *Lemon*:

Thus far, the Court has not had five votes to overturn the Lemon Test. There have been four votes at various times to overrule the Lemon Test, but they have never had the fifth vote to overrule the Lemon Test. Now, there very well may be 5 votes to overrule *Lemon*....we certainly know there are 3: Scalia, Thomas, and Kennedy, and I think there is a good chance that Roberts and Alito would join them. (Chemerinsky)

The notion of Establishment Clause jurisprudence without the Lemon Test raises the question as to what standard, if any, the Court would adopt in the absence of the 3 controlling criteria expressed in *Lemon*. Chemerinsky points to the so called "coercion" or "accommodationist test" as the likely successor of the Lemon Test should *Lemon* ever be overturned. He describes the coercion test as a standard in which "the government violates the establishment clause only if it literally established a church or coerces religious participation" (Chemerinsky). The effects of the coercion test becoming the controlling standard of the Establishment Clause, according to Chemerinsky, would "mean a lot more religious presence in public schools" and would be analogous in the sphere of church-state relations to the reversal of the *Miranda* decision in the realm of criminal procedure and due process (Chemerinsky).

Leaving aside the particulars of judicial tests and the historical evolution of church-state entanglement, *Lemon*'s lasting impact can be seen as a dividing line in the greater debate over the meaning of the Establishment Clause and the proper relationship between religion and government in free, democratic society.

Lemon really goes the larger divide about what the establishment clause is about. If one believes that the establishment clause is really about the separation of church and state, Lemon is a very good test for implementing that. Certainly you can argue over what is secular purpose or what 'effect' is to advance religion or what is excessive entanglement, but Lemon gives you a basis for arguing and implementing the separation of church and state. If however, one believes that the separation of church and state is wrong, that we should accommodate religion into government and government into religion, then Lemon is undesirable, so Lemon is really doctrinal, the rules that separate these two very different views of the establishment clause. (Chemerinsky)

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