

Ch. 4A: Religion and the State: the No-Establishment Clause

I. **The genesis of church-state conflict:** both institutions claim authority to regulate human behavior

II. Overview of church-state relations

A. **No-establishment clause:** how much separation of church and state should there be?

1. Total-separation interpretation: (subordinating churches to a nonpolitical role) e.g., China, Egypt, Mexico, & Russia
2. Total-union interpretation:
 - a. *Theocracy* model: e.g., Christian nationalism proposed by some members of the Christian right in the U.S. (similar to Islamic nationalism in some Muslim nations, e.g., Iran (Shiite) & Saudi Arabia (Sunni))
 - b. *Erastian* model: subordinating religion totally under state control, e.g., in fascist or communist totalitarian nations, e.g., North Korea
3. Partial-separation interpretations: contemporary swing vote: Justice Anthony Kennedy
 - a. **High wall of separation:** no government aid to any *church* but government protection of *individual* religious liberty (Justices Hugo Black in 1940s; today: Justices Stephen Breyer, Ruth Bader Ginsberg, Sonia Sotomayor, and Elena Kagan)
 - b. **Accommodation** (or benevolent neutrality or nonpreferentialism): only nondiscriminatory government aid to religion -- government should aid all churches equally (Justice William O. Douglas in 1940s; today: Chief Justice John Roberts, Justices Antonin Scalia, Clarence Thomas, and Samuel Alito)

4. Public opinion

B. **Free-exercise clause:** how far can individuals go in claiming religion as justification for violating secular law?

1. Government may restrict *some* religiously motivated *behaviors*
2. Government may *not* restrict *any* religious *beliefs*

III. How far can government go?

A. *Accommodation*

1. Washington -- revolutionary army compulsory-attendance policy for church services
2. Samuel Adams -- religious proclamations as governor of MA
3. Jefferson -- acceptance of religious use of municipal buildings
4. Jefferson & Washington -- religious funding of religious teachers in public education

B. *Separation*

1. Jefferson & Washington -- no tax support for religious teachers in public education
2. Madison -- no majority church in NW territories
3. John Jay -- no opening prayers in Continental Congress
4. Jefferson -- no proclamation for national prayer

IV. The judicial record T4.1, pp. 80-82; T4.2, p. 83; F4.1, p. 84; F4.2, p. 85

A. Pre-1940s: little attention to either separation or free-exercise issues

B. **Separationist Era: 1940s-1970s; Accommodationist Era (1970s-present)**

1. **No-establishment (separation v. accommodation) cases** – generally more controversial than free-exercise cases
 - a. **Judicial tests** for no-establishment cases
 - (1) “Lemon” rule (all three must be met to uphold a law, only one need fail to strike down a law – and the burden of proof is on the government)
 - (a) Primarily secular purpose
 - (b) Primarily secular result
 - (c) No excessive entanglement of government in religion or of religion in government
 - (2) “Children v. adults” rule:
 - (a) Higher wall of separation between church and state for **public-school** children;
 - (b) More accommodation of government aid to religion when
 - i) Only adults are involved or when
 - ii) Public aid is for secular instruction in **parochial schools**
 - b. The No-Establishment Clause has generally come to mean that government:
 - (1) Cannot authorize a government-approved church,
 - (2) And cannot – without a compelling *secular* reason – pass laws that aid or favor one religion over another,
 - (3) And cannot – without a compelling *secular* reason – pass laws that favor religious belief over non-belief,
 - (4) And cannot for any reason force a person to profess or renounce a religious belief.

In short, government must be neutral toward religion and cannot be excessively entangled with any religion – especially when children are present in **public schools**.

c. **General trend: separation** — the wall is raised *mainly when children are present in public schools*

- (1) *McCullum v. Board of Education* (1948): struck down a Champaign, IL policy allowing voluntary and privately funded religious instruction in public schools during regular class times (compare to the *Zorach* ruling below, #2)
- (2) *Engel v. Vitale* (1962): struck down a NY law requiring public-school teachers to read a state-composed prayer
- (3) *Abington Township School District v. Schempp* (1963): struck down a PA law requiring the reading of Bible verse and the recitation of the Lord's Prayer in public schools
- (4) *Eperson v. AK* (1968): struck down a state law prohibiting the teaching of evolution in public schools
- (5) ***Lemon v. Kurtzman (1971)***: struck down a state law contributing to parochial-school teachers' salaries (even for secular instruction because of excessive entanglement of government in hiring, promoting, firing decisions)
- (6) *Committee for Public Education v. Nyquist* (1973): struck down a state law financing parochial-school maintenance and reimbursing parents for tuition
- (7) *Levitt v. Committee for Public Education* (1973): struck down a state law reimbursing parochial schools for the cost of educational testing required by the state (compare to the *Wolman* ruling below, #6)
- (8) *Meek v. Pittenger* (1975): struck down a state law lending instructional materials other than textbooks to parochial-school students
- (9) *Wolman v. Walter* (1977): struck down an Ohio law paying parochial schools for field trips, some instructional materials and equipment
- (10) *Stone v. Graham* (1980): struck down KY law requiring posting of Ten Commandments in public schools
- (11) *Bradshaw v. Hall* (1981): held unconstitutional printing a "motorists' prayer" on state maps
- (12) *Treen v. Karen B.* (1982): struck down a law that allowed voluntary organized prayer in public schools
- (13) *Larkin v. Grendel's Den* (1982): held unconstitutional a municipal ordinance that gave churches veto power over liquor license applications for sites near the church
- (14) *Wallace v. Jaffree* (1985): struck down an AL law requiring silent meditation in public schools because of the legislature's explicit intent to reintroduce state-sponsored prayer into the public-school curriculum (compare to *Brown v. Gilmore*, #12 below)
- (15) *Grand Rapids v. Ball* and *Aguilar v. Fenton* (1985): struck down public funding of even part-time or remedial teaching in parochial schools
- (16) *Edwards v. Aguillard* (1987): struck down a LA law that required the teaching of creation science alongside evolution in public schools
- (17) *Allegheny v. ACLU* (1989): struck down a Pittsburgh, PA Christmas creche displayed alone at a courthouse (compare to *Lynch*, *Allegheny*, and *Capitol Square Review*, #8, #9, and #11 below)
- (18) *Swaggart Ministries v. Board of Equalization* (1990): upheld a CA sales tax imposed on religious materials (compare to *Waltz* and *Mueller*, #5 and #7 below)
- (19) *Lee v. Weisman* (1992): struck down a RI middle-school policy of organizing a "non-denominational" prayer at public-school graduation exercises
- (20) *Santa Fe Independent School District v. Doe* (2000): struck down a TX public high school's policy of sponsoring student-led, student-initiated prayer at football games (on school property, at a school-sponsored event, over the school's public-address system, by a speaker representing the student body, under the supervision of school faculty, operating according to school policy)

d. **Exceptions: accommodation** — the wall is often lowered *when children are provided public aid for secular (not religious) instruction in parochial schools or in many other settings where adults are present*

- (1) *Everson v. Board of Education* (1947): upheld a NJ law compensating parents of all children, including those attending parochial schools, for bus transportation
- (2) *Zorach v. Clausen* (1952): upheld a NY City law releasing students from public-school classes to attend religious classes somewhere else
- (3) *McGowan v. MD* (1961): upheld a MD blue law imposing Sunday-closing restrictions
- (4) *Board of Education v. Allen* (1968): upheld a NY law providing the same free (secular) textbooks to both public and parochial-school students
- (5) *Waltz v. NY* (1971): upheld a state law exempting religious property from property taxes
- (6) *Wolman v. Walter* (1977): upheld an Ohio law reimbursing parochial schools for diagnostic and therapeutic services and some standardized test materials
- (7) *Mueller v. Allen* (1983): upheld a MN law providing income tax deductions for the cost of tuition, secular textbooks, and transportation for elementary and secondary students in public or parochial schools
- (8) *Lynch v. Donnelly* (1984): upheld a Pawtucket, RI Christmas nativity display placed among other holiday symbols
- (9) *Allegheny v. ACLU* (1989): upheld a Pittsburgh, PA Chanukah menorah placed among other holiday symbols, including Christian symbols [compare to case # 17 above]
- (10) *Rosenberger v. VA* (1995): struck down a UVA regulation that denied funds to public-university student organizations that promoted a religious perspective. The majority ruled that UVA's regulation too narrowly interpreted the *no-establishment* clause and that "religion-neutral" state funding was ok.
- (11) *Capitol Square Review and Advisory Board v. Pintette* (1995): struck down an Ohio board's ruling that prohibited the KKK from placing a cross on the state's capitol square at Christmas time with other religious symbols.
- (12) *Brown v. Gilmore* (2001): let stand a VA statute authorizing a moment-of-silence in public schools