**THE ESTABLISHMENT CLAUSE**

By Marci A. Hamilton and Michael McConnell

America's early settlers came from a variety of religious backgrounds: Puritans predominated in New England; Anglicans predominated in the South; Quakers and Lutherans flocked especially to Pennsylvania; Roman Catholics settled mostly in Maryland; Presbyterians were most numerous in the middle colonies; and there were Jewish congregations in five cities.

During colonial times, the Church of England was established by law in all of the southern colonies, while localized Puritan (or "Congregationalist") establishments held sway in most New England states. In those colonies, clergy were appointed and disciplined by colonial authorities and colonists were required to pay religious taxes and (often) to attend church services. Dissenters were often punished for preaching without a license or refusing to pay taxes to a church they disagreed with. Delaware, New Jersey, Pennsylvania, Rhode Island, and much of New York had no established church.

After Independence, there was widespread agreement that there should be no nationally established church. The Establishment Clause of the First Amendment, principally authored by James Madison, reflects this consensus. The language of the Establishment Clause itself applies only to the federal government ("Congress shall pass no law respecting an establishment of religion"). All states disestablished religion by 1833, and in the 1940s the Supreme Court held that disestablishment applies to state governments through the Fourteenth Amendment.

Virtually all jurists agree that it would violate the Establishment Clause for the government to compel attendance or financial support of a religious institution as such, for the government to interfere with a religious organization's selection of clergy or religious doctrine; for religious organizations or figures acting in a religious capacity to exercise governmental power; or for the government to extend benefits to some religious entities and not others without adequate secular justification. Beyond that, the meaning of the Amendment is often hotly contested, and Establishment cases in the Supreme Court often lead to 5-4 splits.

**The *Lemon* Test**

In 1971, the Supreme Court surveyed its previous Establishment Clause cases and identified three factors that identify whether or not a government practice violates the Establishment Clause: "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 entanglement with religion." *Lemon v. Kurtzman* (1971). In the years since *Lemon*, the "test" has been much criticized and the Court often decides Establishment Clause cases without reference to it. Yet the Justices have not overruled the *Lemon* test, meaning the lower courts remain obliged to use it. In some specific areas of controversy, however, the Court has adopted specific, more targeted "tests" to replace *Lemon*.

The vast majority of Establishment Clause cases have fallen in four areas: monetary aid to religious education or other social welfare activities conducted by religious institutions; government-sponsored prayer; accommodation of religious dissenters from generally-applicable laws; and government owned or sponsored religious symbols.

**Aid to religious institutions**

Scholars have long debated between two opposing interpretations of the Establishment Clause as it applies to government funding: (1) that the government must be neutral between religious and non-religious institutions that provide education or other social services; or (2) that no taxpayer funds should be given to religious institutions if they might be used to communicate religious doctrine. Initially, the Court tended toward the first interpretation, in the 1970s and 1980s the Court shifted to the second interpretation, and more recently the Court has decisively moved back to the first idea.

After two early decisions upholding state statutes allowing students who attend private religious schools to receive transportation, *Everson v. Board of Education* (1947), and textbook subsidies available to all elementary and secondary students, *Board of Education v. Allen* (1968), the Court attempted for about fifteen years to draw increasingly sharp lines against the use of tax-funded assistance for the religious aspects of education. At one point the Court even forbade public school teaching specialists from going on the premises of religious schools to provide remedial assistance. *Aguilar*

*v. Felton* (1985). More recently, the Court has upheld programs that provide aid to educational or social programs on a neutral basis "only as a result of the genuine and independent choices of private individuals." *Zelman v. Simmons-Harris* (2002). Indeed, the Court has held that it is unconstitutional under free speech or free exercise principles to exclude otherwise eligible recipients from government assistance solely because their activity is religious in nature. *Rosenberger v. University of Virginia* (1995).

**Government-sponsored prayer**

The Court's best-known Establishment Clause decisions held it unconstitutional for public schools to lead schoolchildren in prayer or Bible reading, even on an ostensibly voluntary basis. *Engel v. Vitale* (1962); *Abington School District v. Schempp* (1963). Although these decisions were highly controversial among the public (less so among scholars), the Court has not backed down. Instead it has extended the prohibition to prayers at graduation ceremonies, *Lee v. Weisman* (1992), and football games, *Santa Fe Independent School District v. Doe* (2000).

In less coercive settings involving adults, the Court has generally allowed government-sponsored prayer. In *Marsh v. Chambers* (1983), the Court upheld legislative prayer, specifically because it was steeped in history. More recently, the Court approved an opening prayer or statement at town council meetings, where the Town represented that it would accept any prayers of any faith. *Town of Greece v. Galloway* (2014).

**Accommodation of religion**

Hundreds of federal, state, and local laws exempt or accommodate religious believers or institutions from otherwise neutral, generally-applicable laws for whom compliance would conflict with religiously motivated conduct. Examples include military draft exemptions, kosher or halal meals for prisoners, medical neglect exemptions for parents who do not believe in medical treatment for their ill children, exemptions from some anti-discrimination laws for religious entities, military headgear requirements, and exemptions for the sacramental use of certain drugs. The Supreme Court has addressed very few of these exemptions. While the Court held that a state sales tax exemption limited to religious publications was unconstitutional in *Texas Monthly, Inc. v. Bullock* (1989), it unanimously upheld the exemption of religious

organizations from prohibitions on employment discrimination for ministers. *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* (2012).

Two federal laws, the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), provide broad-based statutory accommodations for religious practice when it conflicts with federal and certain state and local laws. A unanimous Court upheld this approach for prisoners against a claim that granting religious accommodations violates the Establishment Clause, reasoning that RLUIPA "alleviates exceptional government-created burdens on private religious exercise" in prisons. *Cutter v. Wilkinson* (2005).

The Court in *Cutter* left open the question whether such a regime applied to land use is constitutional and it also left open the possibility that even some applications in prisons may be unconstitutional if they are not even-handed among religions or impose too extreme a burden on non-believers. The Court's recent 5-4 decision in *Burwell v. Hobby Lobby Stores, Inc.* (2014), holding that RFRA exempts for-profit employers from paying for insurance coverage of contraceptive drugs that they believe are abortion-inducing, has reinvigorated the debate over such laws.

**Government-sponsored religious symbols**

The cases involving governmental displays of religious symbols—such as Ten Commandment displays in public school classrooms, courthouses, or public parks; nativity scenes in courthouses and shopping districts; or crosses on public land—have generated much debate. The most prominent approach in more recent cases is called the "endorsement test"; it asks whether a reasonable observer acquainted with the full context would regard the display as the government endorsing religion and, therefore, sending a message of disenfranchisement to other believers and non-believers.

The Court's decisions in this arena are often closely divided. They also illustrate that the Court has declined to take "a rigid, absolutist view" of the separation of church and state. In *Lynch v. Donnelly* (1984), the Court allowed display of a nativity scene surrounded by other holiday decorations in the heart of a shopping district, stating that it "engenders a friendly community spirit of good will in keeping with the season." But in *County of Allegheny v. American Civil Liberties Union* (1989), a different majority of Justices held that the display of a nativity scene by itself at the top of the grand stairway in a courthouse violated the Establishment Clause because it was "indisputably

religious—indeed sectarian." In *McCreary County v. American Civil Liberties Union* (2005), the Court held that a prominent display of the Ten Commandments at the county courthouse, which was preceded by an official's description of the Ten Commandments as the "embodiment of ethics in Christ," was a religious display that was unconstitutional. The same day, it upheld a Ten Commandments monument, which was donated by a secular organization dedicated to reducing juvenile delinquency and surrounded by other monuments on the spacious statehouse grounds. *Van Orden v. Perry* (2005). Only one Justice was in the majority in both cases.

More broadly, the Establishment Clause provides a legal framework for resolving disagreements about the public role of religion in our increasingly pluralistic republic.