CHURCH-STATE RELATIONSHIPS IN AMERICA

ARTICLE VI

> ". . . no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

AMENDMENT I:

> "**Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV; Section 1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, Liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws."

THE ESTABLISHMENT CLAUSE

1. *Everson* v. *Board of Education* 330 U.S. 1 (1947)

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence 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. 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect "a wall of separation between church and state."
>
> (Incorporation)

2. *Engel* v. *Vitale* 370 U.S. 421 (1962)

3. *Abington Township School District* v. *Schempp* 374 U.S. 203 (1963)

4. [*Walz* v. *Tax Commission of the City of New York* 397 U.S. 644 (1970)]

5. *Epperson* v. *Arkansas* 393 U.S. 97 (1968)

6. *Stone* v. *Graham* 449 U.S. 39 (1980)

7. *Wallace* v. *Jaffree* 472 U.S. 38 (1985)

8. *Edwards* v. *Aguillard* 482 U.S. 578 (1987)

9. *Board of Education* v. *Mergens* 496 U.S. 226 (1990)

10. *Lee* v. *Weisman* 505 U.S. 577 (1992)

11. *Santa Fe Independent School District* v. *Doe* 530 U.S. 290 (2000)

12. *Good News Club v. Milford Central School District* 533 U.S. 98 (2001)

13. *Zelman v. Simmons-Harris* 536 U.S. 639 (2002)

14. *Elk Grove School District v. Newdow* 542 U.S. 1 (2004)

PRINCIPLES FOR ADJUDICATING THE ESTABLISHMENT CLAUSE

1. *The secular purpose test*: does the law have a secular purpose? i.e., what is the intent of the legislation? If the purpose of the law is not secular, i.e., if it attempts to give government support to religion or to use religious means to accomplish secular results, it is unconstitutional.

2. *The primary effect test*: if the primary effect of the law is to either advance or hinder religion, then it is unconstitutional. This test involves, not the purpose or intent of the law, but its implementation or enforcement. If it either advances or hinders religion, it is unacceptable to the establishment clause.

The first two tests were first articulated in *Abington Township School District v. Schempp* 374 U.S. 203 at 222 (1963)

3. *The excessive entanglement test*: if the law or a program under the law has the effect of promoting a high degree of interaction between religion and civil authorities, then the law is unconstitutional under the establishment clause. For example, if teachers in parochial schools receive a salary supplement from any state funds on the condition that they teach only secular subjects, the surveillance necessary to guarantee that they in fact teach only secular subjects raises the level of entanglement between religious schools and state authorities and thus invalidates the program. (See *Lemon* v. *Kurtzman* 403 U.S. 602 (1971))

The third test was first articulated in *Walz v. Tax Commission* 397 U.S. 644 at 674-675 (1970). The three were first used together in *Lemon v. Kurtzman* and are routinely referred to as the "*Lemon* test."

<u>A law must pass all three tests to be declared constitutional.</u>

Subsequently, Justice Sandra Day O'Connor proposed a reinterpretation of the *Lemon* test called the "endorsement test." The Establishment Clause is violated if a law causes some religious believers to feel as political insiders because their religion is endorsed by the law, and others to feel as political outsiders because their religion is disfavored by the law. First articulated in a concurring opinion in *Lynch v. Donnelly* 465 U.S. 668 at 690-692 (1984), perhaps its clearest expression is in her concurring opinion in *Wallace v. Jaffree* 472 U.S. 38 at 69-70 (1985): "The *Lynch* concurrence suggested that the religious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it 'sends a message to nonadherents 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.' Under this view, *Lemon's* inquiry as to the purpose and effect of a statute requires courts to examine whether government's purpose is to endorse religion and whether the statute actually conveys a message of endorsement. . . . The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."

See Robert T. Miller and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court*. (Waco, TX: Baylor University Press, 1977, 1982, 1987, 1992, 1996), especially pp. 7-16; Ronald B. Flowers, Melissa Rogers, and Steven K. Green, *Religious Freedom and the Supreme Court*. (Waco, TX: Baylor University Press, 2008), 858-61, 650-57.

THE ESTABLISHMENT CLAUSE:
The Original Intent Debate

As a way of understanding the Establishment Clause, a paragraph of background about different views of the origin and meaning of the Clause is in order. Keeping in mind that this description is oversimplified, there are two prevailing attitudes about this constitutional principle. One position is the "accommodationist" or "nonpreferential" view. The other is the "separationist" or "no aid" view. Accommodationists believe that when the founders wrote the no-establishment principle they intended to prohibit a "national church," i.e., government could not single out only one church or tradition for aid or favoritism. (This is a restricted view of the Establishment Clause; all the founders intended was to prohibit a national church.) As a corollary to that, accommodationists also believe that the no-establishment principle allows government to aid religion so long as the aid is given to religious groups in a nondiscriminatory way. This is the reason it is called "nonpreferentialism." The no-establishment principle will allow government to accommodate religion so long as it does not prefer one over another. Some people have described this position this way: the government may not support an establishment, but it may support multiple establishments.[1]

The "separationist," "no aid" position is naturally the opposite. (It is an expansionist view of the Establishment Clause.) Those who hold this conviction believe that the founders intended that the no-establishment principle should mean just that, no establishment. That is, government should not aid religion at all, not even if the aid could be distributed in an evenhanded way. Government may not aid religion over nonreligion, or vice versa. Government must maintain a stance of neutrality between religions and between religion and nonreligion. A multiple establishment is no more acceptable than a single establishment.[2] (Because both sides refer to the motivations of the founders, this argument is often called a debate over "original intent.")

---

1 The clearest expression of this notion in Supreme Court literature is Chief Justice William Rehnquist's dissent in *Wallace v. Jaffree* 472 U.S. 38 at 91 (1985). A scholarly presentation of accommodationism is Robert L. Cord, "Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment," *Harvard Journal of Law and Public Policy* 9 (Winter 1986): 129-172, or his book, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982). See Barry Hankins, "The Terrible 'A' Word," *Liberty: A Magazine of Religious Freedom* 93 (May/June 1998): 16-21. This useful article both explicates accommodationism and exposes its inherent flaw.

2 The clearest expression of this view in Supreme Court literature is the famous paragraph, that begins "The 'establishment of religion' clause of the First Amendment means at least this: . . .", by Justice Hugo Black in *Everson v. Board of Education* 330 U.S. 1 at 15-16. A scholarly presentation of separationism is Leonard W. Levy, "The Original Meaning of the Establishment Clause of the First Amendment," in James E. Wood. Jr., ed. *Religion and the State: Essays in Honor of Leo Pfeffer* (Waco, TX: Baylor University Press, 1985), 43-83 or his book, *The Establishment Clause: Religion and the First Amendment* (Chapel Hill: University of North Carolina Press, 1994).