



CHURCH AND STATE UNDER THE CONSTITUTION AND THE COURTS



FEDERAL COURT STRUCTURE

***U.S. District
Court***



***U.S. Circuit
Court of Appeals***



***U.S. Supreme
Court***



The trial court of fact.

The court of law.

The final word.



We are not final because we are
infallible, but infallible only because
we are final.

— *Robert H. Jackson* —

AZ QUOTES

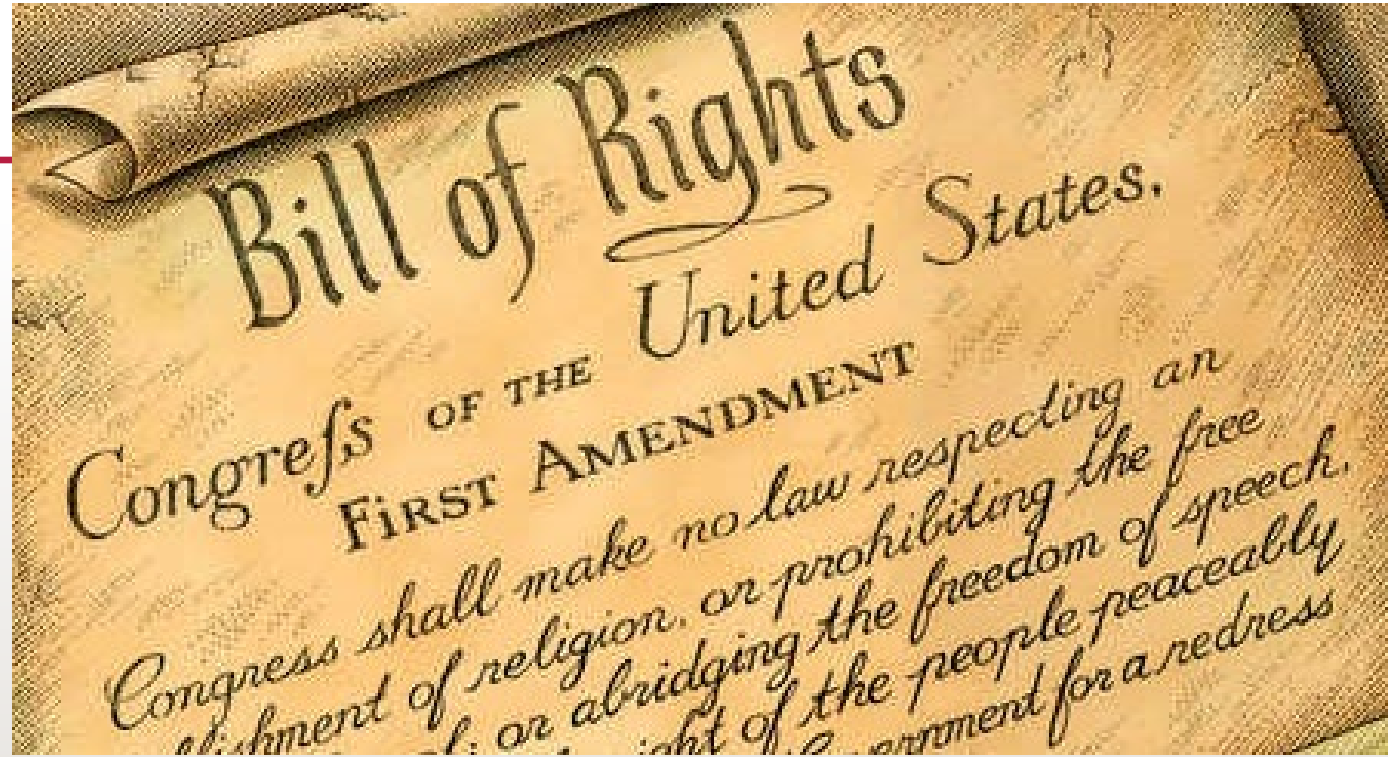
APPELLATE JUDICIAL DECISIONS

Multiple member appellate courts can issue

- majority opinions
- dissenting opinions
- concurring opinions
- plurality opinions

FIRST AMENDMENT RELIGION CLAUSES

- Congress shall pass no laws respecting an establishment of religion, or prohibiting the free exercise thereof.

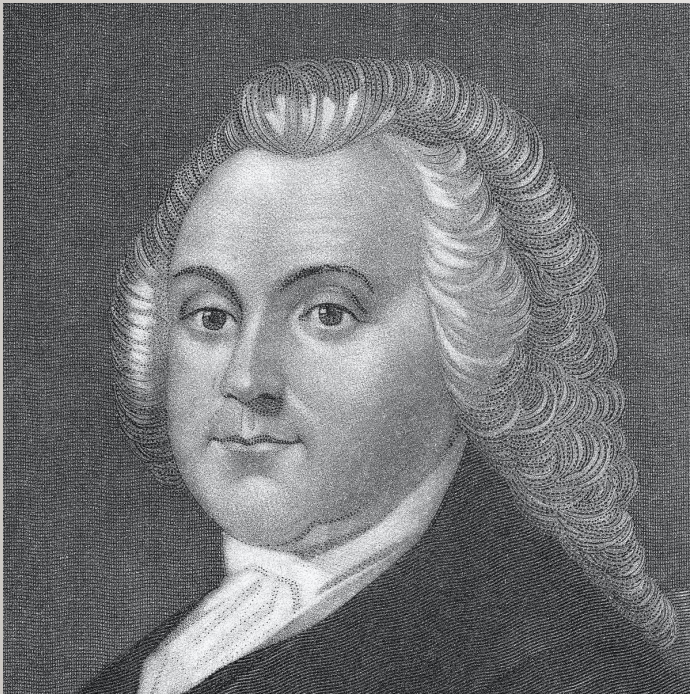


RELIGIOUS DIFFERENCES IN THE COLONIES

- The Puritans of Boston followed different practices than the Puritan Separatists of Plymouth Colony and the Puritans of Salem, whose rules were different than the Puritans of Connecticut. Similar disagreements existed between the Anglicans of Virginia and the Anglicans of the Carolinas.



ROGER WILLIAMS IN CHARTER OF RHODE ISLAND



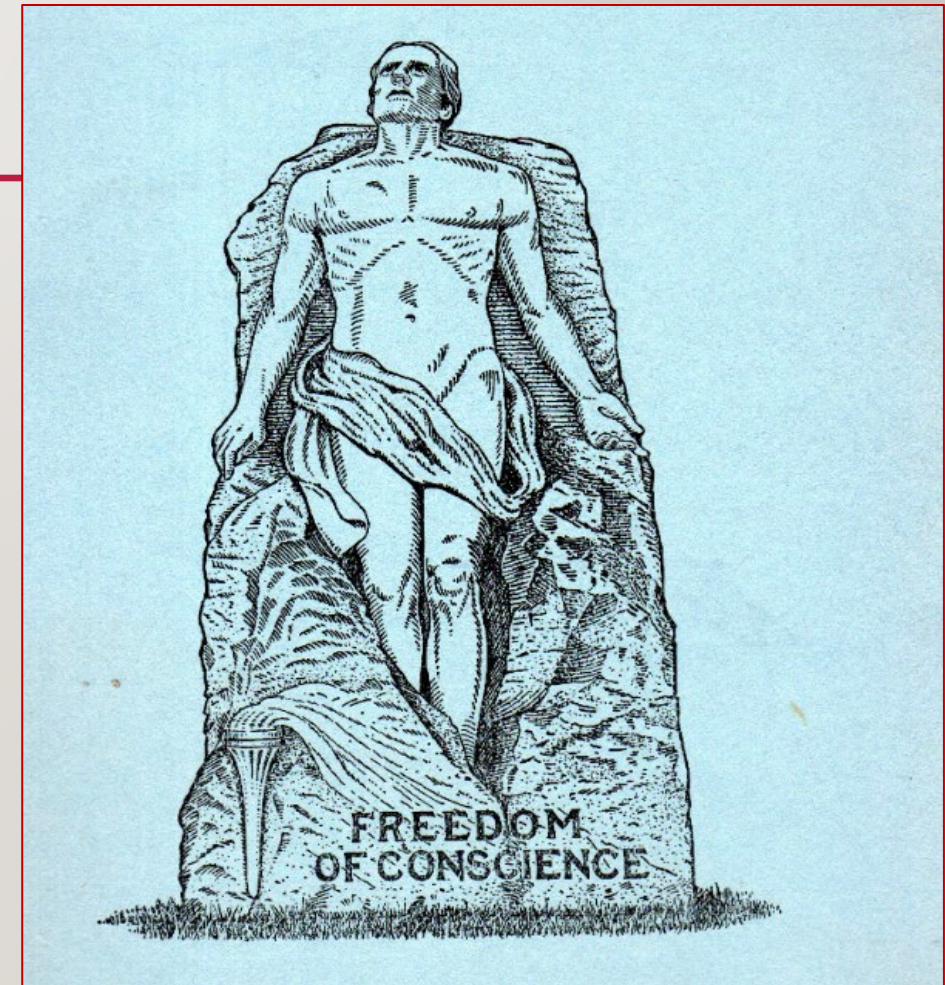
“No person within the said colony, at any time hereafter, shall be anyways molested, punished, disquieted, or called in question, for any differences in opinions in matters of religion, that do not actually disturb the peace of our said colony; but that all and every person and persons may, from time to time and at all times hereafter, freely and fully have and enjoy his and their own judgements and consciences, in matters of religious concernments.”

William Penn promised prospective non-Quaker settlers in Germany religious freedom if they came to Pennsylvania.



MARYLAND TOLERATION ACT OF 1649

- Declared the government could not molest any form of private Christian worship.
- The Act was repealed in 1654
- By 1702 the Church of England was Maryland's official church
- Catholics were disenfranchised in 1718



ESTABLISHMENT AND CONFORMITY



- Establishment meant taxes were used to build churches, pay ministers and organize religious activity

- Conformity was enforced with a combination of legal compulsion to attend religious services in the established church as well as burdening those who belonged to disfavored religions.

SOCIAL FERMENT AROUND TIME OF THE REVOLUTION

AFFECT ON CHURCH AND STATE RELATIONS



- Of the 9 colonies that had established religions five disestablished the churches at the beginning of the revolution, 3 in the South and 2 in the North, all of them previously Anglican.
- Of the 10 state constitutions that mentioned religion after the Declaration of Independence, all guaranteed liberty of conscience.
- Of the 19 state constitutions written between 1776 and 1800 all protected religious freedom.

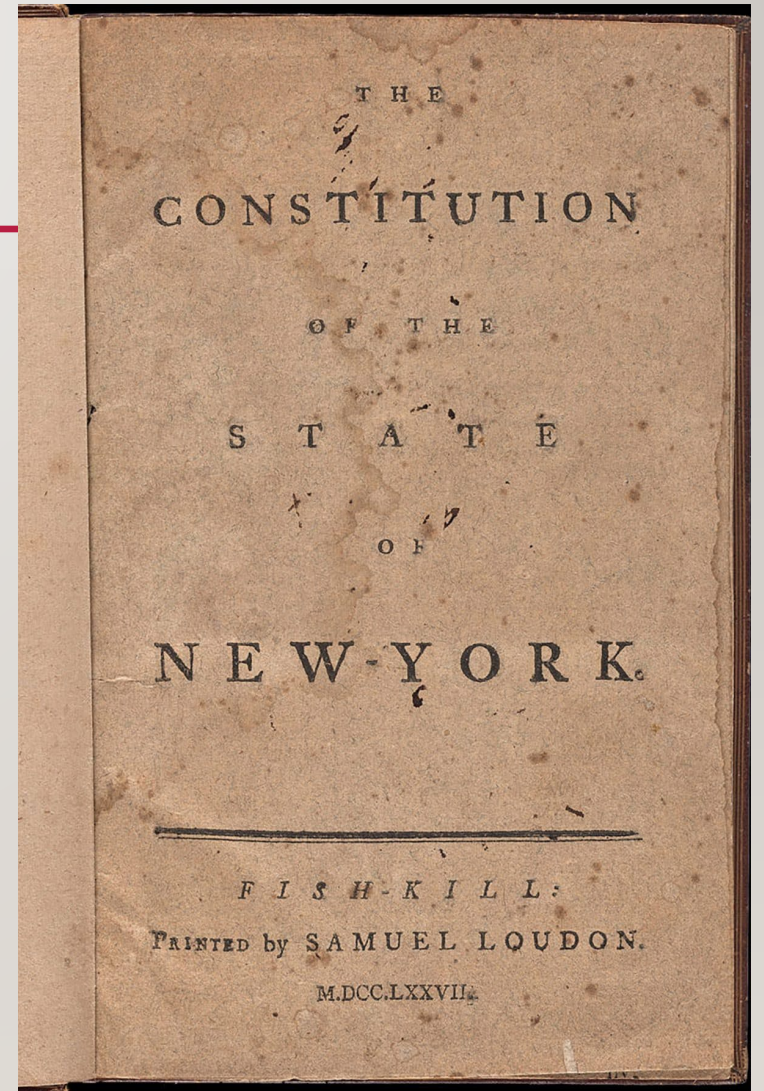
GEORGIA'S 1798 CONSTITUTION

“Nor shall any person be denied the enjoyment of any civil right merely on account of his religious principles.”



NEW YORK'S 1777 CONSTITUTION

Promised religious freedom without discrimination or preference, providing it was not construed “...as to excuse acts of licentiousness, or to justify practices inconsistent with the peace and safety of this state.”



MASSACHUSETTS' CONSTITUTION

“[N]o subject shall be hurt, arrested or restrained, in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession of sentiments; provided he doth not disturb the peace or obstruct others in their religious worship.”



REMONSTRANCES AGAINST RELIGIOUS ASSESSMENTS

“Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man.”



TWO ORIGINAL AMENDMENTS ABOUT RELIGION

DRAFT AMENDMENT ONE

“The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or in any pretext, be infringed”



DRAFT AMENDMENT TWO

“No state shall violate the equal rights of conscience, the freedom of speech or of the press, nor the rights of trial by jury in criminal cases.”

U.S. CONSTITUTION, ART.VI

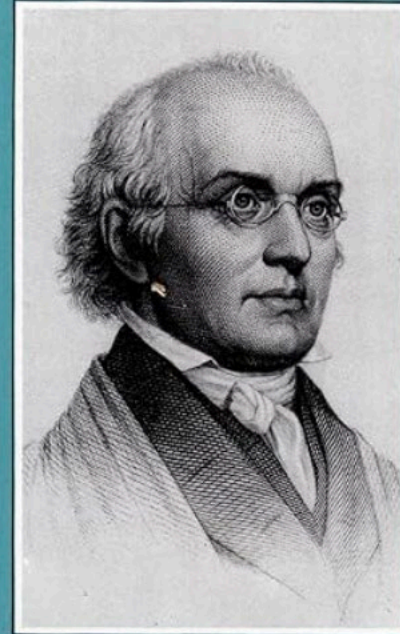
No religious test shall ever be required as a Qualification to any Office or public Trust under the United States.



COMMENTARIES ON THE CONSTITUTION

JOSEPH STORY

“[T]his clause cut off forever any pretense of any alliance between church and state in the national government. The framers of the Constitution were fully sensible of the dangers from this course...[knowing] that intolerance was ever ready to arm itself with all the terror of the civil power to exterminate those, who doubted its dogmas, or resisted its infallibility.”



JOSEPH STORY

COMMENTARIES
ON THE
CONSTITUTION
OF THE
UNITED STATES

PRESIDENT WASHINGTON TO THE LEADERS OF THE TOURO SYNAGOGUE

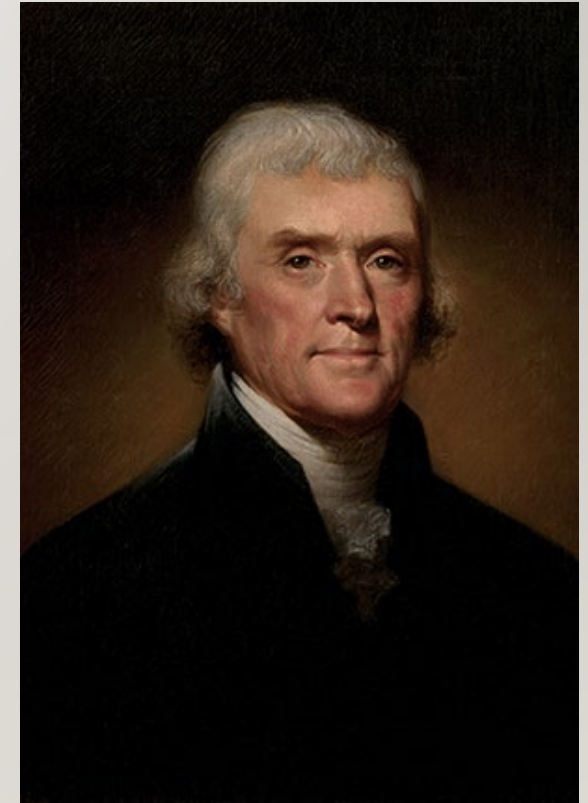


“Happily the government of the United States gives to bigotry no sanction, to persecution no assistance, requires only that those who live under its protections should demean themselves as good citizens, in giving it on all occasions their effectual support...May the children of the stock of Abraham who dwell in this land continue to merit and enjoy the good will of the other inhabitants – while everyone shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid.”



PRESIDENT JEFFERSON TO THE BAPTISTS OF DANBURY, CONNECTICUT

“Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only and not opinions. I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting the establishment of religion, or prohibiting the free exercise thereof’, thus building a wall of separation between Church and State.”



TREATY BETWEEN THE UNITED STATES AND THE GOVERNMENT OF TRIPOLI



“As the government of the United States of America is in not in any sense founded on the Christian religion – as it has in itself no character of enmity against the laws, religion or tranquility of Musselmen...it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption in the harmony existing between the two countries.”

KEY FRAMERS' THREE MAIN VIEWS OF RELIGION LAWRENCE TRIBE

1. The evangelical view associated mostly with Roger Williams of Rhode Island, worried that worldly corruption might consume the churches if sturdy fences against the wilderness were not maintained.
2. The Jeffersonian view that the church should be walled off from the state in order to safeguard secular interests against “ecclesiastical depredations and incursions.”
3. The Madisonian view that religious and secular interests alike would be advanced best by diffusing and decentralizing power so as to assure competition among the sects rather than dominance by any one of them.

JUSTICE BRENNAN ON CHANGES IN AMERICAN RELIGION



“They knew differences chiefly among Protestant sects. Today the nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well as those who worship according to no version of the Bible and those who worship no God at all.”

WHAT DEFINES RELIGION?

1. In cases under the Selective Service Act for the purpose of granting conscientious objector status.
2. The Court has ruled that lower courts may not ask if a religious belief is sincerely held in order to decide whether it is protected under the First Amendment.
3. The Court has ruled in a number of cases that a religious belief that is sincerely held by an individual is protected by the Constitution even if it is not the dogma or dominant view within that person's religion.



SOME QUESTIONS RAISED ABOUT CHURCH AND STATE

1. Can a government that rejects religious establishment but sees the social value of religion provide support to religions like tax breaks for religious institutions?
2. If government provides benefits to secular institutions that promote government interests can it provide the same benefits to religious institutions, knowing the money might be used to support religious activity?
3. What part can religion play in official secular governmental activities?

THE ESTABLISHMENT CLAUSE

Three Theories For Deciding Establishment Clause Cases

I. STRICT SEPARATION

- Strict Separation – Government and religion should be separated to the greatest extent possible.
- This approach believes that strict separation not only protects government from religion but also protects religious institutions from government.
- Too close and government can choose the accepted form of religion

MARSH V. CHAMBERS

REASONS FOR STRICT SEPARATION

“The first which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment is to guarantee the individual right to conscience...The second purpose of separation...is to keep the state from interfering in the essential autonomy of religious life, either by taking on itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials. The third purpose of separation...is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government...Finally, the principles of separation...help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena.”



2. NEUTRALITY

- Government cannot favor one religion over another or religion over secularism or vice versa.
- The religion clauses read together stands for the precept that government cannot utilize religion as a standard for action or inaction.
- Religion cannot be used for either conferring a benefit or imposing a burden.

3. ACCOMMODATION

- The Court should interpret the Establishment Clause as recognizing the importance of religion in society and accommodate its presence in the government.
- Government violates the Establishment Clause only when it literally establishes a Church, coerces religious participation, or favors one religion over others in providing benefits.
- Government needs to treat religious beliefs and groups equally with non-religious ones.

ALLEGHENY COUNTY V. GREATER PITTSBURGH ACLU

- Two displays put up during the end of the year holiday season.
- A creche representing the birth of Jesus installed in a display case in a stairway of the county courthouse.
- A large Christmas tree and a large Menorah and a sign that said the city salutes liberty during the holiday season in front of a government building.

STRICT SEPARATIONISTS

JJ. STEVENS, BRENNAN AND MARSHALL

- Both displays were unconstitutional violations of the Establishment Clause
- “Establishment Clause should be construed to create a strong presumption against the display of religious symbols on government property.”

NEUTRALITY APPROACH

JJ. BLACKMUN AND O'CONNOR

- Applied the symbolic endorsement test
- Found the Christmas tree and Menorah were constitutional because they were paired along with a secular message about liberty.
- The creche was not permissible because it was alone and on government property and was likely to be seen as a symbolic endorsement of Christianity.

ACCOMODATIONIST APPROACH

JJ. KENNEDY, REHNQUIST, SCALIA AND WHITE

- These four would have allowed both displays.
- “[T]he principles of the Establishment Clause and our nation’s historic traditions of diversity and pluralism allow communities to make reasonable judgements respecting the accommodation or acknowledgement of holidays with both cultural and religious aspects.”

ALLEGHENY COUNTY V. GREATER PITTSBURGH ACLU

The decision was 5 to 4 that the nativity scene unconstitutional, but 6 to 3 that the Menorah and the Christmas tree were permissible.

Reflecting the importance of which theory of interpretation was adopted by the justices.

STRICT SCRUTINY

Strict Scrutiny is a Supreme Court doctrine that says that discrimination by the government in certain categories can only be allowed if the government can show that it has a compelling interest in making the discriminatory choice and that it is carried out in the most narrowly tailored manner to satisfy that interest.

The scrutiny is strict in theory but fatal in fact.

LARSEN V. VALENTE

- A Minnesota law imposed registration and reporting requirements on charitable organizations.
- It exempted religious institutions that received more than half their financial support from membership contributions.
- The law discriminated in favor of large religious organizations while smaller religions would have to comply
- The Court ruled that the law was unconstitutional because there was no compelling government interest to justify the discrimination.

BOARD OF EDUCATION OF KIRYAS JOEL VILLAGE SCHOOL DISTRICT V. GRUMET

- Kiryas Joel was a small upstate New York village populated only by Hasidic Jews.
- The Hasidim did not want their children to attend the secular schools with non-Hasidic children, but they did not have the resources to help their learning-disabled children.
- They got the state to establish a school district with exactly the boundaries of Kiryas Joel where everyone on the school board was Hasidic.
- The school board could now use public funds to educate its children in a single religion school.
- The Court found the law an impermissible preference of one religion over others.

THE LEMON TEST

- A test first articulated by the Court in deciding *Lemon v. Kurtzman*.
- “First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion.”

SUPPORT AND OPPOSITION TO THE LEMON TEST

- Justices who take the Strict Separationist approach to interpreting the religion clauses favor the Lemon test.
- Justices in the neutrality interpretation camp also use the Lemon test, but generally emphasize whether the purpose or effect of the statute under consideration is to symbolically endorse religion.
- Justice favoring accommodation to religion believe the Lemon test should be abandoned.

TWO REACTIONS TO THE LEMON TEST

Justice Scalia

“Discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations...is not binary, or indeed even finite...To look for the sole purpose of even a single legislator is probably to look for somethings that does not exist.”

Justice Souter

“Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country, and governmental purpose is a key element of a good deal of constitutional doctrine.”

THE LEMON TEST

REQUIREMENT OF A SECULAR PURPOSE

STONE V. GRAHAM

- The Court struck down a state law requiring that the Ten Commandments be posted on the walls of every public-school classroom.
- The Court found the law violated the Establishment Clause because it had no secular legislative purpose.

WALLACE V. JAFFREE

- The Court invalidated state law authorizing public-school teachers to hold a one minute period of silence for meditation or voluntary prayer.
- The majority found that the law was a pretext for reintroducing prayer into schools and was without secular legislative purpose.

EDWARDS V. AQUILLARD

- Louisiana passed a law requiring that public schools that teach evolution had to teach Creation Science as well.
- The Court struck down the law saying that Creation Science is a religious theory explaining the origin of human life.
- “Because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause.”

MCCRORY COUNTY, KENTUCKY V. ACLU OF KENTUCKY

- McCrory County, Kentucky posted the Ten Commandments in county buildings.
- The Court decided that there was no doubt that the county was acting to advance religion.
- Justice Souter wrote that the Act “violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government’s ostensible object is to take sides.”

MCGOWAN V. MARYLAND

- The Court upheld Maryland state laws requiring businesses to be closed on Sunday.
- The Court recognized that the laws had a strongly religious origin.
- It held that the laws did not violate the Establishment Clause because the “purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is a Sunday, a day of particular significance for the dominant Christian sects, does not bar the state from achieving its secular goals.”

THE LEMON TEST

THE REQUIREMENT FOR A SECULAR EFFECT

THORNTON V. CALDOR

- The Court ruled unconstitutional a Connecticut law that an employer cannot require an employee to work on his or her sabbath.
- Court said the law created an absolute right for individuals not to work for religious reasons and favored religion over all other interests.
- “[T]he statute goes beyond having an incidental or remote effect of advancing religion. The statute has a primary effect that impermissibly advances particular religious practice.”

CORPORATION OF PRESIDING BISHOP OF THE CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS V. AMOS

- The Court upheld an exemption from Title VII's prohibition on employment discrimination based on religion.
- The Court reasoned that the secular purpose of the exemption was "to alleviate significant government interference with the ability of religious organizations to define and carry out their religious missions."
- Justice White wrote for the majority "[a] law is not unconstitutional simply because it allows churches to advance religion which is their very purpose. For a law to have forbidden effects under Lemon, it must be fair to say that the government itself has advanced religion through its own activities and influence."

HOSSANA-TABOR EVANGELICAL LUTHERAN CHURCH AND SCHOOL V. EEOC

- The Court held that religious institutions are exempt from employment discrimination laws that limit their choices of who will be ministers.
- The Court found that it would violate both the Establishment and Free Exercise Clauses to hold a religion liable for decisions it makes regarding who will be ministers.
- The distinction between the last two cases and the first one is that in *Thorton* the government was advancing religion through its own activity and influence, while in the latter two cases the Court was providing an exemption from a statute for religious institutions to pursue their own purposes.

THE LEMON TEST

THE PROHIBITION OF EXCESSIVE ENTANGLEMENT

GRAND RAPIDS SCHOOL DISTRICT V. BALL AQUILAR V. FELTON

- The Court ruled that the government cannot pay teachers' salaries in parochial schools even if they are special education teachers or are teaching secular subjects.
- The Court's reason was that if the government paid such salaries it would need to check constantly if the teachers were teaching secular or religious subjects.
- That kind of monitoring would constitute excessive entanglement in religion
- Agostini v. Felton overruled Aquilar v. Felton saying that public school teachers can provide remedial education in parochial schools.

COMMITTEE FOR PUBLIC EDUCATION V. NYQUIST

“[A]part from any specific entanglements of the State in particular religious programs, assistance...violates the establishment clause if it carries the grave potential for entanglements in the broader sense of continuing political strife over aid to religion.”

MITCHELL V. HELMS

- The Court held, without a majority opinion, that the government could give instructional equipment to parochial schools as long as it is not used for religious instruction.
- Four justices would have allowed the equipment to be used for religious instruction if all religions were treated equally.
- Three others would have prohibited the government from giving the schools equipment because it might be used for religious instruction.
- The final two justices thought that the aid could be allowed so long as it is not used for religious instruction.

RELIGIOUS SPEECH AND THE FIRST AMENDMENT



POLICE DEPARTMENT OF CHICAGO V. MOSLEY

- “[A]bove all else the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subjects or its content”
- Content based regulations are presumptively invalid.
- The burden of proof lies with the government in showing that content-based regulation does not violate the First Amendment.
- In *Turner Broadcasting System v. F.C.C.* the Court said the general rule is that content based restrictions on speech must satisfy strict scrutiny, while content neutral regulation need only meet intermediate scrutiny.

STRICT SCRUTINY

INTERMEDIATE SCRUTINY

RATIONAL BASIS

- **Strict Scrutiny** – The government must show it has a compelling interest in discriminating and is using the most narrowly tailored means to do so.
- **Intermediate Scrutiny** – The government must show that it has an important interest and it is using means that are substantially related to that interest to achieve it.
- **Rational Basis** – The government must have a legitimate state interest and there must be a rational connection between the statute's means and goals.

CONTENT BASED OR CONTENT NEUTRAL

- To be content neutral the government prohibition must be both viewpoint neutral and subject matter neutral.
- Viewpoint neutral means that the government cannot regulate speech based on the ideology of the message.
- Subject matter neutrality means the government cannot regulate speech based on the topic of the speech.

MATAL V. TAM

- A rock band of Asian Americans wanted to call themselves the Slants, in order to take back what had been a derogatory term used to describe Asians.
- They tried to get the name trademarked but the Patent and Trademark Office refused citing the Lanham Act that says, in part, that a trademark cannot be registered if it “consists of matter which may disparage persons living or dead, institutions, beliefs or national symbols or bring them into contempt or disrepute.”
- The Court struck down that part of the Lanham Act as unconstitutional viewpoint discrimination.
- The government cannot regulate speech on the grounds that the speech was offensive.

RELIGIOUS GROUP ACCESS TO SCHOOL FACILITIES



