FREEDOM OF RELIGION: ESTABLISHMENT CLAUSE

To help you understand the numerous religious freedom cases you read about in the text, the following outlines the basic legal positions on the establishment clause:

1. “Wall of Separation” position: argues that the Establishment clause means there must be an absolute separation between church and state, thus the name “wall of separation.” This has lead to bans on school prayer, Bible readings in schools, prayers at after-school activities such as football games, and so on. The “wall of separation” principle comes from Thomas Jefferson, who believed there needs to be an absolute wall of separation between the church and state. The extreme version of this debate argues that government must not prefer any religion at all over nonreligion—essentially, government must prefer nonreligion over religion.

2. “Non-Preferentialist position: argues that the establishment clause means that government cannot prefer any religion over another. Advocates of this position argue that a moment of silence every morning in the public schools would be permissible since it does not designate any specific religious preference—Christian students can pray their prayers, Muslims can pray to Allah, Jews can pray to their God, and atheists can think about whatever they wish during that time and so forth.

3. “Excessive Entanglement” position: argues that government can provide support to private religious schools or support other religious activities so long as it does not involve excessive government entanglement with religion (of course as you have probably guessed, what “excessive entanglement” means is very open to debate!). The US Supreme Court ruled that it is ok for public schools to donate used textbooks to private parochial schools since it does not involve excessive entanglement and is used for a secular purpose. However, the state may not fund private schools teacher salaries as it would involve excessive entanglement and state support for religious instruction. However, using public funds to pay for an interpreter for a deaf student at a private religious school has been declared constitutional since its purpose is secular and does not excessively entangle the government in religion.

Which position do you agree with?

Presently, there is no clear majority opinion on any of these positions. Keep in mind that when the First Amendment was written, much of Europe saw church and state intricately linked together. Even today, in Great Britain, British citizens’ taxes go to support the Church of England regardless of whether they are a member of that church. Some argue that the establishment was only designed to prevent such scenarios, not keep religion out of government and schools altogether. They read the First Amendment establishment clause (“Congress shall make no law respecting an establishment of religion”) as meaning that Congress cannot establish a state religion or church. Others (“wall of separation” advocates) argue that the clause means
Congress and the states by extension through the 14th Amendment cannot have anything to do with religion.

An interesting side note to all this…churches, synagogues, and mosques are exempt from paying taxes. This has been the case since the 1800’s in order to prevent the government from taxing a religious group out of existence. Non-profit religious groups are also exempt, so long as their activities are primarily religious and not political or economic. This has gotten the Christian Coalition in hot water recently as the IRS threatened to take away its tax-exempt status due to its activities being primarily political and not religious.

Two recent public policy debates have divided Americans along these lines:

1. **School vouchers for parents to send their kids to private schools, including religious schools**
   - Would the use of taxpayer money for these voucher programs constitute state support for religious schools? Would this violate the “excessive entanglement” position established by the US Supreme Court? Would you support your taxpayer dollars going to support children attending a Catholic (or Jewish or Baptist or Islamic, etc.) religious school?

2. **President Bush’s “Faith Based Initiative”**
   - This plan involves federal government grants being given to faith-based charities to carry out their programs. Opponents argue that this violates the establishment clause; supporters argue that it does not involve excessive entanglement of the federal government in religion. Would this policy violate the establishment clause? Do you support President Bush’s plan?

**The Lemon Test**

In 1971, the U.S. Supreme Court issued a landmark ruling in *Lemon v. Kurtzman* in which it denied public aid to private and parochial schools for the salaries of teachers of secular subjects as well as instructional materials for certain secular subjects. It ruled that the establishment clause is designed to prevent three evils: “sponsorship, public support, and active involvement of the sovereign [the government] in religious activity.” The Lemon test is a three-part test:

1. A state’s school aid to private schools must be clearly secular
2. A state’s school aid to private schools must have its primary effect to be to neither advance nor inhibit religion
3. A state’s school aid must avoid excessive government entanglement with religion

(Do you notice the similarities of these prongs to the positions outlined in the previous page? The positions in this establishment debate come partially from this test.)

The Court held that for state or government aid to private religious schools to be constitutional, it must meet all three parts of this test.
In 2000, the Supreme Court held that a federal law requiring that public school districts receiving special services and instructional equipment from the U.S. government had to share it with all private schools in the district was constitutional and did not violate the Lemon test.

In a Wisconsin state supreme court case, the court ruled that the use of state school vouchers for parents in Milwaukee to send their children to private religious schools did not violate the Lemon test (*Jackson v. Benson*, 1998). In 2000, a federal appeals court in Ohio ruled that the Ohio’s school voucher program which gave $2,250 to low-income families to send their children to a public or private school of their choice was unconstitutional. This ruling was overturned by the U.S. Supreme Court in *Zelman v. Simmons-Harris* (2002) when the Court ruled 5-4 that the voucher program did not violate the Lemon test. In the court’s majority opinion, Chief Justice William Rehnquist wrote that the "Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice."

It is unlikely that this debate will end anytime soon. The next major battle is likely to be the application of No Child Left Behind standards to private schools, religious schools, and home schooling families. This battle will be interesting as one of the original intents of the framers was to keep the government out of religion, not the other way around. Now, some experts argue that there is a compelling state interest in ensuring that private schools and home-schooling families are meeting national education standards. What do you think?