"*Carson v. Makin* and the Level Playing Field"
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The Establishment Clause — How did we get where we are?

> "Congress shall make no law respecting an establishment of religion . . ."

This was a federalism provision: **Congress** could do nothing **respecting** established churches — neither establishing a Church of the United States nor interfering with state established churches.

The 14th Amendment was designed to protect Americans from violations **by the states** of many Bill of Rights provisions.

- Originally, through the Privileges or Immunities Clause.
- After *The Slaughterhouse Cases*, 83 U.S. 36 (1873), through Substantive Due Process.

Either way, " incorporating" a federalism provision to apply against the states doesn't make much sense as a matter of constitutional interpretation — but the Court did it in *Everson v. Board of Education*, 330 U.S. 1 (1947). It's as if the clause now reads:

> "No governmental entity in the United States — federal, state, or local — may establish any religion."

And maybe that's the right outcome. I don't know that anyone wants a state or local established church today.

But what *IS* an "establishment of religion"?

Michael McConnell, *Cleaning Up the Lemon Mess*, The Volokh Conspiracy, February 28, 2019:

> Religious establishments at the time of the founding shared six characteristics:
>
> * government control over the doctrine and personnel of the established church;
> * mandatory attendance in the established church;
> * government financial support of the established church;
> * restrictions on worship in dissenting churches;
> * restrictions on political participation by dissenters; and
> * use of the established church to carry out civil functions.

The burden is on the plaintiffs to show that the government's conduct shares the historic characteristics of an establishment. It includes government action that favors one religion over another, that involves the government in doctrinal or ecclesiological issues, that invests religious bodies with political power, and much more. In short, an historical

approach is bounded and objectively administrable, but not as narrow as "coercion" or as subjective as "endorsement."

Early on, the Supreme Court got this right:

Bradfield v. Roberts, 175 U.S. 291 (1899) [Justice Peckham]

The commissioners of the District of Columbia had entered into an agreement with the directors of Providence Hospital, then owned and operated by an order of Catholic nuns, whereby the government would in essence reimburse the Hospital to some extent for its care of poor patients.

Did this violate the Establishment Clause?

HELD: No. This is a charitable, not-for-profit hospital (a "private eleemosynary corporation"), not a church. "There is nothing sectarian in the corporation."

> Whether the individuals who compose the corporation under its charter happen to be all Roman Catholics, or all Methodists, or Presbyterians, or Unitarians, or members of any other religious organization, or of no organization at all, is of not the slightest consequence with reference to the law of its incorporation. Nor can the individual beliefs upon religious matters of the various incorporators be inquired into. Nor is it material that the hospital may be conducted under the auspices of the Roman Catholic Church.

Even as late as *Zorach v. Clausen*, 343 U.S. 306 (1952) (involving released time religious education), the flamboyantly non-Christian Justice William O. Douglas found no Establishment Clause violation through a "common sense" approach.

State and religion should not be "hostile, suspicious, and even unfriendly."

> A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court." We are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs.

But things had begun to change in *Everson v. Board of Education*, 330 U.S. 1 (1947) (involving state reimbursement of public transit expenses for students in public or private K-12 schools).

The funding program was upheld, but the Court:

- incorporated the Establishment Clause against the states and
- said this about its meaning:

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 establishment of religion by law was intended to erect "a wall of separation between church and State."

Some of these (e.g., "set up a church") are consistent with the founding-era understanding of religious establishments.

Others, however, do not mesh with the 18th century meaning of "established Church":

- "Aiding all religions" would have been fine.
- Taxes to support religious activities and institutions such as nonprofit hospitals, soup kitchens, and homeless shelters were also permissible — encouraged, in fact! See *Bradfield v. Roberts*.

The "wall of separation" quote from Jefferson cited in the opinion, came from a private letter that Jefferson wrote to a group of Baptists in Danbury, Connecticut (the point of which was to decry the legal establishment of the Congregationalist Church in Connecticut):

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

The phrase, of course, appears nowhere in the Constitution. The concept is there in one sense, but not in another.

By the 1960s, the Court had moved firmly into its "high wall of separation" phase:

- The world can be divided into "religious" stuff and "secular" stuff. All religious stuff (thoughts, viewpoints) must be kept far away from the public square (law and policy).

- That made some sense in a world where almost everyone identified as a Christian, but a large number gave no more significance to their "faith" than spending one hour a week in a church service. Religion ≠ normal life.
- This "high wall" mindset caused problems in a variety of areas, including funding of religious schools, public displays (Nativity scenes, Ten Commandments, etc.), and prayer at public events.
- But as America came to be divided more and more into serious, faithful believers and nonbelievers, the religious/secular demarcation became increasingly uncomfortable for the believers. The idea that faith governs only some aspects of one's life is inconsistent with the idea that Christ is Lord over all that we are.

Lemon v. Kurtzman, 403 U.S. 602 (1971)

Both PA and RI had programs of support for private schools that, among other things, allowed for grants to partially pay teacher salaries. The program required government investigation of teachers and courses to make sure that public funds weren't spent on, e.g., Bible teachers.

Under an historical understanding of established churches, or under *Bradfield v. Roberts*, this is obviously fine. The education of children is a universal public good. No one was forced to go to religious schools, and all private schools — "secular," or involving different religions — were equally eligible. BUT . . . The Court creates the "*Lemon* test" from whole cloth.

(1)	The statute must have a secular legislative purpose — i.e., purpose not entirely religious. *And what if the government's purpose changes over time? And how do we really know what various legislators are thinking when they vote for a law? Is it possible that the whole effort to sniff out legislative "purpose" is illegitimate?*
(2)	The law's primary effect must neither advance nor inhibit "religion." *But this, of course, presumes that we can know what is "religion" and what is not. Aren't secularism, humanism, and atheism all foundational worldviews that govern the lives of their believers?*
(3)	The law must not foster "excessive government entanglement with religion."

So what was the problem with the actual programs in *Lemon*? The states were so scrupulous in trying to keep any government money from getting into a religiously-themed classroom that they created an "excessive entanglement." Therefore, unconstitutional.

Under the *Lemon* test, allegations of religious establishments almost always win!

Over the years, the *Lemon* test began to be used only sporadically — typical when the Court wanted to find an Establishment Clause violation. If the Court saw no Establishment problem, *Lemon* would be explained away or ignored. This led to a really well-known Scalia concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993):

Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: our decision in *Lee v. Weisman* conspicuously avoided using the supposed "test" but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.

The secret of the *Lemon* test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will. When we wish to strike down a practice it forbids, we invoke it; when we wish to uphold a practice it forbids, we ignore it entirely. Sometimes, we take a middle course, calling its three prongs "no more than helpful signposts." Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

But things began to change. After the "high wall" high water mark in the 1970s, a different idea began to seep into Establishment Clause jurisprudence: maybe instead of promoting and establishing secularism, the government should just be religiously neutral.

The beginning came in an area of law familiar to veteran CLS folks: Equal Access.

Engel v. Vitale, 370 U.S. 421 (1962) — The New York State Board of Regents prayer, required by law to be said aloud in each public school classroom every day.

Abington School District v. Schempp, 374 U.S. 203 (1963) — A Pennsylvania public school requirement that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day" (with the ability of any parent to "opt out" his/her children), and a Baltimore City, Maryland, rule that provided for the holding of opening exercises in the schools of the city, consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."

Both violated the Establishment Clause.

The Court's decisions in *Engel* and *Abington School District* raised huge waves of criticism in some parts of the American Christian community. The cases were described as "banning voluntary school prayers" and "kicking God out of public schools." Efforts to promote a constitutional amendment to reverse Engel and Schempp have been repeated many times over the intervening years. Try searching for "school prayer amendment" on the internet to get a sense of the controversy.

In the 1960s and 1970s a group of Christian lawyers, led by Christian Legal Society and its Center for Law & Religious Freedom, proposed a different approach. Instead of trying to amend the Constitution to bring back teacher-led classroom devotional exercises, these advocates argued that it would be wiser and more biblical to work to ensure that

religious student-led groups could meet on the campuses of public colleges, universities, high schools, and perhaps even elementary/middle schools — on the same terms as other, non-religious student groups. This approach came to be known as "Equal Access."

Widmar v. Vincent, 454 U.S. 263 (1981)

University of Missouri-KC excludes a student religious group from using campus facilities for its meetings.

Held (8-1): It violates the Free Speech Clause to make such a content based exclusion from a "limited public forum." **AND** it does not violate the Establishment Clause to grant religious student groups the same expressive rights as other student groups.

The Equal Access Act (1984)

High schools. Is there a "limited open forum"? Clubs meeting during non-instructional time?

Safe harbor provision if:

(1)	the meeting is voluntary and student-initiated;
(2)	there is no sponsorship of the meeting by the school, the government, or its agents or employees;
(3)	employees or agents of the school or government are present at religious meetings only in a non-participatory capacity;
(4)	the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and
(5)	non-school persons may not direct, conduct, control, or regularly attend activities of student groups.

Some opposition among Christians — "This will permit Satanist groups to meet." The fears have proved silly: very few Satanists, lots of Bible clubs.

Westside School District v. Mergens, 496 U.S. 226 (1990) — EAA is constitutional. School had tried to create an Establishment Clause problem by requiring teachers to "lead" all student groups.

Don't advantage religious students — just treat them the same way that you treat others.

By the 1990s, Establishment Clause jurisprudence is a hot mess. *Lemon*, coercion, pseudo-coercion (*Weisman*), endorsement — different tests depending on the facts. But the "level playing field" approach began to spread.

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993)

Good News Club v. Milford Central School, 533 U.S. 98 (2001)

The Court held that when a school district makes public school buildings available for use or rental outside of school hours, it may not discriminate against some attempted uses because of their religious nature. Specifically, schools were required to give equal treatment to:

- a church that wanted to show an evening film series by Dr. James Dobson of Focus on the Family (*Lamb's Chapel*); and
- a parent-run evangelistic Bible club operated after school hours (*Good News Club*).

Rosenberger v. Rector, 515 U.S. 819 (1995)

Christian student religious newspaper at the University of Virginia (a state university and thus an organ of the state) seeks eligibility for student activities funds on the same basis as other similar student clubs or publications. The University refuses.

Court: A "limited public forum" can consist of something intangible, spatial, or financial — a pool of funds, for example. It is not limited to physical facilities.

This is not a case of government engaging in its own speech. It is a content-based and viewpoint-based exclusion from a forum made available for expressive purposes. Violation of the Free Speech Clause; not justified by the Establishment Clause.

The Court is increasingly recognizing that:

1. **"religion" cannot be segregated from the rest of one's identity;**
2. **establishment of secularism is establishment of religion;**
3. **there is no Establishment Clause issue when government money is made broadly available for public purposes and is directed into religious institutions by the choices of private citizens;**
4. **government's job with respect to religion is to respect private choice and keep the playing field level.**

Kennedy v. Bremerton School Dist., 597 U.S. 507 (2022):

This Court long ago abandoned *Lemon* and its endorsement test offshoot. *American Legion*; see also *Town of Greece*. The Court has explained that these tests "invited chaos" in lower courts, led to "differing results" in materially identical cases, and created a "minefield" for legislators. This Court has since made plain, too, that the Establishment Clause does not include anything like a "modified heckler's veto.

Which brings us to *Carson v. Makin*, 596 U.S. 767 (2022)

Facts: Maine school districts too small to operate a high school may provide secondary education by paying students' tuition to attend a public school in another district or an

"approved" private school. To be "approved," the private school must be "nonsectarian in accordance with the First Amendment."

Families filed a lawsuit in federal court arguing that the "nonsectarian" requirement violates the Constitution on its face and as applied. The U.S. Court of Appeals for the First Circuit denied the parents' claim, allowing Maine to continue to discriminate against families who choose religious education over "secular" private schools.

The Supreme Court reversed:

> "We have repeatedly held that a State violates the Free Exercise Clause when it excludes religious observers from otherwise available public benefits."

Maine argued that the Establishment Clause required it to exclude religious schools. **No!**

> A neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. . . . As we explained in both *Trinity Lutheran Church v. Comer*, 582 U.S. ___ (2017), and *Espinoza v. Montana Department of Revenue*, 591 U.S. ___ (2020), such an "interest in separating church and state more fiercely than the Federal Constitution requires . . . cannot qualify as compelling in the face of the infringement of free exercise."

Carson thus stands in line with a plethora of "level playing field cases," including *Zelman*, *Widmar*, high school equal access, *Rosenberger*, *Lamb's Chapel*, *Good News Club*, etc. The government may not exclude "religious" people and groups from generally-available programs.

Not only is a religious leveling field permitted by the Establishment Clause; it is **required** by the Free Exercise.

Religion Clause jurisprudence has mostly been a mess since the Supreme Court trotted out the "high wall of separation" in *Everson*. But there has been steady improvement in recent years. Today the Court seems be unifying its diverse approaches into a classically liberal, religion-friendly worldview that is better than our nation has seen in almost 100 years.