WHAT TO DO ABOUT THE FIRST AMENDMENT

By Robert H. Bork

The text of the First Amendment is quite simple: “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.” These are not words that would lead the uninitiated to suspect that the law, both with regard to religion and with regard to speech, could be what the Supreme Court has made of it in the past few decades.

Where religion is concerned, for example, a state may lend parochial schoolchildren geography textbooks that contain maps of the United States but may not lend them maps of the United States for use in geography class; a state may lend parochial schoolchildren textbooks on American colonial history but not a film about George Washington; a state may pay for diagnostic services conducted in a parochial school but therapeutic services must be provided in a different building.

The First Amendment’s establishment clause — “Congress shall make no law respecting an establishment of religion” — clearly precludes recognition of an official church, and it can easily be read to prevent discriminatory aid to one or a few religions. But it hardly requires the conclusion that government may not assist religion in general or sponsor religious symbolism. An established religion is one which the state recognizes as the official religion and which it organizes by law. Typically, citizens are required to support the established church by taxation. The Congress that proposed and the states that ratified the First Amendment knew very well what an establishment of religion was, since six states

had various forms of establishment at the time; ironically, one reason for the prohibition was to save these state establishments from federal interference.

The history of the formulation of the clause by Congress demonstrates that it was not intended to ban government recognition of and assistance to religion; nor was it understood to require government neutrality between religion and irreligion.

And as we shall see, it most certainly was not intended to erase religious references and symbolism from the actions and statements of government officials.

Had the establishment clause been read as its language and history show it should have been, the place of religion in American life would be very different from what it now is. But in modern times, the Supreme Court has developed a severe aversion to connections between government and religion. Nowhere is that more evident than in the Court's alteration of its fixed rules to allow such connections to be challenged far more easily than other claimed violations of the Constitution.

Major philosophical shifts in the law can occur through what may seem to laymen mere tinkerings with technical doctrine. Thus, the judiciary's power to marginalize religion in public life was vastly increased through a change in the law of what lawyers call "standing." Orthodox standing doctrine withholds the power to sue from persons alleging an interest in an issue only in their capacities as citizens or taxpayers. An individualized personal interest, some direct impact upon the plaintiff, such as the loss of money or liberty, is required. But in 1968, in *Flast v. Cohen,* the Supreme Court created the rule that taxpayers could sue under the establishment clause to enjoin federal expenditures to aid religious schools.

Though the opinion offered a strained explanation that would fit some suits under other parts of the Constitution, the

Court has managed to avoid allowing such suits with still more strained rationales. Every single provision of the Constitution from Article I, Section 1 to the 37th Amendment is immune from taxpayer or citizen enforcement – except one. Only under the establishment clause is an ideological interest in expunging religion sufficient to confer standing.

The unhistorical severity of establishment-clause law was codified in the Supreme Court's opinion in *Lemon v. Kurtzman* (1971). To pass muster, the Court held, a law must satisfy three criteria: (1) the statute or practice must have a secular legislative purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive government entanglement with religion.

So few statutes or governmental practices that brush anywhere near religion can pass all of those tests that, were they uniformly applied, they would erase all traces of religion in governmental affairs. But there are too many entrenched traditions around for *Lemon* to be applied consistently. While a case challenging the use of a paid chaplain in Nebraska's legislature was pending in the Supreme Court, the appeals court on which I then sat gathered to hear a challenge by atheists to the practice of paying the chaplains who serve Congress. We and counsel stood while a court officer intoned, "God save the United States and this honorable court," an inauspicious beginning for the plaintiffs since the ritual, followed in the Supreme Court as well, would appear to violate all three prongs of *Lemon.*

Our case was later rendered moot because the Supreme Court approved the Nebraska legislature's chaplain in *Marsh v. Chambers* (1983). Justice William Brennan, dissenting, argued that the state's practice could not pass the *Lemon* test since it hardly had a secular purpose, and the process of choosing a "suitable" chaplain who would offer "suitable" prayers involved governmental supervision and hence "entanglement"

with religion. The Court majority, however, relied on the fact that employing chaplains to open legislative sessions conformed to historic precedent: not only did the Continental Congress employ a chaplain but so did both houses of the first Congress under the Constitution which also proposed the First Amendment. In fact, they also provided paid chaplains for the Army and Navy.

Presumably for that reason, Chief Justice Burger, who had written *Lemon,* did not apply it in *Marsh.* And quite right he was. The Court often enough pays little attention to the historic meaning of the provisions of the Constitution, but it would be egregious to hold that those who sent the amendment to the states for ratification intended to prohibit what they had just done themselves.

But if the *Lemon* test should be ignored where there exists historical evidence of the validity of specific practices or laws that could not otherwise pass muster, then it is a fair conclusion that the test itself contradicts the original understanding of the establishment clause and is destroying laws and practices that were not meant to be invalidated.

As matters stand, *Lemon* makes it difficult for government to give even the most harmless or beneficial forms of assistance to religious institutions. New York City, for example, implemented a program, subsidized with federal funds, under which public-school teachers could volunteer to teach in private schools, including religious schools. The program offered instruction to educationally deprived children in remedial reading, mathematics, and English as a second language. The teachers were accountable only to the public-school system, used teaching materials selected and screened for religious content by city employees, and taught in rooms free of religious symbols. The teachers were generally not members of the religious faith espoused by the schools to which they were assigned. There was no evidence that any teacher complained of interference by private school officials

or sought to teach or promote religion.

The court of appeals said this was “a program that apparently has done so much good and little, if any, detectable harm.” Nevertheless, constrained by *Lemon,* that same court held the program an impermissible entanglement because the city, in order to be certain that the teachers did not inculcate religion, had to engage in some form of continuing surveillance. The Supreme Court, in *Aguilar v. Felton* (1985), affirmed on the same ground. The educationally deprived children were then required to leave the school premises and receive remedial instruction in trailers.

The Supreme Court has found the “establishment of religion” in the most innocuous practices. A lower court held that it was unconstitutional for a high school football team to pray before a game that nobody be injured. Another court held that a Baltimore ordinance forbidding the sale of non-kosher foods as kosher amounted to the establishment of religion. A federal court decided that a school princi- pal was required by the establishment clause to prevent a teacher from reading the Bible silently for his own purposes during a silent reading period because students, who were not shown to know what the teacher was reading, might, if they found out, be influenced by his choice of reading material.

The list of such decisions is almost endless, and very few receive Supreme Court review, not that that would be likely to change things. After all, the Supreme Court itself decided in *Stone v. Graham* (1980) that a public school could not display the Ten Commandments. (The school authorities were so intimidated by the current atmosphere that they attached a plaque stating that the display was intended to show our cultural heritage and not to make a religious statement; no matter, it had to come down. It also did not matter that the courtroom in which the case was heard was decorated with a painting of Moses and the Ten Commandments.)

So, too, in *Lee v. Weisman,* decided in 1992, a five-Justice majority held that a short, bland nonsectarian prayer at a public-school commencement amounted to an establishment of religion. The majority saw government interference with religion in the fact that the school principal asked a rabbi to offer a nonsectarian prayer. Government coercion of Deborah Weisman was detected in the possibility that she might feel "peer pressure" to stand or to maintain respectful silence during the prayer. (She would, of course, have had no case had the speaker advocated Communism or genocide.) Thus was ended a longstanding tradition of prayer at school-graduation ceremonies. The law became a parody of itself in *Lynch v. Donnelly,* a 1984 decision concerning Pawtucket, Rhode Island's inclusion of a creche in its annual Christmas display. The Court held that the display passed muster, but only because along with the creche, it also included such secular features as a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cut-out figures repre- senting such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, and a large banner that reads 'SEASON'S GREETINGS.' The display of a menorah on a public building has been subjected to a similar analysis. In other words, the question to be litigated nowadays is whether there is a sufficient number of secular symbols surrounding a religious symbol to drain the latter of its meamng.

Despite all this, governments regularly and inevitably take actions that do not have a secular purpose, whose principal effect is to advance religion, and which entangle them with religion.

Aside from the examples already given, there are property-tax exemptions for places of worship, which do not have a secular purpose and do advance religion. Government, in the form of boards, courts, and legislatures, determines what qualifies as religion in order to award draft exemptions for conscientious

objectors, aid to schools, and the like. In order to see that education is properly conducted, states must inspect and demand certain levels of performance in religious schools. Federal employees receive paid time off for Christmas, and the National Gallery preserves and displays religious paintings.

In short, our actual practices cannot be made consistent with the complete separation of religion and government.

The tendencies of the Supreme Court's unhistorical applications of the First Amendment are fairly clear. The late social critic Christopher Lasch asked what accounted for our "wholesale defection from standards of personal conduct – civility, industry, self-restraint – that were once considered indispensable to democracy." He concluded that though there were a great number of influences, "the gradual decay of religion would stand somewhere near the head of the list."

Despite widespread religious belief, public life is thoroughly secularized. The separation of church and state, nowadays interpreted as prohibiting any public recognition of religion at all, is more deeply entrenched in America than anywhere else. Religion has been relegated to the sidelines of public debate.

As religious speech is circumscribed in the name of the First Amendment, however, the Court – in the name of that same amendment – strikes down laws by which communities attempt to require some civility, some decency in public expression. The Ten Commandments are banned from the schoolroom, but pornographic videos are permitted. Or, as someone has quipped about the notorious sculpture by Andres Serrano, a crucifix may not be exhibited – unless it is dipped in urine, in which case it will be awarded a grant by the National Endowment for the Arts.

The result of all this is an increasingly vulgar and offensive moral and aesthetic environment, and, surely, since what is

sayable is doable, an increasingly less moral, less happy, and more dangerous society.

The Supreme Court should therefore revisit and revise its First Amendment jurisprudence to conform to the original understanding of those who framed and enacted it. Religious speech and symbolism should be permissible on public property. Nondiscriminatory assistance to religious institutions should not be questioned. Communities, if they so desire, should be permitted to prefer religion to irreligion.

There is no justification whatever for placing handicaps on religion that the establishment clause does not authorize.