Florida Law Review

Volume 53 | Issue 3 Article 5

July 2001

Separation of Church and State: Expanding the Purpose Prong of the Lemon Test

Sara S. Davis

SEPARATION OF CHURCH AND STATE: EXPANDING THE PURPOSE PRONG OF THE *LEMON* TEST

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

*Sara S. Davis**

Petitioner's policy[1] allowed students to deliver a prayer or address prior to home football games.[2] The stated purposes of the policy were to foster free expression, solemnize the event, promote sportsmanship, and establish the appropriate environment for the competition.[3] Respondents challenged the policy, asserting that it violated the Establishment Clause of the First Amendment.[4] The district court ordered Petitioner to require all student addresses to be non-sectarian and non-proselytizing.[5] Both Petitioner and

---

* To my parents, Harvey and Susan Davis, for all their love and support and my irreplaceable friends for their understanding.

1. The text of the policy read:

> STUDENT ACTIVITIES:
> PRE-GAME CEREMONIES AT FOOTBALL GAMES
> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring the high school student council shall conduct an election, by the student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student from the list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.

Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 298 n.6 (2000).

2. *Id.* at 294.

3. *Id.* at 309. Petitioner later re-stated its purpose as to "foste[r] free expression of private persons . . . as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety and establis[h] an appropriate environment for competition." *Id.*

4. Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 811 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000). The First Amendment reads: "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." U.S. CONST. amend. I.

5. *Doe*, 168 F.3d at 812. Prior to the district court's order, petitioner's policy contained no requirement governing the content of the student-led message or invocation. *Id.* However, the policy did contain a provision that provided for the addition of a nonsectarian, nonproselytizing content limitation should the petitioner be enjoined from enforcing the policy. *Id.*

Respondents appealed the decision and the appellate court affirmed in part and reversed in part, ultimately holding the policy unconstitutional.[6] The Supreme Court granted certiorari[7] and, in affirming the appellate court's decision, HELD, that the policy of allowing non-sectarian, non-proselytizing addresses prior to home football games violated the Establishment Clause.[8]

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."[9] Historically, courts have had difficulty drawing the line between permissible actions that may benefit religion and those that violate the Establishment Clause.[10] In *Lemon v. Kurtzman*,[11] the Court established a three-part test to determine whether a government action or policy violated the Establishment Clause.[12]

In *Lemon*, the Court evaluated the constitutionality of two state statutes that provided supplemental salaries to teachers at non-public schools.[13] In deciding that both statutes violated the Establishment Clause, the Court applied a three-part test.[14] This test, now known as the *Lemon* Test, requires a government act or policy to have a secular purpose, have a primary or principal effect that neither advances nor inhibits religion, and avoid fostering an excessive governmental entanglement with religion.[15] The Court indicated that, if a policy or statute did not meet all three requirements of the *Lemon* Test, it would violate the Establishment Clause.[16] Applying the test to the case before it, the Court determined that both state statutes involved excessive interaction between the government and religiously affiliated schools.[17] The Court, therefore, concluded that

---

6. *Id.* at 824. The portion of the appellate court's holding that is most relevant to the instant case is its reversal of the district court's decision that Petitioner's policy of allowing nonsectarian, nonproselytizing student messages or invocations is permissible. *See id.*

7. *Doe*, 530 U.S. at 301. The Court limited it's consideration of the matter to the narrow issue of "[w]hether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." *Id.*

8. *Id.* at 317.

9. U.S. CONST. amend. I.

10. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

11. 403 U.S. 602 (1971).

12. *Id.* at 612.

13. *Id.* at 606. The Rhode Island statute allowed the state to supplement the salaries of teachers of secular curriculum in private elementary schools. *Id.* at 607. The state paid the supplement directly to the teachers. *Id.* The Pennsylvania Statute provided that the state could directly reimburse private schools for actual expenditures for the costs of secular educational services. *Id.* at 609. Both statutes provided benefits to religious and non-religious private schools. *Id.* at 606.

14. *Id.* at 612.

15. *Id.*

16. *Id.*

17. *Id.* at 613.

both statutes had the cumulative effect of fostering an excessive entanglement of government and religion.[18]

Despite finding the statutes unconstitutional, the Court recognized that each statute had a legitimate purpose: to enhance the quality of secular education.[19] The Court went further, holding that, because no reason existed to question this stated secular purpose, it would afford the purpose deference and find it valid under the purpose prong.[20] Applying the purpose prong of the *Lemon* Test in light of this notion of deference was a central issue of the Court's decision in *Lynch v. Donnelly*.[21]

In *Lynch*, the Court refused to hold that city sponsorship of a nativity scene, displayed during the holiday season, violated the Establishment Clause.[22] Rather, the Court held that the city's display had the valid secular purpose of celebrating the Christmas holiday and depicting its origins.[23] The Court was unwilling to charge the city with having an implied intent to advocate a certain religious message.[24]

In its decision,[25] the Court took special note that displaying the nativity scene did not violate the purpose prong of the *Lemon* Test because the display was not wholly motivated by religious considerations.[26]

---

18. *Id.* at 614.

19. *Id.* at 613. The Court did not find it necessary to consider whether the primary or principle effect of the statutes was to advance religion. *Id.* This issue was not considered because the Court found clear evidence of excessive entanglement of government and religion, which gave it ample ground to declare the statute unconstitutional. *Id.* at 613-14.

20. *See id.* at 613. The language of the Court's opinion is particularly relevant because it is indicative of the Court's reluctance to look past the government actor's stated secular purpose. The relevant portion of the opinion reads:

> Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else.

Id.

21. 465 U.S. 668 (1984).

22. *Id.* at 687.

23. *Id.* at 680. In coming to this conclusion, the Court emphasized that Christmas is a religious event with a very significant history of celebration in the Western World. *Id.* The Court further noted that Christmas has long been recognized as a National Holiday. *Id.*

24. *See id.*

25. To decide the issue, the Court also held that the city's sponsorship of the nativity scene violated neither the primary effect nor the excessive entanglement prongs of the *Lemon* Test. *Id.* at 681-85.

26. *Id.* at 680. The exact wording of the *Lynch* Court's opinion attests to its unwillingness to lightly disregard a government actor's stated secular purpose. The relevant portion reads: "The

Additionally, the significant benefits to religion resulting from the display were not enough to convince the Court that the stated secular purpose was invalid.[27] In its decision, the Court was once again deferential to the stated secular purpose of the government action.[28] However, the Court did not act so deferentially in *Edwards v. Aguillard*.[29]

The Court in *Edwards* considered whether a statute requiring balanced treatment of creation and evolution[30] in schools violated the Establishment Clause.[31] The officials in charge of implementing the statute contended that its purpose was to promote the legitimate secular interest of academic freedom.[32] Considering this contention, the Court expanded its analysis of the purpose prong of the *Lemon* Test.[33] Rather than look solely to whether the legislature acted with the sincere intent to protect academic freedom, the Court also considered whether the statute would effectively further this goal.[34]

Ultimately, the Court decided that the statute did not further its stated secular purpose because teachers already possessed the academic freedom that it was designed to provide.[35] Considering this, along with aspects of the statute's legislative history,[36] the Court held that the statute's sole purpose was to promote the teaching of creationism.[37] Further, the Court

---

Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations." *Id.*

27. *See id.* at 680; Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 242 (1986).

28. *See Lynch*, 465 U.S. at 680.

29. 482 U.S. 578 (1987).

30. The Act prohibited the teaching of evolution in public schools unless creation science is taught as well. *Id.* at 581. However, no school is required to teach either theory. *Id.*

31. *Id.* at 597.

32. *Id.* at 586. The Court took the common meaning of academic freedom to be "the freedom of teachers to teach what they will." *Id.* The legislature, however, may have intended the phrase to mean "a basic concept of fairness; teaching all of the evidence." *Id.* The distinction was not ultimately important to the Court because it held that the Act did not further the stated purpose under either interpretation. *See id.*

33. *See id.* at 613-14 (Scalia, J., dissenting). In his dissent, Justice Scalia points out that, in previous applications of the purpose prong, the Court has considered only the actual motives for the challenged action. *Id.* at 613.

34. *Id.* at 586-87.

35. *Id.* at 587. The Court noted that no restriction existed prohibiting public school teachers from teaching any scientific theory that was supported by adequate proof. *Id.* Based on this, the Court concluded that the Act did not provide the teachers with any new authority and therefore did not further the goal of academic freedom. *Id.*

36. The Court found that the Act's sponsor had expressed a dislike for evolution theory because it supported beliefs that were contrary to his own. *Id.* at 592. Further, the sponsor stated that theories supporting his religious views should be taught in public schools to counter the fact that evolution was taught. *Id.*

37. *Id.* at 593.

found that this purpose endorsed a particular religious belief and therefore violated the purpose prong of the *Lemon* Test.[38] In reaching this conclusion, the Court embarked on a lengthy explanation of why it did not accept the statute's stated secular purpose.[39]

Much like the Court in *Edwards*, the instant Court used extrinsic factors to scrutinize the stated secular purpose of Petitioner's policy.[40] However, the instant Court's reasoning for its decision was not as extensive as the reasoning of the *Edwards* Court.[41] Citing both the text[42] and evolution of the petitioner's policy, the instant Court held that the policy's true purpose was to continue the tradition of prayer before home football games.[43] Further, the instant Court held that this purpose violated the purpose prong of the *Lemon* Test.[44] In reaching this conclusion, the instant Court examined the wording of Petitioner's policy and inferred that the only type of message Petitioner would accept was a religious invocation.[45] The fact that Petitioner's stated secular purposes for the policy might have truly reflected Petitioner's motivations did not dissuade the instant Court from using the purpose prong of the *Lemon* Test to invalidate the policy.[46]

In reaching its decision, the instant Court did not afford Petitioner's policy the sort of deference that both *Lynch* and *Lemon* suggested was appropriate.[47] Instead, the instant Court suggested that it had a duty to determine whether the stated secular purpose of the policy was sincere.[48] By inferring a religious purpose for Petitioner's policy, the Court indicated it was not bound to afford the policy a presumption of constitutionality.[49] The Court might not have afforded the policy this presumption because it questioned Petitioner's motives for adopting the policy.[50]

---

38. *Id.* at 593-94.

39. *See id.* at 586-93. The Court's explanation of why it did not accept the statute's stated secular purpose continues for seven pages and explains in detail why any interpretation of the stated secular purpose could not be considered sincere. *See id.* The Court also explains that, in light of the extrinsic evidence and with no valid stated secular purpose to consider, the only purpose it can find for the statute is religious in nature. *See id.*

40. *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000).

41. *See id.*

42. *See supra* note 1.

43. *Doe*, 530 U.S. at 309.

44. *Id.*

45. *See id.*

46. *See id.*

47. *See supra* notes 20 and 26 and accompanying text.

48. *See Doe*, 530 U.S. at 308 (quoting Wallace v. Jaffree, 472 U.S. 38, 75 (1985)).

49. *See* Edwards v. Aguillard, 482 U.S. 578, 618 (1987) (Scalia, J., dissenting) (suggesting that the court should not "attribute unconstitutional motives to the States") (quoting Mueller v. Allen, 463 U.S. 388, 394 (1983)).

50. *See Doe*, 530 U.S. at 308-09.

In a strong dissent, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, argued that, by inferring a religious purpose rather than accepting Petitioner's plausible, stated secular purpose, the majority misapplied the purpose prong of the *Lemon* Test.[51] Chief Justice Rehnquist disagreed with the majority's conclusion that Petitioner's policy had no secular purpose.[52] Particularly, he disapproved of the majority's inference that the only message Petitioner's policy advocated was a religious invocation.[53] Additionally, Chief Justice Rehnquist found that Petitioner's attempt to comply with the district court's order by modifying the policy was evidence of its willingness to adhere to the limits imposed by the Establishment Clause.[54] Based on this reasoning, Chief Justice Rehnquist would have deferred to Petitioner's stated secular purpose and held that the policy did not violate the purpose prong of the *Lemon* Test.[55]

By invalidating Petitioner's policy even though it has a plausible secular purpose, the instant Court applies the purpose prong of the *Lemon* Test more stringently than have previous courts.[56] It makes no mention of the standard used in *Lynch*,[57] which would require a policy to be wholly motivated by religious considerations before it is invalidated.[58] Additionally, the instant Court relies on several of its own inferences in concluding that Petitioner's policy has an inappropriate religious purpose.[59]

Unlike the Court in *Edwards*,[60] the instant Court provides very little reasoning for its conclusion that Petitioner's stated secular purpose is invalid.[61] The limited reasoning that the instant Court does provide rests on

---

51. *Id.* at 322-24 (Rehnquist, C.J., dissenting). In his dissent, Chief Justice Rehnquist makes it clear that he disapproves of the *Lemon* test and does not feel bound to apply it. *Id.* at 319-20 (Rehnquist, C.J., dissenting). However, he goes on to consider the test's application to the instant case and concludes that Petitioner's policy should not be invalidated. *Id.* at 320 (Rehnquist, C.J., dissenting).

52. *Id.* at 323-24 (Rehnquist, C.J., dissenting).

53. *Id.* at 322-23 (Rehnquist, C.J., dissenting).

54. *Id.* at 323-24 (Rehnquist, C.J., dissenting). Moreover, Chief Justice Rehnquist found that Petitioners exceeded what was necessary to comply with the Establishment Clause by adopting a policy that gave the student speaker an opportunity to deliver either an invocation or a message. *Id.* (Rehnquist, C.J., dissenting).

55. *Id.* at 324 (Rehnquist, C.J., dissenting).

56. *See id.* at 319 (Rehnquist, C.J., dissenting).

57. *See supra* note 26 and accompanying text.

58. *See Doe*, 530 U.S. at 307-15. The Court questioned whether a football game was an appropriate occasion for a solemn address. *See id.* at 309. Additionally, the Court found that limiting the content of the address to material of a solemn nature did not advance the purpose of fostering free expression. *Id.* However, the Court did not explain why the goals of promoting good sportsmanship and student safety and establishing the proper atmosphere for competition were invalid. *See id.* at 308-09.

59. *See supra* text accompanying note 45.

60. *See supra* note 39 and accompanying text.

61. *See supra* text accompanying note 41.

its assumption that the only form of message Petitioner's policy approves of is a religious invocation.[62] The Court invalidates the policy because it finds a religious invocation inadequate to achieve Petitioner's stated secular purpose.[63] However, the text of the policy[64] provides that either a message or invocation may be delivered.[65] Nowhere does it stipulate that either must be of a religious nature.[66]

The instant Court contends that it is reasonable to infer that Petitioner's policy favors an invocation because an invocation is the sort of speech most likely to solemnize an event.[67] Yet, as Chief Justice Rehnquist points out in his dissent, it is not difficult to think of a solemn message that is not religious.[68] By inferring otherwise, the instant Court seems more critical of Petitioner's stated secular purpose than previous courts would have been.[69] Even though the Court in *Edwards* invalidated a statute because it did not achieve its stated purpose, it did so without relying on the type of inferences the instant Court makes.[70]

Arguably, the instant Court's willingness to make multiple inferences to invalidate Petitioner's stated secular purpose increases the petitioner's burden in satisfying the purpose prong of the *Lemon* Test.[71] Under the instant Court's application, it seems that Petitioner would have to prove not only that it has a plausible secular purpose for its policy, but also that no alternative religious purpose exists.[72] This application seems to virtually do away with the presumption of validity that both *Lemon* and *Lynch* would have afforded Petitioner's stated secular purpose.[73]

---

62. *See Doe*, 530 U.S. at 309.

63. *See id.*

64. *See supra* note 1.

65. *Doe*, 530 U.S. at 298 n.6.

66. *See id.*

67. *Id.* at 309, 314-15.

68. *See id.* at 322-23 (Rehnquist, C.J., dissenting). The example Chief Justice Rehnquist gives of a non-religious solemnizing message is one "urging that a game be fought fairly." *Id.* at 322.

69. *See id.* at 319 (Rehnquist, C.J., dissenting).

70. *See supra* notes 35-39 and accompanying text.

71. *See supra* notes 56-59 and accompanying text. While the Court does not specifically state that government actors will be held to a higher standard, its actions are highly indicative of the proposition. *See Doe*, 530 U.S. at 308-15. By failing to consider plausible secular motives of the petitioner's policy and focusing on what the Court considered an alternative purpose to continue the practice of prayer prior to home football games, *see supra* note 43, the Court is sending a message to government actors. *See Doe*, 530 U.S. at 308-15. The message the Court sends is that a secular purpose may not be adequate to satisfy the purpose prong of the *Lemon* Test when it is possible for the Court to reasonably infer a different religious motivation for the policy. *See id.* at 309.

72. *See id.*

73. *See supra* notes 20 and 26 and accompanying text.

While the *Edwards* Court took a large step away from the tradition of applying the purpose prong of the *Lemon* Test in a manner that is deferential to the government actor's stated secular purpose, it did not abandon the practice completely.[74] The extensive reasoning it provided for its holding indicated that the Court would not lightly dismiss a government actor's stated purpose.[75] The instant Court, however, exhibits no such concern.[76] It seems comfortable applying a more stringent version of the purpose prong, which would invalidate a policy based only on the Court's own inference that the policy was religiously motivated.[77] It is questionable whether the Court intended the purpose prong to impose such a stringent standard when it created the *Lemon* Test.[78]

74. *See supra* text accompanying note 34.

75. *See supra* note 39 and accompanying text.

76. *See Doe*, 530 U.S. at 309, 314-15.

77. *See id.*

78. *See* Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (noting that stated intent must be afforded deference); *see also* Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (noting that a policy or law should be invalidated under the purpose prong only when there is no question that it was wholly motivated by religious considerations); *cf.* Edwards v. Aguillard, 482 U.S. 578, 614 (1987) (noting that, in all previous cases where policies or laws were struck down because they violated the purpose prong of the *Lemon* Test, the government actor's sole motive had been to promote religion).