

Constitutional Highlights

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Wisconsin Constitution Article I, Section 18 The Establishment Clause

Freedom of worship; liberty of conscience; state religion; public funds. The right of every person to worship Almighty God according to the dictates of conscience shall never be infringed; nor shall any person be compelled to attend, erect or support any place of worship, or to maintain any ministry, without consent; nor shall any control of, or interference with, the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

History and purpose of the section

Within article I, the Wisconsin Constitution's Bill of Rights, section 18 sets forth the right to freedom of religion and incorporates both the right to free exercise of religion and freedom from the establishment of a state religion. The Establishment Clause in the Wisconsin Constitution includes the right to be free from a state-preferred religion, to be free from compelled adherence to or support of any religion, and to be free from giving compulsory monetary aid to any religion.

This section reiterates, and expands upon, the rights established by the First Amendment to the United States Constitution to free exercise of religion and freedom from the establishment of a state religion. Article I, section 18 has been amended once to adopt gender-neutral language.

How courts interpret the section

The right to freedom of religion is protected by the First Amendment to the United States Constitution, which reads simply that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." Article I, section 18 of the Wisconsin Constitution is more specific than that, but Wisconsin courts have consistently held that the same analysis applies under both Constitutions. See *Jackson v. Benson*, 218 Wis. 2d 835 (1998).

An enduring test for whether a statute or a practice violates the Establishment Clause was set forth by the United States Supreme Court in *Lemon v. Kurtzmann*, 403 US 602, 612-613 (1971). The *Lemon* test holds that to survive constitutional scrutiny, a statute or practice must (1) have a secular purpose; (2) have a principal or primary effect that neither advances nor inhibits religion; and (3) not foster excessive governmental entanglement with religion. The Wisconsin Supreme Court adopted the *Lemon* test in *State ex. Rel. Holt v. Thompson*, 66 Wis. 2d 659 (1974).

Secular Purpose

Both the Wisconsin courts and the United States Supreme Court have struggled to define what constitutes a sufficient secular purpose. In Wisconsin, the supreme court considered a challenge to a system of public school funding that would allow some funded students to attend private (and religious) schools. The court held that the goal of educating all students, and especially, affording “low-income parents with an opportunity to have their children educated outside the embattled Milwaukee Public School System” was a sufficiently secular purpose for the proposed funding scheme. *Jackson v. Benson* (218 Wis.2d 835 (1998)). The court held that the proposed funding scheme satisfied the other two prongs of the *Lemon* test, as well.

On the other hand, the United States Supreme Court could find little secular purpose behind a Louisiana law that required creationism to be taught in public schools. *Edwards v. Aguillard*, 482 US 578 (1987).

Primary Effects

The Wisconsin courts and the United States Supreme Court have also struggled to determine whether a statute or practice, regardless of its secular purpose, has the primary effect of advancing or inhibiting religion.

In *State ex rel. Wisconsin Health Facilities Authority v. Lindner*, 91 Wis. 2d 145 (1979), the court considered whether the state was advancing religion when it funded private, non-profit (and religious) health facilities. The court acknowledged that some religious facilities may receive a financial benefit from the funding, but held that the primary effect was not to benefit the religious group, but to fund facilities to enhance the public health and safety.

Contrast *Board of Education of Kiryas Joel v. Lumet*, 512 US 687 (1994). In *Kiryas Joel*, the Court acknowledged that the state of New York had a secular purpose in promoting and providing public education when it established a separate school district for a village inhabited solely by the members of one religious group. However, the Court found that the primary purpose of the legislation was to promote the religious beliefs of the group, and thus violated the Establishment Clause.

Excessive Entanglement

The *Lemon* test has been compared to a three-legged stool: each leg is equally important and if one fails, the entire stool will fall. Similarly, courts have found that even if a challenged statute or practice has a secular purpose and does not have a primary effect of promoting or inhibiting religion, it cannot pass constitutional muster if it entangles the government, to an excessive degree, in religious matters.

The Wisconsin Supreme Court considered a case where a woman accused a church of negligently hiring and retaining an allegedly abusive priest. The court declined to consider the negligence claim, holding that to do would require the court to determine what the standards of competence are for a priest. That type of analysis, the court held, would excessively entangle the courts in the role of religion, and would run afoul of the *Lemon* test and the Establishment Clause. *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 303 (1995).

The Wisconsin Supreme Court engaged in a similar analysis when it held that the courts may rule in a property dispute between two churches, but that they must tread carefully. In order to avoid excessive entanglement, the courts must be very careful to avoid any analysis of the religious laws, policies, or practices of the disputing churches. *United Methodist Church, Inc., v. Culver*, 237 Wis. 2d 343 (2000).

The *Lemon* test has, in recent years, been under some fire at the United State Supreme Court. Although the Court has not overturned or rescinded the *Lemon* test, it has used its three prongs as a means to other analyses. More recent decisions have focused on whether a challenged statute or practice has the effect of endorsing a specific religion (or religion in general, to the detriment of people without any religious affiliation) or coercing citizens into supporting or engaging in religion.

The Establishment Clause analyses in more recent decisions have focused on both the subjective intent and objective effects of a statute or practice. The United States Supreme Court has looked to the subjective intent of a statute or practice, to determine whether it promotes or endorses a religion or religiosity. The Court has also looked to the objective effects of a statute or practice, to determine whether an average citizen would feel coerced or intimidated to either support or shun religious activity or religiosity in general. See *Lee v. Weisman*, 505 US 577 (1992) and *Mitchell v. Helms*, 530 US 793 (2000), (O'Connor, J., concurring).

Strategies for reconciling legislation with the section

The three-prong *Lemon* test is still used to determine whether legislation passes constitutional muster in Wisconsin. In order to avoid running afoul of the Establishment Clause, a legislator should ensure that proposed legislation has a secular purpose; neither promotes nor inhibits religious expression; and does not excessively entangle any branch of government in religious matters.

In light of recent court trends, a legislator should also ensure that proposed legislation does not have the intent of endorsing a religion or religiosity, and that the average citizen would not feel coerced or

compelled to support or participate in a religious exercise or in religiosity as a result of the proposed legislation.

A secular purpose is perhaps the easiest part of the test to satisfy. Any legislation that promotes the general health and welfare of the state or that addresses a particular societal ill will probably be held to have a secular purpose. Legislation that is overtly religious in nature or that affects a particular religious group may need a stronger legislative history that demonstrates the secular purpose behind the facially religious objective.

The primary effect of proposed legislation may not advance or inhibit religion. That is not to say, however, that the proposed legislation may not confer a benefit to any religious group or that the religious practices of a group may not be inhibited by the legislation. If the primary effect of the legislation is to promote the health or welfare of the state or to address a particular societal ill, its secondary effects may affect religious groups or religiosity without running afoul of the Establishment Clause. More recent decisions by the United States Supreme Court suggest that the “effects” analysis may be limited to determining whether the legislation actively endorses religion or religiosity or whether it would make the average person feel coerced to support a religion that he or she does not support.

Finally, a legislator should ensure that proposed legislation does not excessively entangle any branch of government in religious matters. Proposed legislation should not contain an evaluation or analysis of religious practices, unless the inclusion of such material is minimal and essential to achieving a secular purpose and addressing a more general legislative concern. Further, a legislator should make sure that any legislation passed would not compel the courts or the administrative branch to engage in an excessive analysis or evaluation of, or entanglement with, the religious practices or tenets of any group.

Prepared by Peggy Hurley, Legislative Attorney



**One East Main Street
Madison, WI 53701-2037
(608) 266-3561
www.legis.wisconsin.gov/lrb**