

Lemon v. Kurtzman – Its Impact on Eirubin

Lemon v. Kurtzman is a landmark United States Supreme Court case. Since this case has considerable impact on Halachic practice, we present the students' summary of their presentation as well as a discussion of how Lemon v. Kurtzman impacts the construction of Eirubin on public grounds.

Lemon v. Kurtzman (1971)

HISTORICAL BACKGROUND: With the defeat of the British in the American Revolution came an end to the Anglican Church as the official church of America. While under British rule, the Americans were taxed to support the church, required to attend services, and religious minorities had to abide by the rules of the church or else suffer penalties. The Founding Fathers of America hoped such would not be the case with their new government. Jefferson and Madison therefore pushed for noninterference between religious groups and the government and vice versa. Their voices were expressed through the Establishment Clause of the First Amendment of the Constitution, which prohibits the government from making any law "respecting an establishment of religion."

FACTS: In both Pennsylvania and Rhode Island, the state government created statutes that provided financial aid to church-related elementary and secondary schools. In Pennsylvania, the statute provided financial support for teachers' salaries, textbooks, and secular instructional materials in non-public schools. In Rhode Island, the statute provided direct additional salary payments to teachers who worked for non-public elementary schools. Alton J. Lemon, along with other individuals and religious liberty organizations, sued the Superintendent of Public Instruction of Pennsylvania, David H. Kurtzman, on the premise that these statutes violated the Establishment Clause, also known as the concept of the separation between church and state, in the First Amendment.

CONSTITUTIONAL QUESTION: Were the statutes enacted by the respective states constitutional? Or did they violate the Establishment Clause of the First Amendment?

DECISION: The judges voted 9-0 in favor of Lemon, stating that Pennsylvania's and Rhode Island's statutes that provide aid to church-related schools violated the Establishment Clause of the First Amendment.

REASONING: In making this decision the court utilized three factors, which would soon be named "The Lemon Test."

1) The first question was whether the statute was passed by the legislature for a secular legislative purpose. In both the case of the Pennsylvania law and the Rhode Island law, no evidence was found which showed that these laws were passed for religious legislative purposes. Therefore, both passed this aspect of the Lemon Test, as they were each passed to improve "the quality of the secular education in all schools covered by the compulsory attendance laws."

2) The second question was whether the programs provided by Rhode Island and Pennsylvania had the primary effect of either advancing or inhibiting religion. This question was bypassed because both laws violated the third factor (below).

3) The third question was whether these laws caused the state or local governments to become too entangled with the religious establishments. The Court decided that these laws and their respective aids would cause the government to become too entangled and intertwined with these religious entities in unconstitutional ways; therefore, the laws were declared unconstitutional.

SIGNIFICANCE: This case was monumental in U.S. history as it established the Lemon Test, the "official" test that clarified the government's involvement in religion-related issues. This important case set up a litmus test that would be used in the future in dealing with cases involving the Establishment Clause.

Clarification of the First Amendment Issue

The three-pronged Lemon Test is intended to help resolve a basic contradiction in the First Amendment. On the one hand, the Establishment Clause prohibits the United States government from "establishing" or promoting religion. On the other hand, the First Amendment also guarantees "free exercise" of religion, meaning

that the government cannot prohibit citizens from practicing religion ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). The three parts of the Lemon Test help civil courts resolve the tension between free exercise of religion and establishment of religion, in applying the First Amendment to cases that appear before them.

We will offer an overview of the impact of the Lemon Tests in regard to both Eiruvim, as it involves the Halachah's interface with the United States government.

Eiruvim

Unlike most construction associated with Orthodox practice such as Batei Keneset, Yeshivot, and Mikva'ot, community Eiruvim are usually constructed on public or government-owned property. In addition, Halachah requires a Jewish community to symbolically rent the area surrounded by an Eiruv from a government official such as a mayor and/or chief of police. Does permitting the construction of Eiruvim violate the Establishment Clause of the First Amendment?

Using the three-pronged Lemon Test, we can demonstrate that it does not. The court, in *ACLU of New Jersey v. City of Long Branch* (1987) stated:

"By permitting the synagogue to use its own funds to create an almost invisible boundary in which its members may engage in secular activities on the Sabbath, the City of Long Branch is not putting its imprimatur on any public manifestations of religion, such as moments of prayer in public schools or the posting of the ten commandments on classroom walls."

Thus, there is a "secular purpose" to Eiruvim, thereby passing the first prong of the Lemon Test. An Eiruv passes the second prong as explained by the court of the Long Branch case since an Eiruv does not advance the observance of religion. Observant Jews will continue to observe the Shabbat with an Eiruv as they would without an Eiruv. An Eiruv merely allows observant Jews to engage in secular activities, such as pushing a stroller or carrying a book, while observing the Sabbath.

This court argued that since it is permissible to construct houses of worship on public land at an airport to enable travelers and airport employees to practice their religions, it is certainly permissible to unobtrusively designate an area as an Eiruv to permit observant Jews to engage in secular activities while they practice their religion. An Eiruv, like a synagogue or church at an airport, makes it easier to observe religion, but does not promote religious observance.

Eiruvim on public property also pass the third prong of the Lemon Test because they do not excessively entangle the government in religion. The government does not pay for Eiruvim or maintain them. Nor is the government called upon to resolve Halachic disputes that arise in the creation and maintenance of Eiruvim. Moreover, Eiruvim are hardly recognizable, as a Federal Court (U.S. Court of Appeals, Third Circuit) cited this author in its decision in the case of Tenafly Eiruv Association v. The Borough of Tenafly (2002): "Rabbi Howard Jachter, representing the TEAI (Tenafly Eruv Association Incorporated), said that 'most Orthodox Jews do not...would not know how to make an Eiruv, wouldn't see where the Eiruv is or how it is created. Even most rabbis wouldn't know where it is.'"

This court also correctly noted that "the Eiruv is not a religious symbol." An Eiruv is a structure, a doorframe, and functions no differently from other typical components of a standard barrier, such as a fence surrounding a highway or a golf course. No Jew would be offended if one kicked, defaced, or spat at any component of the Eiruv as it is not a religious object like a Menorah or a Mezuzah. Thus, allowing an Eiruv to be placed on government property hardly entangles government in a matter of religion. As the court in *Smith v. Community Board 14* (1985, regarding the Belle Harbor, N.Y. Eiruv) ruled, the government should make reasonable accommodation of religious practice and permit an Eiruv to be installed on public land.

Conclusion – Unobtrusive Eiruvim

In the three court rulings upholding the legality of the construction of Eirubin on government property (Long Branch, Tenafly, and Belle Harbor Eirubin), each mentioned the “unobtrusive” and “nearly invisible” nature of Eirubin. This fact should be borne in mind whenever constructing or expanding community Eirubin on public property. Simple black-wire mould, often used on utility poles to insulate wires, or one inch conduit (which often are affixed by utility workers to poles) should be used as Lechis in order to blend in and fit unnoticeably on a utility pole. Plain uncolored fishing wire should be used to remain inconspicuous. Eirubin in the United States cannot be made using barrels as Lechis, as is sometimes done in Israel. While Israel is a Jewish state (as stated in its declaration of independence) and therefore doesn’t require certain Eirubin constraints, these constraints remain necessary in the United States, because the land is not our “home turf.”

Good citizenship and neighborliness is also most important. Eirubin should not be constructed without permission. Eirubin checkers and installers should endeavor to do their work in as inconspicuous a manner as possible. Proper coordination with local police is important as well so as not to cause unnecessary and unpleasant incidents. We should express our gratitude to the United States government and courts for allowing us to construct Eirubin on public grounds and we should act in a manner that reflects that sense of gratitude.