
# There's No Juice Left in *Lemon*

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Francis Beckwith hit the nail on the head in finding that the problem with the discredited-but-not-quite-overruled *Lemon* test is that it synthesized Establishment Clause jurisprudence from the previous 25 years instead of going back to Founding-era understandings. It was an originalist sin, if you will, codifying Vinson and Warren Court dogma about the expulsion of religion from the public square that the Constitution doesn't require.

Indeed, Chief Justice Warren Burger personally continued his predecessor Earl Warren's work on the strict separation of church and state when he wrote the majority opinion in *Lemon v. Kurtzman* (1971), where the Court invalidated a state law that allowed school superintendents to reimburse Catholic schools for the salaries of teachers. Thus he originated a test for determining when a law violated the Establishment Clause—a test whose prongs are so indeterminate that courts have struggled to apply them. Two decades later, Justice Antonin Scalia in *Lamb's Chapel v. Center Moriches Union School District* (1993) likened the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried . . . frightening the little children and school attorneys."

In that concurring opinion, Scalia channeled James Madison, the father of the Constitution and not a man looking to infuse the young republic with theocratic rule. Madison opposed state religion because colonial Virginia was teeming with religious persecution. Preachers were jailed for publishing their views, while the official state religion was integrated into many parts of the government.

This environment had such a profound effect on Madison that when he wrote his draft of the First Amendment, he envisioned the Establishment Clause as the culmination of a philosophy on religion and government with liberty of conscience as the centerpiece. His purpose was to ensure that people could exercise their faith free from compulsion. The Establishment Clause was thus

a shield to defend individual liberty of conscience, not a sword to be used against innocuous symbols and subjective "entanglements" that don't impinge on anyone's freedom.

In a document that George Mason called "an intellectual guidepost of the American Revolution," he and Madison declared that: "Religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience." Accordingly, religious institutions can persuade and convince but cannot compel people—through government—to accept belief. This framework perfectly mirrors Madison's earlier writings about the dangers of state religion: when a religious institution can use force, it tramples one's liberty of conscience. Preserving individual liberty of conscience is thus the motivating factor behind the constitutional prohibition on the establishment of state religion.

*Lemon* turned all that on its head, asking whether a statute was enacted for a "secular purpose," whether its "primary effect . . . neither advances nor inhibits religion," and whether it "fosters" an "excessive government entanglement with religion." Not only is this *Lemon* test vague and hard to apply, but it distracts courts from a focus on whether a given government action compels nonbelievers or otherwise detracts from individual liberty. The sheer confusion in the lower courts, as well as the Supreme Court's reluctance even to discuss this doctrine in relevant cases, shows that all of *Lemon*'s constitutional juice has been squeezed out.

The Court should, at the next opportunity, do away with the ghoulish *Lemon* test and return to the original meaning of the Establishment Clause. While *Lemon* has been around for 50 years, it doesn't deserve the protection of *stare decisis*, a Latin term that protects precedent in order to "to stand by things decided." *Stare decisis* plays a crucial role in maintaining stability in our law, but it shouldn't preserve decisions that are divorced from the original meaning of the Constitution, have proven unworkable, and have been abandoned by most justices.

The Court has vacillated among using the test as its singular understanding of the Establishment Clause, referencing it without relying upon it, and omitting it from its analysis altogether. The result is not merely inconsistent jurisprudence, but rulings that appear directly contradictory when dealing with the same subject matter. The Court held in *Wallace v. Jaffree* (1985) that a moment of silence and meditation is considered an Establishment Clause violation, but only if religiously motivated. On the other hand, in *Marsh v. Chambers* (1983) and *Town of Greece v. Galloway* (2014), the Court held that government-paid chaplains and congressional prayers, respectively, aren't violations even though they're explicitly religious. The Court invoked *Lemon* in analyzing *Wallace* but ignored the test completely in *Marsh*.

The Court seems not to have applied *Lemon* with any force since 2005 and has begun looking more closely at the history and text to interpret the boundaries of the Establishment Clause. This shows that the unworkability of *Lemon*'s prongs isn't an aberration, but the source of continuing mutability in the Court's Establishment Clause jurisprudence. The test's most attractive aspect has turned out to be not its clarity or incisiveness, but its ability to be invoked or avoided at will—which is the antithesis of a viable legal rule.

Instead of relying on nebulous factors, the Court should rely on the original public meaning of the religious provisions of the First Amendment: to ensure liberty of conscience and to protect people from truly "established" state religions that coerce belief and support.

Societal changes also warrant discarding *Lemon*. As the Court explained in *Janus v. AFSCME* (2018), "later developments" can undermine the rationale for a precedent, show it to be unworkable, or otherwise weaken reliance interests. Government's relationship with religion has changed since the Founding in the direction of *less* entanglement. It's unlikely that any state today would favor using the coercive power of government to compel assent to, or worship in, a religious establishment. But coercion would be an obvious Establishment Clause violation even without *Lemon*, as the Court recognized in *Town of Greece*: "Courts remain free however to review the pattern of prayers over time to determine whether they comport with the tradition . . . or whether coercion is a real and substantial likelihood."

The fact that religion remains an ever-present force in American life may militate even more for discarding *Lemon*. Indeed, *Lemon*'s purported safeguards haven't clarified the relationship between church and state but have rather confounded it.

Moreover, government's relationship with religion has changed as society has become more pluralistic. Many religions are now afforded monuments on public land: the Library of Congress contains statues of Moses and depictions of Greek gods; the Capitol has a statue of a Franciscan monk; the postal service released forever-stamps featuring the Arabic script for "holiday" during Christmas, and one lower court concluded that a Buddhist friendship bell was equally welcome in the public sphere (*Brooks v. City of Oak Ridge*, 6th Cir. 2000). These examples show that America's religious landscape has become more diverse, which development has been naturally reflected in state and local governments' accommodation of myriad religions.

The *Lemon* test, on the other hand, has led to inconsistent and unpredictable precedent, and the exclusion of religion from the public square to an extent inconsistent with the history and practice of the First Amendment. The Court ought to adopt a test that would be more consistent with the religious pluralism that the Founders facilitated, in which we moderns are living.

Instead of relying on nebulous factors, the Court should rely on the original public meaning of the religious provisions of the First Amendment: to ensure liberty of conscience and to protect people from truly "established" state religions that coerce belief and support. A non-coercive, harmless monument—a cross memorial, or a Star of David, or any other religious symbol—is not an establishment of religion. Tearing down memorials instead establishes an anti-religious orthodoxy, with a mandate that religious symbols be eradicated from public life to create a sanitized government. The Framers did not intend for that to happen.

In sum, coercive state action violates the Establishment Clause, while non-coercive state action doesn't. Scholars and jurists alike should clarify that the clause was written to be a shield that protects people of all faiths—or no faith—from the coercive power of state religion. It was not meant to be a sword that strikes at voluntary civic actions on public land. Madison's simple idea still makes sense today: freedom of conscience is paramount to a free people, but it doesn't require banishing religion from the public square altogether.

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