

LEMON, MARSH, AND REFOUNDING ESTABLISHMENT CLAUSE JURISPRUDENCE

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Thank you for that kind introduction. Before I begin my presentation, I wanted to touch on four points.

First, I wanted to say thank you to Rutgers and to Don Clark for putting together this Endowed Lecture on what really could not be a more timely topic. I have had the pleasure of working with Don on several different matters in the past and given those interactions, I was not at all surprised when I found out that he had endowed this Lecture and would be moderating today. It is a credit both to Rutgers and to Don that you are convening this forum today.

Second, I wanted to say that I was happy to see who else would be speaking today. Professor Dane is someone whose writings I have admired from afar, and has been a thoughtful participant in this field of law for decades. Reverend Lynn is someone I have the honor of disagreeing with about 90% of the time, though I think we try to keep it civil.

Third, I was not sure whether I would be rewriting this presentation this morning on the train up from DC. As most of you know, the Supreme Court could issue its decision in *Town of Greece* almost any day now. So my thanks to the Court for saving me a rush job of changing this presentation, though the downside is that my thoughts may be entirely irrelevant just a few days hence when the opinion is issued.

Finally, a word of background about the Becket Fund. We are a non-profit law firm that represents people of all religious traditions. I personally have represented Buddhists, Christians, Hindus, Jews, Muslims, Santeros, Sikhs, and other religious groups. As an organization, we appear relatively frequently before the Supreme Court and the Courts of Appeals. A couple of years ago we won the *Hosanna-Tabor* case at the Supreme Court.²

¹ Deputy General Counsel, Becket Fund for Religious Liberty. A version of these remarks were presented on March 27, 2014 as part of the Sixth Annual Donald C. Clark, Jr. '79, Endowed Law and Religion Lecture at Rutgers School of Law-Camden. As noted in the text, they were prepared and delivered before the Supreme Court issued its decision in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

² *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012).

Earlier this year we got an order from the Supreme Court in the *Little Sisters of the Poor* case issuing an injunction under the All Writs Act, which is not a terribly frequent occurrence.³ And earlier this week I was in Court for arguments in the *Hobby Lobby* case we are pursuing.⁴ So we think a lot about the Supreme Court and the Religion Clauses, the subject of today's Lecture.

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My presentation today is called "*Lemon, Marsh* and Refounding Establishment Clause Jurisprudence."

I will start with a proposition that I do not think anyone here disagrees with: No one involved in church-state issues is satisfied with the Supreme Court's current Establishment Clause jurisprudence.

Professors specializing in law and religion issues are not satisfied, and frequently publish critiques of the Supreme Court's Establishment Clause decisions, from both sides. Though I suppose one might argue that professorial dissatisfaction does not prove much. With no offense intended to Professor Dane, law professors may have a bias towards remaining dissatisfied with the law, since satisfactory laws eliminate the need for legal scholarship, and thus legal scholars.

Litigators in the church-state field are not satisfied with the jurisprudence either. Individual decisions are welcomed by one side or the other, but few litigators if any would say that they are satisfied with Establishment Clause jurisprudence as a whole, regardless of where they are on the ideological spectrum.

Lower court judges certainly are not satisfied. There have been numerous lower court opinions basically begging the Supreme Court to fix the jurisprudence in this area of the law. My favorite quote in this vein was from Judge Fernandez on the Ninth Circuit, who wrote a concurring opinion in a 2008 appeal:

I applaud Judge Wardlaw's scholarly and heroic attempt to create a new world of useful principle out of the Supreme Court's dark materials. Alas, even my redoubtable colleague cannot accomplish that. The still stalking *Lemon* test and the other tests and

³ *Little Sisters of the Poor Home for the Aged, Denver, Colorado v. Sebelius*, No. 13-cv-2611-WJM-BNB, 2013 WL 6839900 (D. Colo. Dec. 27, 2013), *injunction granted*, 134 S. Ct. 1022 (2014) (mem.).

⁴ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

factors, which have floated to the top of this chaotic ocean from time to time in order to answer specific questions, are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable. Would that courts required neutrality in the area of religion and nothing more or less.⁵

This sort of direct criticism of Supreme Court precedent from a Court of Appeals judge is unusual, to say the least. But although it is infrequent in most areas of the law, it has become increasingly common in Establishment Clause jurisprudence, as lower court judges struggle to reconcile strands of Supreme Court precedent that seem at times to be directly contradictory.

And finally, most of the Justices themselves have expressed dissatisfaction with the current state of Establishment Clause precedent—and in particular the *Lemon* test and its corollary the endorsement test—be it in concurrences or dissents.⁶

So I think it is safe to say that nobody is happy about the perceived lack of guidance in Establishment Clause cases.

Enter into this universally dissatisfying jurisprudence the *Town of Greece* case.⁷ For purposes of this discussion, I am going to presume knowledge of the basic facts in the case. From a jurisprudential standpoint, the case presents at its most fundamental level a conflict between two different lines of

⁵ *Card v. City of Everett*, 520 F.3d 1009, 1023-24 (9th Cir. 2008) (Fernandez, J., concurring).

⁶ *See, e.g., Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), *Thomas, J., dissenting from denial of cert.*, *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 132 S. Ct. 12, 12-23 (2011) (mem.) (collecting cases and criticizing *Lemon* and endorsement tests); *County of Allegheny v. ACLU*, 492 U.S. 573, 669 (1989) (Kennedy, J., dissenting) (criticizing endorsement test “flawed in its fundamentals and unworkable in practice”); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 798 n.3 (1995) (plurality opinion) (“[The endorsement test] supplies no standard whatsoever It is irresponsible to make the Nation’s legislators walk this minefield.”); *Salazar v. Buono*, 130 S. Ct. 1803, 1819 (2010) (Kennedy, J., joined by Roberts, C.J., and Alito, J.) (“Even if [the endorsement test] were the appropriate one, *but see [Allegheny and Pinette]*”); *Id.* at 1824 (Alito, J., concurring) (“Assuming that it is appropriate to apply the so-called ‘endorsement test,’ this test would not be violated [here.]”); *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring) (declining to apply the *Lemon* and endorsement tests and stating that “I see no test-related substitute for the exercise of legal judgment”).

⁷ *Town of Greece*, 134 S. Ct. 1811.

Supreme Court precedent, *Lemon v. Kurtzman* and *Marsh v. Chambers*.⁸

Lemon v. Kurtzman and its progeny are the dominant line of Establishment Clause precedent in the lower courts nationwide, though *Lemon* is frequently ignored by the Supreme Court.⁹ *Lemon* sets out a three-prong test for deciding whether there is an Establishment Clause violation. If a governmental action (1) does not have a secular purpose; or (2) its primary effect is to advance or inhibit religion; or (3) entangles government with religious bodies, then the Establishment Clause has been violated. The prongs are independently sufficient to result in an Establishment Clause violation.

The other line of precedent at issue in this case derives from *Marsh v. Chambers*, which is the only Supreme Court case to decide how the Establishment Clause applies to prayer before governmental bodies. In that case the Nebraska legislature had a paid chaplain who delivered prayers to the legislature. The Court upheld the practice, relying principally on the fact that legislative prayer was an accepted practice at the time of the Founding, and indeed was something the Framers themselves practiced when they met.¹⁰

If one had to characterize the two opinions, one might call *Lemon* the abstract, anti-historical approach to deciding Establishment Clause questions, and *Marsh* the concrete, historical approach.

Lemon professes the Court's ignorance and confusion concerning the Establishment Clause and why it is drafted the way it is. For example, the *Lemon* Court starts its analysis with this confession: "Candor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."¹¹

Then later, "The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment."¹²

8 *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Marsh v. Chambers*, 463 U.S. 783 (1983).

9 *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005) (neither plurality opinion nor concurring opinion of Justice Breyer mention *Lemon* in the religious display case); *Utah Highway Patrol Ass'n*, 132 S. Ct. at 14-15 (collecting cases where *Lemon* has been ignored by the Supreme Court).

10 *Marsh*, 463 U.S. at 790-92.

11 *Lemon*, 403 U.S. at 612.

12 *Id.*

Throwing up its hands, the Court expressly says that “In the absence of precisely stated constitutional prohibitions, we must draw lines”¹³ The *Lemon* Court then drew those lines not by looking to the history of religious establishments in the Founders’ experience, or even the state religious establishments that lasted for decades after the Founding. Instead the Court looked to the twenty-four preceding years of Establishment Clause cases to “glean[]” *Lemon*’s familiar three-prong test of purpose, effects, and entanglement.¹⁴ What is interesting is that in drawing these lines, the Court does not really explain where it is getting the three prongs from. It just sort of groks them.

By contrast, *Marsh* relies entirely on historical practice, almost frustratingly so. The existence of the historical practice of legislative prayer is by itself evidence enough to uphold the practice.¹⁵ There is no effort to delineate any broader framework for deciding cases. We do not find out anything about how the Founders thought about establishments generally; the focus is strictly on legislative prayer. If anything, *Marsh* is *overly* concrete.

Lemon and *Marsh* thus have something in common—a feature that some have complained was a problem plaguing Burger Court decisions generally—reliance on *ipse dixits*. *Lemon*’s canvassing of Establishment Clause jurisprudence of the preceding twenty-four years almost magically results in the three prongs. And *Marsh* pronounces that “it is historical, so it must be okay” without situating that claim in a broader framework for deciding constitutional claims. Neither approach is terribly helpful to lower court judges who have to apply principles to a wide variety of facts. *Lemon*’s prongs are too abstract to be true principles, and *Marsh*’s focus on the specific history of legislative prayer is too concrete to apply to that wide variety of facts.

But here is the rub—it is the abstract nature of *Lemon* and the concrete nature of *Marsh* that results in the difference in how they are applied in the lower courts. *Lemon* purports to provide a comprehensive test for Establishment Clause cases. It is a very abstract test, and it has frequently been ignored by the Supreme Court, but its comprehensiveness is a useful tool for lower courts – it gives them something to work with, even if the prongs are too abstract to work. *Marsh*, by contrast, by looking narrowly at legislative prayer, is applied by courts in that context only.

13 *Id.*

14 *Id.* at 612-13.

15 *Marsh*, 463 U.S. at 790-92.

Yet there is a seed of a jurisprudential approach in *Marsh* that could become a better way to analyze Establishment Clause claims. That approach is the historical approach.

That is what we advocated for in our amicus brief in *Town of Greece* – the Court should re-found Establishment Clause jurisprudence on Marsh’s historical approach, but more broadly conceived.¹⁶ We point out that the first question to ask in any Establishment Clause case is, “is there an ‘establishment of religion?’” The way you figure that out is by looking to what the Founders meant by an “establishment of religion”—a feature of public life far more familiar to them than it is to us today. In particular we identify four features of an establishment: government control, government coercion, government funding, or assignment of government functions to religious bodies. If a government action possesses one of these features, then it can run afoul of the Establishment Clause. If it does not fall into any of these categories, then it is not an establishment of religion and there is no violation.¹⁷

Applied to the *Town of Greece* case, this historical approach both demonstrates that legislative prayer is not a problem and also makes more sense of *Marsh* itself. Legislative prayer does not involve government control of religious bodies, government coercion of religious belief or practice (this is the point that Reverend Lynn will disagree with me about), government funding of religion, or assignment of government functions to religious bodies. Because it has none of the features of an “establishment of religion” as the Founders meant it, legislative prayer is not an establishment of religion and does not violate the First Amendment.

At this point I have a confession to make—we did not come up with this idea ourselves. Michael McConnell of Stanford Law School did, in a 2003 article he published called “Establishment

¹⁶ See Brief *Amicus Curiae* of the Becket Fund for Religious Liberty, available at <http://www.becketfund.org/wp-content/uploads/2013/08/Town-of-Greece-v.-Galloway-Becket-Fund-Amicus-Brief-to-SCOTUS.pdf> (last visited Oct. 1, 2014).

¹⁷ At the Lecture, Professor Dane suggested that the four forms of establishment we identify left out an important form of establishment: the government’s official proclamation of a “church by law established.” See Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2108 (2003). I suspect that this would also have been viewed as an aspect of establishment by the Founders.

and Disestablishment at the Founding.”¹⁸ Professor McConnell identified these different features of an establishment of religion, and in exhausting detail (and over 580 footnotes) describes how these establishments functioned in the colonial period. He grouped them differently—we put three of his categories under the more general heading of government coercion—but otherwise the historical understanding is common to his article and our amicus brief. The part new to our brief is that we suggest dispensing with *Lemon* and relying on this approach instead.

What would the effects be of this re-founding of Establishment Clause jurisprudence?

First, it would bring Establishment Clause doctrine into line with other constitutional doctrines that rely heavily on the historical approach. The law of the Second, Fourth, Fifth, and Sixth Amendments is heavily dependent on the historical approach.¹⁹ This has been an increasing trend at the Court and the re-founding we suggest would bring Establishment Clause law into line with these other areas of constitutional law.

Second, it would make Establishment Clause jurisprudence more concrete. Being able to measure a modern-day practice against a historical practice is much better than having to decide in the abstract whether a practice has the effect of advancing a religion. There is far less room for judicial inventiveness and much more ability for different judges to build on each other’s opinions.

Third, as we point out in our amicus brief, the historical approach would change the *doctrine* but not the *outcomes* in Supreme Court cases. Cases like *Texas Monthly*, *Kiryas Joel*, *Torcaso*, and *Hosanna-Tabor* would come out the same way, but the jurisprudential superstructure in which those decisions were embedded would be entirely different.²⁰ What it *would* change is

18 *Id.*

19 *See, e.g.*, *Apprendi v. New Jersey*, 530 U.S. 466, 478 (2000) (examining “the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation’s founding”); *Crawford v. Washington*, 541 U.S. 36, 43 (2004) (examining “the historical background of the [Sixth Amendment’s Confrontation] Clause to understand its meaning”); *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) (examining “the history that the founding generation knew” to interpret the Second Amendment); *Id.* at 642 (Stevens, J., dissenting) (examining “contemporary concerns that animated the Framers”); *United States v. Jones*, 132 S. Ct. 945, 950 n.3 (2012) (examining the “original meaning of the Fourth Amendment,” because “we must assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted”) (internal citations omitted).

20 *See* Brief *Amicus Curiae* of the Becket Fund, *supra* note 16, at 20-27.

the outcomes in the lower courts, where the paranoid approach to establishments wreaks the most havoc.

Fourth, from a consequentialist perspective, the historical approach would make the extremes unhappy, because their preferred policy alternatives would no longer be available. People who believe that the United States should be officially proclaimed a “Christian nation” would have to give up on that. People—like Reverend Lynn—who do not like “under God” in the Pledge of Allegiance, “In God We Trust” on the coinage, or legislative prayers like those in *Town of Greece* would have to rely on the democratic process to see their preferred policy outcomes become a reality.

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Making such a change would be a momentous step for the Court. But eventually the Court is going to have to deal with this problem—current law is too muddled, and the dissatisfaction too great, for the problem to be put off forever. And when that time comes, I believe refounding Establishment Clause jurisprudence on the historical approach is the way out of the labyrinth for the Court.