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The Establishment Clause in the First Amendment of the United States Constitution has been the subject of contentious debate. Advocates for a strict separation of church and state believe that it should be broadly interpreted, while critics think that it should be interpreted narrowly. The U.S. Supreme Court invented the Lemon test in its decision in *Lemon vs. Kurtzman* (1971) in order to provide clear guidance for establishment clause cases. The Lemon test set the standard for determining government entanglement with religion for over a decade after its creation. However, beginning in the 1980s, arguments that the test provided an overly broad interpretation of the Establishment Clause began to impact its use. The Lemon test's absence has led to Supreme Court decisions that have slowly eroded the wall of separation between church and state. Justices have tried to create new tests, but they have been unable to replicate the success of Lemon.

Justices have increasingly relied on subjective reasoning that has contradicted past precedent and further obscured the boundary between church and state. Their conflicting interpretations of the Establishment Clause have created questions about their abilities as decision makers. Justices' personal biases and ideological differences can create errors in judgment thus having the potential to influence their decisions, making tests, like Lemon, essential for interpreting the Constitution. The Lemon test provides a clear and concise method that is essential for ensuring that the government and the Supreme Court adhere to a strict set of rules for interpretation of the Establishment Clause. Analysis of the Court's decision making in *Lemon v. Kurtzman* (1971), *Marsh v. Chambers* (1983) and *Lee v. Weisman* (1992) highlights the strength of the Lemon test when it is used and reveals the shortcomings of Establishment Clause interpretation without it.

The Supreme Court's decision in *Lemon v. Kurtzman* (1971) established a comprehensive approach for the Justices to use in Establishment Clause cases. The Court ruled 8-1 that Pennsylvania and Rhode Island violated the First Amendment by providing public funds to private religious schools.[1] The Court, led by Chief Justice Burger, devised a three-prong approach to determine if the states violated the Clause. The first prong of the test held that a statute must have a secular legislative purpose; the second, "the principle or primary effect must be one that neither advances nor inhibits religion;" and third, "the statute must not foster an excessive government entanglement with religion."[2] Burger relied heavily on the third prong of the test when delivering the majority opinion. In his analysis he found that since the teachers were employed by religious organizations and were a part of a system that placed religious ideas in the minds of children, a teacher would find it difficult to navigate the line between secular and religious intent.[3] In order to prevent an excessive entanglement of church and state, both state governments would be forced to oversee the schools to make sure teachers did not incorporate religious ideas into the curriculum.

The lone dissenting opinion of Justice Byron R. White was influenced by his personal beliefs and highlights the errors in judgment that the Lemon test was created to prevent. White found fault in the Court's decision to strike down the Rhode Island statute because he believed no evidence existed that teachers engaged in non-secular activities with their students.[4] His reasoning is misguided because over two-thirds of the teachers were Catholic nuns and religious instruction was permitted.[5] Even if secular teachings were a part of the curriculum, the schools were still sponsored by the Roman Catholic Church, which promotes learning through religious doctrine. Justice White continued his opinion by stating that he "cannot hold that the First Amendment forbids an agreement between the school and the State that state funds would be used only to teach secular subjects."[6] White's subjective interpretation came into complete conflict with the Establishment Clause. The Pennsylvania and Rhode Island statutes violated the First Amendment because the laws respected a religious establishment. White's flawed opinion emphasizes how incorporating a structured test, like Lemon, is essential for preventing a Justice's personal bias from influencing his or her interpretation of the Establishment Clause.

Despite the Lemon test's effectiveness at countering the partiality of some Supreme Court Justices, critics believe that the test is flawed. Law author William B. Petersen argues that one of the biggest pitfalls of the test is "its assumption that a religious purpose, by itself, renders a statute unconstitutional."[7] He proposes that if a law is passed that has a religious purpose, it should not automatically be deemed unconstitutional because religious purpose does not necessarily lead to religious effect. Peterson exemplifies his point by suggesting that laws against murder and theft should be unconstitutional because those ideas are found in religious holy books.[8] Peterson's reasoning is flawed since laws against murder and theft have been included in secular governments prior to the creation of any popular holy texts. Religious organizations certainly do not hold a monopoly on human morality.

Peterson's argument misses the importance of the Lemon test's religious purpose prong by overlooking the implications of a statute that supports the purpose of one religion over another. If a law is passed with the purpose of favoring one religion, it infringes on the First Amendment rights of those that practice all others. The design of the Lemon test not only prevents entanglement with church and state, it stops religious organizations from influencing what should be a secular government open to all religions. Contrary to the belief of some critics, the Lemon test does not restrict religious freedom. The test defends the free exercise of religion by ensuring a single religious faith is not valued over others. The test is extremely important for finding distinctions between purpose and effect, especially when the religious rights of all faiths are on the playing field. Failure to do so can result in Supreme Court decisions that are decided based on biased opinions, rather than on a structured test that arrives at an objective conclusion.

In *Marsh v. Chambers* (1983) the Court did not use the Lemon test, and their decision emphasizes the problems that arise from not using it in establishment clause cases. The question laid out before the court asked if the State of Nebraska violated the Establishment Clause by paying a chaplain to lead a prayer before a legislative session. In a 6-3 decision the Court ruled that it did

not. In his opinion, Chief Justice Burger wrote that "The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[9] Burger stresses that because chaplains opening legislative sessions with prayer has been an historically integral part of the United States, it does not violate the Establishment Clause. He concludes that "this unique history led us to accept the interpretation of the First Amendment draftsman who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged."[10] Burger's conclusion was not based on the Constitution and instead relied on his subjective interpretation of the country's history.

Both Justice William J. Brennan and Justice Thurgood Marshall joined together in dissent against the Court's opinion and found that the ruling was in violation of the Establishment Clause. In his dissent, Brennan declared that "every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years," which the Court did not do.[11] Chief Justice Burger and the other concurring Justices completely ignored using the Lemon Test when forming their decisions and instead relied on historical context. Since Congressional Chaplaincies have been a part of the legislative process for much of the history of the United States, they believed that they did not violate the First Amendment.

Analysis of relevant past Supreme Court decisions is important because it provides helpful context that Justices can use to formulate their own opinions. Completely ignoring the Lemon test led to the possibility of setting a precedent where past decisions no longer matter. In regard to the practice of legislatures hiring chaplains, if the Court decided to make use of the Lemon Test, Justice Brennan asserted that "it would have to strike it down as a clear violation of the Establishment Clause."[12] Brennan's conclusion emphasizes the need for the Court to use a structured test like Lemon when forming their opinions.

The Court's decision in *Marsh v. Chambers* relied on questionable reasoning that created new precedent against the Establishment Clause. Legal scholar Jeremy G. Mallory notes that the chaplain appointed for prayer in *Chambers* was from one religious denomination, payment for the chaplain came from public funds and no analysis of what the prayers said was conducted.[13] If the Lemon test was used, all three of these points would have shown a clear violation of the Establishment Clause. Chief Justice Burger's use of historical context to justify legislative prayer contains serious faults. The fact that chaplains have led prayers since the founding of the United States does not mean it is protected by the Constitution. Using the same reasoning, one could defend the constitutionality of slavery by arguing that it was a historically long-standing tradition since the establishment of the country. Even though slaves were an American tradition it does not make their use moral or constitutional. Suggesting that tradition holds more importance than the Constitutional misses the whole reason for the document in the first place.

The Court's decision in *Chambers* incorrectly held legislative chaplaincies as an exception to the First Amendment. Chaplains engaging with politicians during legislative sessions clearly demonstrates an interaction between church and state. Mallory asserted that a distinction should be made between situated and rotating chaplains. He wrote that the situated chaplain in *Marsh* was

reappointed for good job performance, leading the Supreme Court to believe that, "there was no impermissible motive involved in his sixteen year tenure."[14] In contrast, a rotating chaplain had less of an established relationship with the legislative body and had "less incentive to deal with the pluralistic nature of [the] congregation."[15] The degree to which a situated or rotating chaplain had the potential to violate the Establishment Clause is insignificant when the very act of incorporating a spokesperson for any religion into the legislative process violates the Constitution. A chaplain that associates with the legislative process, even indirectly, threatens secular government. Arguing that legislators who reappoint a chaplain due to his secular tendencies should only raise questions, not answers.

In *Lee v. Weisman* (1992) the Supreme Court left out the Lemon test again in favor of a Coercion test. The Court considered whether conducting prayer during a high school graduation is constitutional. In a 5-4 decision the Justices ruled that religious exercise at the graduation service did in fact violate the Establishment Clause. The principal of the school provided a copy of guidelines that the rabbi had to follow in an effort to make his prayers nonsectarian.[16] Justice Kennedy argued that because the principal was an employee of the state, he violated the Establishment Clause by controlling the religious content of the prayer, even if it was in an attempt to be secular. Kennedy wrote that "the undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction."[17] Kennedy feared that students would be coerced to participate in a religious practice even if went against their own beliefs.

Chief Justice Rehnquist along with Justices Scalia, White and Thomas dissented against the Court's opinion and its argument of coercive intent. Scalia believed that the Court's opinion was flawed because it relied too heavily on the idea of coercion violating the Establishment Clause.[18] In his dissent he wrote that "The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is, not to put too fine a point on it, incoherent."[19] The use of coercion relies on slippery slope reasoning because it is largely based on assumption and not on hard evidence.

Legal scholar Suzanna Sherry correctly points out the issues that the Court ran into by ignoring the Lemon test. She writes that, "the majority opinion relied entirely on the coercive aspect of the setting; he [Justice Kennedy] cobbled together a majority by studiously ignoring *Lemon*."[20] Unlike the Lemon test, a test for coercion is based on a Justice's subjective interpretation that can be influenced by personal bias. Sherry argues that adopting the coercion test narrowed interpretation of the Establishment Clause while simultaneously creating an environment where "equal accommodation of religion nor equal indifference to religion is mandated. Instead, an unrestricted majority is authorized to indulge in discriminatory preferences."[21] By substituting a coercion test for most of the Lemon test, the Court established further precedent that impaired future Establishment Clause interpretation.

While Justice Kennedy's majority opinion was flawed, it still contained some principles of the Lemon test within it. Kennedy determined that the principal, as an employee of the state, violated the Establishment Clause by actively working to incorporate prayer into graduation. The State was in fact entangled with religion and violated the entanglement prong of the Lemon test. Kennedy wrote that, "the principal chose the religious participant, here a rabbi, and that choice is also attributable to the State."[22] Kennedy had enough evidence to show an entanglement with church and state without needing to use the coercion argument.

The cases *Marsh v. Chambers* (1983) and *Lee v. Weisman* (1992) show that the Supreme Court's failure to adhere to a consistent test for determining Establishment Clause cases has further obscured interpretation of the First Amendment. In *Chambers* the Court used historical context to justify the employment of chaplains within state and national legislatures, thereby disregarding the Lemon test that would have surely found paid chaplains in violation of the Establishment Clause. In *Weisman* the Court abandoned the test again by attempting to introduce a coercive test to determine if prayer was constitutional. The coercive test was not an improvement over Lemon and instead raised more questions than answers. Even though the test could have provided clear utility in these cases, some Justices believed that the test was not good enough.[23] Even Chief Justice Burger, the creator of the test has said that "*Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue."[24] Others think that Supreme Court decisions involving the Clause have become unpredictable even with the structure the test provides. Despite the criticism against Lemon, not using it completely has shown why a structured test is needed.

The conflicting decisions in *Marsh* and *Lee* demonstrates the inconsistencies that arise when the Court rules on prayer cases without implementing Lemon. Legal Scholar Bruce P. Merenstein emphasizes that these two rulings created an exception for prayer in other contexts, such as at school board meetings. In *Marsh* the Supreme Court used historical context to determine that legislative prayer was constitutional and found school board prayer the same. Merenstein believes this ruling to be flawed and suggests that a decision based on historical constitutional analysis, fails "to acknowledge that social, cultural and material conditions change dramatically over decades, let alone over centuries."[25] In *Lee,* the Supreme Court employed the coercion test in its decision and used the same principles that would find school board prayer unconstitutional. Since these decisions still stand, the constitutionality of school board prayer is in limbo. Merenstein argues that "were the Court to come to the conclusion that prayer at a public-school board meeting is unconstitutional, it would be adhering to a half-century of consistent jurisprudence in the area of religion and public schools."[26] If the Lemon test had been used in both cases, school board prayer would certainly have been found unconstitutional.

Studies looking at the history of the Supreme Court's decisions in Establishment Clause cases, have shown that they have ruled consistently when using the Lemon test. Political scholar Joseph A. Ignagni gathered statistical data from the era of the Burger Court that displays their accuracy and consistency when using the Lemon test. Ignagni's findings showed that out of the 92 decisions the Burger Court decided, 63 were found to be in violation of the Establishment Clause

while 29 were not.[27] Ignagni writes that, "These cases are not as conflicting, confused, or unpredictable as some legal scholars have claimed . . . most of the decisions can be explained and predicted in a consistent matter."[28] His works shows the importance of the Lemon tests as a tool for guiding the Justices to make accurate and correct decisions.

A similar study conducted by Herbert M. Kritzer and Mark J. Richards analyzed cases involving Establishment Clause jurisprudence in an attempt to see how influential the Lemon test has been on the Court's opinion deciding those cases. Kritzer and Richards tested their hypothesis by creating tables of data that reflect the ruling of Justices when deciding Establishment Clause cases ranging from *Everson v. Board of Education* (1947) to *Mitchell v Helms* (2000). Their findings show that the Lemon test has "served to provide the framework for the decisions in Establishment Clause cases decided for over the last 30 years."[29] The framework has stayed in place in part because Justices have tried and failed to create a method that improves on the precedent the Lemon test has already established. More importantly the data shows that the Court has ruled consistently on Establishment Clause cases when Lemon was in use, contradicting critics that say the test has created an unpredictable environment for decisions involving the Clause.

A fundamental aspect of the Lemon test is its ability to prevent Justices from incorporating their own political and ideological beliefs in decisions. As Ignagni rightly points out, a Justice is not prevented from "voting compatibly with his or her personal policy preferences."[30] They do not face the same scrutiny that elected government officials experience. They do not have to worry about being reelected to the Court and being accountable to voters. Therefore, Justices can make decisions that may not necessarily match what the greater society views as acceptable. A more liberal minded Court may over step its bounds and infringe on religious liberty while a more conservative minded court may vote in favor of upholding a decision that might entangle the state with religion. Legal Scholar David M. Beatty argues that "religious liberty is better protected and democracy more respected when judges move past the interpretive phase of the review process and take a close, hard look at the facts."[31] They should put their own political and personal beliefs in the background when interpreting the constitutionality of a case. Failure to do so can result in decision that is not only wrong but also hinders the jurisprudence that will be needed to decide cases in the future. The Lemon test is critical for ensuring that Justices follow the Constitution and not their personal political leanings.

The Justices are human beings, which means that they have limitations that can impede the reliability of Supreme Court decisions. Psychologist and political scientist Herbert A. Simon conducted extensive research on the limits of human computing power and rationality. His findings showed that by taking into account the limitations of knowledge and power of human beings, one will find that they are incapable of "making objectively optimal decisions . . . but if they use methods of choice that are as effective as decision making and problem-solving permit, we may speak of procedural or bounded rationality."[32] Simon suggests through his research that human decision making is limited to the amount of information one knows when forming a conclusion. When his theory is applied to the Justices it explains how and why they have come to decisions

that do not always work within the context of the constitution and society as a whole. Each Justice comes from a different background and life experience that influences his or her decision making. The absence of a test that balances subjective reasoning with objective truth can be detrimental to Court rulings. The Lemon test is a way to counter the limits of human rationality, by incorporating set principles that help the Court come to a correct decision.

The sheer volume of cases the Supreme Court takes can also hinder its opinions. Joseph A. Ignagni found that the case load of the Court has increased dramatically over the decades. In 1930, 1,039 cases were docketed for the Court to hear, growing from 5,144 in 1980, all the way to between 7,000 and 8,000 in 2016.[33] Out of the thousands of cases, the Court only hears oral argument for about 80 per term. Their massive workload illustrates the unrealistic expectations placed on the Justices. Due to the extensive case load that they preside over, their ability to remain impartial in decision making diminishes. It causes stress and can make Justices form conclusions that may not have been reached in a reasoned matter. Due to this immense burden, Ignagni believes that the "Justices must often rely upon a simple decision-making structure."[34] When coupled with Simon's theory on the limits of human rationality, Supreme Court decisions absent of a core set of determined principles can inhibit the accuracy of their decisions. Ignagni emphasizes that Justices, "do not have the time, resources, or intellectual capacity to make all of their decisions in a more comprehensive manner."[35] A refined tests such as the Lemon test can help relieve the stress and burden placed on Justices during the decision-making process.

In addition to providing a solid foundation for deciding Establishment Clause cases, the Lemon test also assists Justices in forming more objective opinions that are less influenced by their own political leanings. The test was created by the Court of a need to make better decisions when deciding Establishment Clause cases. Despite its value in Establishment Clause cases, it has not escaped criticism or attempts to remove its use completely from the Court. Critics of the Lemon test have unsuccessfully reduced the importance of Lemon, yet Justices have decided to try and rule Establishment Clause cases without using it.

Lastly, the sheer volume of work the Justices are responsible for makes utilizing a test essential for providing correct opinions on cases. Data has shown that when the Lemon test is in use, the Supreme Court has ruled consistently concerning Establishment Clause cases. A test also helps to remove political opinions that can arise among Justices when deciding cases by declaring a clear set of principles that reflect the words of the Constitution. It also helps Justices make correct decisions despite the limits of the human brain. Justices are not computers that can make precise calculations without corruption, they are people that are influenced by forces in and outside of the Court room.

The precedent set by the Lemon test continues to indirectly influence the Supreme Court to this day. When in use, the test has the ability to correctly determine violations of the Clause without the need for other tests. It provides a clear and concise method for Justices to use without relying on political leanings or limitations of the Justices. The perceived short comings of decisions regarding the Clause do not lie with the Test but rather with the Justices. By abandoning a

structured way to rule on Establishment Clause cases, the Court risks undermining the principles set by the Founding Fathers and eroding the wall between church and state further.

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[1] Lemon v. Kurtzman, 403 U.S. 602 (1971).
[2]Amy J Alexander, "When Life Gives You The Lemon Test: An Overview of The Lemon Test and its Application," *Phoenix Law Review* 64, no. 3 (2010): 3.
[3] *Lemon*, 403 U.S. 602.
[4] *Lemon*, 403 U.S. 602.
[5] *Lemon*, 403 U.S. 602.
[6] *Lemon*, 403 U.S. 602.
[7] William B. Petersen, "A Picture Held Us Captive: Conceptual Confusion and the Lemon Test," *University of Pennsylvania Law Review* 137, no. 5 (1989): 1842. http://www.jstor.org/stable/3312241
[8] Petersen, "Picture Held Us Captive," 1842.
[9] Marsh v. Chambers, 463 U.S. 783 (1983).
[10] *Marsh*, 463 U.S. 783.
[11] *Marsh*, 463 U.S. 783.
[12] *Marsh*, 463 U.S. 783.
[13] Jeremy G. Mallory, "'An Officer of the House Which Chooses Him, and Nothing More': How Should *Marsh v Chambers* Apply to Rotating Chaplains?" *The University of Chicago Law Review* 73, no. 4 (2006): 1453-1436.
[14] Mallory, "Officer of the House," 1448.
[15] Mallory, "Officer of the House," 1451.
[16] Lee v. Weisman, 507 U.S. 577 (1992).
[17] *Lee*, 507 U.S. 577.
[18] *Lee*, 507 U.S. 577.
[19] *Lee*, 507 U.S. 577.
[20] Suzanna Sherry, "Lee v Weisman: Paradox Redux," *The Supreme Court Review* (1992): 132.
[21] Sherry, "Lee v Weisman*,"* 152-53.
[22] *Lee*, 507 U.S. 577.
[23] Petersen, "Picture Held Us Captive," 1829-30.
[24] Herbert M. Kritzer and Mark J. Richards, "Jurisprudential Regimes and Supreme Court Decision Making: The Lemon Regime and Establishment Clause Cases," *Law & Society Review* 37, no. 4 (2003): 829.
[25] Bruce P. Merenstein, "Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of *Marsh v. Chambers* and the School Prayer Cases," *University of Pennsylvania Law Review* 145, no, 4 (1997): 1071-72
[26] Merenstein, "Last Bastion of School Sponsored Prayer?" 1095.
[27] Joeseph A. Ignagni, "Explaining and Predicting Supreme Court Decision Making: The Burger Court's Establishment Clause Decisions," *Journal of Church and State* 36, no. 2 (1994):324.
[28] Ignagni, "Explaining and Predicting," 327.
[29] Kritzer and Richards, "Jurisprudential Regimes," 839.
[30] Ignagni, "Explaining and Predicting," 304.
[31] David M. Beatty, "The Forms and Limits of Constitutional Interpretation," *American Journal of Comparative Law* 49, no. 1 (2001): 22.
[32] Herbert A Simon, "Human Nature in Politics: The Dialogue of Psychology with Political Science," The American Political Science Review 79, no. 2 (1985): 294.
[33] "Frequently Asked Questions," Supreme Court of the United States, accessed December 2016, https://www.supremecourt.gov/faq.aspx#faqgi9 (Site revised.) The prior link is no longer active, but the site states, "The Court receives approximately 7,000-8,000 petitions…each term." "FAQs – General Information," Frequently Asked Questions, Supreme Court of the United States, accessed May 23, 2018, https://www.supremecourt.gov/about/faq_general.aspx.
[34] Ignagni, "Explaining and Predicting," 309.
[35] Ignagni, "Explaining and Predicting," 309.

Bibliography:

Lee v. Weisman. 505 U.S. 577 (1992)

Lemon v. Kurtzman. 403 U.S. 602 (1971)

Marsh v. Chambers. 463 U.S. 783 (1983)

Alexander, Amy J. "When Life Gives you the Lemon Test: An Overview of The Lemon Test and its Application." *Phoenix Law Review* 64, no. 3 (2010): 1-23.

Beatty, David M. "The Forms and Limits of Constitutional Interpretation." *American Journal of Comparative Law* 49, no. 1 (2001): 1-27.

Ignagni, Joseph A. "Explaining and Predicting Supreme Court Decision Making: The Burger Court's Establishment Clause Decisions." *Journal of Church and State* 36, no. 2 (1994): 301-327.

Kritzer, Herbert M. and Mark J. Richards. "Jurisprudential Regimes and Supreme Court Decision making: The Lemon Regime and Establishment Clause Cases." *Law & Society Review* 37, no. 4 (2003): 837-840.

Mallory, Jeremy G. "'An Officer of the House Which Chooses Him, and Nothing More'": How Should *Marsh v Chambers* Apply to Rotating Chaplains?" *The University of Chicago Law Review* 73, no. 4 (2006): 1421-1453.

Merenstein, Bruce P. "Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of *Marsh v. Chambers* and the School Prayer Cases." *University of Pennsylvania Law Review* 145, no. 4 (1997): 1035-1095

Petersen, William B. "A Picture Held Captive: Conceptual Confusion and the Lemon Test." *University of Pennsylvania Law Review* 137, no. 5 (1989): 1827-1849.

Sherry, Suzanna. "*Lee v Weisman*: Paradox Redux." *The University of Chicago Press* 1992 (1992): 123-153.

Simon, Herbert A. "Human Nature in Politics: The Dialogue of Psychology with Political Science." *The American Political Science Review* 79, no. 2 (1985): 293-304.

The Supreme Court Frequently Asked Questions, https://www.supremecourt.gov/faq.aspx#faqgi9.