ESTABLISHMENT CLAUSE HEALTH ON A RESTRICTED, ARTIFICIAL LEMON DIET

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INTRODUCTION

The Establishment Clause precludes the state from favoring or disfavoring religion.[1] Regrettably, the Court has offered no coherent account of which practices violate Establishment Clause guarantees,[2] and instead has announced different tests without explaining the circumstances under which each should be used.[3] The Lemon test, although described as the prevailing test to determine

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[1] Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting) ("[N]neither support nor hostility, but neutrality, is the goal of the religion clauses of the First Amendment.").

[2] *See* Utah Highway Patrol Ass'n v. Am. Atheists, Inc., 565 U.S. 994, 995 (2011) (Thomas, J., dissenting from the denial of certiorari) ("Today the Court rejects an opportunity to provide clarity to an Establishment Clause jurisprudence in shambles.").

[3] *See, e.g.*, Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592–93 (1989) (the endorsement test); Lee v. Weisman, 505 U.S. 577, 587 (1992) (the coercion test); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (the *Lemon* test).

when Establishment Clause guarantees have been violated,[4] is sometimes used,[5] at other times ignored,[6] and at other times described as no longer good law. But this means that courts deciding whether establishment guarantees have been violated do not have adequate guidance about which test to apply, which will likely result in similar cases being decided differently in different jurisdictions.

In American Legion v. American Humanist Association, the Court declined to employ the Lemon test without overruling it and without explaining when, if ever, it should be used.[7] The Court's opinion might seem to have followed the past jurisprudence because it reached an anticipated result without overruling any past precedent.[8] But the opinion includes reasoning that might, at worst, further erode Establishment Clause protections and, at best, makes the jurisprudence more muddled and confusing.

This article discusses the evolution of the Lemon test, explaining some of the changes in its formulation and application over the years. The article then considers the analysis of that test offered in American Legion, and the possible implications of that decision both for Establishment Clause jurisprudence and for the integrity of the Court. At its first opportunity, the Court must clarify the circumstances under which the different Establishment Clause tests are to be used and refute the impression created in American Legion that the Court has intentionally misapplied controlling law by mischaracterizing the underlying facts in various cases. The Court's current approach does not bode well for Establishment Clause jurisprudence or for public confidence in the Court's integrity as a general matter.

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[4] Marsh v. Chambers, 463 U.S. 783, 796 (1983) (Brennan, J., dissenting) ("The most commonly cited formulation of prevailing Establishment Clause doctrine is found in *Lemon v. Kurtzman* . . . ."); *see also* Allison Hugi, Comment, *A Borderline Case: The Establishment Clause Implications of Religious Questioning by Government Officials*, 85 U. CHI. L. REV. 193, 212 (2018) ("Recent court practice suggests that the *Lemon* test remains the prevailing Establishment Clause test"); Sophia Martin Schechner, *Religion's Power Over Reproductive Care: State Religious Freedom Restoration Laws and Abortion*, 22 CARDOZO J.L. & GENDER 395, 412 (2016) (discussing "the currently prevailing Establishment Clause test articulated in *Lemon v. Kurtzman*").

[5] *See* McCreary County., Ky. v. Am. Civil Liberties Union of Ky, 545 U.S. 844, 870 (2005) (finding that a public Ten Commandments display violated the purpose prong of the *Lemon* test).

[6] Van Orden v. Perry, 545 U.S. 677, 686 (2005) ("Whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds.").

[7] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).

[8] *See, e.g.*, Lauretta Brown, *Maryland Peace Cross Case Gives Supreme Court Chance to Revisit Public Religious Symbols*, NATIONAL CATHOLIC REGISTER (Mar. 14, 2019), http://www.ncregister.com/daily-news/peace-cross-case-offers-high-court-chance-to-revisit-religious-symbols-in-p ("The justices appeared largely inclined to allow the cross to remain in oral arguments. The main question seemed to be on what basis the court will allow the memorial to remain.").

THE EVOLVING *LEMON* TEST AND ITS APPLICATION

The Lemon test has long been controversial.[9] To make matters more complicated, the test itself has changed over time in both formulation[10] and application.[11] American Legion promises that courts will use the modified, more forgiving Lemon test inconsistently, if at all, and that the resulting Establishment Clause jurisprudence will be even more confusing in both application and result.

A. *The Lemon Test*

Lemon v. Kurtzman involved attempts by Rhode Island and Pennsylvania to "provid[e] state aid to church-related elementary and secondary schools."[12] Both states imposed limits on how the monies could be spent, so that public funding would not be used to pay for the inculcation of religious doctrine.[13] At issue was whether these laws violated guarantees under the Religion Clauses.[14]

The *Lemon* Court looked to prior cases and came up with three different criteria to determine whether a state practice offended Establishment Clause guarantees:[15]

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[9] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring) ("*Lemon* . . . has not been overruled or its test modified. Yet, continued criticism of it could encourage other courts to feel free to decide Establishment Clause cases on an ad hoc basis."); *see also* Eric Rassbach, *Town of Greece v. Galloway: The Establishment Clause and the Rediscovery of History*, 2014 CATO SUP. CT. REV. 71, 78 ("The Supreme Court has in recent years almost routinely ignored the test. But because it has never expressly overruled *Lemon*, *Lemon* remains the law of the land in all 12 of the regional circuits.").

[10] Rather than view *Lemon* as a three-part test, the Court expressly modified the jurisprudence in the school funding context to limit the test to only two parts. *See* Agostini v. Felton, 521 U.S. 203, 233 (1997) ("[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.").

[11] *See id.* at 236 ("[O]ur Establishment Clause jurisprudence has changed significantly since we decided [School District of City of Grand Rapids v. Ball] and [Edwards v. Aguilar], so our decision to overturn those cases rests on far more than 'a present doctrinal disposition to come out differently from the Court of [1985].' We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.") (citing Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 864 (1992)).

[12] Lemon v. Kurtzman, 403 U.S. 602, 606 (1971) ("These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools.").

[13] *Id.* at 608 (Rhode Island salary supplements would only be for courses taught in public schools using teaching materials employed in public schools); *id.* at 610 (Pennsylvania supplements would only be for particular courses taught at public schools using materials approved by the state Superintendent of Public Instruction).

[14] *Id.* at 606.

[15] *Id.* at 612 ("Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases.").

"the statute must have a secular legislative purpose,"[16]

"its principal or primary effect must be one that neither advances nor inhibits religion,"[17] and

"the statute must not foster 'an excessive government entanglement with religion.'"[18]

The Court rejected that the Rhode Island and Pennsylvania Legislatures' intentions were to advance religion, instead accepting that both "intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[19] Because there was nothing in the record undermining the claim that the legislative purpose was to promote a legitimate, nonreligious goal, the first prong of the *Lemon* test was met.[20]

The Court did not focus on whether the principal or primary effect of the challenged legislation was to advance religion.[21] There was no need to do so because the Court "conclude[d] that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[22] The safeguards adopted to assure that the state was not spending funds in a way prohibited under the Establishment Clause required the state to act in ways that were themselves prohibited. For example, to make sure that the State was only paying for the teaching of secular content, the State had to make decisions about which content was religious and which secular. But "[t]his kind of state inspection and evaluation of the religious content ... is fraught with the sort of entanglement that the Constitution forbids."[23]

While some content is unquestionably secular and other content unquestionably religious, the Court appreciated that drawing the line between the two is not always easy. "What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion."[24] That these determinations are difficult has implications, because the state has a duty to refrain from paying for religious teaching.[25] The Court noted that "a dedicated religious person, teaching in a school affiliated with his or her

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[16] *Id.*

[17] *Id.* (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

[18] *Id.* at 613 (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674 (1970)).

[19] *Id.*

[20] *Id.* ("[W]e find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.").

[21] *See id.* at 613–14.

[22] *Id.* at 614.

[23] *Id.* at 620.

[24] *Id.* at 619.

[25] *See id.* at 612 (discussing "the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'") (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 668 (1970)).

faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral."[26] The Court was not imputing bad faith to those teachers,[27] but instead was suggesting that "[w]ith the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine."[28]

The Constitution's limitation on state funding of religious teaching has a number of ramifications. For example, in *Levitt v. Committee for Public Education & Religious Liberty*,[29] the Court cited *Lemon* when striking down a New York law reimbursing nonpublic schools for testing expenses.[30] The reimbursement was not only for expenses incurred in administering the state Regents' exam,[31] but also for "traditional teacher-prepared tests, which [were] drafted by the nonpublic school teachers for the purpose of measuring the pupils' progress in subjects required to be taught under state law."[32] However, the statute included no requirement "to assure that internally prepared tests [were] free of religious instruction."[33] Because of "the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church"[34] and because "the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination,"[35] the Court held the reimbursement plan unconstitutional.[36]

After the Court had struck down the state programs for violating Establishment Clause guarantees, Pennsylvania and New York modified their programs to address some of the difficulties noted by the Court. *Sloan v. Lemon* involved the constitutionality of Pennsylvania's Parent Reimbursement Act for Nonpublic Education,[37] which was enacted after the *Lemon* Court had struck

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[26] *Id.* at 618.

[27] *Id.* ("We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment.").

[28] *Id.* at 618–19.

[29] Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973).

[30] *See id.* at 480–81.

[31] *Id.* at 475 ("Such 'tests and examinations' appear to be of two kinds: (a) state-prepared examinations, such as the 'Regents examinations' and the 'Pupil Evaluation Program Tests.'").

[32] *Id.*

[33] *Id.* at 480.

[34] *Id.*

[35] *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602, 617 (1971)).

[36] *Id.* at 482 ("We hold that the lump-sum payments under Chapter 138 violate the Establishment Clause.").

[37] Sloan v. Lemon, 413 U.S. 825, 827 (1973).

down the Pennsylvania Nonpublic Elementary and Secondary Education Act.[38] To avoid the difficulty mentioned in *Lemon v. Kurtzman* - that the State had provided "financial aid directly to the church-related schools"[39] - this statute instead "provide[d] for reimbursement to parents who pa[id] tuition for their children to attend the State's nonpublic elementary and secondary schools."[40] To sidestep entanglement worries, "the statute impose[d] no restrictions or limitations on the uses to which the reimbursement allotments [could] be put by the qualifying parents."[41]

The *Sloan* Court did not question the state's secular purpose.[42] Nonetheless, after noting that the district court found more than 90% of the children attending nonpublic schools were attending religious schools,[43] the Court concluded that the "State has singled out a class of its citizens for a special economic benefit."[44] "Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."[45] As a result, the Court held that the Pennsylvania program "violate[d] the constitutional mandate against the 'sponsorship' or 'financial support' of religion or religious institutions."[46]

In *Committee for Public Education & Religious Liberty v. Nyquist*,[47] a case argued and decided concurrently with *Sloan*, the Court examined the constitutionality of New York's Elementary and Secondary Education Opportunity Program.[48] The State offered "a limited plan providing tuition reimbursements to parents of children attending elementary or secondary non-public schools," only open to individuals with very low incomes.[49] Those parents not qualifying for that limited program could "subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school tuition."[50]

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[38] *Id.* at 826.

[39] *Lemon*, 403 U.S. at 621.

[40] *Sloan*, 413 U.S. at 828.

[41] *Id.* at 829.

[42] *See id.* at 829–30.

[43] *See id.* at 830.

[44] *Id.* at 832.

[45] *Id.*

[46] Sloan v. Lemon, 413 U.S. 825, 832–33 (1973) (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).

[47] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[48] Both decisions were issued on June 25, 1973. *See Sloan*, 413 U.S. at 825; *Nyquist*, 413 U.S. at 756.

[49] *Nyquist*, 413 U.S. at 764 ("To qualify under this section a parent must have an annual taxable income of less than $5,000").

[50] *Id.* at 765. Parents with lower annual incomes could subtract more. *See id.*

Citing *Lemon*, the Court explained that the Constitution requires a "careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects."[51] High on the list of practices that violate constitutional guarantees are the "sponsorship, financial support, and active involvement of the sovereign in religious activity."[52]

As was true in *Sloan*,[53] the *Nyquist* Court did not dispute that the state had valid secular purposes.[54] However, a state's having legitimate and secular intentions does not "immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State."[55] The *Nyquist* Court explained that the program's tuition reimbursement ran afoul of constitutional guarantees because "[b]y reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools."[56] While recognizing that "the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable," the Court nonetheless could not uphold the law when "the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."[57]

Both *Sloan* and *Nyquist* were significant for two reasons. First, they rejected that a state's provision of funds to parents, rather than directly to religious schools, would immunize that part of the program from Establishment Clause challenge.[58] Second, both Courts took cognizance of the fact that because so many of the children attending private school would be attending religious schools[59] or so many of the schools that would benefit were religious schools,[60]

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[51] *Id.* at 771–72.

[52] *Id.* (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 668 (1970); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).

[53] Sloan v. Lemon, 413 U.S. 825, 827 (1973).

[54] *See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

[55] *Id.* at 774.

[56] *Id.* at 783.

[57] *Id.*

[58] *See Sloan*, at 832; *Nyquist*, 413 U.S. at 783.

[59] *See Nyquist*, 413 U.S. at 768 ("Some 700,000 to 800,000 students constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85% of which are church affiliated.").

[60] Sloan v. Lemon, 413 U.S. 825, 830 (1973) ("[T]he District Court indicated that 'more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propagating and promoting religious faith.'").

the tuition reimbursement would have a primary effect of "preserv[ing] and support[ing] religion-oriented institutions."[61]

In *Meek v. Pittenger*, the Court examined whether a Pennsylvania law aiding religious elementary and secondary schools was constitutional.[62] Applying the *Lemon* test, the *Meek* Court upheld the provision of the law that authorized lending textbooks—suitable for use in public schools—to students in nonpublic schools.[63] Here, the Court followed past precedent, where it had previously upheld New York's textbook loan program in *Board of Education v. Allen*.[64] However, the Court reached a different conclusion about "the loan of instructional material and equipment directly to qualifying nonpublic elementary and secondary schools in the Commonwealth."[65]

The *Meek* Court accepted that Pennsylvania had a legitimate secular purpose when loaning these educational aids.[66] However, the Court reasoned that "the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."[67] While the loaned materials—maps, charts, and laboratory equipment—were secular in nature,[68] the Court reasoned that in "religion-pervasive institutions,"[69] whose "very purpose . . . is to provide an integrated secular and religious education,"[70] the materials would likely be used to help inculcate religious doctrine.

The Court also considered the authorized auxiliary services: "remedial and accelerated instruction, guidance counseling and testing, speech and hearing services, [which] are provided directly to nonpublic school children with the appropriate special need."[71] These services are "expressly limited to those services which [were] secular, neutral, and nonideological."[72] However, the *Meek* Court reasoned that it was error to rely "entirely on the good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained."[73]

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[61] *Id.* at 832; *see also See* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973) ("By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools.").

[62] 421 U.S. 349, 351 (1975), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[63] *See id.* at 358, 362.

[64] *See id.* at 359 (discussing Board of Education v. Allen, 392 U.S. 236 (1968)).

[65] *Id.* at 362–63, 366.

[66] *Id.* at 363.

[67] *Id.*

[68] *Id.* at 365.

[69] *Id.* at 366.

[70] *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602, 616–17 (1971))

[71] *Id.* at 367.

[72] *Id.* at 368.

[73] *Id.* at 369.

In order to meet its constitutional obligation to assure that "auxiliary teachers remain religiously neutral . . . the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed."[74] The "prophylactic contacts required to ensure that teachers play a strictly nonideological role . . . necessarily [gave] rise to a constitutionally intolerable degree of entanglement [sic] between church and state."[75]

One difficulty posed by the *Meek* analysis was that some of the considerations militating against the constitutionality of the provision of the auxiliary services also militated against the constitutionality of the textbook loan program. For example, while the books were themselves secular, they might have been used to promote sectarian ends. Further, the New York textbook loan program that the Court had previously upheld[76] had been considered prior to *Lemon*,[77] and this program might not have been upheld had it been challenged following the Court's ruling in *Lemon*.[78]

The *Lemon* test was itself "gleaned from [the Court's] cases."[79] But an analysis based on past case law poses certain interpretation problems. For example, it is not clear whether such an approach should be understood to mean that the criteria must be consistent with previously decided cases in which the Court had upheld the constitutionality of a program permitting secular textbooks to be loaned to pupils attending sectarian schools,[80] a law permitting parents to be reimbursed for transportation costs to parochial schools,[81] and a law granting property tax exemptions to religious organizations.[82] The cases upholding those practices were favorably cited in *Lemon*,[83] so the *Lemon* Court presumably endorsed or at least countenanced the results. Given the Court's apparent

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[74] *Id.* at 372.

[75] *Id.* at 370 (citing *Lemon*, 403 U.S. at 619).

[76] *See id.* (Brennan, J., concurring in part and dissenting in part) (discussing "the textbook loan program . . . indistinguishable from the New York textbook loan program upheld in Board of Education v. Allen, 392 U.S. 236 (1968)).

[77] *Id.* at 378 (Brennan, J., concurring in part and dissenting in part) ("*Allen* ... was decided before *Kurtzman*.").

[78] *Cf. id.* (Brennan, J., concurring in part and dissenting in part) (discussing "whether or not *Allen* can withstand overruling in light of *Kurtzman* and *Nyquist*").

[79] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[80] Board of Education v. Allen, 392 U.S. 236 (1968).

[81] *See* Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1 (1947).

[82] *See* Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970).

[83] Robert A. Dietzel, *The Future of School Vouchers: A Reflection on Zelman v. Simmons-Harris and an Examination of the Blaine Amendments As A Viable Challenge to Sectarian School Aid Programs*, 2003 MICH. ST. DCL L. REV. 791, 803 n.64 (2003) ("The *Lemon* Court was relying primarily on Walz v. Tax Commission, 397 U.S. 664 (1970), Board of Education v. Allen, 392 U.S. 236 (1968), and Everson v. Board of Education, 330 U.S. 1 (1947)").

willingness to accept those results,[84] the question that the Court considered in later cases was whether those practices should be thought to be at the outer reaches of the state's power in light of Establishment Clause limitations[85] so that practices which seemed to be an extension of those cases should be held unconstitutional.[86]

Two years after *Meek*, the Court in *Wolman v. Walter* considered an Ohio statute authorizing "the State to provide nonpublic school pupils with books, instructional materials and equipment, standardized testing and scoring, diagnostic services, therapeutic services, and field trip transportation."[87] Of the 720 nonpublic schools that would receive funds, 691 of them were religious.[88] The district court had concluded that the schools at issue were similar in all relevant respects to the schools involved in the *Lemon* litigation.[89] The Court had no difficulty with the purpose behind the funding,[90] but instead focused on the effect and entitlement prongs.[91]

As had been true in *Meek*, the Court upheld the provision authorizing the loaning of books.[92] Ohio law provided that nonpublic schools would receive funds to provide "standardized tests and scoring services."[93] Because the state rather than the private schools controlled the test and its result, the Court upheld

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[84] The Court cites *Everson*, *Allen*, and *Walz* with approval both in cases upholding the validity of states practices under Establishment Clause guarantees and also in cases striking down other states practices under Establishment Clause guarantees. *See* Bowen v. Kendrick, 487 U.S. 589, 609 (1988); Lynch v. Donnelly, 465 U.S. 668, 680 (1984); Mueller v. Allen, 463 U.S. 388, 393 (1983); *Lemon*, 403 U.S. at 611–12. Further, those cases might have been cited with approval by the majority, concurrence, and dissent in the same opinion. *See* Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 791 (1973); *id.* at 798–99 (Burger, concurring in part and dissenting in part); *id.* at 821 (White, J., dissenting). *See also* Mitchell v. Helms, 530 U.S. 793, 890 (2000) (Souter, J., dissenting).

[85] *See Everson*, 330 U.S. at 16 ("But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power.").

[86] *Cf. Nyquist*, 413 U.S. at 775 ("In *Everson*, the Court, in a five-to-four decision, approved a program of reimbursements to parents of public as well as parochial schoolchildren for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the 'verge' of impermissible state aid.") (citing *Everson*, 330 U.S. at 16).

[87] 433 U.S. 229, 233 (1977), *overruled by* Mitchell v. Helms, 530 U.S. 793 (2000).

[88] *Id.* at 234.

[89] *See id.* at 235.

[90] *Id.* at 236 ("In the present case we have no difficulty with the first prong of this three-part test. We are satisfied that the challenged statute reflects Ohio's legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the schoolchildren of the State.").

[91] *Id.* ("As is usual in our cases, the analytical difficulty has to do with the effect and entanglement criteria.").

[92] *See id.* at 238.

[93] *Id.* at 238–39.

the constitutionality of that provision of the state law.[94] With respect to the provision of speech, hearing, and psychological diagnostic services, the Court also upheld the law.[95] The Court reasoned that providing health services to schoolchildren in both public and private schools did not have the primary effect of promoting religion.[96] The Court distinguished diagnostic services from teaching and counseling, reasoning that the former services had little, if any, educational content.[97]

The Court also upheld the provision of therapeutic and remedial services to nonpublic school students that were delivered off-site.[98] However, the Court was unwilling to uphold the constitutionality of giving instructional materials and equipment to students, because permitting such loans might have "the primary effect of providing a direct and substantial advancement of the sectarian enterprise."[99] The Court also struck down funding field trips, fearing that they would be used to teach sectarian lessons.[100] In effect, the Court held the line at instructional services because those services were more likely to involve religious teaching or training,[101] but modified its view about the need to adopt strong prophylactic measures to prevent those providing other services from straying over the line and consciously or unconsciously inculcating religious doctrine.

At issue in *Committee for Public Education & Religious Liberty v. Regan* was the constitutionality of a "New York statute authorizing the use of public funds to reimburse church-sponsored and secular nonpublic schools for performing various testing and reporting services mandated by state law."[102] The State prepared the tests at issue.[103] Many of the tests involved objective multiple-choice questions.[104] While some of the tests involved essays, the District Court

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[94] *Id.* at 240, 241.

[95] *Id.* at 242.

[96] *Id.*

[97] *Id.* at 244.

[98] *Id.* at 248 ("[W]e hold that providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion.").

[99] *Id.* at 250.

[100] *See id.* at 254 ("The field trips are an integral part of the educational experience, and where the teacher works within and for a sectarian institution, an unacceptable risk of fostering of religion is an inevitable byproduct.").

[101] Margo R. Drucker, *Bowen v. Kendrick: Establishing Chastity at the Expense of Constitutional Prophylactics*, 64 N.Y.U. L. REV. 1165, 1180 (1989). "When religious people are directly involved in teaching and counseling functions, the Court has recognized a greater likelihood that religion will be inculcated, that there will be a perception of a symbolic church-state union, or that government surveillance will be needed to assure that religious teachers do not advance religion." *Id.*

[102] 444 U.S. 646, 648 (1980).

[103] *Id.* at 654.

[104] *Id.* at 655.

rejected that the tests would be used to impart or test the understanding of religious doctrine.[105] So, too, the reimbursed recordkeeping and reporting services did not involve teaching and did not lend themselves to religious indoctrination.[106] Applying the *Lemon* test,[107] the Court upheld the constitutionality of the New York law.[108] The Court distinguished *Levitt* because *Regan* did not involve "traditional teacher-prepared tests."[109] The Court held that the *Lemon* effects prong was not violated[110] because grading the secular tests provided by the State had a secular purpose and effect[111] and because the recordkeeping and reporting functions also had a secular purpose and effect.[112]

Even if the purpose and effect were secular, *Lemon* teaches that the entanglement prong—to assure that the state is not financing or promoting teaching—may be enough to invalidate a program.[113] But the *Regan* Court suggested that because the reimbursement process was straightforward and routine, there was no excessive entanglement.[114] Perhaps realizing that its *Lemon* analysis in *Regan* was more forgiving than had been used in some of the previous cases, the Court noted that "Establishment Clause cases are not easy."[115] Some on the Court were not convinced that the entanglement prong was so readily satisfied. In his *Regan* dissent, Justice Blackmun noted that the grading would require the teacher's "subjective judgment,"[116] which meant that the state would have to impose correspondingly more serious scrutiny to assure respect for the Establishment Clause guarantees.[117] While this increased scrutiny could have violated entanglement guarantees, the Court held that the relevant line had not been crossed.[118]

The *Regan* Court's apparent willingness to use a more forgiving standard when assessing the entanglement prong did not mean that the entanglement prong no longer did any work. *Aguilar v. Felton* involved public funding of

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[105] *Id.* at 656.

[106] *Id.* at 656–57.

[107] *See id.* at 653.

[108] *Id.* at 662.

[109] *Id.* at 649.

[110] *See id.* at 659

[111] *Id.* at 657.

[112] *Id.* at 658–59.

[113] *See* Lemon v. Kurtzman, 403 U.S. 602, 614, 620 (1971).

[114] Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 660 (1980).

[115] *Id.* at 662.

[116] *Id.* at 669 (Blackmun, J., dissenting).

[117] *See id.* at 669–70 (Blackmun, J., dissenting) ("For the State properly to ensure that judgment is not exercised to inculcate religion, a 'comprehensive, discriminating, and continuing state surveillance will inevitably be required.'") (citing *Lemon*, 403 U.S. at 619).

[118] *Id.* at 670 (Blackmun, J., dissenting) ("Chapter 507 . . . fosters excessive government entanglement with religion.").

private school programming.[119] The funded programs included "remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services."[120] Public school employees provided these services[121] in the parochial schools.[122] When striking down this public funding, the Court explained that the supervisory system required to make sure that public funds were not being used to support religious teaching itself involved excessive entanglement between Church and State.[123]

In *School District of City of Grand Rapids v. Ball*,[124] a case argued and decided the same day as *Aguilar*,[125] the Court examined a program "in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in 'leased' classrooms in the nonpublic schools."[126] The courses offered were "'remedial' and 'enrichment' mathematics, 'remedial' and 'enrichment' reading, art, music, and physical education."[127] Almost all the schools involved were pervasively sectarian.[128] Applying the *Lemon* test,[129] the Court discussed the different ways in which the program might impermissibly promote religion:

> "[T]he teachers participating in the programs may become involved in intentionally or inadvertently inculcating particular religious tenets or beliefs."[130]
>
> "[T]he programs may provide a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating the school."[131]

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[119] 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[120] *Id.* at 406.

[121] *Id.* ("These programs are carried out by regular employees of the public schools (teachers, guidance counselors, psychologists, psychiatrists, and social workers)").

[122] *Id.* at 404 ("The City of New York uses federal funds to pay the salaries of public employees who teach in parochial schools.").

[123] *Id.* at 409.

[124] 473 U.S. 373 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).

[125] Both cases were argued on December 5, 1984 and decided on July 1, 1985. *See* Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997); *Ball*, 473 U.S. at 373.

[126] *Ball*, 473 U.S. at 375.

[127] *Id.*

[128] *Id.* at 385 ("40 of the 41 schools in this case are thus 'pervasively sectarian'").

[129] *Id.* at 383 ("We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the Lemon criteria.").

[130] *Id.* at 385.

[131] *Id.*

"[T]he programs may have the effect of directly promoting religion by impermissibly providing a subsidy to the primary religious mission of the institutions affected."[132]

The *Ball* Court explained: "Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[133] But this program involved individuals who taught in the pervasively sectarian schools, "many of whom no doubt teach in the religious schools precisely because they are adherents of the controlling denomination and want to serve their religious community zealously."[134] The Court was skeptical that "those instructors [could] put aside their religious convictions and engage in entirely secular Community Education instruction as soon as the schoolday [sic] [was] over," especially because those instructors would be "before the same religious school students and in the same religious school classrooms that [were] employed to advance religious purposes during the 'official' schoolday [sic]."[135] Further, the Court noted that the "classes [were] not specifically monitored for religious content,[136] which further undermined the Court's confidence that establishment limitations would be respected.

The Court did "not question that the dedicated and professional religious schoolteachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously."[137] Nonetheless, the Court worried that there was "a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular schoolday [sic] will infuse the supposedly secular classes they teach after school."[138] After reviewing these elements, the Court announced that 'the conclusion [was] inescapable that the Community Education and Shared Time programs have the 'primary or principal' effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment."[139]

The *Lemon* jurisprudence in the secondary school context,[140] while not entirely coherent, seemed relatively understandable. The state was not to promote religious teaching, which meant that instructional materials could not be provided in religious schools (although secular books could be provided) and teachers' salaries could not be augmented. Services that were sufficiently

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[132] *Id.*

[133] *Id.*

[134] *Id.* at 386.

[135] *Id.* at 386–87.

[136] *Id.* at 387.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 397.

[140] *See* Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 669–70 (1980) (Blackmun, J., dissenting) (suggesting that the entanglement prong analysis in *Regan* is less demanding than it had been in *Lemon*).

differentiable from teaching could be provided, although the Court has not been consistent with respect to when those providing such services may be presumed to act within the appropriate limitations.[141] There was some leeway in what would suffice to meet the entanglement prong, which depended at least in part on how routine the suggested oversight plan was.[142] Nonetheless, the changes in emphasis and in the strength of certain presumptions in this jurisprudence are hardly worth mentioning when compared to some of the other changes that have occurred over the years in the formulation and application of the *Lemon* test.

B. *The Wavering Commitment to Enforcing Establishment Guarantees*

The Court has reached some surprising conclusions when applying the *Lemon* test in various scenarios. While some variation should be expected when the factors are applied in differing contexts, a review of the Court's application of the *Lemon* test suggests that that the Court has not always respected the language or the spirit of the test.

Tilton v. Richardson was issued the same day as *Lemon*.[143] At issue was the constitutionality of the Higher Education Facilities Act, which authorized federal construction grants and loans to colleges and universities, provided that the funded facilities would not be used for sectarian instruction or religious worship.[144] The Court applied the *Lemon* test to analyze the validity of the Act.[145] In response to the allegation that a primary effect of the Act was to impermissibly aid these schools in promoting their religious purposes, the Court noted prior Courts had upheld reimbursement for bus transportation to parochial schools, loaning textbooks to parochial school students, and property tax exemptions for religious groups.[146] While the Court acknowledged that the possibility always exists that the permissible objectives "may be subverted by conscious design or lax enforcement," the Court was unconvinced that such a possibility warranted striking the aid—"judicial concern about these possibilities cannot, standing alone, warrant striking down a statute as unconstitutional."[147]

The *Tilton* Court was reassured that Establishment Clause guarantees would be respected because the Act expressly prohibited the use of grants and loans

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[141] *Compare* Wolman v. Walter, 433 U.S. 229, 248 (1977), *with* Meek v. Pittenger, 421 U.S. 349, 372 (1975).

[142] *See Regan*, 444 U.S. at 660 ("The reimbursement process, furthermore, is straightforward and susceptible to the routinization that characterizes most reimbursement schemes.").

[143] Both were issued on June 28, 1971. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Tilton v. Richardson, 403 U.S. 672 (1971).

[144] *See Tilton*, 403 U.S. at 675.

[145] *See id.* at 678.

[146] *Id.* at 679 (citing *Everson*, *Allen*, and *Walz*).

[147] *Tilton*, 403 U.S. at 679.

"for religious instruction, training, or worship."[148] In addition, "the record show[ed] that some church-related institutions have been required to disgorge benefits for failure to obey [these restrictions]."[149] However, the evidence that some institutions had not followed the restrictions demonstrates that the worries about misuse were not mere possibilities or idle speculation. Stricter oversight might have been necessary to assure that such violations did not occur, thus triggering possible entanglement difficulties.[150]

The *Tilton* Court distinguished what was at issue in this case from what had been before the *Lemon* Court by noting that there were "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools."[151] For example, "college students are less impressionable and less susceptible to religious indoctrination."[152] While such a point is well-taken, it misconstrues the question at issue. The Establishment Clause is not merely designed to prevent the state from engaging in *successful* religious indoctrination but also in preventing the state from supporting any religious teaching.[153]

The *Tilton* Court reasoned that because these schools were not pervasively sectarian and because "religious indoctrination [was] not a substantial purpose or activity of these church-related colleges and universities, there [was] less likelihood than in primary and secondary schools that religion will permeate the area of secular education."[154] Because that likelihood was lower, there was a reduction in "the risk that government aid will in fact serve to support religious activities,"[155] which diminished "the necessity for intensive government surveillance."[156]

The Court offered an additional reason to justify reduced concern about whether the state would be helping to fund religious indoctrination. Surveillance was allegedly less necessary because of the "nonideological character of the aid

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[148] *Id.* at 679–80.

[149] *Id.* at 680.

[150] *See infra* notes 154–160 and accompanying text (discussing the *Tilton* Court's entanglement analysis).

[151] Tilton v. Richardson, 403 U.S. 672, 685 (1971).

[152] *Id.* at 686.

[153] "Were the focus of concern instead that public funds not be used to promote religious teaching or worship, that concern would not be allayed merely because the target audience was hard to persuade. Thus, while it may well be true that college students are not as impressionable as schoolchildren, that point relates to whether the religious teaching will alter the views of the students rather than to whether the state should be supporting an attempt to indoctrinate religion." Mark Strasser, *Death by a Thousand Cuts: The Illusory Safeguards Against Funding Pervasively Sectarian Institutions of Higher Learning*, 56 BUFF. L. REV. 353, 369–70 (2008).

[154] *Tilton*, 403 U.S. at 687.

[155] *Id.*

[156] *Id.*

that the Government provides," i.e., construction funds.[157] Here, the Court was comparing buildings with teachers, reasoning that because "teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction."[158]

Finally, "the Government aid here [was] a one-time, single-purpose construction grant," and the Court believed that "[i]nspection as to use is a minimal contact."[159] These factors together convinced the Court that the entanglement prong did not pose insuperable difficulties.[160]

Yet, this analysis was surprising. Even if the risks of religious indoctrination in the university context are less severe than the risks of such indoctrination in the primary and secondary schools, the former risks may nonetheless be too high, especially where there was evidence that schools were not obeying the imposed restrictions. The fact that the aid itself was nonideological did not speak to how the funded buildings would be used, necessitating oversight to assure that the buildings would solely be used for permissible activities. The Court implied that concerns regarding abuse lessen where schools use aid for building construction rather than teacher salaries,[161] but one of the questions at hand was how teachers would use the buildings' classrooms. Further, the Court was unpersuasive when suggesting that there was no concern of religious indoctrination because "the schools subscribe[d] to a well-established set of principles of academic freedom, and nothing in this record show[ed] that these principles [were] not in fact followed."[162] These very principles permitted schools to impose religious restrictions on what could be taught, and these schools in fact had such restrictions.[163]

The Court understood that the schools had restrictions on what could be taught, but was satisfied that these restrictions were not enforced by the schools.[164] But even if the schools were not enforcing their self-imposed restrictions at the relevant time, the schools made no guarantee that this nonenforcement would continue in the future. At the very least, the *Tilton* Court's interpretation of Establishment Clause guarantees was much more forgiving than the *Lemon* Court's interpretation.

Unsurprisingly, *Tilton* provided the basis to uphold the constitutionality of more aid to religious colleges and universities. At issue in *Roemer v. Board of*

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[157] *Id.*

[158] *Id.* at 687–88.

[159] *Id.* at 688.

[160] *See id.*

[161] *See supra* note 153 and accompanying text.

[162] Tilton v. Richardson, 403 U.S. 672, 687 (1971).

[163] *See* Strasser, *supra* note 153, at 363.

[164] *See Tilton*, 403 U.S. at 681 ("Although appellants introduced several institutional documents that stated certain religious restrictions on what could be taught, other evidence showed that these restrictions were not in fact enforced.").

Public Works of Maryland was a grant program to qualifying private colleges and universities.[165] Any funds awarded could not be put "to any sectarian use."[166] In order for a qualifying institution to receive the funds, the application had to include "an affidavit of the institution's chief executive officer stating that the funds will not be used for sectarian purposes, and . . . a description of the specific nonsectarian uses that [were] planned."[167] If there was a challenge regarding funds' use, the issue would be resolved, where possible, "on the basis of information submitted . . . by the institution . . . without actual examination of its books."[168] If the issue could not thereby be resolved, "a 'verification or audit' may be undertaken, [which] . . . would be 'quick and non-judgmental,' taking one day or less."[169]

Here, the program did not demand particularly rigorous oversight. The chief executive officer might well in good faith attest that the building funds were used to pay for nonsectarian purposes (aiding in the construction of academic buildings) with no way of knowing whether the buildings were sometimes used for religious indoctrination during a class.

In deciding the program's constitutionality, the *Roemer* Court applied the *Lemon* test,[170] which the Court seemed to encapsulate by stating that "[n]eutrality is what is required."[171] The Court understood that such an articulation did not lend itself to easy application without more explanation, because "a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity."[172] Further, the "State may not . . . pay for what is actually a religious education, even though it purports to be paying for a secular one, and even though it makes its aid available to secular and religious institutions alike."[173]

The *Roemer* Court announced that that it was merely trying to ensure that "the principles governing public aid to church-affiliated private schools"[174] were "faithfully applied in this case."[175] No debate occurred about whether the purpose prong had been fulfilled.[176] Rather, the Court focused on the other two *Lemon* prongs—"those concerning the primary effect of advancing religion and excessive church-state entanglement."[177]

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[165] 426 U.S. 736, 740 (1976).

[166] *Id.* at 742.

[167] *Id.*

[168] *Id.* at 743.

[169] *Id.*

[170] *See id.* at 745.

[171] *Id.* at 747.

[172] *See id.* ("[T]hat principle is more easily stated than applied.").

[173] *Id.*

[174] *Id.* at 754.

[175] *Id.*

[176] *See id.*

[177] *Id.* at 754–55.

The district court found that it was possible to separate the secular from the sectarian,[178] and that the challenged statute "forb[ade] the use of funds for 'sectarian purposes.'"[179] The Court was willing to "assume that the colleges . . . will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate [and that they] . . . will give a wide berth to 'specifically religious activity,' and thus minimize constitutional questions."[180] Given this assumption, the Court felt confident acknowledging that that the primary effect of providing funding to these colleges would not be to promote religion until allegations of actual misuse came before the Court.[181]

With respect to the supervision necessary to assure fulfillment of constitutional requirements, the Court reasoned that due to the absence of a finding of pervasive sectarianism, "secular activities, for the most part, [could] be taken at face value."[182] Because there was "a substantially reduced danger that an ostensibly secular activity . . . will actually be infused with religious content or significance," the Court decided that the "need for close surveillance of purportedly secular activities is correspondingly reduced."[183]

The *Roemer* Court distinguished the instant case from *Lemon* by noting that primary and secondary students were much more impressionable than college students.[184] Furthermore, the schools at issue in *Lemon* were sectarian,[185] which made it impossible for "the State to identify and subsidize separate secular functions carried out at the school, without on-the-site inspections being necessary to prevent diversion of the funds to sectarian purposes."[186] In any event, "religious institutions need not be quarantined from public benefits that are neutrally available to all."[187] This analysis is unpersuasive. The point is not to quarantine religious institutions, but merely to make sure that state funds are not used to teach religion. The factors discussed by the Court as mitigating the need for surveillance did not justify the Court's confidence that state funds would only be used for secular activities.

The institutions at issue in *Roemer* subscribed to the Principles of Academic Freedom[188] which permitted institutions to impose religious restrictions on what

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[178] *Id.* at 759.

[179] *Id.* at 760.

[180] *Id.*

[181] *See id.* at 761–62.

[182] *Id.* at 762.

[183] *Id.*

[184] *Id.* at 764 ("The elementary and secondary schooling in *Lemon I* came at an impressionable age.").

[185] *Id.* ("[R]eligion 'pervade(d) the school system.'") (citing Lemon v. Kurtzman, 403 U.S. 602, 617 (1971)).

[186] *Id.* at 765.

[187] *Id.* at 746.

[188] *Id.* at 756.

could be taught.[189] The fact that the institutions subscribed to the Principles did little to allay concerns about whether the state would be supporting sectarian instruction. The Court noted that while some classes began with a prayer, there was "no 'actual college policy' of encouraging the practice" and that was a matter left up to the professor.[190] The lack of a college policy on these matters may have made it less likely that *all* classes would begin with prayer and thus made it less likely that *all* of the classes in government-subsidized buildings would hold classes beginning with prayer, but that hardly provided assurance that *no* classes in the relevant buildings would begin that way.[191]

The Court realized that there was sometimes a hiring preference for individuals of a particular religious order[192] and that there were mandatory religion or theology classes taught by clerics.[193] Nonetheless, the Court was willing to assume that state funds would be used appropriately and seemed unconcerned that the state might be put in the position of supporting prayer.[194]

The point is not that religious universities should be precluded from teaching matters of faith or from employing individuals who share that faith, but merely that, in this case, there was too little oversight to make sure that the state was not financing religious teaching.[195] The *Roemer* Court seemed to think that the absence of a finding of pervasive sectarianism justified a presumption that religion simply would not be taught in any secular classes,[196] notwithstanding its knowledge that professors sometimes chose to begin classes with prayer.[197] Ultimately, the Court believed that the *Roemer* case was closer to *Tilton* than to *Lemon*[198]and held that the Establishment Clause was not violated.[199]

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[189] *See* Strasser, *supra* note 153, at 363.

[190] *Roemer*, 426 U.S. at 756.

[191] *See id.* at 774 (Stewart, J., dissenting) ("Recognition of the academic freedom of these instructors does not necessarily lead to conclusion that courses in the religion or theology departments at the five defendants have no overtones of indoctrination.").

[192] *Id.* at 757.

[193] *Id.* at 756.

[194] *See id.* at 760 ("We must assume that the colleges, and the Council, will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate.").

[195] *See* Tanner Bean & Robin Fretwell Wilson, *When Academic Freedom Collides with Religious Liberty of Religious Universities*, 15 U. ST. THOMAS L.J. 442, 444 (2019) ("In theological disputes, the covenantal university's view must prevail in order to accomplish its *raison d'etre*.").

[196] *See* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 762 (1976).

[197] *See id.* at 756 ("Some classes are begun with prayer").

[198] *See id.* at 763–64 ("But if the question is whether this case is more like *Lemon I* or more like *Tilton*—and surely that is the fundamental question before us—the answer must be that it is more like *Tilton*.").

[199] *See id.* at 767 (affirming district court's refusal to enjoin implementation of statute granting aid to religious schools in question).

When applying the *Lemon* test in both *Tilton* and *Roemer*, the Court was willing to assume that colleges receiving funds would not use the funds to promote religious teaching or prayer, which meant that there was less need for oversight to make sure that state funds were not used for that purpose.[200] *Widmar v. Vincent* went a step further to discuss the conditions under which a state university might be obligated to provide a forum for such activity.[201] At issue in *Widmar* was "whether a state university, which makes its facilities generally available for the activities of registered student groups, [could] close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion."[202] Applying the *Lemon* test, the Court reasoned that two of the prongs were clearly satisfied: the purpose prong and the entanglement prong.[203] The more difficult question was whether "allowing religious groups to share the limited public forum would have the 'primary effect' of advancing religion."[204]

To make that determination, the Court suggested that the relevant "question [was] not whether the creation of a religious forum would violate the Establishment Clause."[205] Rather, the Court noted that "[t]he University has opened its facilities for use by student groups, and the question is whether it can now exclude groups because of the content of their speech."[206] The Court was "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion."[207]

While admitting that religious groups might benefit from having access to university facilities, the *Widmar* Court reasoned that "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion."[208] The Court offered two reasons to believe that the effect would only be incidental: (1) "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," and (2) "the forum is available to a broad class of nonreligious as well as religious speakers . . . [and] [t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect."[209]

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[200] *See Roemer*, 426 U.S. at 763–64; Tilton v. Richardson, 403 U.S. 672, 684–85 (1971).

[201] Widmar v. Vincent, 454 U.S. 263, 263 (1981).

[202] *Id.* at 264–65.

[203] *See id.* at 271–72 ("In this case two prongs of the test are clearly met. Both the District Court and the Court of Appeals held that an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose and would avoid entanglement with religion.").

[204] *Id.* at 272.

[205] *Id.* at 273.

[206] *Widmar*, 454 U.S. at 273 (citing Healy v. James, 408 U.S. 169 (1972)).

[207] *Id.*

[208] *Id.* at 273–74 ("It is possible—perhaps even foreseeable—religious groups will benefit from access to University facilities.").

[209] *Id.* at 274.

In dissent, Justice White rejected the majority's reasoning, which was "founded on the proposition that because religious worship uses speech, it is protected by the Free Speech Clause of the First Amendment" and, further, that "religious worship *qua* speech is not different from any other variety of protected speech as a matter of constitutional principle."[210] But if religious speech was like any other speech, one would not expect the Court to hold that certain speech, such as the Ten Commandments, could not be posted in schoolhouses.[211] Nor would one expect the Court to preclude prayer in public schools.[212]

Widmar takes *Roemer* neutrality to a new level by implying that as long as funding "[did] not confer any imprimatur of state approval on religious sects or practices" and as long as funding was "available to a broad class of nonreligious as well as religious [groups]," then Establishment guarantees would not be violated by direct funding of religious groups.[213] But such a view is hard to reconcile with *Nyquist*'s discussion of "the evils against which [the Establishment] Clause protects," including "financial support ... of the sovereign in religious activity."[214] Perhaps the Court thought its *Widmar* analysis was consistent with the *Lemon* test,[215] although some commentators have criticized *Widmar*'s application of the *Lemon* test.[216] Other commentators

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[210] Widmar v. Vincent, 454 U.S. 263, 284 (1981) (White, J., dissenting).

[211] *See id.* at 284–85 (White, J., dissenting) (citing Stone v. Graham, 449 U.S. 39 (1980)) ("[T]he Court found it sufficiently obvious that the Establishment Clause prohibited a State from posting a copy of the Ten Commandments on the classroom wall that a statute requiring such a posting was summarily struck down. That case necessarily presumed that the State could not ignore the religious content of the written message, nor was it permitted to treat that content as it would, or must, treat, other—secular—messages under the First Amendment's protection of speech.").

[212] *See id.* at 285 (White, J., dissenting) ("Similarly, the Court's decisions prohibiting prayer in the public schools rest on a content-based distinction between varieties of speech: as a speech act, apart from its content, a prayer is indistinguishable from a biology lesson.").

[213] *Id.* at 274.

[214] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973) (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)); Walz v. Tax Comm'n of the City of New York, 397 U.S. 664, 668 (1970)).

[215] *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 63 (1997) ("The Court thought that *Lemon* and *Widmar* were entirely consistent.").

[216] *See* Catherine E. Lilly, Rosenberger v. Rector and Visitors of University of Virginia: *The Supreme Court Revisits the Framers' Intent Behind the Religion Clauses*, 22 J. CONTEMP. L. 485, 510 (1996) ("Most notably, *Widmar*, *Mergens*, *Kiryas Joel*, and the recently decided *Rosenberger*, illustrate the ease with which the Court modifies or discards *Lemon*'s rigid application in lieu of a more convenient, relevant or compelling analysis."). *But see* Jay Alan Sekulow, James Matthew Henderson, Sr., and Kevin E. Broyles, *Religious Freedom and the First Self-Evident Truth: Equality As A Guiding Principle in Interpreting the Religion Clauses*, 4 WM. & MARY BILL RTS. J. 351, 379 (1995) ("Partial application of the test was found in the faithful and sensible application of the effect prong of *Lemon* as recognized by

have suggested that *Widmar* offers a different test that is preferable to the *Lemon* test, which at least acknowledges the difficulty in reconciling these differing approaches.[217]

There is some irony in the mode of analysis offered in *Widmar*, given the overriding concerns expressed in the previous case law.[218] The Establishment Clause precludes state promotion of religious teaching and exercise.[219] The cases involving state funding of private schools often involved express prohibitions on the use of state funding for the inculcation of religion, and the Court wrestled with how much oversight was required to assure that the government did not fund religious indoctrination.[220] In *Tilton* and *Roemer*, for example, buildings constructed with state funds could not be used for religious teaching and prayer, and one of the issues before the Court was what the Constitution required the State to do to make sure that these restrictions were observed.[221] In contrast, *Widmar* permitted the use of state-funded buildings for religious teaching and prayer, while allegedly employing the very test that in previous cases precluded the use of state facilities for such purposes.[222]

In *Mueller v. Allen*, the Court examined a "Minnesota [statute] allow[ing] taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children."[223] The deduction was "limited to actual expenses incurred for the 'tuition, textbooks and transportation' of dependents attending elementary or secondary schools," which could "not exceed $500 per dependent in grades K through six and $700 per dependent in grades seven through twelve."[224] The Court applied the *Lemon*

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the Court in *Widmar v. Vincent*, *Mueller v. Allen*, and *Zobrest v. Catalina Foothills School District*.").

[217] *See* Richard S. Vacca, H.C. Hudgins, Jr., and Louis M. Millhouse, *Accommodation of Religion Without Establishment of Religion*, 115 EDUC. L. REP. 9, 16 (1997) ("[T]he Supreme Court of 1981, in *Widmar*, had begun to revert to a more benevolent form of neutrality, and to move away from the strict application of the neutrality standard as set forth in *Lemon*"); *see also* Benjamin D. Eastburn, *Hold That Line!: The Proper Establishment Clause Analysis for Military Public Prayers*, 22 REGENT U. L. REV. 209, 228 (2010) ("[T]he University of Missouri at Kansas City's principal argument was that allowing religious groups to use its facilities would violate the second prong of *Lemon* (i.e., that it would have the primary effect of advancing religion). The Court, while tacitly admitting the validity of the university's reasoning, nevertheless stated that such an interest was not 'sufficiently compelling to justify content-based discrimination against . . . religious speech.").

[218] Widmar v. Vincent, 454 U.S. 263, 266-67 (1981).

[219] *See* Levitt v. Comm. for Pub. Educ. and Religious Liberty, 413 U.S. 472, 481–82 (1973); *Nyquist*, 413 U.S. at 783.

[220] *See* Tilton v. Richardson, 403 U.S. 672, 687 (1971); Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 762 (1976).

[221] *See Roemer*, 426 U.S. at 762; *Tilton*, 403 U.S. at 687;.

[222] *See* Widmar, 454 U.S. at 277.

[223] Mueller v. Allen, 463 U.S. 388, 390 (1983).

[224] *Id.* at 391.

test, quickly dispensing with the purpose prong analysis by explaining that the state had evidenced "a purpose that is both secular and understandable."[225] The state promotes a secular interest when "ensuring that the state's citizenry is well-educated."[226]

When concluding that the statute did not have the primary effect of promoting religion,[227] the Court explained that "the deduction [was] available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools."[228] The Minnesota program was contrasted with the assistance available in *Nyquist*, which "was provided only to parents of children in *nonpublic* schools."[229] Finally, the Court believed that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject."[230] While the Court recognized that the "financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children," the Court nonetheless reasoned that the "public funds become available only as a result of numerous, private choices of individual parents of school-age children."[231]

In both *Sloan* and *Nyquist*, the Court expressly rejected that the state could immunize its supporting parochial schools by channeling the money through the parents.[232] Further, the Court recognized in both *Sloan* and *Nyquist* that because so much of this funding channeled through the parents was going to parochial schools, the permitted deduction would have a primary effect of "preserv[ing] and support[ing] religion-oriented institutions."[233] But if the programs in *Sloan* and *Nyquist* were impermissible because "the effect of the aid [was] unmistakably to provide desired financial support for nonpublic sectarian

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[225] *Id.* at 394–95 ("Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose.").

[226] *Id.* at 395.

[227] *See id.* at 396 (citing Committee for Public Education & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("We turn therefore to the more difficult but related question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools.").

[228] *Id.* at 397.

[229] *Id.* at 398.

[230] *Id.* at 399.

[231] *Id.*

[232] *See* Meek v. Pittenger, 421 U.S. 349, 359 (1975) (discussing Bd. of Educ. v. Allen, 392 U.S. 236 (1968)); *see supra* note 59 and accompanying text.

[233] Sloan v. Lemon, 413 U.S. 825, 832 (1973); *see also* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973) ("By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools.").

institutions," then it is difficult to see how the program at issue in *Muller* could pass muster in light of the *Lemon* test.[234]

The *Mueller* Court was correct that in *Nyquist* the benefit was afforded to families with children in private school while the Minnesota law afforded a benefit to all families with students in school.[235] But parents of children attending public school might be entitled to deductions that would be quite small[236] compared to the deductions that could be taken by parents of children attending private school.[237] As Justice Marshall explained in his dissent, "[p]arents who send their children to free public schools are simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children."[238] While not all private schools in Minnesota were sectarian, the Court noted that "about 95% of these students [in private schools] attended schools considering themselves to be sectarian."[239]

The number attending sectarian schools in *Mueller* was comparable to if not even greater than the number in *Sloan*, and the *Sloan* Court concluded that the Pennsylvania program was unconstitutional, whether viewed as a subsidy, an incentive to send children to parochial schools, or as a reward for having done so.[240] There seem to be two distinct reasons that the *Mueller* Court was unfazed by the potential constitutional difficulties posed by the sheer number of children attending parochial school: "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools."[241] Further, the greater benefits accorded to parents of children attending sectarian schools "can fairly be regarded as a rough return for the benefits . . . provided to the state and all taxpayers by parents sending their children to parochial school."[242]

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[234] *Nyquist*, 413 U.S. at 783.

[235] *See* Mueller v. Allen, 463 U.S. 388, 394 (1983).

[236] *See id.*, 463 U.S. at 408 (Marshall, J., dissenting) ("That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition.").

[237] *See id.* at 400–01 ("Petitioners . . . contend that most parents of public school children incur no tuition expenses, and that other expenses deductible . . . are negligible in value.").

[238] *Id.* at 409 (Marshall, J., dissenting).

[239] *Id.* at 391.

[240] *See* Sloan v. Lemon, 413 U.S. 825, 832 (1973) (finding Court wrote that over 90% of the students were attending sectarian schools, which is presumably less than the 95% mentioned in *Mueller*).

[241] *Mueller*, 463 U.S. at 401–02 (citing Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring and dissenting)).

[242] *Id.* at 402.

Regrettably, the Court changed the focus from whether the state was violating Establishment guarantees by shifting funds to parochial schools to whether the state was getting a good deal when doing so.[243] Prior case law made clear that the state was prohibited from providing funds that would have as a primary effect the "substantial advancement of the sectarian enterprise,"[244] whether or not the education advanced was "wholesome."[245] The secular benefits involved in reducing the tax burden might justify providing some aid (*e.g.*, secular books that would be appropriate for use in the public schools), but could not justify supporting sectarian education.[246]

The *Mueller* Court suggested that entanglement was not a problem[247] because the only issue was whether a tax deduction was being offered for the purchase of religious books.[248] The determination of which books were secular rather than sectarian could have been made without too much controversy[249] if the only books that had been at issue were those that were used in the public schools.[250] However, Minnesota's program also provided reimbursement for texts used in the parochial schools but not the public schools, which would have made decisions about which books were permissible more difficult, and might have made entanglement questions thornier.[251]

Entanglement questions would be even thornier still due to another Minnesota law that permitted parochial school students to be loaned books that were used in the public schools.[252] This meant that the books purchased, rather than borrowed, would tend to be only those books that would be assigned exclusively

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[243] *See id.* at 401-02 (describing the educational benefits and tax savings).

[244] *Wolman*, 433 U.S. at 250.

[245] Mueller v. Allen, 463 U.S. 388, 401–02 (1983) (citing *Wolman*, 433 U.S. at 262 (Powell, J., concurring and dissenting)).

[246] *See supra* text accompanying note 61.

[247] *Mueller*, 463 U.S. at 403 ("[W]e have no difficulty in concluding that the Minnesota statute does not 'excessively entangle' the State in religion.").

[248] *Id.* ("[S]tate officials must determine whether particular textbooks qualify for a deduction.").

[249] *Id.* ("In *Board of Education v. Allen*, 392 U.S. 236 (1968), for example, the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state officials were required to determine whether particular books were or were not secular . . . .").

[250] *Id.* at 415 (Marshall, J., dissenting) (citing *Allen*, 392 U.S. at 244–45) ("[T]he Court's assumption in *Allen* that the textbooks at issue there might be used only for secular education was based on the fact that those very books had been chosen by the State for use in the public schools.").

[251] *Id.* ("In contrast, the Minnesota statute does not limit the tax deduction to those books which the State has approved for use in public schools. Rather, it permits a deduction for books that are chosen by the parochial schools themselves.").

[252] *Id.* ("Like the law upheld in *Board of Education v. Allen*, Minn. Stat. §§ 123.932 and 123.933 (1982) authorize the State Board of Education to provide textbooks used in public schools to nonpublic school students.").

in the private schools.[253] Therefore, while some of the books purchased for private schools might have been suitable for public schools but not chosen for reasons having nothing to do with sectarian content, other books might well not have been suitable precisely because of their religious content. The very worry animating the *Lemon* Court was that having the state decide which material was sufficiently secular and which material was too sectarian involved impermissible entanglement under the Establishment Clause.[254] But the *Mueller* Court, although using the *Lemon* test, dismissed this concern rather quickly.[255]

In the same year that *Mueller* was decided, the Court also decided *Marsh v. Chambers*.[256] At issue was the constitutionality of the Nebraska Legislature's opening each session with a prayer.[257] The Court began its analysis by noting that beginning legislative sessions with prayer "is deeply embedded in the history and tradition of this country."[258] The Court was not suggesting that history alone immunizes a practice,[259] but that such practices might provide evidence of what the Framers thought permissible.[260]

The Court "saw no real threat to the Establishment Clause arising from [this] practice of prayer," concluding that legislative prayer was no more problematic for Establishment purposes than subsidizing bus transportation to parochial schools, providing grants to religious universities, or exempting religious organizations from paying taxes.[261] The Court reasoned that prayer in this context did not constitute an establishment, but was instead simply an acknowledgment: "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[262] Yet, an analogous claim might be made in other contexts. For example, one might characterize prayer in school as simply affording children an "opportunity of sharing in the spiritual heritage

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[253] *Id.* ("Parents have little reason to purchase textbooks that can be borrowed under this provision.").

[254] *See supra* text accompanying note 26.

[255] *See supra* text accompanying note 247.

[256] Marsh v. Chambers, 463 U.S. 783 (1983).

[257] *Id.* at 784.

[258] *Id.* at 786.

[259] *Id.* at 790 ("Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees").

[260] *Id.* ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent.").

[261] *Id.* at 791.

[262] *Id.* at 792.

of our Nation."[263] But prayer in school is a paradigmatic example of what the Establishment Clause prohibits.[264]

One issue was whether having legislative prayer as a general matter violates constitutional guarantees. Even if not, a separate analysis would seem to be required if the same person consistently delivered the prayer[265] because that would seem to be favoring one religion over others.[266] The Court rejected that having the same clergyman deliver the prayer year after year would advance the views of a particular church, instead characterizing such a decision as indicating legislative approval of the clergyman's "performance and personal qualities."[267] But even if the person was reappointed simply because the Legislature approved of him,[268] that would speak to legislative intent rather than to whether such views were in fact being promoted.[269]

Given the *Marsh* Court's discussion of history, it was unclear whether the Court believed that the practice at issue was permitted because of its historical pedigree[270] or, instead, that the practice did not fall afoul of the existing standard (even bracketing that it had long been practiced).[271] But unless the Court was grandfathering in the practice,[272] one might have difficulty in seeing how this

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[263] Engel v. Vitale, 370 U.S. 421, 445 (1962) (Stewart, J., dissenting).

[264] *See* Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 205 (1963) (striking down practice of Bible reading and recitation of the Lord's Prayer as a violation of Establishment Clause guarantees).

[265] *See* Marsh v. Chambers, 463 U.S. 793 (1983) ("[A] clergyman of only one denomination—Presbyterian—has been selected for 16 years.").

[266] *Id.* ("[T]he prayers are in the Judeo-Christian tradition.").

[267] *Id.*

[268] *But see id.* at 823–24 (Stevens, J., dissenting) ("Perhaps [the Court] . . . would be unable to explain away the clearly sectarian content of some of the prayers given by Nebraska's chaplain. Or perhaps the Court is unwilling to acknowledge that the tenure of the chaplain must inevitably be conditioned on the acceptability of that content to the silent majority.").

[269] *Cf. id.* at 793–94 (majority opinion) ("Absent proof that the chaplain's reappointment stemmed from an impermissible motive, we conclude that his long tenure does not in itself conflict with the Establishment Clause.").

[270] *Id.* at 814 (Brennan, J., dissenting) ("This is a case, however, in which—absent the Court's invocation of history—there would be no question that the practice at issue was unconstitutional.").

[271] *See id.* at 791 (suggesting that Establishment Clause guarantees had not been violated by the practice at issue).

[272] *Id.* at 796 (Brennan, J., dissenting) ("[T]he Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."). *But see* Town of Greece, N.Y. v. Galloway, 572 U.S. 565, 576 (2014) ("Yet *Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation.").

practice could be viewed as permissible under the *Lemon* test.[273] As Justice Brennan noted in dissent, "if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional."[274]

Certain activities like prayer are paradigmatically religious.[275] So, too, certain symbols seem paradigmatically religious.[276] At issue in *Lynch v. Donnelly* was whether a municipality violated Establishment Clause guarantees by including a crèche within its annual Christmas display.[277] After announcing an "unwillingness to be confined to any single test or criterion in this sensitive area,"[278] the Court applied the *Lemon* test to determine the display's constitutionality.[279]

The Court made clear that the purpose prong of the *Lemon* test is rather forgiving, because it is violated only when there is "no question that the statute or activity was motivated wholly by religious considerations."[280] Such a test is even more forgiving when one considers what might *not* count as a religious consideration. For example, when considering the display at issue, the Court suggested: "The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes."[281] But if celebration of a religious holiday counts as a secular purpose,[282] it may be difficult to find cases in which the purpose prong will invalidate a practice.[283] That said, while the Court will usually defer to a State that claims its purpose its secular, the Court insists that the statement "be sincere and not a sham."[284] If

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[273] *Cf.* Lynch v. Donnelly, 465 U.S. 668, 679 (1984) ("[T]he Court did not even apply the *Lemon* "test" . . . in *Marsh*.").

[274] *But see* Marsh v. Chambers, 463 U.S. 793, 800–01 (1983) (Brennan, J., dissenting).

[275] *See* John E. Taylor, *Why Student Religious Speech Is Speech*, 110 W. VA. L. REV. 223, 269 n.176 (2007) (discussing "core religious activities like worship and prayer").

[276] *See* Frank S. Ravitch, *Religious Objects As Legal Subjects*, 40 WAKE FOREST L. REV. 1011, 1023 (2005) (discussing "objects that represent core religious principles (such as a crèche)").

[277] *Lynch*, 465 U.S. at 670–71.

[278] *Id.* at 679.

[279] *See id.* at 685.

[280] *Id.* at 680.

[281] *Id.* at 681.

[282] *Cf. id.* at 698 (Brennan, J., dissenting) ("[T]he City's inclusion of the crèche in its Christmas display simply does not reflect a 'clearly secular purpose.'") (citing Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973)). A separate question is whether the Holiday should be considered religious or secular. *See* Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 579 (1989) ("As observed in this Nation, Christmas has a secular, as well as a religious, dimension.").

[283] In McCreary Cty., Ky v. Am. Civil Liberties Union of Ky., 545 U.S. 844 (2005), the Court found that postings of the Ten Commandments in county courthouses violated the purpose prong.

[284] Edwards v. Aguillard, 482 U.S. 578, 586–87 (1987).

the Court cannot infer a secular purpose and does not believe that the state has provided one in good faith, the Court may well find a violation of the purpose prong.[285]

When deciding whether the challenged crèche violated constitutional guarantees, the *Lynch* Court characterized the relevant question as whether what was at issue here constituted more of an endorsement than other activities or practices upheld in the past:

But to conclude that the primary effect of including the crèche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored schools, federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education, noncategorical grants to church-sponsored colleges and universities, and the tax exemptions for church properties.[286]

The Court concluded that including a crèche was no more of an endorsement than some of the practices that had already passed muster and ultimately upheld inclusion of the crèche.[287] Yet, this is a somewhat surprising approach for at least two reasons. When the Court affirmed the constitutionality of loaning secular textbooks to parochial students, it denied that it was thereby upholding a practice promoting religion.[288] The same was true when the Court upheld reimbursements of bus fares for those attending parochial schools,[289] federal

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[285] *See id.* at 596; *see also* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) ("[T]he First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion."); Stone v. Graham, 449 U.S. 39, 41 (1980) ("Kentucky's statute requiring the posting of the Ten Commandments in public schoolrooms had no secular legislative purpose, and is therefore unconstitutional.").

[286] Lynch v. Donnelly, 465 U.S. 668, 681–82 (1984) (citations omitted).

[287] *Id.* at 685 ("We are satisfied that the City has a secular purpose for including the crèche, that the City has not impermissibly advanced religion, and that including the crèche does not create excessive entanglement between religion and government.").

[288] Bd. of Ed. v. Allen, 392 U.S. 236, 248 (1968) ("[W]e cannot agree with appellants . . . that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.").

[289] *See* Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 16 (1947) ("No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."); *see also id.* at 17 ("Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.").

grants to religious colleges and universities,[290] and tax exemptions.[291] It is both disappointing and alarming that practices previously described as not promoting religion are suddenly promoting religion to such an extent that they are the equivalent of exhibiting a paradigmatic religious symbol like a crèche.[292]

There is another difficulty posed by the comparative analysis seemingly endorsed by the *Lynch* Court, in that some of the practices struck down as violating Establishment Clause guarantees seem to promote religion *less* than the inclusion of a crèche would. For example, permitting the State to loan maps, charts, and laboratory equipment to parochial schools would promote religion less than would inclusion of a crèche in a public display.[293] So, too, reimbursing parochial schools for providing secular, neutral, and non-ideological auxiliary services would seem less of an endorsement than including a crèche in a public display, and the Court nonetheless found these practices to violate Establishment Clause guarantees.[294]

The Court's confusing approach to the proper analysis of Establishment guarantees was also employed in *Witters v. Washington Department of Services for the Blind*, where the Court addressed whether the Constitution precluded Washington's rehabilitation assistance program from helping a blind person to study at a religious institution to become a pastor or missionary.[295] The court applied the *Lemon* test to uphold the constitutionality of the program.[296] In doing

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[290] *See* Roemer v. Bd. of Pub. Works of Md., 426 U.S. 736, 760 (1976) ("[T]he colleges, and the Council, will exercise their delegated control over use of the funds in compliance with the statutory, and therefore the constitutional, mandate. It is to be expected that they will give a wide berth to 'specifically religious activity,' and thus minimize constitutional questions."); Tilton v. Richardson, 403 U.S. 672, 679–80 (1971) ("The Act itself . . . authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship. These restrictions have been enforced in the Act's actual administration.").

[291] *See* Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 676 (1970) ("For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Such treatment is an 'aid' to churches no more and no less in principle than the real estate tax exemption granted by States.").

[292] *Cf.* Ravitch, *supra* note 276, at 1025 (discussing "a pure religious symbol like a crèche").

[293] *See supra* notes 65–70 and accompanying text (discussing *Meek*'s analysis of lending such materials).

[294] Meek v. Pittenger, 421 U.S. 349, 367–370, 372 (1975) (citing Lemon v. Kurtzman, 403 U.S. 602, 619 (1971)) (discussing analysis of auxiliary services.)

[295] Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 482 (1986).

[296] *Id.* at 485 ("We are guided . . . by the three-part test set out by this Court in *Lemon*"); *see also id.* at 489 ("We therefore reject the claim that, on the record presented, extension of aid under Washington's vocational rehabilitation program to finance petitioner's training at a Christian college to become a pastor, missionary, or youth director would advance religion in a manner inconsistent with the Establishment Clause of the First Amendment.").

so, the Court noted the secular purpose behind the legislation at issue.[297] With respect to the primary effect, the Court believed that only a small fraction of the awarded funds would go to religious institutions.[298] The court stated that "no more than a minuscule amount of the aid awarded under the program is likely to flow to religious education."[299] According to one understanding of the Court's view, the state's funding pastoral studies in this one case was compatible with Establishment Clause guarantees as a kind of de minimis exception.[300]

Yet, the *Witters* Court also provided a rationale that did not rely on the number of individuals using the aid for sectarian training. The Court reasoned that merely because some state aid ends up in the hands of a sectarian institution does not mean that the Establishment Clause has been violated: "For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary."[301] Of course, this example was not entirely felicitous. When an individual is paid a salary, she is free to spend it as she wishes. But the state funds were being dispensed with certain conditions attached—they had to be used for education and the question at hand was whether they could only be used for secular education. The Court in *Sloan* and *Nyquist* had rejected that

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[297] *Id.* at 485–86 (noting that the "program was designed to promote the well-being of the visually handicapped through the provision of vocational rehabilitation services").

[298] *Id.* at 488 ("Further, and importantly, nothing in the record indicates that, if petitioner succeeds, any significant portion of the aid expended under the Washington program as a whole will end up flowing to religious education.").

[299] *Id.* at 486.

[300] *See* Kimberly M. DeShano, *Educational Vouchers and the Religion Clauses Under Agostini: Resurrection, Insurrection and A New Direction*, 49 CASE W. RES. L. REV. 747, 754 (1999) ("As no one else had used the blind vocational scholarship to attend a religious institution, this program did not impermissibly advance religion."); *see also* Mark Strasser, *Repudiating Everson: On Buses, Books, and Teaching Articles of Faith*, 78 MISS. L.J. 567, 609 n.244 (2009) ("The *Witters* Court had noted that grants at issue usually involved secular rather than sectarian training . . . implying that the use of grants for sectarian purposes might be upheld as a de minimis exception.").

[301] Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481, 486–87 (1986); *see, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 639 (2002) (upholding the use of vouchers to attend sectarian schools, at least in part because those public monies had been channeled through the parents); *see id.* at 652 ("[W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.").

funneling funds through parents would immunize choices about how state funds were used.[302] The *Witters* Court seemed to take a different view.[303]

Some commentators read *Witters* as an abandonment of at least one understanding of the *Lemon* test.[304] However, if the reason that the aid was permissible was simply that Witters was the only person who had ever used the aid in this way,[305] the Court might have reasoned that the *Lemon* test primary effect prong was not violated because the case presented a unique set of circumstances.[306]

In *Bowen v. Kendrick*,[307] the Court followed the example (possibly) set in *Witters* of offering a rather permissive reading of the *Lemon* test.[308] At issue

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[302] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 (1973); Sloan v. Lemon, 413 U.S. 825, 832 (1973).

[303] *See Witters*, 474 U.S. at 488 ("Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."). *Cf.* Marc Falconetti, *Constitutional Law: Does the Establishment Clause Prohibit Sending Public Employees into Religious Schools?*, 6 U. FL. J.L. & PUB. POL'Y 277, 280 (1994) ("In *Witters*, the Court concluded that a general scholarship program does not violate the Establishment Clause when students use the funds to attend religious schools.").

[304] *See* Suzanne H. Bauknight, *The Search for Constitutional School Choice*, 27 S.C. J.L. & EDUC. 525, 533 (1998) (suggesting that the *Witters* Court used "a watered-down Lemon analysis"); Andrew A. Beerworth, *Religion in the Marketplace: Establishments, Pluralisms, and the Doctrinal Eclipse of Free Exercise*, 26 T. JEFFERSON L. REV. 333, 361 (2004) ("Using *Mueller* and *Witters* as springboards, the Rehnquist Court mounted a full-scale attack against the separationist applications of *Lemon* in the educational aid context."); Christian Chad Warpula, *The Demise of Demarcation: Agostini v. Felton Unlocks the Parochial School Gate to State-Sponsored Educational Aid*, 33 WAKE FOREST L. REV. 465, 486 (1998) (discussing "*Witters*'s retreat from the strict separationist application of the *Lemon* test."); Ellen M. Wasilausky, *See Jane Read the Bible: Does the Establishment Clause Allow School Choice Programs to Include Sectarian Schools After Agostini v. Felton?*, 56 WASH. & LEE L. REV. 721, 744 (1999) ("[T]he Court built on the reasoning of both *Witters* and *Zobrest* to alter substantially the application of the *Lemon* test.").

[305] *Witters*, 474 U.S. at 488 ("No evidence has been presented indicating that any other person has ever sought to finance religious education or activity pursuant to the State's program.").

[306] *But see id.* at 491 n.3 (Powell, J., concurring) ("Contrary to the Court's suggestion, . . . this conclusion does not depend on the fact that petitioner appears to be the only handicapped student who has sought to use his assistance to pursue religious training.").

[307] Bowen v. Kendrick, 487 U.S. 589, 590–91 (1988).

[308] Derrick R. Freijomil, *Has the Court Soured on Lemon?: A Look into the Future of Establishment Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 141, 164 n.83 (1994) ("[W]hat the *Bowen* Court appeared to do was simply manipulate the Lemon framework to accommodate AFLA — i.e., the Court employed a 'loose' application of Lemon."); P. Michelle Grigsby, *The Constitutionality of Direct Government Aid to Religious Organizations: Bowen v. Kendrick, 108 S. Ct. 2562 (1988)*, 57 U. CIN. L. REV. 1501, 1534 (1989) (*Bowen* convolutes the *Lemon* Test.); Richard L. Marasse, *Bowen v. Kendrick: A New*

was the Adolescent Family Life Act, which provided funding for services aimed at reducing adolescent sexuality and pregnancy.[309] A number of services were provided such as pregnancy testing, adoption referral, counseling, and "educational services relating to family life and problems associated with adolescent premarital sexual relations."[310] The Act "expressly require[d] grant applicants to describe how they [would] involve religious organizations in the provision of services."[311] Not only did the Act make "it possible for religiously affiliated grantees to teach adolescents on issues that can be considered 'fundamental elements of religious doctrine,'"[312] but it did so "without imposing any restriction whatsoever against the teaching of 'religion qua religion' or the inculcation of religious beliefs in federally funded programs."[313]

Applying the *Lemon* test,[314] the Court found that there was a secular purpose.[315] When examining whether the primary effect would be to promote religion, the Court noted that the grantees would include a host of groups, some religious and some not.[316] The Court was not worried that the Act "authorizes 'teaching' by religious grant recipients on 'matters [that] are fundamental elements of religious doctrine,' such as the harm of premarital sex and the reasons for choosing adoption over abortion,"[317] reasoning that "it is not surprising that the Government's secular concerns would either coincide or conflict with those of religious institutions."[318] But this is to misconstrue the concern, which is not whether the religious group agrees with Congress that

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Era of Doctrinal Funding?, 9 PACE L. REV. 341, 371 (1989) ("It is difficult to ascertain what remains of the *Lemon* Test as a whole after *Bowen v. Kendrick*."); Elisabeth Divine Reid, *Thou Shalt Honor the Establishment Clause: The Constitutionality of the Faith-Based Initiative*, 28 HAMLINE J. PUB. L. & POL'Y 431, 448 (2007) ("In *Bowen*, the Court took a dramatic turn by holding that, consistent with Lemon, faith-based programs could receive government financial assistance directly."); Michael Stokes Paulsen, *Lemon Is Dead*, 43 CASE W. RES. L. REV. 795, 819 (1993) ("Going back to *Bowen v. Kendrick* in 1988, the *Lemon* test had been sapped of much of its tang.").

[309] *Bowen*, 487 U.S. at 593.

[310] *Id.* at 594.

[311] *Id.* at 598.

[312] *Id.*

[313] *Id.* at 599.

[314] *Id.* at 602 ("[W]e assess the constitutionality of an enactment by reference to the three factors first articulated in Lemon v. Kurtzman, 403 U.S. 602 (1971)").

[315] *Id.* (discussing "the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood").

[316] *See id.* at 607.

[317] *Id.* at 612.

[318] *Id.* at 612–13.

abortion should not be promoted,[319] but instead that the group agreeing with that view will promote a religious message when offering the counseling.[320]

The Court's decision to uphold public funding of religious colleges and universities to construct buildings that would be used for secular purposes[321] does not support the constitutionality of providing state funding for religious groups to impart their message,[322] especially without any oversight to assure that the message would be secular rather than sectarian and without an express prohibition on indoctrination of sectarian views.[323] The amount of oversight necessary to make sure that religious views would not be imparted might itself have violated the entanglement prong,[324] therefore the Court's requirement of only relatively lax oversight allowed the program was able to survive constitutional challenge.[325] In previous cases in which the *Lemon* test was applied, the Court made clear that "the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination."[326] But in *Bowen* the Court reversed course, apparently unworried that tax dollars were being used to permit groups to teach their religious beliefs.[327]

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[319] *Id.* at 597 ("[T]he AFLA states that 'grants may be made only to projects or programs which do not advocate, promote, or encourage abortion.'").

[320] *See id.* at 635–36 (Blackmun, J., dissenting) ("The majority acknowledges the constitutional proscription on government-sponsored religious indoctrination but, on the basis of little more than an indefensible assumption that AFLA recipients are not pervasively sectarian and consequently are presumed likely to comply with statutory and constitutional mandates, dismisses as insubstantial the risk that indoctrination will enter counseling . . .").

[321] *See id.* at 608.

[322] *See id.* at 641–42 (Blackmun, J., dissenting) ("For some religious organizations, the answer to a teenager's question 'Why shouldn't I have an abortion?' or 'Why shouldn't I use barrier contraceptives?' will undoubtedly be different from an answer based solely on secular considerations. Public funds may not be used to endorse the religious message.).

[323] *Id.* at 614 ("A final argument that has been advanced for striking down the AFLA on 'effects' grounds is the fact that the statute lacks an express provision preventing the use of federal funds for religious purposes.").

[324] *See id.* at 615 (discussing the "'Catch–22' argument: the very supervision of the aid to assure that it does not further religion renders the statute invalid").

[325] *Id.* at 616 ("There is accordingly no reason to fear that the less intensive monitoring involved here will cause the Government to intrude unduly in the day-to-day operation of the religiously affiliated AFLA grantees."). *But see* Alexandra Petrich, *Bowen v. Kendrick: Retreat from Prophylaxis in Church-State Relationships*, 16 HASTINGS CONST. L.Q. 513, 536 (1989) ("The Court thus avoided examining the issue of the risk of impermissible advancement of religion inherent in the AFLA, with its complete lack of statutory restrictions on the use of federal funds to teach religion.").

[326] Levitt v. Comm. for Pub. Educ. and Religious Liberty, 413 U.S. 472, 480 (1973) (citing *Lemon*, 403 U.S. at 617).

[327] Bowen v. Kendrick, 487 U.S. 589, 589-90 (1988).

In some cases, the Court offered guidance to help understand how the Lemon prongs should be applied. Consider, for example, *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, where the Court examined two displays in light of the *Lemon* test.[328] One display involved a crèche on the Grand Staircase of the County Courthouse,[329] while the other involved a forty-five-foot Christmas tree combined with a sign "Salute to Liberty"[330] and a menorah.[331]

In clarifying the test for determining whether a particular government practice violates either of the first two prongs, the Court suggested that the test was whether "the challenged governmental practice either has the purpose or effect of 'endorsing' religion."[332] The Court struck down the display of the crèche,[333] but upheld the display of the Christmas tree, menorah, and sign.[334]

The Court reasoned that the determination of whether a particular practice involves an endorsement of religion depends upon whether a reasonable, informed observer would believe that a particular display had the effect of endorsing religion.[335] Some commentators have suggested that the individual

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[328] *See* Cty. of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989).

[329] *Id.* at 578 ("The first is a crèche placed on the Grand Staircase of the Allegheny County Courthouse.").

[330] *Id.* at 582 ("A few days later, the city placed at the foot of the tree a sign bearing the mayor's name and entitled "Salute to Liberty.").

[331] *Id.* at 587 ("On December 22 of the 1986 holiday season, the city placed at the Grant Street entrance to the City–County Building an 18–foot Chanukah menorah of an abstract tree-and-branch design.").

[332] *Id.* at 592.

[333] *Id.* at 601–02 ("Here, Allegheny County has transgressed this line. It has chosen to celebrate Christmas in a way that has the effect of endorsing a patently Christian message: Glory to God for the birth of Jesus Christ. Under *Lynch*, and the rest of our cases, nothing more is required to demonstrate a violation of the Establishment Clause. The display of the crèche in this context, therefore, must be permanently enjoined.").

[334] *See id.* at 620 (citing *Grand Rapids*, 473 U.S. at 390) ("[I]t is not 'sufficiently likely' that residents of Pittsburgh will perceive the combined display of the tree, the sign, and the menorah as an 'endorsement' or 'disapproval . . . of their individual religious choices.'").

[335] *See id.* at 630 (O'Connor, J., concurring in part and concurring in the judgment) (explaining that "a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion"); *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 773 (1995) (O' Connor, J., concurring in part and concurring in the judgment) ("[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer."); *see also* Kelsey Curtis, *The Partiality of Neutrality*, 41 Harv. J.L. & Pub. Pol'y 935, 970 (2018) ("Under that modified test, if a reasonable observer could perceive a government action as an endorsement of anything religious, as opposed to an endorsement of the secular, that government action is unconstitutional."); Abner S. Greene, *"Not in My Name" Claims of Constitutional Right*, 98 B.U.L. Rev. 1475, 1514 (2018) ("Over the course of several opinions discussing the endorsement test, O'Connor clarified

making the judgment should be a reasonable non-adherent of the religion in question,[336] although even such a test might be indeterminate in that some non-adherents might believe consider a practice an endorsement whereas others might not.[337] Justice Stevens suggested that "[i]f a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display."[338] But prohibiting any display that a reasonable non-adherent might believe an endorsement would likely be overly restrictive.[339] That said, ignoring the view of the non-adherent would likely permit too many displays and practices to pass constitutional muster.[340]

Ironically, the endorsement test used in *Allegheny* itself did not seem to reflect the view of either the reasonable adherent or the reasonable non-adherent. The Court announced that the reasonable person would say that "[t]he menorah . . . is a religious symbol,"[341] but that the "Christmas tree . . . is not itself a religious symbol"[342] and instead is "the preeminent secular symbol of the Christmas

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that we should apply the test from the point of view of a reasonable observer who is aware of the history and context of the symbol in question.").

[336] *See Pinette*, 515 U.S. at 799 (Stevens, J., dissenting) ("It is especially important to take account of the perspective of a reasonable observer who may not share the particular religious belief it expresses."); *see also Leading Cases*, 103 HARV. L. REV. 137, 234 (1989) ("If the endorsement test is indeed designed to prevent government from 'sending a clear message to nonadherents that they are outsiders or less than full members of the political community,' then the controlling standard should be the perceptions of a reasonable nonadherent.").

[337] Mark Strasser, *The Protection and Alienation of Religious Minorities: On the Evolution of the Endorsement Test*, 2008 MICH. ST. L. REV. 667, 713 (2008) ("[S]uch a standard would be indeterminate, because one reasonable nonadherent might believe a display to be an endorsement while another might not.").

[338] *Pinette*, 515 U.S. at 799 (Stevens, J., dissenting).

[339] *See* Cty. of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 670 (1989) (Kennedy, J., dissenting) (suggesting that if "the touchstone of an Establishment Clause violation is whether nonadherents would be made to feel like 'outsiders' by government recognition or accommodation of religion, [then few] of our traditional practices recognizing the part religion plays in our society can withstand scrutiny under a faithful application of this formula."); *see also* Paula Abrams, *The Reasonable Believer: Faith, Formalism, and Endorsement of Religion*, 14 LEWIS & CLARK L. REV. 1537, 1543 (2010) ("Justice Kennedy . . . rejects the endorsement test in large part because evaluating government action from the perspective of the reasonable nonadherent would effectively prohibit the government from accommodating religion.").

[340] *See* Benjamin I. Sachs, *Whose Reasonableness Counts?*, 107 YALE L.J. 1523, 1527 (1998) ("By skewing the perceptions of the reasonable observer toward those of the religious majority or adherent, and thereby rendering the endorsement test insufficiently sensitive to displays of majority religious symbols, the O'Connor formulation subverts the goal of the test—forbidding government from sending messages to nonadherents that they are outsiders to the political community.").

[341] *Allegheny*, 492 U.S. at 613.

[342] *Id.* at 616.

holiday season."[343] But some reasonable adherents and non-adherents might disagree with that assessment. Justice Brennan in his concurrence and dissent suggested that both the Christmas tree and the menorah were religious.[344] Further, non-adherents of Christianity might well view a Christmas tree as religious, announcement that it is secular notwithstanding.[345] At the very least, the Endorsement test's clarification of the *Lemon* test may be less helpful than might have been hoped.

The Court made Establishment Clause analysis even murkier in *Board of Education of Westside Community Schools v. Mergens*.[346] At issue was the constitutionality of a federal law requiring public schools under certain conditions to permit religious schools to meet during noninstructional time.[347] Plaintiff Bridget Mergens wanted to form a club that that would "permit the students to read and discuss the Bible, to have fellowship, and to pray together."[348] The principal denied the request, fearing that authorizing the club would violate the Establishment Clause.[349] Mergens sued, claiming that the school's denial violated federal law.[350]

The Court noted its application of the *Lemon* test in *Widmar*, where the Court held that affording access to religious groups "would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion."[351] But *Widmar* involved college students, who were "less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."[352]

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[343] *Id.* at 617.

[344] *Id.* at 641 (Brennan, J., concurring in part, dissenting in part) ("Even though the tree alone may be deemed predominantly secular, it can hardly be so characterized when placed next to such a forthrightly religious symbol.").

[345] *See* Mark Strasser, *The Endorsement Test is Alive and Well: A Cause for Celebration and Sorrow*, 39 PEPP. L. REV. 1273, 1284 (2013) ("[F]or some non-Christians, the Christmas tree continues to carry religious connotations."); *cf.* Ravitch, *supra* note 276, at 1081–82:

> If Christmas were a "public" holiday and a Christmas tree were a completely secularized object, it would be more likely that those who practice other faiths would be willing to have one. Yet a devout Jew, Muslim, Hindu, or other non-Christian would be unlikely to have a Christmas tree since Christmas is neither a Jewish, Muslim, Hindu, or Buddhist holiday, nor is it considered a "public" holiday by many Atheists. The irony that it is called a Christmas (or Christ's Mass) tree rather than a winter tree or holiday tree, seemed lost on the Court in *Allegheny*.

[346] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

[347] *Id.* at 231.

[348] *Id.* at 232.

[349] *See id.* at 232–33 ("The school officials explained that . . . a religious club at the school would violate the Establishment Clause.").

[350] *Id.* at 233.

[351] *Id.* at 235 (citing Widmar v. Vincent, 454 U.S. 263, 271–274 (1981)).

[352] *Id.* (citing *Widmar*, 454 U.S. at 274 n.14).

The *Mergens* Court began its analysis by interpreting "noncurriculum related student group."[353] Because that expression was interpreted broadly to include chess clubs, stamp collecting clubs, [354] political clubs, [355] and scuba diving clubs,[356] the school was found to have permitted the kinds of clubs that triggered the obligation to have religious clubs as well.[357] The Court then set about examining whether the federal statute violated Establishment guarantees.[358] The Court reasoned that permitting religious groups to use the facilities would evidence neutrality, and that "if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[359] Inclusion of religious speech along with the other permitted speech would not amount to endorsement—"secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis."[360] Further, the school could expressly deny endorsement of the club's religious views, thereby preventing individuals from making the wrong inferences.[361] Basically, *Mergens* extended *Widmar* to include secondary schools,[362] although

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[353] *Id.* at 239 (quoting from the Equal Access Act, § 802(b), 20 U.S.C. § 4071(b) (2018)).

[354] *Id.* at 240.

[355] *See id.* at 238 ("[A] religious or political club is itself likely to be a noncurriculum-related student group.").

[356] *Id.* at 265 (Marshall, J., concurring in the judgment).

[357] *Id.* at 247 (O'Connor, J., majority opinion).

[358] *See id.* at 247–48.

[359] *Id.* at 248.

[360] *Id.* at 250; *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (requiring school facilities to be open for after-school use by church groups if they were open for use by other kinds of groups).

[361] *See* Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 251 (1990) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.").

[362] *See* Ryan W. Decker, Note, *Removing A Brick from the Jeffersonian Wall of Separationism: A Per Se Rule for Private Religious Speech in Public Fora*, 41 VILL. L. REV. 559, 573 (1996) ("Extending the logic of *Widmar* and its application of *Lemon*, the *Mergens* Court reaffirmed its holding that denial of equal access to limited public fora is unconstitutional."); *see also* Amy D. Smith, Case Note, *Constitutional Law - Freedom of Religion and Establishment Clause - School Board's Refusal to Allow Religious Group to Meet in Public School Constitutes Unlawful Viewpoint Discrimination Under First Amendment*, 32 CUMB. L. REV. 463, 471 (200) ("The application of the Equal Access Act to Westside's programs did not violate the Establishment Clause because the Act met the three elements laid out in *Lemon v. Kurtzman* and discussed in *Widmar v. Vincent*."). *But see* Scott J. Wilkov, *The Writing Is on the Wall: Equal Access Erodes the Establishment Clause*, 34 ARIZ. L. REV. 375, 384 (1992) ("Under a proper analysis of the two essential factors set forth in *Widmar*, the application of the Equal Access Act to Westside High School would be unlikely to survive the *Lemon* effects test.").

the free speech analysis it applied to speech occurring during the school day would seem to permit religious exercise, perhaps with an express waiver denying endorsement.[363]

In *Zobrest v. Catalina Foothills School District*, the Court applied its *Witters* analysis to the secondary schools context.[364] At issue was whether the school district violated establishment guarantees by providing a sign language interpreter for a student attending a Roman Catholic high school.[365] Because the "service at issue in this case is part of a general government program that distributes benefits neutrally to any child qualifying as 'disabled' under the IDEA,"[366] it did not matter that the "petitioners seek to have a public employee physically present in a sectarian school to assist in James' religious education."[367] This meant that the Court was upholding the use of public funds to support "the school's inculcation of religion."[368]

In *Agostini v. Felton*,[369] the Court provided its own interpretation of *Zobrest*. The *Agostini* Court reaffirmed that "government inculcation of religious beliefs has the impermissible effect of advancing religion."[370] However, the *Agostini* Court's willingness to say that the Constitution precludes the government from inculcating religious beliefs is predicated on a particular understanding of who will count as having inculcated a message: "Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place."[371] The *Agostini* Court declined to attribute inculcation to an interpreter, who would be presumed to "dutifully discharge her responsibilities as a full time public employee and comply with the ethical guidelines of her profession by accurately translating what was said."[372] But the *Agostini* analysis has surprising implications—a teacher should not be understood to be indoctrinating as long as she *accurately* reads what is contained in a book, even if that book is a religious text. In any event, the Court was less worried about state support resulting in religious teaching, having clarified that there was a new understanding of what counts as prohibited indoctrination because not "all government aid that directly assists the educational function of religious schools is invalid."[373]

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[363] *See supra* note 361 and accompanying text.

[364] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9–10 (1993) (suggesting that the *Witters* analysis should be applied in the secondary school context).

[365] *Id.* at 3.

[366] *Id.* at 10.

[367] *Id.* at 11.

[368] *See id.* at 19 (Blackmun, J., dissenting).

[369] 521 U.S. 203 (1997).

[370] *Id.* at 223.

[371] *Id.*

[372] *Id.* at 224 (citing Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 12 (1993)).

[373] *Id.* at 225.

In addition to providing a gloss on when inculcation could be attributed to an employee (and thus the State), the *Agostini* Court expressly modified the *Lemon* factors at least in the school funding context by including entanglement within the effects prong.[374] *Agostini* represents a change in Establishment Clause jurisprudence. Under the *Lemon* test, programs might be struck down because they did not include adequate safeguards to make sure that teachers and others did not inadvertently teach religious doctrine.[375] Under *Agostini*, programs could be upheld despite the use of federal funds to facilitate religious teaching.[376]

This revised understanding of what counts as prohibited government inculcation of religion helps explain the plurality view in *Mitchell v. Helms*.[377] At issue was a federal program which distributed funds to state and local agencies that lent educational materials and equipment to public and private (including pervasively sectarian) schools,[378] because the materials and equipment might be used to facilitate religious teaching.[379] The *Mitchell* plurality noted the change in the application of the *Lemon* test to cases involving school funding:

Whereas in *Lemon* we had considered whether a statute (1) has a secular purpose, (2) has a primary effect of advancing or inhibiting religion, or (3) creates an excessive entanglement between government and religion, in *Agostini* we modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors.[380]

The *Mitchell* plurality reasoned that "the question whether governmental aid to religious schools results in governmental indoctrination is ultimately a question whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action."[381] Rather than let courts decide in a particular case what might reasonably be attributed to the government, the plurality announced what would *not* reasonably be attributed to governmental action: "In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion."[382] In order to attribute indoctrination to the government, the government, according to the Court, must

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[374] *See id.* at 233 ("[I]t is simplest to recognize why entanglement is significant and treat it . . . as an aspect of the inquiry into a statute's effect.").

[375] *See supra* note 74 and accompanying text (discussing the need for adequate safeguards).

[376] *See supra* note 373 and accompanying text.

[377] Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion).

[378] *Id.* at 801.

[379] *See id.* at 804 (discussing prior district court decision suggesting that the Act violated Establishment Clause guarantees because it promoted religious teaching).

[380] *Id.* at 807 (citing Agostini v. Felton, 521 U.S. 203, 222–23 (1997)).

[381] *Id.* at 809.

[382] *Id.*

have in mind particular favorites—"If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government."[383] But this is not what the Court had previously said. On the contrary, the Court previously held that the State's provision of services to a variety of groups might nonetheless involve indoctrination attributed to the government unless adequate safeguards were employed to prevent the teaching of religious doctrine.[384]

The *Mitchell* plurality offered a radically different understanding of what the Establishment seeks to prevent. Suppose the government expressly prohibits the use of funds for religious indoctrination (and so of course such indoctrination would not be at the behest of the government), but employs no safeguards to assure that the prohibited action does not occur. In that event, the *Mitchell* plurality would say that the foreseeable indoctrination resulting from the lack of oversight is constitutionally permissible. However, when discussing neutrality, the *Roemer* Court explicitly stated that neutrality did not permit the State to pay for religious indoctrination "even though it makes aid available to secular and religious institutions alike."[385]

The *Mitchell* plurality acknowledged that "the Establishment Clause requires aid to religious schools not be impermissibly religious in nature."[386] To help determine what is permissible, the plurality explained, "[w]here the aid would be suitable for use in a public school, it is also suitable for use in any private school."[387] The issue was not whether particular items might be used for religious teaching, but only whether the item itself was religious.[388]

While the analysis might be different if the government aid were solely going to religious schools, the *Mitchell* plurality suggests that government programs helping various kinds of schools are likely to pass muster under the Establishment Clause.[389] "If a program offers permissible aid to the religious (including the pervasively sectarian), the areligious, and the irreligious, it is a mystery which view of religion the government has established, and thus a mystery what the constitutional violation would be."[390] Based on this rationale, the *Mitchell* plurality would presumably uphold federal funds given to

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[383] *Id.*

[384] *See supra* note 74 and accompanying text.

[385] *See* Roemer v. Bd. of Pub. Works, 426 U.S. 736, 747 (1976).

[386] Mitchell v. Helms, 530 U.S. 793, 820 (2000).

[387] *Id.* at 822.

[388] *See id.* at 824.

[389] *Cf. id.* at 827 (noting that the "pervasively sectarian recipient has not received any special favor").

[390] *Id.*

sectarian schools to buy Bibles, as long as this neutral aid (money) was also given to nonreligious schools.[391]

In her concurrence, Justice O'Connor summarized the plurality position as "stat[ing] that government aid to religious schools does not have the effect of advancing religion so long as the aid is offered on a neutral basis and the aid is secular in content."[392] While Justice O'Connor believed that the *Mitchell* plurality had mischaracterized the existing jurisprudence, she ultimately concluded that the aid was permissible because only a de minimis amount had been used to promote religious teaching.[393]

The inherent confusion in the Court's approach to the Establishment Clause is particularly apparent through the analysis of two cases *McCreary County v. American Civil Liberties Union of Kentucky* and *Van Orden v. Perry*, both argued and decided on the same day.[394] At issue in *McCreary County* was the practice of two counties who had "posted a version of the Ten Commandments on the walls of their courthouses."[395] The Court explained that governments acting without a secular purpose violates central Establishment Clause values: "When the government acts with the ostensible and predominant purpose of advancing religion, it violates that central Establishment Clause value of official religious neutrality."[396] The *McCreary County* Court struck down the display under the purpose prong of the *Lemon* test.[397]

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[391] *See* Mark Strasser, *Free Exercise and Comer: Robust Entrenchment or Simply More of A Muddle?*, 52 U. RICH. L. REV. 887, 908 (2018) ("The *Mitchell* plurality claimed that the Establishment Clause only precluded 'aid itself [that] has an impermissible content,' suggesting that something fungible like money is permissibly given to pervasively sectarian schools regardless of how those funds are spent, for example, even to buy Bibles.").

[392] Mitchell v. Helms, 530 U.S. 793, 837 (2000) (O'Connor, J., concurring in the judgment).

[393] *See id.* at 861 ("The limited evidence amassed by respondents . . . is at best *de minimis* and therefore insufficient to affect the constitutional inquiry."); *see id.* at 839 ("[W]e have never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid."); Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 861 (1995) (Thomas, J., concurring) ("[O]ur Establishment Clause jurisprudence is in hopeless disarray."); Patrick M. Garry & John P. Garry, *The Establishment Clause and the Making of a New Secularism: A Review Essay on Church, State and the Crisis in American Secularism by Bruce Ledewitz*, 51 DUQ. L. REV. 251, 261 (2013) (reviewing BRUCE LEDEWITZ, CHURCH, STATE AND THE CRISIS IN AMERICAN SECULARISM) (2011)) ("The one point of agreement on the part of all constitutional scholars is that the current Establishment Clause jurisprudence is in a state of great disarray and confusion.").

[394] The cases were argued on March 2, 2005. *See* McCreary County v. Am. Civil Liberties Union of Kentucky, Cty, 545 U.S. 844, 844 (2005); Van Orden v. Perry, 545 U.S. 677, 686 (2005).

[395] *McCreary Cty.*, 545 U.S. at 850.

[396] *Id.* at 860.

[397] *See* Amanda Reid, *Private Memorials on Public Space: Roadside Crosses at the Intersection of the Free Speech Clause and the Establishment Clause*, 92 NEB. L. REV. 124,

Van Orden also involved a Ten Commandments display, although this display was on the Texas State Capitol grounds along with 16 other monuments and 21 historical markers.[398] The *Van Orden* Court upheld the constitutionality of the display.[399] The existing jurisprudence could account for the different results reached in *McCreary County* and *Van Orden* if, for example, the purposes behind the displays had been different.[400] But *McCreary County* and *Van Orden* did not merely differ in result, but also in the applicable test. While the *McCreary County* Court applied the *Lemon* test, the *Van Orden* Court wrote cryptically that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds."[401] But *McCreary County* had also involved a Ten Commandments display, and it was not clear that the display at issue in *McCreary County* was any less passive than the display at issue in *Van Orden*.[402]

Van Orden and *McCreary County* together help illustrate that the lack of clarity about when the *Lemon* test should be used. Initially thought to be the sole test to determine whether Establishment Clause guarantees have been violated,[403] the *Lemon* test is now one of several tests employed by courts;[404]

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167 (2013) ("And after examining the iterations of the displays, the Court found the displays failed the secular purpose prong of the *Lemon* test because the dominant religious nature of the Ten Commandment display was unmistakable.").

[398] *See Van Orden*, 545 U.S. at 681.

[399] *Id.* at 692 ("We cannot say that Texas' display of this monument violates the Establishment Clause of the First Amendment.").

[400] *See* Charles Kelbley, *Modeling Church and State: The Ideological Use of History in Establishment Clause Jurisprudence*, 38 OHIO N.U. L. REV. 639, 677 (2012) ("On the same day that *Van Orden* was handed down, the Court reached a contrary result in *McCreary County v. ACLU* . . . because the displays lacked a secular purpose.") (footnote omitted); *see also* Robert A. Sedler, *Understanding the Establishment Clause: A Revisit*, 59 WAYNE L. REV. 589, 642 (2013) ("The likely effect of *McCreary* and *Van Orden*, then, is that older displays containing the Ten Commandments along with secular monuments or documents are likely to be upheld against Establishment Clause challenge because usually it can be shown that the display was designed to advance a secular purpose.").

[401] Van Orden v. Perry, 545 U.S. 677, 686 (2005).

[402] Mark Strasser, *Passive Observers, Passive Displays, and the Establishment Clause*, 14 LEWIS & CLARK L. REV. 1123, 1154 (2010) ("When *Van Orden* suggests that the sort of passive monument at issue before the Court is not rightly evaluated in light of *Lemon*, one might well want to know in what respects the Texas monument is peculiarly passive that would not accurately have been said about the Kentucky courthouse displays.").

[403] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) ("*Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking."); *id.* at 2087 ("[T]he *Lemon* Court ambitiously attempted to find a grand unified theory of the Establishment Clause.").

[404] Richard R.W. Fields, *Perks for Prisoners Who Pray: Using the Coercion Test to Decide Establishment Clause Challenges to Faith-Based Prison Units*, 2005 U. CHI. LEGAL F. 541,

however, the Court has never made clear which test should be used when.[405] Further, the *Lemon* test itself has evolved both in formulation[406] and application.[407] Given these difficulties and the need of lower courts to know which test to apply when deciding Establishment Clause cases, one might have hoped that the Court would clarify the jurisprudence in a high profile case like *American Legion*.[408]

American Legion involved the constitutionality of the Bladensburg Peace Cross ("the Cross"), which is situated at a busy traffic intersection and is maintained by the Maryland-National Capital Park and Planning Commission[409] with tax dollars.[410] The monument had been erected as a tribute to "area soldiers who gave their lives in the First World War."[411] Before discussing the constitutionality of the State's maintenance of this monument, the Court offered a short history of the cross as a symbol, noting that the "cross came into widespread use as a symbol of Christianity by the fourth century, and it retains that meaning today."[412] The Court noted that "there are many contexts in which the symbol has also taken on a secular meaning [and] . . . there are instances in which its message is now almost entirely secular."[413] However, the Court did not make clear why it was noting that symbols sometimes evolve into being completely secular. After all, the Court was not claiming that the Cross had lost

549 (2005) ("The Supreme Court has established many different tests for evaluating whether the state has effected an unconstitutional establishment of religion.")

[405] Mark Strasser, *Thou Shalt Not?*, 6 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 439, 460 (2006) ("Given that the different tests articulated by the Court to determine Establishment Clause violations do not always yield similar dictates, it would seem important for the Court to announce clear guidelines with respect to the conditions under which the different tests should be used. Regrettably, no clear guidelines have been forthcoming from the Court.").

[406] Winston R. Kitchingham, *Freiler v. Tangipahoa Parish Board of Education: The Fifth Circuit Leaves William Jennings Bryan Crucified on an Establishment Clause Cross*, 75 TUL. L. REV. 533, 536 (2000) ("[T]he decision in *Agostini* modified the *Lemon* test."); *see also* Joseph R. McKinney, *Special Education and the Establishment Clause*, 65 EDUC. L. REP. 1, 13–14 (1991) ("Although the *Lemon* test has survived for nearly two decades, during the 1980s the test experienced modification and change.").

[407] Ellen M. Wasilausky, *See Jane Read the Bible: Does the Establishment Clause Allow School Choice Programs to Include Sectarian Schools After Agostini v. Felton?*, 56 WASH. & LEE L. REV. 721, 760 (1999) (discussing "the Court's changes in its application of the *Lemon* test").

[408] *Am. Legion*, 139 S. Ct. 2067.

[409] *Id.* at 2078 ("[T]the monument came to be at the center of a busy intersection.").

[410] *Id.* at 2074 (discussing the claim that the Cross's presence on public land "and the expenditure of public funds to maintain it violate the Establishment Clause of the First Amendment").

[411] *Id.*

[412] *Id.*

[413] *Id.*

its religious meaning but at most that it might in addition have acquired some secular meaning as well.[414]

The Court included a description of the dedication ceremony of "the Bladensburg memorial—a plain Latin cross."[415] A local priest offered the invocation.[416] The speaker offering the keynote address, "encouraged the community to look to the 'token of this cross, symbolic of Calvary,' to 'keep fresh the memory of our boys who died for a righteous cause.'"[417] A Baptist pastor ended the ceremony with a benediction.[418] Description of this ceremony notwithstanding, the Court implied that as "is often the case with old monuments, symbols, and practices," there may be "no way to be certain about the motivations of the men who were responsible for the creation of the monument."[419]

The Court noted that the Cross had "served as the site of patriotic events honoring veterans, including gatherings on Veterans Day, Memorial Day, and Independence Day."[420] Other war memorial monuments have been built near the Cross,[421] although because of space limitations, the closest is about 200 feet away.[422]

The Court introduced its legal analysis by noting that the District Court upheld the constitutionality of the monument using the *Lemon* test,[423] but that the Fourth Circuit reversed, holding that "a reasonable observer would view the Commission's ownership and maintenance of the monument as an endorsement of Christianity."[424] Rather than discuss whether the constitutionality of the monument should be upheld under the *Lemon* test, the Court explained that "[i]n many cases, this Court has either expressly declined to apply the test or has simply ignored it."[425] This refusal to use the test "is a testament to the *Lemon* test's shortcomings," allegedly because "[a]s Establishment Clause cases

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[414] *See id.* at 2089 ("That the cross originated as a Christian symbol and retains that meaning in many contexts does not change the fact that the symbol took on an added secular meaning when used in World War I memorials.").

[415] *Id.* at 2075.

[416] *Id.* at 2077 ("At the dedication ceremony, a local Catholic priest offered an invocation").

[417] *Id.*

[418] *Id.* ("The ceremony closed with a benediction offered by a Baptist pastor").

[419] *Id.* at 2082.

[420] *Id.* at 2077.

[421] *Id.* ("Over the years, memorials honoring the veterans of other conflicts have been added to the surrounding area, which is now known as Veterans Memorial Park.").

[422] *Id.* at 2078 ("Because the Cross is located on a traffic island with limited space, the closest of these other monuments is about 200 feet away in a park across the road.").

[423] *Id.* ("The Cross, the District Court held, satisfies both the three-pronged test announced in Lemon v. Kurtzman, 403 U. S. 602 (1971).").

[424] *Id.* at 2079 ("A divided panel of the Court of Appeals for the Fourth Circuit reversed.").

[425] *Id.* at 2080.

involving a great array of laws and practices came to the Court, it became more and more apparent that the *Lemon* test could not resolve them."[426]

In suggesting that the *Lemon* test would not helpfully resolve certain disputes, the Court might have meant either that the criteria did not apply in certain cases,[427] or, instead, that the factors led to the wrong result.[428] The Court apparently thought the latter, because the test allegedly:

could not "explain the Establishment Clause's tolerance, for example, of the prayers that open legislative meetings, . . . certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving."[429]

This short explanation is itself quite illuminating. The Court implies that while it had adopted a test that was designed to cover the cases at hand, the Court neither overruled the test nor applied it, because use of the test would not have yielded the desired result. If that was so, then the Court presumably had some other test in mind that it was using *sub silentio*.[430] In that case, it would have been preferable for the Court to have announced what that test was, unless Court members were instead using a "I know it when I see it" approach.[431]

The *American Legion* Court discussed some of the difficulties posed by applying the *Lemon* test purpose prong.[432] For example, that "identifying . . . original purpose or purposes may be especially difficult."[433] Even where an original purpose can be identified, "the purposes associated with an established monument, symbol, or practice often multiply."[434] Yet, the Court has already made clear that the *Lemon* test purpose prong invalidates practices only when "there was no question that the statute or activity was motivated wholly by religious considerations,"[435] so it was not even clear that the Court was criticizing the test actually used. Just as purpose can change over time, the Court

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[426] *Id.*

[427] *Cf.* Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 689 n.14 (1975) ("These factors are not present in, and are inapplicable to, the case at bar.").

[428] *Cf.* Michael J. Venditto, *The Implied Requirement of "Good Faith" Filing: Where Are the Limits of Bad Faith?*, 1993 DET. C.L. REV. 1591, 1594 n.11 (1993) ("[M]echanical application of previously identified factors may lead to the wrong result.").

[429] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019) (citing Van Orden v. Perry, 545 U.S. 677, 699 (2005) (Breyer, J., concurring)).

[430] *Cf.* Dugger v. Adams, 489 U.S. 401, 424 (1989) (Blackmun, J., dissenting) (suggesting that the Court was repudiating past case law *sub silentio*).

[431] *Cf.* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that").

[432] *See Am. Legion*, 139 S. Ct. at 2082.

[433] *Id.*

[434] *Id.*

[435] Lynch v. Donnelly, 465 U.S. 668, 680 (1984).

explained that "[t]he 'message' conveyed . . . may change over time."[436] Yet, that is exactly the kind of change that the *Lemon* test is designed to accommodate—where the new message is secular, there is "no realistic danger that the community would think that the [message] was endorsing religion or any particular creed, and any benefit to religion . . . would [be] no more than incidental."[437]

Finally, the Court reasoned, "when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to the local community for which it has taken on particular meaning."[438] This justification may have important implications, because it suggests that the removal of a monument (allegedly endorsing religion) might itself be problematic because "tearing down monuments with religious symbolism and scrubbing away any reference to the divine will strike many as aggressively hostile to religion."[439]

The Court's more recent neutrality approach suggests that including religious speech along with other kinds of speech is not an endorsement but merely inclusion of religious speech "on a nondiscriminatory basis."[440] One might expect that if nonreligious monuments are being commissioned, then the refusal to permit religious ones might "evince a hostility to religion."[441]

The *American Legion* Court eschewed "a grand unified theory of the Establishment Clause, instead recommending "a more modest approach that focuses on the particular issue at hand and looks to history for guidance."[442] For example, the Court noted that in *Marsh*, "the Court upheld the Nebraska Legislature's practice of beginning each session with a prayer by an official chaplain, and in so holding, the Court conspicuously ignored *Lemon*."[443] Further, the *Marsh* Court "reached these results even though it was clear, as stressed by the *Marsh* dissent, that prayer is by definition religious."[444] But using history as a guide might permit a great deal, especially when combined

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[436] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2084 (2019) (citing Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 477 (2009)).

[437] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 395 (1993).

[438] *Am. Legion*, 139 S. Ct. at 2084.

[439] *Id.* at 2084–85.

[440] Bd. of Educ. of Westside Cmty. Sch. v. Mergens, 496 U.S. 226, 250 (1990).

[441] Van Orden v. Perry, 545 U.S. 677, 684 (2005). A separate issue would be whether the refusal to permit such monuments would be construed as government speech and hence not subject to Free Speech analysis. Yet, even government speech is subject to Establishment constraints. *See Pleasant Grove City*, 555 U.S. at 468 ("[G]overnment speech must comport with the Establishment Clause.").

[442] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019).

[443] *Id.*

[444] *Id.* (citing Marsh v. Chambers, 463 U.S. 793, 797–98 (1983) (Brennan, J., dissenting)).

with a neutrality analysis suggesting that precluding religious speech evidences religious hostility.[445]

The *American Legion* Court clearly indicated how future challenges to longstanding monuments should be handled. The constitutionality of keeping such monuments is very likely to be upheld[446] because the "passage of time gives rise to a strong presumption of constitutionality"[447] and removing such a monument "may no longer appear neutral, especially to the local community for which it has taken on particular meaning."[448]

Some aspects of the *American Legion* opinion are likely to yield confusion. For example, while admitting that the Cross was religious,[449] the Court suggested that in this case the monument had acquired secular meaning as well.[450] Perhaps that is why the monument survives an Establishment challenge, although the Court also suggested that the religious nature of the monument provided part of the reason that it was protected—"a campaign to obliterate items with religious associations may evidence hostility to religion even if those religious associations are no longer in the forefront."[451] The Court explained that "retaining established, religiously expressive monuments, symbols, and practices is quite different from erecting or adopting new ones,"[452] although a separate issue involves how long a monument must be in existence in order for it to require additional protection.[453] Further, members of the Court themselves do not know whether *American Legion* only protects existing religious

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[445] *See supra* note 441 and accompanying text.

[446] *See id.* at 2081–82 ("[T]hese considerations counsel. . . toward application of a presumption of constitutionality for longstanding monuments, symbols, and practices.").

[447] *Am. Legion*, 139 S. Ct. at 2085.

[448] *Id.* at 2084.

[449] *Id.* at 2090 ("The cross is undoubtedly a Christian symbol"); *see also id.* at 2093–94 (Kavanaugh, J., concurring) ("I fully understand the deeply religious nature of the cross. It would demean both believers and nonbelievers to say that the cross is not religious, or not all that religious."); *id.* at 2104 (Ginsburg, J., dissenting) ("The Latin cross is the foremost symbol of the Christian faith.").

[450] *Id.* at 2090 (majority opinion) ("For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark."); *see also id.* at 2087 ("A monument may express many purposes and convey many different messages, both secular and religious.").

[451] *Id.* at 2087.

[452] *Id.* at 2085.

[453] *See id.* at 2102 (Gorsuch, J., concurring in the judgment):

> How old must a monument, symbol, or practice be to qualify for this new presumption? It seems 94 years is enough, but what about the Star of David monument erected in South Carolina in 2001 to commemorate victims of the Holocaust, or the cross that marines in California placed in 2004 to honor their comrades who fell during the War on Terror?.

monuments[454] or, instead, offers an umbrella of protection for both new and old monuments.[455]

The *American Legion* Court did not apply the *Lemon* test, having noted that the test "presents particularly daunting problems in cases . . . that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations."[456] However, the Court did not provide an approach specifying the conditions under which each Establishment Clause test is to be used.[457]

In his concurring opinion, Justice Kavanaugh suggested that different tests were used depending upon what was at issue.[458] For example, when considering "religious symbols on government property and religious speech at government events," "the Court has relied on history and tradition and upheld various religious symbols on government property and religious speech at government events." [459] Regrettably, Justice Kavanaugh neither explained nor even mentioned *McCreary County*, which invalidated the Ten Commandments postings on *Lemon* purpose prong grounds.[460]

Justice Kavanaugh explained that the Court "has upheld government benefits and tax exemptions that go to religious organizations, even though those policies have the effect of advancing or endorsing religion."[461] The difficulty posed is not that he was incorrect about the Court's having upheld the benefits, but instead in misleadingly suggesting that the Court believed that it was advancing or endorsing religion when upholding these benefits or exemptions. For example, while the *Walz* Court recognized that a tax exemption would give religious groups "an indirect economic benefit,"[462] the Court upheld the policy, claiming it "neither [involves] the advancement nor the inhibition of religion; it

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[454] *Id.* at 2091 (Breyer, J., concurring) ("Nor do I understand the Court's opinion today to adopt a 'history and tradition test' that would permit any newly constructed religious memorial on public land.").

[455] *See id.* at 2102 (Gorsuch, J., concurring in the judgment) ("Though the plurality does not say so in as many words, the message for our lower court colleagues seems unmistakable: Whether a monument, symbol, or practice is old or new, apply *Town of Greece*, not *Lemon*.").

[456] *Id.* at 2081 (majority opinion).

[457] *Id.* at 2098 (Thomas, J., concurring in the judgment) ("Regrettably, I cannot join the Court's opinion because it does not adequately clarify the appropriate standard for Establishment Clause cases.").

[458] *Id.* at 2092–93. (Kavanaugh, J., concurring) (noting five categories of Establishment cases in which the outcomes were inconsistent with *Lemon*).

[459] *Id.* at 2092 (Kavanaugh, J., concurring).

[460] *See supra* note 397 and accompanying test.

[461] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2092 (2019) (Kavanaugh, J., concurring) (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664 (1970); Mueller v. Allen, 463 U.S. 388 (1983); and Mitchell v. Helms, 530 U.S. 793 (2000) (plurality opinion)).

[462] *Walz*, 397 U.S. at 674.

is neither sponsorship nor hostility."[463] One infers from Justice Kavanaugh's comments that the Court intentionally ignored or misapplied the prevailing Establishment Clause test, which does not inspire confidence that the Court was applying the test in good faith.[464] The *American Legion* Court's pointing out that the Court would simply ignore the test when it did not like the result also does not inspire confidence that the Court has been applying the applicable test in an evenhanded way.

CONCLUSION

The *Lemon* test has changed substantially over the past several decades, eventually being interpreted to permit practices that would never have been upheld under the test as initially interpreted.[465] The test when first formulated was designed to prevent the state from even inadvertently supporting religious education, but later was characterized as permitting state support of religious indoctrination under a variety of circumstances. That change, which occurred gradually, was accomplished at least in part through a recharacterization of approved practices. The Court would claim that certain practices did not promote religion (and thus were constitutionally permissible).[466] Those same practices were later characterized as promoting religion to such an extent that other practices must also be permissible because the latter practices did not promote religion any more than the previously approved practices.[467] Such an approach undermines confidence in the Court's honesty and integrity.

American Legion upheld state support of a monument that is a paradigmatic symbol of one of the world's major religions.[468] The opinion did not overrule using the *Lemon* test nor suggest when, if ever, it should be used.[469] Instead, the Court implied that the test simply had not been used when it would not have yielded the correct result as defined by some unknown test.[470] But the Court's

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[463] *Id.* at 672.

[464] *See Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring) ("If *Lemon* guided this Court's understanding of the Establishment Clause, then many of the Court's Establishment Clause cases over the last 48 years would have been decided differently.").

[465] *See supra* notes 326–27 and accompanying text.

[466] *See supra* notes 143–99 (discussing the programs upheld in *Tilton* and *Roemer*).

[467] *See supra* note 287 and accompanying text (discussing how the Court upheld including the crèche within a state display by noting how other practices upheld by the Court had involved practices promoting religion).

[468] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2106 (2019) (Ginsburg, J., dissenting) ("[W]hen a cross is displayed on public property, the government may be presumed to endorse its religious content. The venue is surely associated with the State; the symbol and its meaning are just as surely associated exclusively with Christianity.").

[469] *Cf. id.* at 2094 (Kagan, J., concurring in part) ("Although I agree that rigid application of the *Lemon* test does not solve every Establishment Clause problem, I think that test's focus on purposes and effects is crucial in evaluating government action in this sphere.").

[470] *See supra* note 429 and accompanying text.

recharacterizing of which practices promote religion combined with the Court's refusing to use the applicable test when members disagreed with the result further undermines confidence in the Court's ability to judge impartially.

American Legion was not surprising after *Van Orden*, which had suggested that the *Lemon* test should not be applied to passive monuments and which had upheld a Ten Commandments display.[471] Further, *American Legion* did not significantly change the jurisprudence in that it did not expressly overrule use of the *Lemon* test as a general matter but rather followed past cases in choosing not to employ it in the case at hand.[472] Nonetheless, the opinion bodes poorly for Establishment Clause jurisprudence both because the opinion suggests that the Court has been trying to undermine *Lemon* for decades[473] and because the Court implies that removing religious monuments might reasonably be thought to manifest hostility towards religion.[474] Such an analysis of what constitutes hostility towards religion suggests that the Establishment Clause may come to be understood to preclude the State from removing such symbols,[475] i.e., to prevent the State from stopping its endorsement of religion. *American Legion* sends a message that the Establishment Clause may soon be interpreted in ways that are antithetical to its foundations (as previously articulated by the Court),[476] and which may well result in Court approval of practices long thought clearly prohibited.[477]

American Legion implies that the Court may have been intentionally ignoring or misapplying the law or the facts to achieve the results of which it approved, which is exactly the kind of approach that undermines perceptions of objectivity and good faith. The decision cannot promote confidence in the Court's integrity. *American Legion*, while unsurprising in result, is extremely disquieting in both

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[471] *See supra* notes 399-401 and accompanying text.

[472] *Am. Legion*, 139 S. Ct. at 2080 ("In many cases, this Court has either expressly declined to apply the test or has simply ignored it.").

[473] It would be unsurprising if the Court had in addition been trying to fix the test with such apparent "shortcomings." *See id.* at 2080, by reworking the test while pretending to apply it. *Cf. id.* at 2092 (Kavanaugh, J., concurring) ("If *Lemon* guided this Court's understanding of the Establishment Clause, then many of the Court's Establishment Clause cases over the last 48 years would have been decided differently.").

[474] *See supra* note 438 and accompanying text.

[475] *See* Lemon v. Kurtzman, 403 U. S. 602, 612 (1971) ("its principal or primary effect must be one that neither advances nor *inhibits* religion") (emphasis added). Justice Kavanaugh suggests that legislatures will be permitted to remove religious symbols. *See Am. Legion*, 139 S. Ct. at 2094 (Kavanaugh, J., concurring), although he does not address whether such a removal would evidence hostility to religion.

[476] *See, e.g.*, *Ball*, 473 U.S. at 385 ("Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith.").

[477] *Cf.* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080 (2019) (discussing "difficult and controversial Establishment Clause issues, ranging from Bible reading and prayer in the public schools").

its implicit reasoning and in its implicit endorsement of a particular mode of judicial decision-making that seems "more appropriate in *Alice in Wonderland*."[478] The Court must, at its earliest opportunity, provide a coherent approach to Establishment issues and try to undo the damage that it has caused by its description of its own decision-making. Perceptions of the Court's legitimacy hang in the balance.

[478] Chardon v. Fumero Soto, 462 U.S. 650, 668 (1983) (Rehnquist, J., dissenting).