

THE ESTABLISHMENT CLAUSE’S HYDRA: THE *LEMON* TEST IN THE CIRCUIT COURTS

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I. INTRODUCTION

In the past half-century, there has been an explosion in the number of cases questioning the relationship between the state and religion. The Religion Clauses of the First Amendment—consisting of the Establishment Clause and the Free Exercise Clause¹—have been hotly contested. Both clauses are declarations of intent to keep some degree of separation between the state and “the Church.”² The Court has ardently attempted to find where that line lies, balancing every individual’s right to religious expression against the Framers’ prohibition of the establishment of a state religion.³

One of the most infamous attempts at reconciling the Religion Clauses came in the form of the *Lemon* test,⁴ which has been with us in one form or another for over forty years. The test is simple enough, mandating that any state action must: (1) have a secular primary purpose, (2) not advance or inhibit religion, and (3) avoid excessive government entanglement with religion.⁵ However, over time, justices⁶ and scholars⁷ alike soured on the test, advocating for a variety of replacements to fill the void. The Court has been visibly ambivalent about the test, sometimes entirely ignoring the *Lemon* test,

¹ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”).

² 1 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS* 3 (Princeton Univ. Press 2006) (“Protecting free religious exercise is one undoubted and fundamental aim of the Constitution’s religion clauses. Many people care deeply about their religious beliefs and practices, and they feel that their religious obligations supersede duties to the state if the two collide. These basic sentiments constitute a strong reason why governments should avoid interfering with religious participation insofar as they reasonably can. Another fundamental purpose of the religion clauses is to keep the enterprises of religion and government distinct. The state should not sponsor any particular religion; in turn, it should not be controlled by religious authorities.”).

³ See Michael W. McConnell, *The Religion Clauses of the First Amendment: Where Is the Supreme Court Heading?*, 32 CATH. LAW. 187, 187–88 (1989) (discussing the Supreme Court’s shifting view on the Religion Clauses).

⁴ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

⁵ *Id.* at 612–13.

⁶ *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (“For my part, I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced.”); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 346 (1987) (O’Connor, J., concurring) (“I write separately to note that this action once again illustrates certain difficulties inherent in the Court’s use of the test articulated in *Lemon v. Kurtzman*”); *Wallace v. Jaffree*, 472 U.S. 38, 110 (1985) (Rehnquist, J., dissenting) (“[T]he *Lemon* test has caused this Court to fracture into unworkable plurality opinions[] . . . depending upon how each of the three factors applies to a certain state action.” (internal citation omitted)); *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting) (“Rather than continuing with the Sisyphean task of trying to patch together the ‘blurred, indistinct, and variable barrier’ described in *Lemon v. Kurtzman* . . . , I would resurrect the ‘high and impregnable’ wall between church and state constructed by the Framers of the First Amendment.”).

⁷ Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 674 (1979); William J. Cornelius, *Church and State—the Mandate of the Establishment Clause: Wall of Separation or Benign Neutrality?*, 16 ST. MARY’S L.J. 1, 3–4 (1984); Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CAL. L. REV. 817, 817–18 (1984); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 269 (1987); Michael W. McConnell, *Stuck with a Lemon: A New Test for Establishment Clause Cases Would Help Ease Current Confusion*, A.B.A. J. 46, 46–47 (1997).

while concurring justices noted its demise and heralded in a new era of Establishment Clause jurisprudence. Time and time again, scholars have declared that finally, *Lemon* has been laid to rest, and its reign of terror has ended.⁸

The funeral procession has arrived too early. Despite the Court's clear ambivalence about *Lemon*, the circuits continue to employ the test in the vast majority of Establishment Clause cases. However, the circuits have also attempted to reconcile the clarifications and new tests proposed by the Court at various junctures in an attempt to track the Court's evolution; meaning that the nature of *Lemon*'s application varies so severely from context to context that at first glance it can hardly be considered a uniform test. Instead, the *Lemon* test appears as a many-headed beast, frightening to face and growing in complexity with every attempt to explain it.

However, this Article will demonstrate that despite its shortcomings, the *Lemon* test continues to champion crucial, largely agreed-upon principals underlying the relationship between religion and the state. Furthermore, while there is variance over the form and application of the test, the circuits have responded to the Court's watershed cases by reaching increasingly uniform outcomes. In effect, the *Lemon* test has "filled out" its prongs, demonstrating the sort of nuance necessary to properly address Establishment Clause cases. Moreover, overruling *Lemon* would almost certainly require reevaluating our normative view of the Religion Clauses since the original case stands for our current understanding that the government should not directly aid religious missions. In other words, *Lemon* is not just alive, it has largely accomplished its intended purpose by leading to a common understanding of the Establishment Clause.

This Article proceeds by discussing the development of the *Lemon* test and considering its current state. Part II discusses the cases that the *Lemon* Court drew from in its attempt to create a unifying standard and then details the Court's evolution in the post-*Lemon* world, category by category. After showing the Court's deep ambivalence on the use of the *Lemon* test, Part III considers the relatively "easy" cases dealt with by the lower courts where there is little divergence on the applicable test. Part IV analyzes the relatively "hard" cases where the lower courts have struggled to reconcile the Court's departures from and adherences to *Lemon*, resulting in many different versions of the test. Finally, Part V addresses the current state of and proposed solutions to the problems posed by *Lemon*.

⁸ Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. CAL. L. REV. 781, 784–85 (1998); Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 685–86 (1992); Michael Stokes Paulsen, *Lemon is Dead*, 43 CASE W. RES. L. REV. 795, 796–97 (1993).

II. THE EVOLUTION OF THE ESTABLISHMENT CLAUSE IN THE SUPREME COURT

The best way to understand how the Supreme Court arrived at a unifying test for all Establishment Clause jurisprudence is through an exploration of the history leading up to *Lemon*.⁹ In short, the *Lemon* test was a distillation of a half-century's worth of Establishment Clause jurisprudence expressed as a simple three-part rule. The *Lemon* test, therefore, intended to provide a straightforward solution to an incredibly complicated problem: resolving the relationship between religion and the state.¹⁰

A. *The Establishment Clause, Pre-Lemon*

Before *Lemon*, the Court decided the highly controversial *Everson v. Board of Education*, where the Court held that funding bus transportation to and from parochial schools via a reimbursement to parents was permissible, finding that the law's true secular purpose was to benefit children's education as part of public welfare.¹¹ This "public welfare" rationale was somewhat tempered by the final words of Justice Black's opinion: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."¹²

After *Everson*, many of the tests applied became familiar themes in Establishment Clause jurisprudence. One such theme—the threat of indoctrination—was articulated in *Zorach v. Clauson*, where the Court upheld a "release time" program that offered religious education off-grounds during school hours, while non-participants remained in school.¹³ This was differentiated from a similar, but unconstitutional proposal, in Illinois that required students to opt-out of the religious instruction rather than opt-in, with the Court reasoning that opting-out carried a greater threat of coercion than opting-in.¹⁴

The Court then began marking out the lines that would be used in *Lemon*. First, in *Abington v. Schempp*, the Court struck down a state law mandating the recitation of the Lord's Prayer in schools, citing the lack of a secular purpose.¹⁵ Second, in *Board of Education v. Allen*, the Court found

⁹ See 2 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS 1 (Princeton Univ. Press 2008) (discussing a more significantly expansive history of the Establishment Clause).

¹⁰ Paulsen, *supra* note 8, at 800–01 (addressing the *Lemon* test's "well deserved" criticism).

¹¹ 330 U.S. 1, 18 (1947) ("The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.")

¹² *Id.* (emphasis added).

¹³ 343 U.S. 306, 315 (1952).

¹⁴ *Id.* at 312, 315.

¹⁵ 374 U.S. 203, 223 (1963). Similarly, the Court unanimously struck down an Arkansas law that prohibited the teaching of evolution for having a primarily religious purpose. *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968).

that neither the purpose nor the primary effect of a statute authorizing a public school textbook loan program to parochial schools advanced or inhibited religion.¹⁶ Finally, in *Walz v. Tax Commission*, the Court upheld a tax exemption for schools because it applied to non-religious and religious schools alike, thereby avoiding excessive entanglement by the government in religious matters.¹⁷

B. *The Origin of the “Oft-Maligned” Lemon test*

In 1971, the Supreme Court faced yet another school funding case, *Lemon v. Kurtzman*, and its companion cases, *Earley v. DiCenso* and *Robinson v. DiCenso*.¹⁸ The *DiCenso* cases debated the merits of a Rhode Island statute, while *Lemon* considered a Pennsylvania statute.¹⁹ Both empowered the states to grant forms of supplemental funding directly to private schools that agreed to teach secular subjects, and in both states, over 95% of the private schools in the area were religious in nature.²⁰

Due to the prominence of school funding cases up until *Lemon*, the Court had several cases to consider in deciding the standard to apply. Ultimately, they saw *Everson* as “‘the verge’ of forbidden territory,” finding programs which exceeded those indirect reimbursements unconstitutional.²¹ Furthermore, the Court defined “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.’”²² These evils in turn became the three prongs of the *Lemon* test, requiring that a state action: (1) has a secular legislative purpose; (2) that its principal or primary effect neither advances nor inhibits religion; and (3) that the act does not “foster ‘an excessive government entanglement with religion.’”²³

In applying this new test, the Court’s chief fears were that the programs both advanced religion and entangled the state in religious matters in an impermissible way, ultimately failing the second and third prongs of the *Lemon* test.²⁴ In the process of striking down these statutes, the Court had created what they believed would be an uncomplicated checklist for

¹⁶ 392 U.S. 236, 247–48 (1968).

¹⁷ 397 U.S. 664, 680 (1971). The Court also noted that it would be excessive entanglement to interfere with a tax exemption that had been in place for 200 years, another recurring theme in post-*Lemon* cases. *Id.* at 686 (Brennan, J., concurring). Similarly, in *Engel v. Vitale*, the Court struck down the recitation of non-denominational prayers composed by the State of New York in schools, citing excessive entanglement with religion due to the State’s involvement in composing those prayers. 370 U.S. 421, 424 (1962).

¹⁸ 403 U.S. 602, 606 (1971) (discussing companion cases in Rhode Island and Pennsylvania).

¹⁹ *Id.*

²⁰ *Id.* at 607–10.

²¹ *Id.* at 611–12.

²² *Id.* at 612.

²³ *Id.* at 612–13 (quoting *Walz v. Tax Comm’n of N.Y.*, 397 U.S. 664, 674 (1970)).

²⁴ *Id.* at 616–18.

Establishment Clause inquiries.²⁵ A state action that violated any of the three prongs would be deemed unconstitutional.

Inevitably, this bold attempt to simplify Establishment Clause litigation led to a great deal of litigation. Each case after *Lemon* marked an attempt to answer new questions raised by the last attempt to clarify the boundaries of the Establishment Clause. Fact-specific categories of cases tended to approach the departure or “explanations” of the *Lemon* test differently, and all the while the Court refused to expressly overrule *Lemon*. To further complicate matters, the post-*Lemon* jurisprudence contains several premature burials, complete with early eulogies by justices and scholars alike, but the Court’s actions have instead ensured that *Lemon* still lives. However, there is one area where *Lemon* is indisputably dead: legislative prayer.

C. Legislative Prayer

The matter of applying the *Lemon* test was swiftly settled in the legislative prayer context. In *Marsh v. Chambers*, the Court unequivocally refused to apply *Lemon* in upholding the practice of starting legislative sessions with a prayer led by a paid, retained chaplain.²⁶ The Court argued that a literal reading of *Lemon* would lead to a result contrary to the nation’s history and tradition of legislative prayer.²⁷ Regardless of any normative disagreements about the outcome of *Marsh*, the circuits never applied *Lemon* in any legislative prayer cases thereafter. Furthermore, in *Town of Greece v. Galloway*, a divided Court affirmed another town’s legislative prayer practice without invoking *Lemon*, again applying the reasoning from *Marsh* by analyzing the setting of the prayer and its intended audience.²⁸ While the plurality and the concurrence disagreed over what constituted coercion by the State, and the majority and dissents argued over the required actions of a legislature in ensuring that prayers were non-proselytizing, all nine justices agreed that *Marsh*—not the *Lemon* test—controlled in legislative prayer cases.²⁹

²⁵ *Id.* at 625.

²⁶ 463 U.S. 783, 794–95 (1983).

²⁷ *See id.* at 800–01 (Brennan, J., dissenting). Justice Brennan, in dissent, summed this up by stating that he had “no doubt that, 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.” *Id.*

²⁸ 134 S. Ct. 1811, 1825 (2014).

²⁹ *See id.* at 1826–27, 1831–32, 1835. Coercion, as explored in the subsection on school prayer, was a consideration in *Lee v. Weisman*, and considers whether the forum and the occasion, taken together, constitute some level of coercion by the state. Justices Scalia and Thomas both understand coercion to be significantly more restrained and largely limited to forced financial obligations by the state to support religion, or the literal creation of a state religion. Alex Geisinger & Ivan E. Bodensteiner, *An Expressive Jurisprudence of the Establishment Clause*, 112 PENN ST. L. REV. 77, 131 (2007) (“Justice Scalia has written that the only type of coercion that he deems to violate the Establishment Clause is direct coercion.”).

D. School Prayer

Prayer in public schools was a seemingly settled matter before *Lemon*. In both *Engel* and *Abington*, the Supreme Court made it clear that the State could not compose prayer or allow teachers to lead their students in prayer.³⁰ The Court expanded the scope of this doctrine outside the classroom in *Lee v. Weisman*, which concerned a benediction at a high school graduation ceremony.³¹ In finding that the city's practice of allowing such benedictions violated the Establishment Clause, the majority expressly upheld the validity of the *Lemon* test, but chose not to apply it without stating a reason for its departure.³² Instead, the majority opted for a Coercion test, which inquired into the setting, nature, and intended audience of the prayer.³³ Meanwhile, the concurrence argued that *Lemon* should have been explicitly applied,³⁴ and the dissent found the Coercion test acceptable, but believed that the threshold for coercion should be set significantly higher.³⁵

Lee left the lower courts to debate when to apply the *Lemon* test or Coercion test, with several circuits applying both.³⁶ Moreover, the circuits split over whether student-initiated prayers at school ceremonies were permissible after *Lee*. The Court answered this split in *Santa Fe Independent School District v. Doe*,³⁷ explicitly applying both a modified *Lemon* test and the Coercion test in light of *Lee*,³⁸ holding that student-led, student-initiated prayer at school events was a violation of the Establishment Clause.³⁹ The dissent criticized what it viewed as “the most rigid version of the oft-criticized” *Lemon* test, and noted that *Lee* “did not feel compelled to apply the *Lemon* test.”⁴⁰ Therefore, while *Santa Fe* reinforced the application of the *Lemon* test—albeit various versions—in school prayer cases, it also left the circuits divided over the application of additional tests in the school prayer context.

³⁰ 370 U.S. 421, 436 (1962); 374 U.S. 203, 223–24 (1963).

³¹ 505 U.S. 577, 596 (1992).

³² *Id.* at 587 (“We can decide the case without reconsidering the general constitutional framework by which public schools’ efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* the United States to reconsider our decision in *Lemon v. Kurtzman*.”).

³³ *Id.* at 593.

³⁴ *Id.* at 603 (Blackmun, J., concurring). Justice Blackmun was quick to note that in thirty-one Establishment Clause cases, the Court only deviated from the *Lemon* test once, in *Marsh v. Chambers*. *Id.* at 603 n.4.

³⁵ *Id.* at 640 (Scalia, J., dissenting) (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”).

³⁶ Mark Strasser, *The Coercion Test: On Prayer, Offense, and Doctrinal Inculcation*, 53 ST. LOUIS U. L.J. 417, 433–67 (2009) (discussing lower court cases in the aftermath of the *Lee* decision).

³⁷ 530 U.S. 290, 316 (2000).

³⁸ This modified test, which defined coercion as an element of the “effect” prong, included the Endorsement test, discussed in subsection E, and derived from Justice O’Connor’s concurrence in *Lynch v. Donnelly*. 465 U.S. 668, 690–92 (1984) (O’Connor, J., concurring).

³⁹ *Santa Fe*, 530 U.S. at 316.

⁴⁰ *Id.* at 319–20.

E. Religious Symbols

While school prayer cases are certainly difficult, that complexity pales in comparison to that found in religious symbols cases. Since the contexts and types of religious symbols vary widely, the Court has struggled to find a unifying test. The stage set by *Stone v. Graham* was deceptively simple when the Court held that a Kentucky law mandating the posting of the Ten Commandments in public classrooms violated *Lemon's* purpose prong.⁴¹

However, by the time *Lynch v. Donnelly* was decided, the Court had eroded this simple foundation.⁴² The majority found that a crèche displayed in a city park did not violate the *Lemon* test due to the overall composition of the display.⁴³ In her concurrence, Justice O'Connor articulated what would become a widely-used clarification of the *Lemon* test, the Endorsement test.⁴⁴ This modified *Lemon's* first and second prongs to ask whether a reasonable observer, informed of the display's history and context, would perceive the actions as a purposeful or effective government endorsement of religion.⁴⁵ This led to a split over what constituted an acceptable context for religious displays, as well as whether the Endorsement test was the new standard of review for symbols cases.⁴⁶

The answer to the latter question became clear in two cases concerning religious displays, whereby two pluralities used Justice O'Connor's Endorsement test as a modification of *Lemon* to reach opposite results, with differing articulations of the prongs. In *County of Allegheny v. ACLU*, the majority applied the Endorsement test to find that a crèche display inside a courthouse violated the Establishment Clause, while a Chanukah menorah outside a city building did not.⁴⁷ The concurrences argued over the proper way to apply the Endorsement test, while Justice Kennedy argued for the use of the tradition and context consideration from *Marsh* instead.⁴⁸ Later, in *Capitol Square Review & Advisory Board v. Pinette*, the Court again

⁴¹ 449 U.S. 39, 39–40, 42–43 (1980). In concluding that the law was a violation, the majority noted that the secular purpose prong allowed some inquiry into the true intent of the legislature, while Justice Rehnquist, in his dissent, argued that a secular purpose should suffice despite any accompanying sectarian purpose, with some deference given to the legislature. *Id.* at 43–44 (Rehnquist, J., dissenting).

⁴² 465 U.S. at 687.

⁴³ *Id.*

⁴⁴ The Endorsement test has many critics, and while their criticisms are merited and certainly inform the Court's ambivalence towards the test, they are outside the scope of this Article. For a detailed critique of the Endorsement test, see Smith, *supra* note 7, at 268–70, 313–15.

⁴⁵ *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring). The dissent, like the majority, applied *Lemon* but reached the opposite conclusion. *Id.* at 695 (Brennan, J., dissenting).

⁴⁶ See Kathryn R. Williams, *Constitutional Law - Squeezing Lemon - Capitol Square Review & Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995), 69 TEMP. L. REV. 1609, 1624–37 (1996).

⁴⁷ 492 U.S. 573, 621 (1989). The recent *Town of Greece* case limits, if not entirely reverses, this holding with respect to the crèche display. 134 S. Ct. 1811, 1821 (2014).

⁴⁸ *Cty. of Allegheny*, 492 U.S. at 668 (Kennedy, J., dissenting). Justice Kennedy further noted that the use of the concurrence and dissents of *Lynch v. Donnelly* in the present case were inappropriate, stating that, “[i]t has never been my understanding that a concurring opinion . . . could take precedence over an opinion joined in its entirety by five Members of the Court.” *Id.*

applied the Endorsement test, with the plurality arguing for a *per se* “public forum” exception to the test, distinguishing between private action and government action on state property.⁴⁹ Three concurring justices rejected this *per se* exception, opting instead for a case-by-case approach.⁵⁰ However, despite the Court’s disagreement about the *per se* exception, lower courts agreed that the Endorsement test—either on its own or as part of *Lemon*—was the proper test for religious symbols cases.

This brief sense of tranquility ended abruptly with the twin cases of *McCreary County v. ACLU* and *Van Orden v. Perry*.⁵¹ Both cases involved the posting of the Ten Commandments, with the majority in *McCreary County* applying the Endorsement test, and the plurality in *Van Orden* rejecting the Endorsement test in favor of a “nature and history” inquiry for passive monument cases.⁵² Justice Breyer acted as the swing vote and stated in his *Van Orden* concurrence that he was not guided by any particular test, but rather the “basic purposes” of the First Amendment, advocating for an “exercise of legal judgment.”⁵³ Particularly in light of this concurrence, drawing a clear, single test from the two cases has proven challenging.⁵⁴

F. State Funding of Religion in Schools

State funding cases struggle with the fact that each and every case naturally requires re-examining *Lemon*’s underlying assumptions. Funding cases come in many different forms, which can be broken into three categories: direct aid, indirect aid, and aid in limited public forums. These categories are helpful guidance, but are over-simplifications.

For direct aid to schools, two early cases, *Levitt v. Committee for Public Education & Religious Liberty* and *Committee for Public Education & Religious Liberty v. Nyquist*, both applied *Lemon* in holding that direct funding of parochial schools constituted either an impermissible advancement of religion, or excessive entanglement.⁵⁵ Furthermore, both majorities found neutrality in the funding program to be a necessary but not sufficient condition

⁴⁹ 515 U.S. 753, 769–70 (1995).

⁵⁰ *Id.* at 785 (Souter, J., concurring).

⁵¹ 545 U.S. 844 (2005); 545 U.S. 677 (2005).

⁵² 545 U.S. at 859–61; 545 U.S. at 686 (“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.”).

⁵³ 545 U.S. at 700 (Breyer, J., concurring). The Justice did note, however, that both *Lemon* and the Endorsement test, along with other formal tests, would support his conclusion. *Id.* at 703.

⁵⁴ While differentiating between *Van Orden* and *McCreary County* will be discussed in detail in Part IV, for a deeper discussion on both cases, see Adam Silberlight, *Thou Shall Not Overlook Context: A Look at the Ten Commandments Under the Establishment Clause*, 18 WIDENER L.J. 113, 113 (2008).

⁵⁵ 413 U.S. 472 (1973); 413 U.S. 756 (1973). This particular phenomenon—where the state is in danger of violating the excessive entanglement prong if it attempts to avoid violating the effect prong—has been characterized as a “Catch-22” created and enforced by the Court. *Aguilar v. Felton*, 473 U.S. 402, 420–21 (1985) (O’Connor, J., dissenting) (“In this case the Court takes advantage of the ‘Catch-22’ paradox of its own creation, . . . whereby aid must be supervised to ensure no entanglement but the supervision itself is held to cause an entanglement.”).

to staying within the Establishment Clause.⁵⁶ However, in both *Meek v. Pittenger* and *Wolman v. Walter*, two deeply divided Courts attempted to draw lines between permissible and impermissible direct aid, holding that some forms of aid would be permissible, while others would not.⁵⁷ This same line drawing persisted in *Aguilar v. Felton* and *School District v. Ball*, where the Court found that due to a violation of *Lemon*'s effect prong, both the payment of teacher salaries and public funding of classes in private schools would be impermissible.⁵⁸ After *Meek* and *Wolman*, the circuits were fairly uniform in applying *Lemon* to hold that direct aid to pervasively sectarian schools violated the Establishment Clause, though the definition of "pervasively sectarian" led to general confusion.⁵⁹

With *Zobrest v. Catalina Foothills Sch. Dist.*, however, the Court ignored the *Lemon* test in holding that State employees could provide a neutral service—disability aid—to parochial schools.⁶⁰ This omission became a point of contention in *Board of Education v. Grumet*,⁶¹ where the Court openly argued about the state of the *Lemon* test.⁶² While the plurality ignored the *Lemon* test, Justices Blackmun and Scalia both noted that *Lemon* was likely still alive, while Justice O'Connor considered the snub to be the final nail in *Lemon*'s coffin.⁶³

Shortly thereafter, the Court clarified the state of *Lemon* in *Agostini v. Felton*, where the Court used an altered *Lemon* test to conclude that direct aid available on a neutral basis would not violate the Establishment Clause.⁶⁴

⁵⁶ *Levitt*, 413 U.S. at 481 ("To the extent that appellants argue that the State should be permitted to pay for any activity 'mandated' by state law or regulation, we must reject the contention . . . such commands would not authorize a State to provide support for those facilities in church-sponsored schools."); *Nyquist*, 413 U.S. at 771 ("It is enough to note that it is now firmly established that a law may be one 'respecting an establishment of religion' even though its consequence is not to promote a 'state-religion,' . . . and even though it does not aid one religion more than another but merely benefits all religions alike.").

⁵⁷ 421 U.S. 349, 372 (1975); 433 U.S. 229, 246–47 (1977).

⁵⁸ 473 U.S. at 411–13; 473 U.S. 373, 397 (1985).

⁵⁹ See Timothy S. Burgett, Note, *Government Aid to Religious Social Services Providers: The Supreme Court's "Pervasively Sectarian" Standard*, 75 VA. L. REV. 1077 (1989) (describing the failings of the Supreme Court's "pervasively sectarian" standard).

⁶⁰ 509 U.S. 1, 13–14 (1993).

⁶¹ 512 U.S. 687 (1994). The case itself doesn't concern school funding, but the justices directly address the use of *Lemon* in school funding cases. *Id.*

⁶² *Id.* at 710 (Blackmun, J., concurring) ("I write separately only to note my disagreement with any suggestion that today's decision signals a departure from the principles described in *Lemon v. Kurtzman*."); *id.* at 718–21 (O'Connor, J., concurring) ("As the Court's opinion today shows, the slide away from *Lemon*'s unitary approach is well under way. A return to *Lemon*, even if possible, would likely be futile, regardless of where one stands on the substantive Establishment Clause questions."); *id.* at 751 (Scalia, J., dissenting) ("Unlike Justice O'Connor, however, I would not replace *Lemon* with nothing, and let the case law 'evolve' into a series of situation-specific rules (government speech on religious topics, government benefits to particular groups, etc.) unconstrained by any 'rigid influence' . . .").

⁶³ *Id.* at 710 (Blackmun, J., concurring); *id.* at 721 (O'Connor, J., concurring). Justice Scalia in particular despondently noted that the failure to directly apply *Lemon* in any one case does not necessarily mean the test has died. *Id.* at 750–51 (Scalia, J., dissenting) ("I no longer take any comfort in the Court's failure to rely on [*Lemon*] in any particular case, as I once mistakenly did . . .").

⁶⁴ 521 U.S. 203 (1997). The *Agostini* test collapsed "entanglement" prong into the "effect" prong. *Id.* at 232.

However, while the Court in *Mitchell v. Helms* also applied the *Lemon* test as modified in *Agostini*, the plurality held that direct aid was *per se* permissible if it was made neutrally available to both secular and parochial schools,⁶⁵ regardless of the actual use of the aid. In contrast, Justices O'Connor and Breyer argued against the *per se* rule and in favor of considering the actual effect of the aid.⁶⁶ The circuits are left with conflicting messages about the newfound prominence of the neutrality standard, but generally agree that *Lemon* continues to apply in school funding cases.

Like direct aid, the indirect aid cases had arguments over the applicable scope of the *Lemon* test. In both *Sloan v. Lemon* and *Mueller v. Allen*, the Court applied the *Lemon* test.⁶⁷ However, in *Sloan* the Court held that funding via grants to parents was impermissible, while at the same time upholding a tax deduction program for parents in *Mueller*, under a "private choice" theory.⁶⁸ In *Witters v. Washington Department of Services for the Blind*, the Court reaffirmed *Mueller* by holding that paying grants directly to students was permissible under the *Lemon* test under the same private choice theory.⁶⁹ Sixteen years later, due to developments in other areas of Establishment Clause law, the Court chose to apply the *Agostini* test in *Zelman v. Simmons-Harris* upholding a school voucher program under private choice and arguing that neutral grants should be *per se* permissible.⁷⁰ In concurrence, Justice O'Connor argued against this *per se* rule, arguing that neutrality was not dispositive.⁷¹ Despite this division in the Court, *Zelman* effectively ended the controversy on voucher programs with respect to federal law and shifted the controversy to Blaine Amendment challenges,⁷² which largely focused on state law claims and are therefore outside the scope of this Article.⁷³

⁶⁵ 530 U.S. 793, 822 (2000) ("The issue is not divertibility of aid but whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school.")

⁶⁶ *Id.* at 839 (O'Connor, J., concurring) ("[The Court has] never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.")

⁶⁷ 413 U.S. 825, 835 (1973); 463 U.S. 388, 394 (1983).

⁶⁸ 413 U.S. at 832–33; 463 U.S. at 402–03.

⁶⁹ 474 U.S. 481, 485, 489 (1986).

⁷⁰ 536 U.S. 639, 658, 662 (2002).

⁷¹ *Id.* at 670 ("In particular, a 'neutrality test . . . [should] focus on a category of aid that may be directed to religious as well as secular schools, and ask whether the scheme favors a religious direction.'")

⁷² Ira C. Lupu & Robert W. Tuttle, *Zelman's Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 NOTRE DAME L. REV. 917, 919 (2003) ("The outcome in *Zelman*, decided by a vote of five to four, may have been close, but the question it answers has now been firmly resolved. . . . [T]he voucher decision . . . resolves a particular question in a way highly unlikely to be revisited.")

⁷³ Kyle Duncan, *Secularism's Laws: State Blaine Amendments and Religious Persecution*, 72 FORDHAM L. REV. 493, 493 (2003) (arguing that Blaine Amendments violate the First Amendment by persecuting religious groups).

G. *Limited Public Forum Cases*

Religious expression in forums is one of the most complicated areas in Establishment Clause jurisprudence. The struggle between free religious expression and the governmental interest in avoiding an Establishment Clause violation lies at the heart of every single case. Among its many wrinkles, the Court has created categories of forums, each which require an independent inquiry in weighing the government's interest against the individual. The Court has gradually developed four categories of forums: the traditional public forum, the designated public forum, the limited public forum, and the nonpublic forum.⁷⁴ While traditional public forums present challenging issues of their own, this Article analyzes them alongside religious symbols cases.

The post-*Lemon* Court's public forum doctrine was first seen in *Perry Education Association v. Perry Local Educator's Association*, where the Court held that a public school's internal mail system was not designated as a public forum, and therefore could have its access conditioned so long as the restraints were "reasonable" and viewpoint neutral.⁷⁵ Furthermore, the Court defined a limited public forum as one created by the government, but "for a limited purpose such as use by certain groups . . . or for the discussion of certain subjects"⁷⁶ These cases frequently involve the university and school settings, given their unique nature. Since *Perry*, the Court has consistently held that providing such a forum for both secular and religious speech is compatible with the Establishment Clause, but the test to apply changed over time. In *Board of Education v. Mergens* and *Widmar v. Vincent*, the Court applied the *Lemon* test in finding that private religious speech in limited public forums did not violate the Establishment Clause.⁷⁷ The Court also held that school policies barring religious extracurricular clubs from using school facilities violated the Establishment Clause, with *Widmar* considering the university context, and *Mergens* considering the high school setting.⁷⁸ *Mergens* began to show disagreement with the *Lemon* test, with Justices Kennedy and Scalia arguing for a coercion and neutrality test.⁷⁹

To further exacerbate the divide, the Court ignored *Lemon* entirely in *Rosenberger v. Rector & Visitors of the University of Virginia*, instead distinguishing and comparing the case against past limited public forum cases.⁸⁰ Justice O'Connor, in concurrence, applied the Endorsement test in reaching the same conclusion as the majority, while Justice Souter noted his

⁷⁴ See Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1981–89 (2011).

⁷⁵ 460 U.S. 37 (1983).

⁷⁶ *Id.* at 45 n.7 (citation omitted).

⁷⁷ 496 U.S. 226, 248 (1990); 454 U.S. 263, 271–75 (1981).

⁷⁸ 454 U.S. 263; 496 U.S. 226

⁷⁹ See 496 U.S. at 260–61 (Kennedy, J., concurring).

⁸⁰ See 515 U.S. 819, 834–35 (1995).

disagreement with the departure from the *Lemon* test.⁸¹ The majority's focus on neutrality appeared to diverge from *Lemon*, naturally raising questions about the test's continued vitality.⁸² Furthermore, in *Good News Club v. Milford Central School*, the Court appeared to state that *Lemon* was all but gone in the limited public forum context.⁸³ Rather than opting for a single test, the majority selected a factual comparison to *Lamb's Chapel v. Center Moriches Union Free School District* finding the elements of neutrality, coercion, and endorsement in the present case indistinguishable from *Lamb's Chapel*, and therefore meriting the same result.⁸⁴ Again, it appears that the Court has dismissed *Lemon* as done and gone, but the circuits remained divided over its application, particularly because many of the decisions in the forum cases were penned by pluralities—a familiar theme across all of Establishment Clause jurisprudence.

H. *The Accumulated Establishment Clause tests Post-Lemon*

Since the Supreme Court has refused to explicitly overrule *Lemon* and has instead opted to clarify and differentiate away various cases, the lower court has been left with a plethora of tests. Some of these tests were presented as versions of the *Lemon* test, while others appeared to be entirely independent tests. These accumulated tests include the original *Lemon* test; the Endorsement test; the *Agostini* test; the Coercion test; neutrality; the “nature of the monument” test; an “exercise of legal judgment;” and the “history and context.” To further complicate matters, the application of each of these tests vary from circuit to circuit, and several of the tests are still called “the *Lemon* test” despite their disparate applications. That said, even in the face of a lack of clear guidance, some contexts feature less confusion regarding the applicable test than others.

III. THE EASIER CASES IN THE CIRCUIT COURTS

In the “easy” cases, the circuits have little trouble deciding what test to apply due to fairly consistent Supreme Court guidance, albeit with some disagreements about the gravity of certain prongs. For example, in the legislative prayer context the circuits were deeply split over what type of prayer *Marsh* actually authorized until the recent *Town of Greece* case.⁸⁵ Despite this split, every circuit agreed early on that legislative prayer cases were addressed through the history and tradition analyzed in *Marsh* rather than the *Lemon* test.

⁸¹ See *id.* at 849–50 (O'Connor, J., concurring); see also *id.* at 863–64 (Souter, J., dissenting).

⁸² See James E. Mitchell, Note, *The Establishment Clause and Public Universities: Drawing the Constitutional Line Between Permissible and Impermissible Support of Religious Student Groups*, 87 NOTRE DAME L. REV. 459, 481 (2011).

⁸³ 533 U.S. 98, 106–07 (2001).

⁸⁴ *Id.* at 109–10.

⁸⁵ See *supra* notes 26–29 and accompanying text.

A. Legislative Prayer

After *Lemon* and before the Court's decision in *Marsh*, there were few cases concerning legislative prayer. The Eighth Circuit considered two cases on the subject,⁸⁶ while several state courts were confronted with the practice.⁸⁷ With the exception of *Chambers v. Marsh* in the Eighth Circuit, the courts uniformly agreed that legislative prayer was compatible with the Establishment Clause, even when analyzed under the *Lemon* test. Perhaps illustrating problems with the *Lemon* test in the legislative prayer setting, the Eighth Circuit reached opposite conclusions in *Chambers v. Marsh* and *Bogen v. Doty* despite applying *Lemon* to seemingly similar facts.⁸⁸ *Chambers* drew a distinction from past cases approving the practice, arguing that the use of a single paid chaplain violated all three prongs of *Lemon*. The court argued that *Bogen*—where the court upheld a practice allowing for a rotation of volunteers to lead prayer services—set the bar between permissible and impermissible legislative prayer practices, ultimately concluding that paying a single chaplain who represented only one faith crossed that line.⁸⁹ In concluding that a legislative prayer practice could violate the Establishment Clause, *Chambers* was a lone outlier.

Perhaps prompted by this exceptional result, the Supreme Court reversed *Chambers v. Marsh* and made it abundantly clear that the *Lemon* test did not apply in cases involving legislative prayer.⁹⁰ Despite the controversy that erupted over the *Marsh* decision and the resulting circuit split concerning sectarian prayers,⁹¹ the circuits currently recognize this strong exception to the application of the *Lemon* test in legislative prayer cases.⁹² The Court's recent *Town of Greece* decision clearly reaffirmed the use of *Marsh* rather than *Lemon* in this context, given that it was one of the few points of agreement between the dissenting justices and the majority.⁹³ Regardless of

⁸⁶ *Chambers v. Marsh*, 675 F.2d 228 (8th Cir. 1982); *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979).

⁸⁷ See *Marsa v. Wernik*, 430 A.2d 888, 899 (N.J. 1981) (applying *Lemon* to hold that invocation had a predominately secular purpose and did not aid or inhibit religious practices); *Colo. v. Treasurer & Receiver Gen.*, 392 N.E.2d 1195, 1196, 1200 (Mass. 1979) (applying *Lemon* to uphold the State's practice of paying legislative chaplains due to the history and tradition of the practice).

⁸⁸ 675 F.2d at 235; 598 F.2d at 1115.

⁸⁹ *Chambers*, 675 F.2d at 234 (“The Bogen Court, while upholding the practice as a whole, sternly warned the county ‘of the quagmire it is near.’”).

⁹⁰ See *Marsh v. Chambers*, 463 U.S. 783, 795 (1983).

⁹¹ See Kenneth A. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 GEO. J.L. & PUB. POL'Y 219, 235–38. (2008) (discussing circuit splits).

⁹² See Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 988 (2010) (“A few years ago, for example, the Court offhandedly referred to legislative prayer as the sole ‘special instance [where it] found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious.’ Lower courts have picked up on this as well. They often refer to how ‘Marsh is one of a kind,’ and have also clearly understood that the usual ‘endorsement,’ ‘coercion,’ and ‘Lemon’ tests - which apply to all other Establishment Clause litigation - are inapposite when it comes to legislative prayer.”).

⁹³ None of the opinions in *Town of Greece* mention the *Lemon* test, while some of them address how *Marsh* related to the case. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014); see also *id.* at 1831 (Alito, J., concurring); see also *id.* at 1841–42 (Kagan, J., dissenting).

the disagreements about whether legislative prayer practices should be permissible, the cases demonstrate one simple truth about the *Lemon* test: the only way to stop the circuits from using *Lemon* is to expressly overrule it—not merely ignore it—and replace it with something else.

B. School Prayer

While there is quite a bit of controversy inherent in adjudicating school prayer cases, the applicable test is less debatable. Unlike legislative prayer where the test to apply is entirely governed by *Marsh*, there are several pivotal cases that each altered the analysis employed by circuit courts. Ultimately, these decisions still resulted in a relatively uniform test, much like the legislative prayer cases. Furthermore, the outcomes of these cases are uniform across circuits as a result of the Supreme Court's clarifications of the Establishment Clause's reach.

1. School Prayer, 1971–2000

As Part II discussed, *Wallace v. Jaffree* was the Court's first post-*Lemon* case about school prayer, where the Court found that Alabama's moment-of-silence laws were a brazen attempt to reinstitute school prayer.⁹⁴ The Court applied the *Lemon* test to quickly conclude that the law lacked any true secular purpose.⁹⁵ While *Wallace* helped answer questions about the nature of prayer in the classroom, it presented a new question: whether prayers given at schools outside the classroom setting would be acceptable. Before the Court's decision in *Lee v. Weisman*, a circuit split developed, with the First and Eleventh Circuits holding under *Lemon* modified by the Endorsement test that benedictions given by a state actor at school graduation ceremonies violated the Establishment Clause,⁹⁶ while the Sixth Circuit chose to apply *Marsh* in holding that non-sectarian prayers at graduations could be permissible.⁹⁷ The Sixth Circuit's decision in *Stein v. Plainwell Community School* was deeply fractured, with the concurrence applying both *Marsh* and *Lemon* in finding sectarian graduation prayers impermissible, and the dissent arguing that regardless of the test applied, invocations at ceremonies did not automatically violate the Establishment Clause—instead, the invocation had to be considered in the “whole context.”⁹⁸ On the other hand, in *Weisman v. Lee*, the First Circuit applied *Lemon* modified by the Endorsement test to hold that benedictions given at school graduation ceremonies had the impermissible effect of advancing religion due to the symbolic union between

⁹⁴ 472 U.S. 38 (1985).

⁹⁵ *Id.* at 56 (“[T]he record . . . reveals that the enactment of § 16-1-20.1 was not motivated by any clearly secular purpose -- indeed, the statute had *no* secular purpose.”).

⁹⁶ *Weisman v. Lee*, 908 F.2d 1090, 1090 (1st Cir. 1990); *Jager v. Douglas Cty. Sch. Dist.*, 862 F.2d 824, 834–35 (11th Cir. 1989).

⁹⁷ *Stein v. Plainwell Cmty. Sch.*, 822 F.2d 1406, 1409 (6th Cir. 1987).

⁹⁸ *Id.* at 1410 (Milburn, J., concurring); *id.* at 1415–17 (Wellford, J., dissenting).

the school and a particular religion.⁹⁹ In the course of deciding that the prayer was impermissible, the court recognized that there was confusion over the applicable test, first considering and rejecting *Marsh*, but eventually choosing to apply the Endorsement test in light of the *Allegheny* decision.¹⁰⁰

The Court attempted to rectify some of the confusion in *Lee v. Weisman*, agreeing with the First Circuit that state-sponsored benedictions at graduation ceremonies violated the Establishment Clause.¹⁰¹ In reaching this conclusion, the majority failed to apply the *Lemon* test, ultimately creating and applying the Coercion test.¹⁰² Furthermore, the majority unequivocally barred the use of *Marsh* in the school setting, arguing that the tradition backing *Marsh* was irreconcilable with the public school context.¹⁰³ Both concurrences noted the majority's failure to apply *Lemon*, arguing that the Coercion test posited by the majority should not supplant the *Lemon* test, while Justice Scalia, in his dissent, applied the Coercion test to argue that there was a lack of true coercion.¹⁰⁴

Understandably, *Lee* led some scholars to question whether *Lemon*'s days were finally at an end,¹⁰⁵ while the circuits, prior to the Court's *Santa Fe* decision, held fast to the use of the *Lemon* test, but also employed the new Coercion test in cases involving prayer at school ceremonies.¹⁰⁶ A new split emerged over student-initiated graduation prayers, with the Third, Fifth, Sixth, and Ninth Circuits holding that prayer given after a majority of students voted for prayer at graduation was still controlled by the state,¹⁰⁷ thereby violating the Establishment Clause under *Lee*, *Lemon*, and the Endorsement test, while the Fifth and Ninth Circuits differentiated away student-initiated

⁹⁹ *Weisman*, 908 F.2d at 1095 (“As the district court held, it is self-evident that a prayer given by a religious person chosen by public school teachers communicates a message of government endorsement of religion.”).

¹⁰⁰ *Id.* at 1094 (“[The appellants] contend that the prayers are acceptable under either the prevailing *Lemon* test or under the exception to that standard delineated in *Marsh v. Chambers*. Such arguments have been rejected by other courts.”).

¹⁰¹ 505 U.S. 577, 599 (1992).

¹⁰² *Id.* at 593 (“The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.”).

¹⁰³ *Id.* at 597 (“Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one, and we cannot accept the parallel relied upon by petitioners and the United States between the facts of *Marsh* and the case now before us.”).

¹⁰⁴ *Id.* at 640 (Scalia, J., dissenting) (“The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.”).

¹⁰⁵ See Paulsen, *supra* note 8, at 819–25.

¹⁰⁶ See 530 U.S. 290, 316 (2000). After *Wallace v. Jaffree*, federal appeals courts rarely, if ever, litigated state-initiated prayers in classrooms.

¹⁰⁷ See, e.g., *ACLU v. Black Horse Pike Reg’l Bd. of Educ.*, 84 F.3d 1471, 1488 (3d Cir. 1996); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406–07 (5th Cir. 1995); *Coles ex rel. v. Cleveland Bd. of Educ.*, 171 F.3d 369, 371 (6th Cir. 1999) (citing student-led school prayer); *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated*, 41 F.3d 447 (9th Cir. 1995).

prayer as outside the scope of *Lee*, and therefore permissible.¹⁰⁸ Similarly, the Seventh Circuit found a non-sectarian invocation at the university level permissible, limiting *Lee* to the primary and secondary school context.¹⁰⁹ The test to apply, however, was deeply unclear to all of the circuits, most of which resorted to applying the Coercion test via the facts of *Lee* alongside one of the modified *Lemon* tests.¹¹⁰ Perhaps best illustrating this problem, the Fifth Circuit applied three different tests, using *Lemon*, Endorsement, and Coercion as separate tests. In *Ingebretsen v. Jackson Public School District*, the court held that student-initiated non-proselytizing prayers at various compulsory and non-compulsory school events were impermissible, violating all three prongs of *Lemon* and the Coercion test.¹¹¹ Due to the variety of tests, the court compared the facts of the case to *Lee* and circuit precedent to decide whether the context was more or less “coercive” than the other cases.¹¹² In doing so, the court refused to abandon *Lemon* and used it to structure their analysis.¹¹³

2. School Prayer, Currently

The lower courts’ continued reliance on *Lemon* after *Lee* appeared merited after the *Santa Fe* decision, where the Court struck down student-initiated prayers at school events as an Establishment Clause violation, explicitly applying both the Coercion test and *Lemon* as modified by the Endorsement test.¹¹⁴ While the case largely settled the circuit split regarding student-initiated prayer and breathed new life into the *Lemon* test, it did little to alleviate the confusion over which test to apply. The *Santa Fe* majority appeared to apply the Coercion test in order to clarify the true breadth of the *Lee* decision, rather than as an independent test for school prayer cases.¹¹⁵ This has left the circuits to wonder whether the Coercion test should be an independent test of its own or part of the consideration taking place in the *Lemon* test. In our current post-*Santa Fe* environment, the circuits have largely agreed that it is permissible for a school to bar proselytizing or sectarian prayers at graduation ceremonies under the *Lemon*, Endorsement, and Coercion tests,¹¹⁶ while prayers given without the school’s impetus were

¹⁰⁸ *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 964 (5th Cir. 1992). The Fifth Circuit distinguished *Clear Creek* in *Doe v. Santa Fe Independent School District*, and the Supreme Court later affirmed the distinction in *Santa Fe Independent School District v. Doe*. See 168 F.3d 806, 809 (5th Cir. 1999); see also 530 U.S. 290, 314 (2000).

¹⁰⁹ *Tanford v. Brand*, 104 F.3d 982, 986 (7th Cir. 1997).

¹¹⁰ *ACLU*, 84 F.3d 1471; *Doe*, 70 F.3d 402; *Coles ex rel.*, 171 F.3d 369; *Tanford*, 104 F.3d 982; *Harris*, 41 F.3d 447.

¹¹¹ See 88 F.3d 274, 279, 281 (5th Cir. 1996).

¹¹² *Id.* at 279.

¹¹³ *Id.* at 278–79.

¹¹⁴ 530 U.S. 290, 299–314 (2000).

¹¹⁵ *Id.* at 312 (noting that *Lee* was not distinguishable, and the prayers in *Santa Fe* had the same improper effect of coercing those in attendance to participate in religious worship).

¹¹⁶ *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 842–43 (7th Cir. 2012); *Borden v. Sch. Dist.*, 523 F.3d 153, 158 (3d Cir. 2008) (finding that a coach praying along with his team before school games violated the Establishment Clause); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983–84 (9th Cir. 2003) (citing *Cole v. Oroville Union High Sch. Dist.* to uphold a restriction on sectarian or proselytizing

permissible.¹¹⁷

The Court's decision in *Santa Fe* proved not only to rectify a grave split in outcomes, but also demonstrated that *Lemon* was once again the guiding inquiry in school prayer cases. Today, despite disagreements on how to apply the Endorsement and Coercion tests alongside *Lemon*, the circuits generally agree that school prayers are only permissible when they occur as private speech, since prayers given at public events tend to violate *Lemon*'s effect and entanglement prongs.¹¹⁸ The Court's past decisions have informed and "filled in" the prongs in this context, and, as a result, circuits tend to reach similar conclusions due to a better understanding of the test contours.

In sum, the easier cases show that there are a few places where the test to apply is facially uniform. In legislative prayer cases, all of the lower courts apply *Marsh* rather than *Lemon*. In school prayer cases, the circuits consistently apply *Lemon* with the Endorsement and Coercion tests, though the circuits disagree on whether the latter two tests are separate inquiries, or part of *Lemon*'s effect prong. Given the clear guidance from *Santa Fe* and *Lee*, the circuits have little disagreement on the outcomes of such cases, barring state-sponsored religious speech in the school setting while generally allowing private speech. These results across circuits suggest a shared understanding of the Establishment Clause in these areas.

IV. THE HARDER CASES IN THE CIRCUIT COURTS

While the "easy" cases involve little confusion about the applicable test among the circuits, the lower courts struggle with picking a test in religious symbols and school funding cases. Currently, the twin opinions of *McCreary County v. ACLU* and *Van Orden v. Perry* would seem to present a daunting Sophie's Choice for circuits that have been left to contend with a vague factual distinction.¹¹⁹ However, the lower courts have clearly reconciled the two cases, coming to uniform conclusions. Meanwhile, the Court has deeply subdivided the school funding cases, with each successive

graduation prayers); *Doe v. Sch. Bd.*, 274 F.3d 289, 290–91 (5th Cir. 2001) (striking down a Louisiana law allowing verbal prayers in school); *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1095 (9th Cir. 2000) (upholding a restriction on sectarian or proselytizing graduation prayers).

¹¹⁷ *Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605, 607 (8th Cir. 2003) (upholding prayers given at a benediction without the school's cooperation as private speech); *Adler v. Duval Cty. Sch. Bd.*, 206 F.3d 1070, 1071 (11th Cir. 2000) (upholding a school's practice of allowing students to elect their graduation speakers, allowing that speaker to give unrestricted messages at the graduation). These cases rely heavily on weighing speech rights against the government's interest in not violating the Establishment Clause.

¹¹⁸ The Court certainly made the distinction between private prayer and state-sponsored prayer clear. See Mark W. Cordes, *Prayer in Public Schools After Santa Fe* Independent School District, 90 KY. L.J. 1, 33 (2002) ("[T]he Court in both *Lee* and *Santa Fe* affirmed this basic distinction between prohibited government prayer and permissible student prayer. Indeed, the Court in *Santa Fe* both began and concluded its analysis with reference to this basic distinction, emphasizing the central distinction between prohibited government prayer and permitted student-initiated prayer.")

¹¹⁹ 545 U.S. 844, 874–75 (2005); 545 U.S. 677, 691–92 (2005).

decision by the Court answering a split in outcomes at the expense of complicating the test to apply. The result has been an assortment of tests that appear starkly different, but ultimately share and apply the same core principles.

A. *Religious Symbols*

By their very nature, religious symbols present difficult questions for the judiciary. First, these symbols are highly varied in presentation, ranging from the Christian cross, to the menorah, to the Ten Commandments.¹²⁰ Second, the Supreme Court has frequently highlighted the difference between a state action and private speech in a so-called “public forum,” further complicating the applicable test in symbols cases.¹²¹ Third, the Court’s steady movement away from strict separation invited “history and context” as part of the inquiry, and it remains unclear how that inquiry should begin or end, or if it acts as a modification on past tests, or as a new test of its very own.

1. The Ten Commandments Cases, 1971–2005

Before *Van Orden* and *McCreary County*, the lower courts were in relative harmony concerning the test to apply in Ten Commandments cases, largely opting for *Lemon* modified by the Endorsement test. The Third Circuit went so far as to state that the Endorsement test was *the* proper test for all symbols cases after *Capitol Square v. Pinette*, only formally applying *Lemon* in order to cover its bases.¹²² However, the circuits disagreed over the outcomes, with no clear factual distinction governing whether a Ten Commandments display would be judged as an Establishment Clause violation.

The Third Circuit held that two different Ten Commandment displays in front of a county courthouse did not violate the Establishment Clause due to the history and context of the display.¹²³ The Sixth, Tenth, and Eleventh Circuits disagreed, finding Ten Commandments displays in a courtroom,¹²⁴ on state house grounds,¹²⁵ and in front of a judicial building,¹²⁶ to be Establishment Clause violations. These circuits also applied *Lemon* modified by the Endorsement test, calling upon factual distinctions to find that the history and context of the monuments would suggest endorsement of

¹²⁰ See 2 GREENAWALT, *supra* note 9, at 69–90.

¹²¹ *Id.*

¹²² *Freethought Soc’y v. Chester Cty.*, 334 F.3d 247, 260 n.10 (3d Cir. 2003) (“However, in view of the possibility that a higher court may prefer to analyze the constitutionality of this plaque under the traditional *Lemon* purpose and effect inquiry, we will now briefly consider how to evaluate the County’s purpose.”).

¹²³ *Id.*; *Modrovich v. Allegheny Cty.*, 385 F.3d 397, 399 (3d Cir. 2004).

¹²⁴ *ACLU of Ohio Found., Inc. v. Ashbrook*, 375 F.3d 484, 487 (6th Cir. 2004).

¹²⁵ *Sumnum v. City of Ogden*, 297 F.3d 995, 1000 (10th Cir. 2002).

¹²⁶ *Glassroth v. Moore*, 335 F.3d 1282, 1284 (11th Cir. 2003).

Christianity by the state to a reasonable observer.¹²⁷ While the actual application of the Endorsement test varied between circuits, they generally agreed that it was the applicable test.¹²⁸

For example, in *Freethought Society v. Chester County*, the Third Circuit held that under the Endorsement test—applied by itself—an informed reasonable observer would be aware of the secular justifications for placing a Ten Commandments plaque on a courthouse facade, citing *Allegheny* in support.¹²⁹ The court was able to apply the test itself without resorting to factual comparisons. However, in *Books v. City of Elkhart*, the Seventh Circuit held that a Ten Commandments display on the lawn of a city's municipal building violated the Establishment Clause, applying *Lemon* modified by Endorsement, rather than Endorsement as a separate inquiry.¹³⁰ Unlike the Third Circuit, this court held that the Ten Commandments were inherently religious and that because the city had failed to mitigate the religious aspect of the monument, the purpose and effect of the monument both suggested government endorsement of religion.¹³¹ As the court noted, the judge who sought the monument's proliferation did so due to his "desire to provide youths with a common code of conduct that they could use to govern their actions," as opposed to an acknowledgment of the historical significance of the Commandments.¹³² Despite the relatively consistent use of Endorsement as the primary symbols analysis, the outcomes were disparate, raising concern.¹³³

The circuit courts' consistency in applying the Endorsement test continued with the two cases that ultimately triggered the Court to act again: *Van Orden v. Perry* and *ACLU v. McCreary County*.¹³⁴ Both applied the Endorsement test, with the Sixth Circuit again applying it as a modification of the effect prong of *Lemon*, while the Fifth Circuit applied it as a modification of both *Lemon*'s purpose and effect prongs.¹³⁵ Both included an analysis of history and context in determining the intended purpose and effect of the monument. In *Van Orden*, the Fifth Circuit held that the monument's history and context showed that the reasonable observer would not perceive

¹²⁷ *Ashbrook*, 375 F.3d at 491–93; *Sumnum*, 297 F.3d at 1009–10; *Glassroth*, 335 F.3d at 1294–96.

¹²⁸ While the Third Circuit treated the Endorsement test as a separate inquiry from *Lemon*, the Sixth and Eleventh Circuits applied it as a modification of the second prong, and the Seventh Circuit applied it as part of the first and second prongs.

¹²⁹ *Freethought Soc'y v. Chester Cty.*, 334 F.3d 247, 260, 262 (3d Cir. 2003) ("Thus, when evaluating whether the Ten Commandments plaque is an endorsement of religion by the County, we ask whether the plaque 'sends a message to nonadherents [sic] that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'").

¹³⁰ 235 F.3d 292, 294, 304, 307 (7th Cir. 2000).

¹³¹ *Id.* at 303–04.

¹³² *Id.* at 303.

¹³³ *Silberlight*, *supra* note 54, at 129–34 (reviewing the fractured circuit courts prior to the *Van Orden* and *McCreary County* opinions).

¹³⁴ 351 F.3d 173, 177 (5th Cir. 2003); 354 F.3d 438, 446 (6th Cir. 2003).

¹³⁵ *McCreary Cty.*, 354 F.3d at 445–46; *Van Orden*, 351 F.3d at 177–80.

an impermissible endorsement of religion by the State.¹³⁶ The court in *McCreary County* reached the opposite conclusion, finding that the display's history and context supported the opposite inference, and that both the purpose and effect prongs of the *Lemon* test were violated by the display.¹³⁷ Even though the circuits agreed on the applicable test, the disparate outcomes were deeply concerning.

2. The Ten Commandments Cases, Currently

In addressing the split in outcomes, the Supreme Court upheld both the Fifth and Sixth Circuits, but took a wrecking ball to the sense of order over choosing the test to apply. Both decisions were 5-4, with the Court in *McCreary County* commanding a majority in holding that *Lemon* modified by the Endorsement test applied, while a plurality in *Van Orden* explicitly departed from *Lemon* in favor of a "passive monument" inquiry driven by the monument's nature and the Nation's history.¹³⁸ To further complicate matters, Justice Breyer cast the swing vote in both cases, explaining in his concurrence that no single test could govern Establishment Clause jurisprudence because every test had its failings, and that "borderline cases" required an "exercise of legal judgment."¹³⁹ In stating that *Van Orden* presented such a borderline case, he further noted that both *Lemon* and the Endorsement test would support the outcome and could continue to serve as guideposts in future Establishment Clause cases.¹⁴⁰ Despite this declaration, he refrained from picking a particular test.¹⁴¹

The result of the Court's twin opinions was unsurprising, best demonstrated by an exasperated district court noting that four tests—*Lemon*, Endorsement, Coercion, and the "legal judgment test"—could potentially apply in judging in a Ten Commandments display, and that the recent decisions had created yet another circuit split.¹⁴² The Sixth and Eleventh Circuits meanwhile continued the course set before *Van Orden* and continued to apply the Endorsement test as a modification of *Lemon*, considering history

¹³⁶ 351 F.3d at 181.

¹³⁷ 607 F.3d at 449.

¹³⁸ 545 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. Instead, our analysis is driven both by the nature of the monument and by our Nation's history.").

¹³⁹ *Id.* at 700 (Breyer, J., concurring) ("I see no test-related substitute for the exercise of legal judgment.").

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 703-04.

¹⁴² *Freedom from Religion Found., Inc. v. New Kensington-Arnold Sch. Dist.*, 919 F. Supp. 2d 648, 653-54 (W.D. Pa. 2013) ("This conglomerate of mixed messages has not only caused some confusion among the lower courts and litigants alike, but also resulted in a division among the circuits over which test applies to passive displays challenged under the Establishment Clause."). The court also noted that the Coercion test would likely be inapplicable, somewhat simplifying matters, though not entirely. *Id.* at 657.

and context.¹⁴³ Only the Eighth and Ninth Circuits took up the test articulated by the *Van Orden* plurality in holding that a Ten Commandments monument on state grounds did not violate the Establishment Clause, relying heavily on the factual similarities between their present cases and *Van Orden*.¹⁴⁴

Two cases, one from the Sixth Circuit and one from the Ninth Circuit, exemplify the current state of affairs. In *ACLU v. Mercer County*, the Sixth Circuit considered a Ten Commandments display among nine historical documents inside a courthouse.¹⁴⁵ First, the circuit considered the *McCreary County* decision, factually comparing the monument in Mercer County to several similar monuments across Kentucky, ultimately concluding that despite the striking similarity to the unconstitutional monuments in *McCreary County*, the monument's purpose and effect was secular.¹⁴⁶ The court also applied *Lemon* modified by Endorsement, finding that the test survived *Van Orden*, concluding that a reasonable observer would not find impermissible endorsement of religion by the government.¹⁴⁷

Meanwhile, in *Card v. City of Everett*, the Ninth Circuit considered a city's six-foot tall Ten Commandments monument on the grounds of the Old City Hall.¹⁴⁸ Much like the other circuits, the court resorted to factually differentiating the case from *McCreary County*, finding that the setting of the monument looked substantially more like the facts in *Van Orden*.¹⁴⁹ On that basis, the court looked to Justice Breyer's concurrence and as a result the court considered the history of the lack of complaints as well as considerations of purpose and "suggestion of the sacred" as the *Van Orden* plurality had suggested.¹⁵⁰

Despite the departure by the Ninth Circuit and the disparity in the applied test, the method of analysis is relatively common among the circuits. Because *Van Orden* and *McCreary County* left the test to apply uncertain, the

¹⁴³ *ACLU v. Grayson Cty.*, 591 F.3d 837, 844–45 (6th Cir. 2010); *ACLU v. Dixie Cty.*, 690 F.3d 1244 (11th Cir. 2012); *ACLU v. Garrard Cty.*, 517 F. Supp. 2d 925, 932 (E.D. Ky. 2007); *ACLU v. Rowan Cty.*, 513 F. Supp. 2d 889, 905 (E.D. Ky. 2007).

¹⁴⁴ *See Red River Freethinkers v. City of Fargo*, 764 F.3d 948, 949–50 (8th Cir. 2014); *ACLU Neb. Found. v. City of Plattsmouth*, 419 F.3d 772, 776–77 (8th Cir. 2005); *Card v. City of Everett*, 520 F.3d 1009, 1010 (9th Cir. 2008).

¹⁴⁵ 432 F.3d 624, 626 (6th Cir. 2005).

¹⁴⁶ *Id.* at 632 ("Here, unlike *McCreary County*, Mercer County's stated purpose was more than a mere 'litigating position.' Instead, it is supported by context, including the explanatory document and the eight other objectively historical and secular documents. A reasonable observer would not view this display as an attempt by Mercer County to establish religion.")

¹⁴⁷ *Id.* at 636 ("The recent decisions of this Court have routinely applied *Lemon*, including the endorsement test. Because *McCreary County* and *Van Orden* do not instruct otherwise, we must continue to do so." (citations omitted)).

¹⁴⁸ 520 F.3d at 1010–11.

¹⁴⁹ *Id.* at 1019 ("The district court noted that the 'context of the monument at issue in this case is remarkably similar to that presented to the Supreme Court in *Van Orden*,' and found 'that the analysis and holding of *Van Orden* governs this case.' . . . We agree." (citation omitted)).

¹⁵⁰ *Id.* at 1019–21.

courts are left to distinguish their cases from past Supreme Court cases.¹⁵¹ As a result, even though the test to apply is inconsistent across circuits, the ultimate outcomes of the cases are not dependent on the forum. *Van Orden* and *McCreary County*, taken together, stand for the proposition that the Ten Commandments can frequently stand for a valid historical purpose, thereby avoiding an Establishment Clause violation. Due to that common understanding, some circuits use *Lemon* to structure their analysis, considering the facts of prior cases to outline the application of each prong (particularly the effect prong), while other courts consider general notions of “effect” through an exercise of legal judgment. That latter approach speaks to the heart of Justice Breyer’s view on these tests: they simply provide guidance in applying a shared understanding of the relationship between religion and the state. While that guidance appears disparate, the principles underlying the *Lemon* test still pervade both methods of analysis, with the circuits demonstrating a desire to reconcile each case against their understanding of the Establishment Clause.

3. Nativity Scenes and Holiday Displays, 1971–1995

Like the Ten Commandments, other religious displays have resulted in difficult cases over the past few decades. Over the history of these cases, the circuits have shifted on the applicable test, often in reaction to Supreme Court decisions that were intended to clarify a circuit split. For example, in *Lynch v. Donnelly*, where a deeply divided Court held that a nativity scene set in a Christmas display with several secular symbols in the heart of the city’s shopping district was not an Establishment Clause violation, the Court set the stage for the controversies that would follow.¹⁵² The controlling vote belonged to Justice O’Connor, who in concurrence articulated the Endorsement test, a clarification of the first two prongs of the *Lemon* test, intended to ask whether a reasonable observer, informed of the history and context of the display, would perceive an impermissible purpose or effect of advancing religion by the state.¹⁵³

After *Lynch*, the Third, Seventh, and Tenth Circuits all adopted the Endorsement test as a modification of *Lemon*, comparing the facts of *Lynch* to their cases at issue to generally hold that stand-alone nativity scenes were

¹⁵¹ See Silberlight, *supra* note 54, at 147 (arguing that *Van Orden* and *McCreary County* force the circuit courts to embark on a case by case determination, rather than employ bright-line rules for or against certain monuments).

¹⁵² 465 U.S. 668, 671 (1984) (“The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa’s sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads ‘SEASONS GREETINGS,’ and the creche [sic] at issue here. All components of this display are owned by the city.”).

¹⁵³ *Id.* at 690–91 (O’Connor, J., concurring).

Establishment Clause violations.¹⁵⁴ However, in *McCreary v. Stone* the Second Circuit articulated a very narrow “neutral open forum” exception, which found no inference of endorsement when the display at issue was among other symbols in public spaces generally perceived to encourage private speech.¹⁵⁵ The plaintiffs sued the city for denying their application to place a crèche in the village circle during the Christmas holiday season.¹⁵⁶ In finding for the plaintiffs, the court noted that since the village could potentially grant access to various religious and nonreligious groups, the village lacked a compelling interest in barring the plaintiff’s free expression in a neutral forum.¹⁵⁷ However, the Third Circuit in *ACLU v. County of Allegheny* disagreed, holding that both a crèche displayed during the holiday season inside a county courthouse and a menorah displayed next to a Christmas tree one-block away from the courthouse on city property violated the Establishment Clause.¹⁵⁸ In so holding, this court, like the Second Circuit, applied *Lemon* modified by Endorsement and introduced a six-factor inquiry into “effect.”¹⁵⁹ Applying those factors, they found that a reasonable person would assume that “the city and county have tacitly endorsed Christianity and Judaism and have therefore acted to advance religion.”¹⁶⁰ In reaching this conclusion, the court compared Supreme Court precedent and analogous cases from other circuits, disagreeing with the distinctions drawn by other courts, including the “adorned/unadorned distinction” that suggests that secular decorations surrounding a religious one could nullify the religious significance of the sectarian symbol.¹⁶¹ Regardless, the court found that the county did not take the steps necessary to distance itself from the displays, and that the surrounding context was similarly religious in nature.¹⁶² This split in outcomes showed a clear problem with applying the Endorsement test,

¹⁵⁴ *ACLU v. Cty. of Allegheny*, 842 F.2d 655 (3d Cir. 1988); *Am. Jewish Cong. v. City of Chi.*, 827 F.2d 120 (7th Cir. 1987); *ACLU v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986); *Friedman v. Bd. of Cty. Comm’rs*, 781 F.2d 777 (10th Cir. 1985).

¹⁵⁵ 739 F.2d 716 (2d Cir. 1984).

¹⁵⁶ *Id.* at 717–22.

¹⁵⁷ *Id.* at 726–27 (“In *Lynch*, the Court determined that the display of the creche [sic] did not advance religion in general or the Christian faith in particular any more than those benefits and endorsements found not violative of the establishment clause in other Supreme Court cases. . . . The district court stated that it did not believe that a broad class of nonreligious and religious symbols will abound in Scarsdale’s parks. . . . However, this belief does not lessen the opportunities for free-speech usage of Scarsdale’s public forums” (citations omitted)).

¹⁵⁸ 842 F.2d 655, 656, 663 (3d Cir. 1988).

¹⁵⁹ *Id.* at 662 (“The variables that a court should consider in determining whether a display has the effect of advancing or endorsing religion include: (1) the location of the display; (2) whether the display is part of a larger configuration including nonreligious items; (3) the religious intensity of the display; (4) whether the display is shown in connection with a general secular holiday; (5) the degree of public participation in the ownership and maintenance of the display; and (6) the existence of disclaimers of public sponsorship of the display.”).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 668 (“Equally unpersuasive is the *City of Birmingham*’s adorned/unadorned distinction. *Lynch* simply does not support applying such a ‘Two Plastic Reindeer’ rule.”).

¹⁶² *Id.* at 662 (“Further, while the menorah was placed near a Christmas tree, neither the creche [sic] nor the menorah can reasonably be deemed to have been subsumed by a larger display of non-religious items.”).

and provoked the Court to clarify the matter.

The Court's clarification came in the form of the *County of Allegheny v. ACLU* decision, where a majority agreed upon applying *Lemon* modified by the Endorsement test, considering the history and context of the display, overruling the Third Circuit with respect to the menorah display.¹⁶³ Unlike the Third Circuit, the majority found that the Christmas tree and other "secular" symbols mitigated the menorah's principally religious message.¹⁶⁴ While the majority agreed on the outcome, Justices Blackmun and Stevens wanted to strictly adhere to the Endorsement test for all cases involving government displays of objects with religious significance.¹⁶⁵ However, Justice Kennedy insisted that the Endorsement test was the wrong test to apply, and instead noted the unique history and tradition of the displays should govern—much like in *Marsh*.¹⁶⁶

Before the Court clarified its position in *Capitol Square Review & Advisory Board v. Pinette*,¹⁶⁷ circuits were forced to reconcile the divided message offered by *Allegheny*, attempting to differentiate between an impermissible stand-alone crèche and the acceptable display of a menorah amongst other religious symbols. Most circuits held that religious symbols standing on their own would violate the Establishment Clause, while sectarian symbols amongst other secular or sectarian symbols would not. In so doing, the circuits often resorted to comparing the facts of *Allegheny* and *Lynch* to their present controversy, as it was difficult to understand where the line between "endorsement" and "not endorsement" lay. The circuits additionally had to wrestle with public forums and were forced to consider whether a setting was more akin to a traditional forum enabling free speech or a constrained setting enabling only government speech. The Second, Fourth, Seventh, and Ninth Circuits all considered displays on public property under the Endorsement test, holding that religious symbols that appeared to be standing alone were impermissible, while those surrounded by other symbols were not violations.¹⁶⁸ Meanwhile, the Fifth Circuit also considered *Marsh* in concluding that a town insignia emblazoned with a cross was not an Establishment Clause violation, though the Fifth Circuit stood alone in

¹⁶³ 492 U.S. 573, 578–79, 620–21 (1989).

¹⁶⁴ *Id.* at 617–18 ("The tree, moreover, is clearly the predominant element in the city's display. . . . In these circumstances, then, the combination of the tree and the menorah communicates, not a simultaneous endorsement of both the Christian and Jewish faiths, but instead, a secular celebration of Christmas coupled with an acknowledgement of Chanukah as a contemporaneous alternative tradition."). The crèche, however, utterly lacked these mitigating qualities, since "unlike in *Lynch*, nothing in the context of the display detracts from the crèche's [sic] religious message." *Id.* at 598.

¹⁶⁵ *Id.* at 594–97.

¹⁶⁶ *See id.* at 655–66 (Kennedy, J., concurring in part and dissenting in part).

¹⁶⁷ 515 U.S. 753, 770 (1995).

¹⁶⁸ *Kaplan v. Burlington*, 891 F.2d 1024, 1025 (2d Cir. 1989); *Smith v. Cty. of Albemarle*, 895 F.2d 953, 954, 958 (4th Cir. 1990); *Gonzales v. N. Twp. of Lake Cty.*, 4 F.3d 1412, 1414 (7th Cir. 1993); *Kreiser v. City of San Diego*, 1 F.3d 775, 776 (9th Cir. 1993).

choosing to apply *Marsh* to a religious symbols case.¹⁶⁹ Finally, the Sixth, Ninth, and Eleventh Circuits drew a distinction between government displays and public forums, holding that even stand-alone religious symbols in a public forum would either implicate the Establishment Clause, thereby foreclosing the use of the Endorsement test, or would be seen as a state endorsement of a particular faith by an informed reasonable observer.¹⁷⁰ As a result, outcomes varied wildly based on the circuit.

Consider two examples from this era, *Kaplan v. City of Burlington* in the Second Circuit, and *Chabad-Lubavitch of Georgia v. Miller*, in the Eleventh Circuit. Both cases involved a menorah displayed during the holiday season in a public setting.¹⁷¹ In *Kaplan*, the Second Circuit considered a menorah displayed in a park in front of city hall.¹⁷² The park had previously been used for short religious events, including a Jesus rally, but these had never included unattended religious displays for weeks at a time.¹⁷³ The court noted that under *Lynch*, the display would likely be permissible, but that *Allegheny* altered the analysis and meant that the unattended display of Burlington's menorah on government property—particularly in an area closely connected to the act of governance—conveyed an impermissible message of endorsement, much like the crèche display in *Allegheny County*.¹⁷⁴ The circuit also noted that *Allegheny* mandated this sort of heavy factual inquiry even in the public forum setting.¹⁷⁵

However, the Eleventh Circuit disagreed on both the outcome and the applicable test in *Chabad-Lubavitch*, where the court applied *Lemon* modified by the Endorsement test to hold that under a neutral open-access policy, a menorah on display in front of the State Capitol Building during Chanukah did not violate the Establishment Clause.¹⁷⁶ Unlike the Second Circuit, the court found that the State was not “speaking” in their forum, and, therefore, the state “action” granting Chabad's request was permissible, pursuant to its neutral open-access policy.¹⁷⁷ This inquiry was fundamentally different from

¹⁶⁹ *Murray v. City of Austin*, 947 F.2d 147, 155 (5th Cir. 1991).

¹⁷⁰ *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 676 (6th Cir. 1994); *Ams. United for Separation of Church & State v. City of Grand Rapids*, 922 F.2d 303, 310 (6th Cir. 1990); *Kreisner*, 1 F.3d at 776; *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1385 (11th Cir. 1993).

¹⁷¹ *Chabad-Lubavitch*, 5 F.3d at 1385; *Kaplan*, 891 F.2d at 1025.

¹⁷² 891 F.2d at 1025.

¹⁷³ *Id.* at 1026.

¹⁷⁴ *Id.* at 1028 (“The facts here with regard to the menorah are very much like those in *Allegheny* with regard to the creche [sic]. The menorah, like the creche [sic] in that case, is displayed alone on public property closely associated with a core government function. . . . [H]ere, the menorah is right in front of City Hall -- the very phrase ‘is commonly used as a metaphor for government.’”).

¹⁷⁵ *Id.* at 1029 (“Appellees argue that the Lubavitch have an absolute constitutional right to engage in symbolic expressive conduct in a public forum If this were so, however, the public forum doctrine would swallow up the Establishment Clause. . . . We believe that the present case is distinguishable from *Widmar*, since the City, prior to the grant of the permits for the display of the menorah, had not created a forum in City Hall Park open to the unattended, solitary display of religious symbols.”).

¹⁷⁶ *See* 5 F.3d at 1394–95.

¹⁷⁷ *Id.* at 1389.

the Second Circuit's approach in *Kaplan*, since the chief question was about state censorship of private speech, rather than the message communicated by the State itself.¹⁷⁸ The court argued against the applicability of *Allegheny* in public forum cases, though it noted that a reasonable observer would be aware that the rotunda was a public forum, and that therefore the speech was private speech, not government speech.¹⁷⁹ Therefore, between the *Kaplan* and *Chabad-Lubavitch* decisions, there was a split over the proper application of *Allegheny*, the assumptions made in public forum analysis, and the outcome of seemingly similar cases.

4. Nativity Scenes and Holiday Displays, Currently

The Court again attempted to rectify a circuit split in *Capitol Square Review & Advisory Board v. Pinette*, where a fractured Court generally agreed that *Lemon* modified by the Endorsement test was applicable, but could not agree on how to apply it.¹⁸⁰ The plurality argued that there should be a *per se* public forum exception in cases of private religious speech, fearing unfair censorship.¹⁸¹ In a separate opinion, Justices O'Connor, Souter, and Breyer rejected this *per se* public forum exception, focusing heavily on the Free Speech claims and the government's compelling interest to avoid the appearance of endorsement.¹⁸² In dissent, Justice Stevens noted that the Endorsement test could lead to the exact opposite result reached by the majority, effectively demonstrating one of the largest criticisms against the Endorsement test.¹⁸³

After *Capitol Square*, we reach the current state of the circuit courts: all of the lower courts contemplate neutrality as part of a public forum inquiry in religious symbols cases.¹⁸⁴ However, the circuits disagree over whether neutrality should entirely supplant *Lemon*, or accompany it. The Second, Fifth, and Seventh Circuits entirely replaced *Lemon* with a dual inquiry into neutrality and endorsement,¹⁸⁵ while the Tenth Circuit continues to apply

¹⁷⁸ *Id.* at 1388–89 (“Georgia neither approves nor disapproves such conduct, no matter how sordid or controversial it might be. Instead, the state remains aloof; it is neutral toward, and uninvolved in, the private speech.”).

¹⁷⁹ *Id.* at 1390 n.11 (“The endorsement test, however, is not based on perceptions of the ill-informed, first-time visitor who simply views a religious symbol in a government building without regard to public forum issues.”). The court explicitly noted its disagreement with the Second Circuit on this matter, but defended its decision by arguing that the public forum designation foreclosed the inquiry into whether or not Georgia was endorsing Judaism by permitting the menorah display in the Rotunda. *Id.* at 1394 n.17.

¹⁸⁰ 515 U.S. 753, 786–87 (1995) (Souter, J., concurring).

¹⁸¹ *Id.* at 766, 770 (majority opinion).

¹⁸² *Id.* at 772 (O'Connor, J., concurring).

¹⁸³ *See id.* at 799–817 (Stevens, J., dissenting).

¹⁸⁴ This neutrality inquiry comes from public forum cases, e.g., *Lamb's Chapel* and *Rosenberger*. *See Williams, supra* note 46, at 1644–45 (noting the Court's repeated attempts to replace *Lemon* and the Endorsement test with the neutrality inquiry from public forum case law for religious symbols cases, effectively providing a bright line rule in favor of such displays).

¹⁸⁵ *See* *Creator v. Town of Trumbull*, 68 F.3d 59, 61 (2d Cir. 1995); *Campbell v. St. Tammany Par. Sch. Bd.*, No. Civ.A.98–2605, 2003 WL 21783317, at *1, *7 (E.D. La. July 30, 2003); *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 100 F.3d 1287, 1299 (7th Cir. 1996).

Lemon alongside neutrality and endorsement.¹⁸⁶ Again, we consider two cases to illustrate this split: *Grossbaum v. Indianapolis-Marion County* in the Seventh Circuit, and *Summum v. City of Ogden* in the Tenth Circuit, both of which consider nonpublic forums.¹⁸⁷ In *Grossbaum*, the Seventh Circuit considered a county's refusal to permit a menorah display within the City-County Building's lobby due to a restriction against all private displays, religious or otherwise.¹⁸⁸ The court upheld this restriction, finding it to be both reasonable and content-neutral regardless of the actual motive behind the restraint.¹⁸⁹

However, the Tenth Circuit in *Summum v. City of Ogden* applied both *Lemon* as modified by the Endorsement test and neutrality to hold that a city violated the Establishment Clause by declining a church's proposed religious monument, leaving a copy of the Ten Commandments unaccompanied.¹⁹⁰ The court argued that the actual posting of the Ten Commandments was permissible, as a reasonable observer would not assume that the government was endorsing the views espoused by the private displays.¹⁹¹ However, denying the additional posting by the church—a monument of the Seven Principles of the Summum religion—violated the church's right to free speech with no valid Establishment Clause basis for the exclusion.¹⁹²

Despite the disparate outcomes, the Seventh and Tenth Circuit would largely agree on the outcome. In an earlier incarnation of *Grossbaum*, the Seventh Circuit struck down a restriction against purely religious private speech, and the County reformed its policy in accordance with this earlier case and prohibited all private speech.¹⁹³ These examples of the current state of the circuits illustrate that the starkly disparate analysis and various versions of *Lemon* still lead to uniform outcomes, largely because the Supreme Court's

¹⁸⁶ *Summum v. City of Ogden*, 297 F.3d 995, 1009–10 (10th Cir. 2002); *Summum v. Callaghan*, 130 F.3d 906, 921 (10th Cir. 1997).

¹⁸⁷ Even nonpublic forums require reasonable and content-neutral restrictions, often requiring analysis similar to public forum cases. Unlike public forum cases, the court affords significantly more deference to the reasoning provided by the state. *Grossbaum*, 100 F.3d at 1297 (“The constitutional standard governing speech regulations in nonpublic fora is less certain. The Supreme Court has elaborated on the standard in a number of cases, but the Court's language has not always been entirely consistent. The cases have unequivocally held that any speech regulation in a nonpublic forum must be ‘reasonable in light of the purposes served by the forum.’”). Furthermore, the restraint needs to only be reasonable, not the *most* reasonable restraint. *Id.* at 1299.

¹⁸⁸ *Id.* at 1290.

¹⁸⁹ *Id.* at 1298.

¹⁹⁰ 297 F.3d at 1009–11.

¹⁹¹ *Id.* at 1011.

¹⁹² *Id.* (“[W]e are persuaded that a reasonable observer would, instead, note the fact that the lawn of the municipal building contains a diverse array of monuments, some from a secular and some from a sectarian perspective. . . . [T]he City cannot display the Ten Commandments Monument while declining to display the Seven Principles Monument.”).

¹⁹³ *Grossbaum v. Indianapolis-Marion Cty. Bldg. Auth.*, 63 F.3d 581, 592 (7th Cir. 1995) (“The Board's justification for denying the menorah display in its Policy was expressly that it was religious. In this case, therefore, consistent with the Supreme Court in *Rosenberger* and *Lamb's Chapel*, we hold that the prohibition of the menorah's message because of its religious perspective was unconstitutional under the First Amendment's Free Speech Clause.”).

decisions have filled in the applied tests. Whether the analysis is labeled as “neutrality” or as *Lemon*, the circuits have demonstrated a shared understanding of the Establishment Clause, resulting in similar outcomes.

B. School Funding

State laws that provide for the direct or indirect funding of private religious schools have been the most litigated areas of Establishment Clause jurisprudence for over a century. The Court has dealt with the issue rather frequently, setting the stakes fairly high by linking state funding of schools to the potential for the religious indoctrination of children. The post-*Lemon* world in particular featured a significant amount of litigation over various funding regimes, and the Court’s decisions ultimately created distinct—though highly contested—categories of cases based on the type of funding, and the circumstances under which they were given. Assigning controversies to these categories adds to the already difficult task of discerning which test to apply. Despite the deep division on the applicable test, the circuits are relatively uniform in their outcomes.

1. Direct Aid, Currently

Generally speaking, the state engages in direct aid in the school setting when it gives any form of financial support directly to parochial schools, and engages in indirect aid when it gives financial support to students in the form of a tax credit or voucher to then spend as they please.¹⁹⁴ However, the line between direct and indirect aid is rarely this clear, and the courts have debated the true nature of funding programs.¹⁹⁵ Furthermore, the Court has steadily softened on direct lending prohibitions over time, overruling decades of prior law.¹⁹⁶ In the late 1990s, the Court demonstrated this change in two cases: *Agostini v. Felton* and *Mitchell v. Helms*. In both cases, the Court removed previous barriers to direct aid, overruling four cases from a decade earlier.¹⁹⁷ In *Agostini*, the majority collapsed the *Lemon* test into two prongs, expanding the effect prong to include the entanglement prong, while removing certain considerations—like administrative cooperation and political divisiveness—from being considered “excessive entanglement.”¹⁹⁸ Thus, entanglement merely became a factor in a larger consideration of the effects of state actions instead of a dispositive element of its own. Most importantly, the Court held that if direct aid was neutrally

¹⁹⁴ See 2 GREENAWALT, *supra* note 9, at 53–68.

¹⁹⁵ Strout v. Albanese, 178 F.3d 57, 62 (1st Cir. 1999) (“This dichotomy between direct and indirect aid is a recurring theme throughout Establishment Clause litigation. Although not all cases fit neatly within this formula, and this somewhat tenuous distinction has been the subject of considerable criticism by academia, it is the closest thing that we have to a workable bright line rule, or that perhaps is possible.”).

¹⁹⁶ For this reason, our analysis starts later than in other contexts: the case law from the 1970s and 1980s has been explicitly overruled.

¹⁹⁷ *Mitchell v. Helms*, 530 U.S. 793, 835 (2000); *Agostini v. Felton*, 521 U.S. 203, 236 (1997).

¹⁹⁸ 521 U.S. at 233–34.

available to parochial and secular schools alike, regardless of the actual proportion of those schools, the funding program would not be considered a *per se* Establishment Clause violation.¹⁹⁹

Collapsing *Lemon* into the *Agostini* test was fairly straightforward and required little manipulation of the *Lemon* test. However, the Court complicated matters in *Mitchell*, where a plurality applied the *Agostini* test and advocated for the effect inquiry to stop at the manner in which aid was distributed, effectively allowing sectarian schools to divert funds for other—often religious—purposes.²⁰⁰ In other words, neutrally dispensed direct aid would be *per se* legal. Justices O'Connor and Breyer disagreed with this *per se* rule and argued that the actual effect of the aid still mattered, and that under *Agostini* direct aid had to be used for secular purposes.²⁰¹ Understandably, this has led the lower courts to question what sort of direct aid *Agostini* and *Mitchell* actually permitted.

The clearest demonstration of *Mitchell*'s impact comes from the Fourth Circuit in *Columbia Union College v. Clarke*, which came before *Mitchell*, and *Columbia Union College v. Oliver*, which came after *Mitchell*.²⁰² In *Clarke*, the court held that while *Agostini* barred *per se* bans on direct aid to sectarian colleges, under *Roemer v. Board of Public Works*, direct aid to a pervasively sectarian college could still be an Establishment Clause violation.²⁰³ However, in *Oliver*, the court concluded that *Mitchell* foreclosed the inquiry made in *Clarke* about whether the college was pervasively sectarian, so long as the *likely* effect of the aid was secular.²⁰⁴ This reading appears to strike a balance between the *per se* ban suggested by the *Mitchell* plurality and the concurrence's caution about the actual effect of the direct aid by granting a strong presumption in favor of validity under the Establishment Clause.

Aside from the *Oliver* and *Clarke* decisions, the direct aid case law is rather sparse. Between the Fifth, Sixth, and Seventh Circuits, there is general agreement about applying *Lemon* and neutrality, though there is some

¹⁹⁹ *Id.* at 229 (“Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid.”).

²⁰⁰ 530 U.S. at 822 (“The issue is not divertibility of aid but rather whether the aid itself has an impermissible content. Where the aid would be suitable for use in a public school, it is also suitable for use in any private school. Similarly, the prohibition against the government providing impermissible content resolves the Establishment Clause concerns that exist if aid is actually diverted to religious uses.”).

²⁰¹ *Id.* at 837 (O’Connor, J., concurring).

²⁰² 254 F.3d 496, 501 (4th Cir. 2001); 159 F.3d 151, 169 (4th Cir. 1998).

²⁰³ See 159 F.3d at 160 (“Nor does *Agostini* overrule the *Roemer* holding. To be sure, like *Witters*, *Agostini* prohibits a court from concluding that any and all state aid to a pervasively sectarian institution impermissibly advances religion, and so to that extent is contrary to the broad *Roemer* dicta.”); see also 426 U.S. 736 (1976).

²⁰⁴ 254 F.3d at 507–08 (“We recognize, of course, that the Sellinger Program is a direct aid program . . . Nevertheless, the Sellinger Program more than satisfies the ‘neutrality plus’ criteria of *Mitchell*. We thus believe that the Supreme Court would approve of Columbia Union’s use of Sellinger Program funds for secular courses of instruction without resort to a pervasively sectarian analysis.”).

disagreement about whether to incorporate endorsement and coercion as part of *Lemon's* effect prong. The Sixth Circuit chose only to apply endorsement,²⁰⁵ while the Fifth and Seventh Circuits also apply coercion as part of *Lemon*.²⁰⁶ The only case to strike down neutrally available direct aid is *Freedom from Religion Foundation, Inc. v. Bugher*, where the Seventh Circuit held that the use of direct cash payments for telecommunications services differentiated *Bugher* from *Mitchell*, and violated *Lemon's* effect prong as stated in *Nyquist*, *Roemer*, and the original *Lemon* case.²⁰⁷ The chief difference is that in *Mitchell*, “the federal government distributed funds to state and local governmental agencies, which in turn *lent educational materials and equipment* to public and private schools.”²⁰⁸ The Court in *Mitchell* did not directly rule on the matter of direct cash payments to religious schools, but noted that there may be “special Establishment Clause dangers” inherent in the state giving money directly to parochial schools.²⁰⁹ Therefore, despite all of the changes in how the Court views the Establishment Clause, the roots of the *Lemon* test remain largely valid: the state cannot directly finance a religious mission.

In another case that considered cash grants via neutrally available revenue bonds, *Johnson v. Economic Development Corp.*, the Sixth Circuit held that since those bonds were neutrally available and the project was confined to building enhancements, the aid was permissible.²¹⁰ In the decision, the court argued that “the Establishment Clause simply requires neutrality,” and that this requirement was expressed in the *Lemon* test.²¹¹ The court likened the case to *Mueller* and *Witters*, where the Court upheld neutrally available tax deductions and a rehabilitation assistance program extended to parochial schools as well as public schools, respectively.²¹² Given *Johnson*, it is unclear whether the Sixth Circuit would disagree with the *Bugher* decision. However, it is likely that the Seventh Circuit would agree with the *Johnson* decision. While the lack of an answer regarding direct cash payments in the wake of *Mitchell* could become a larger problem down the road, perhaps inviting certiorari, right now the outcomes across circuits

²⁰⁵ *Smith v. Jefferson Cty. Sch. Bd.*, 549 F.3d 641, 656 (6th Cir. 2008); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 512 (6th Cir. 2001).

²⁰⁶ *Doe ex rel. v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 468 (5th Cir. 2001); *Freedom from Religion Found., Inc. v. Bugher*, 249 F.3d 606, 611 (7th Cir. 2001).

²⁰⁷ 249 F.3d at 612–13 (“The Court repeated the warning [from *Nyquist*] that ‘a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity,’ in *Roemer v. Board of Public Works of Maryland* In *Roemer*, the Court held that the Establishment Clause permits direct state-money grants to general secular educational programs of non-pervasively sectarian religious colleges where there is a statutory prohibition against sectarian use and an administrative enforcement of that prohibition.”).

²⁰⁸ *Id.* at 613 (emphasis added).

²⁰⁹ *Id.* (quoting *Mitchell v. Helms*, 530 U.S. 793, 818 (2000)).

²¹⁰ 241 F.3d at 512.

²¹¹ *Id.* As applied, the test collapsed excessive entanglement and effect into a single prong, as seen in *Agostini*, and cited to *Mitchell* to consider endorsement as part of effect. *Id.* at 513.

²¹² *Id.*

appear relatively uniform, and it appears that *Lemon*'s roots are intact, leading to relatively uniform outcomes despite the disparate methods.

2. Indirect Funding

Even before *Zelman v. Simmons-Harris*, there was little confusion about indirect aid, with the Court finding that private choices made by parents avoided the evils cautioned against by the Establishment Clause.²¹³ The majority of indirect aid cases involve Blaine Amendments: state constitutional amendments or laws that bar tuition reimbursements to parochial schools. While vouchers present several important questions about the relationship between religion and the state, those questions are outside of the scope of this Article.²¹⁴ For federal law claims, *Zelman* ended most questions about the applicable test to decide indirect aid cases: the *Agostini* test judges all indirect aid, and as a result, any neutrally available indirect aid does not violate the Establishment Clause.

3. Limited Public Forum, 1971–2000

Unlike the other funding cases, limited public forum cases are concerned with private speech in state-owned property, primarily in schools and universities. Like most of the other areas in Establishment Clause jurisprudence, the Supreme Court's view on limited public forums has changed radically over time. In one of the first post-*Lemon* cases considering these types of forums, *Widmar v. Vincent*, the Court applied the *Lemon* test to strike down a university's categorical ban on religious groups using school facilities, holding that the plaintiff's interest in free speech proved more important.²¹⁵ A decade later, in *Lamb's Chapel*, the Court expanded *Widmar*'s reasoning to primary schools and addressed the applicability of *Lemon* in limited public forums generally, with Justice Scalia memorably registering his personal disdain for the test's endurance.²¹⁶ Despite the Court's disagreement on the continued survival of the *Lemon* test, the circuits had a clear message about the test to apply, though there is little case law directly on point. In one such rare case, *Bender v. Williamsport Area School District*, the Third Circuit held that under *Lemon*, modified by the

²¹³ See Lupu & Tuttle, *supra* note 72, at 928 ("Although direct aid cases have blazed the erratic trail of Establishment Clause jurisprudence, the Court declared that indirect aid cases stand in a 'consistent and unbroken' line, in which the Court has considered three 'true private choice programs' and upheld them all.").

²¹⁴ For a deeper discussion on Blaine Amendments and vouchers, see Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 DENV. U. L. REV. 57, 70 (2005).

²¹⁵ 454 U.S. 263, 276 (1981) ("In this constitutional context, we are unable to recognize the State's interest as sufficiently 'compelling' to justify content-based discrimination against respondents' religious speech.").

²¹⁶ 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

Endorsement test, a high school had a compelling interest in barring a student-initiated, nondenominational prayer club from the same resources afforded secular extracurricular activities.²¹⁷ The court held that the classroom setting was special, and that therefore the interest in not violating the Establishment Clause exceeded the students' interest in free speech.²¹⁸ The Court effectively overruled the Third Circuit in *Mergens*, though the plurality also employed *Lemon* as modified by the Endorsement test in arriving at their contrary result.²¹⁹

However, this agreement in applying *Lemon* fractured in *Rosenberger*, where the Court ignored the *Lemon* test in favor of a neutrality inquiry.²²⁰ The circuits split as a result, with the Second, Fourth, and Fifth Circuits all declining to apply *Lemon*. While the Second Circuit applied the Endorsement test separately from *Lemon* and the neutrality inquiry from *Rosenberger*,²²¹ the Fourth Circuit applied Coercion, Endorsement, and neutrality, all separately from *Lemon*,²²² and the Fifth Circuit applied only the neutrality inquiry.²²³ Meanwhile, the Eighth Circuit chose to apply *Lemon* modified by Endorsement and the neutrality inquiry.²²⁴ The difference in the tests applied led to a split in outcome as well, as seen in two cases: *Good News Club v. Milford Central School* in the Second Circuit,²²⁵ and *Good News/Good Sports Club v. School District* in the Eighth Circuit.²²⁶ In both cases, the court considered prohibitions against private religious club meetings during non-school hours on school grounds, while allowing other extra-curricular clubs to meet.²²⁷ In the Second Circuit, the court held that the school's policy of barring non-secular clubs fell within *Rosenberger's* mandate for a reasonable and neutral restraint on participants in a limited public forum, applying the Endorsement test and the neutrality inquiry.²²⁸ However, the Eighth Circuit disagreed, weighing the group's free exercise right more heavily than the school's concern with violating the Establishment Clause.²²⁹ In doing so, the

²¹⁷ 741 F.2d 538, 560 (3d Cir. 1984) (“We therefore conclude that, in balancing the respective constitutional interests which would be lost and gained if Petros were granted access to the activity period, as against those which would be lost and gained if it were not granted access, there is a greater vindication of the protections of the Constitution if the Establishment Clause prevailed in this instance, as we hold that it does. To this extent, therefore, it can be said that the interest of Williamsport in complying with its constitutional obligations provides a compelling state interest.”).

²¹⁸ *Id.* at 547–49.

²¹⁹ 496 U.S. 226, 253 (1990).

²²⁰ 515 U.S. 819, 834–35 (1995).

²²¹ *Good News Club v. Milford Cent. Sch.*, 202 F.3d 502, 509 (2d Cir. 2000); *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 211–12 (2d Cir. 1997).

²²² *Peck v. Upshur Cty. Bd. of Educ.*, 155 F.3d 274, 279, 287 (4th Cir. 1998).

²²³ *Campbell v. St. Tammany Parish Sch. Bd.*, 231 F.3d 937, 942–44 (5th Cir. 2000).

²²⁴ *Good News/Good Sports Club v. Sch. Dist.*, 28 F.3d 1501, 1504, 1508–09 (8th Cir. 1994).

²²⁵ 202 F.3d at 511.

²²⁶ 28 F.3d at 1510.

²²⁷ *Milford Cent. Sch.*, 202 F.3d at 504; *Good Sports Club*, 28 F.3d at 1502.

²²⁸ *Milford Cent. Sch.*, 202 F.3d at 511 (“[T]he Milford school’s decision to exclude the Good News Club from its facilities was based on content, not viewpoint.”).

²²⁹ *Good Sports Club*, 28 F.3d at 1509–10.

court applied *Lemon* modified by the Endorsement test to find that the restraint on the forum was not applied neutrally, and was therefore impermissible: barring a religious group purely because it was religious failed the effect prong.²³⁰

4. Limited Public Forums, Currently

The Court addressed this split in outcomes in *Milford Central School*,²³¹ but persisted in ignoring *Lemon*. Furthermore, the Court again constrained the state's compelling interests in barring free speech, holding that regardless of how religious the club was, so long as they were teaching on the general subject of "morals and character development" outside of school hours, they were entitled to their speech rights.²³² Despite the apparent death of *Lemon*, the circuits remain divided over its application. The Second, Third, and Sixth Circuits continue to apply *Lemon* modified by the Endorsement test alongside coercion and neutrality.²³³ The Fourth, Seventh, Eighth, Ninth, and Eleventh Circuits uniformly abandoned *Lemon* and apply neutrality, but vary on the application of coercion and the effect inquiry from the Endorsement test.²³⁴ For example, in *Bronx Household of Faith v. Board of Education*, the Second Circuit upheld a school's refusal to permit church use of school facilities, applying *Lemon* and distinguishing the facts of the case from *Lamb's Chapel* and *Good News Club* to hold that a content-based prohibition on religious instruction was permissible.²³⁵ The bulk of the court's analysis rested on factual distinctions to hold that this exclusion differed from past exclusions found to be impermissible by the Supreme Court since the restraint was against a particular type of act—praying—rather than against religion, it was permissible.²³⁶ This meant that the state had a valid compelling interest in avoiding an Establishment Clause violation due to the improper effect of advancing religion.

However, in *Child Evangelism Fellowship of New Jersey, Inc. v.*

²³⁰ *Id.* at 1510 ("In summary, the primary or principal effect of the 1986 Use Policy was not the advancement of religion; rather, the primary effect was to establish a neutral forum for community and student groups to engage in the exchange of ideas.").

²³¹ *See* 533 U.S. at 102.

²³² *Id.* at 108–10.

²³³ *See* *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 41 (2d Cir. 2011); *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 634 (2d Cir. 2005); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 534 (3d Cir. 2004); *Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 219 (3d Cir. 2003); *Rusk v. Crestwood Local Sch. Dist.*, 379 F.3d 418, 420–22 (6th Cir. 2004).

²³⁴ *See* *Child Evangelism Fellowship of Md., Inc. v. Montgomery Cty. Pub. Schs.*, 373 F.3d 589, 595–96 (4th Cir. 2004); *Badger Catholic, Inc. v. Walsh*, 620 F.3d 775, 777–78 (7th Cir. 2010); *Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1003 (8th Cir. 2012); *Prince v. Jacoby*, 303 F.3d 1074, 1092 (9th Cir. 2002); *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1216 (11th Cir. 2004).

²³⁵ *See* 650 F.3d at 41 ("It was certainly not unreasonable for the Board to conclude that permitting the conduct of religious worship services in the schools might fail the second and third prongs of the *Lemon* test, and that the adoption of the 'worship services' branch of SOP § 5.11 was a reasonable means of avoiding a violation of the Establishment Clause.").

²³⁶ *Id.* at 35–48.

Stafford Township School District, the Third Circuit applied elements of neutrality, endorsement, and coercion in holding that a non-profit Christian organization could participate in an after-school program at an elementary school without violating the Establishment Clause.²³⁷ The court, much like the Second Circuit, leaned heavily on comparing the facts of the case to past Supreme Court cases, finding that the conduct heavily mirrored the films shown after school hours in *Lamb's Chapel*.²³⁸ The Third Circuit did not have to consider a content exclusion in this case; rather, they noted that the school could not enforce a restriction against religious speech, effectively agreeing with Second Circuit.²³⁹ With that said, it is unclear whether the Third Circuit would agree with the Second Circuit's relatively narrow reading of *Lamb's Chapel* and *Good News Club*.

These two cases are the norm. Every circuit, regardless of the disagreement over the test to apply, heavily relies on prior case law and factual differentiations in determining what is permissible in the limited public forum context. Despite the different frameworks used for the analysis, the underlying principles harken back to *Lemon*, and more closely define the "effect" prong. As a result, like the other "hard" cases, the circuits have uniform outcomes despite the test applied. All of the circuits still rely on *Lemon's* principles even when they do not explicitly invoke *Lemon* by name: e.g., the Endorsement and Coercion tests were derived from the same core assumptions.²⁴⁰ However, this Article's survey of *Lemon* across the contexts demonstrates the strongest argument against *Lemon*: it might still be alive, but its actual application appears so complex that it can no longer be considered a unified, simple test applicable to all Establishment Clause cases.

V. RECONCILING *LEMON* AGAINST THE ALTERNATIVES

Parts III and IV show that even at its simplest, the post-*Lemon* analysis is fairly complex in the lower courts. The implication, it could be argued, is seen in the difference between how courts treat legislative prayer as opposed to nearly every other Establishment Clause context: the Court must unequivocally address the state of *Lemon* if it wants to create a unified test. This naturally raises the question: what *is* the current state of *Lemon*?

²³⁷ 386 F.3d at 530 ("[G]iving Child Evangelism equal access to the fora at issue would not violate the Establishment Clause.").

²³⁸ See *id.* at 529 ("Applying *Lamb's Chapel* and *Rosenberger*, the Supreme Court reversed and held that the school had engaged in impermissible viewpoint discrimination. . . . This holding forecloses Stafford's argument that its disparate treatment of Child Evangelism was not viewpoint discrimination.").

²³⁹ *Id.* at 529–30.

²⁴⁰ Justice O'Connor derived the Endorsement test from *Lemon* during her *Lynch* concurrence, while Justice Blackmun noted in his *Lee* concurrence that the Coercion test bore the marks of traditional Establishment Jurisprudence. *Lynch v. Donnelly*, 465 U.S. 668, 687–95 (1984) (O'Connor, J., concurring); *Lee v. Weisman*, 505 U.S. 577, 604–06 (1992) (Blackmun, J., concurring). It is unclear whether or not Justice Kennedy would agree with that assertion about the Coercion test. *Lynch*, 465 U.S. at 687–95.

A. *The Current State of the Lemon test*

Despite the Court's original ambitions for the *Lemon* test, *Lemon* in 2015 bears little resemblance to *Lemon* in 1971. The original test was fairly rigid and appeared to stand on its own, attempting to prevent political divisiveness caused by government involvement in religion.²⁴¹ However, as the Court's understanding of the Establishment Clause has evolved, so has the application and nature of the *Lemon* test. To its critics, *Lemon* looks like a context-sensitive, fluid standard that shifts and twists with little rhyme or reason.²⁴² While there are several plausible theories explaining this fluidity, perhaps it is because adherence to a strict interpretation of *Lemon* would lead to results contrary to the judiciary's broader understanding of the Religion Clauses.²⁴³

In practice, each different Establishment Clause context has its own version of *Lemon*, all drawn from the same core principles. The religious symbols cases largely rely on the Endorsement test as articulated in Justice O'Connor's *Lynch* concurrence, asking what a reasonable observer, informed of the display's history and significance, would think of the display's relationship with the government.²⁴⁴ Despite their varying invocations, these versions of *Lemon* all largely ask the same question about the effect of the display. Similarly, in the school prayer context we see a version of *Lemon* with an added focus on coercion, though this emphasis on coercion mostly acts to describe a type of effect. Furthermore, the school funding cases also vary in the exact version of *Lemon* applied, largely due to changes in the underlying assumptions of what should be considered excessive entanglement. Some versions of the resulting *Lemon* tests used by the circuits inquire into neutrality, while others consider endorsement or coercion. However, despite the courts' evolution on what constitutes excessive entanglement, the underlying belief articulated in *Lemon* has endured: direct state funding of a religious mission has the impermissible effect of advancing religion.

At first glance—and without deeper analysis—it would appear that we are faced with a many-headed Hydra: a fearsome and daunting creature

²⁴¹ Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667, 1687 (2006) (“However, Chief Justice Burger went on to identify what he called ‘[a] broader base of entanglement of yet a different character,’ namely, that ‘presented by the divisive political potential of these state programs.’”).

²⁴² See sources cited *supra* note 7.

²⁴³ Ivan E. Bodensteiner, *The “Lemon Test,” Even with All Its Shortcomings, Is Not the Real Problem in Establishment Clause Cases*, 24 VAL. U. L. REV. 409, 412 (1990) (“This departure from the ‘Lemon Test’ was not really explained by the Court. If you want to be somewhat cynical, you might suggest that the majority decided to uphold the practice but could not do so under the ‘Lemon Test’ and therefore just ignored it. Maybe the majority was ‘result oriented’ and the historical test allowed it to reach the ‘right’ result.”).

²⁴⁴ See *supra* notes 45–50 and accompanying text; see also *Lynch*, 465 U.S. at 687–95 (O’Connor, J., concurring).

whose simplicity ultimately led to its demise. That image of *Lemon*, however, is a presumptuous dramatization. When a court applies *Lemon*, what it really does is break up its evaluation of precedent into three categories: purpose, effect, and entanglement. The three prongs have become guiding principles of review, with past cases filling in each prong. Really, the *Lemon* test has become the “*Lemon* guidelines,” acting as a framework for circuits to fall back onto due to the inherent complexity of the Establishment Clause. Based on the actual state of affairs, *Lemon* has continued to function as a means towards a unified understanding of the Establishment Clause. However, due to both normative disagreements with the outcomes *Lemon* advocates and frustration with its current complexity, there has been a vocal and persistent cry by scholars and justices alike to finally overrule *Lemon* and replace it with something else, and those alternatives are worth considering.

B. Replacing the *Lemon* test

Over the years, there have been many justices and scholars voicing their displeasure with *Lemon*, all advocating their own solutions that promise to “solve” the problems presented by the Establishment Clause.²⁴⁵ Of course, overruling one of the foremost tests in Establishment Clause jurisprudence is easier said than done, with the chief conflict arising over what test—if any—should replace *Lemon*. This has presented the largest hurdle to successfully overruling *Lemon*, since it is unlikely that five Justices would ever be able to agree on what test should govern the Establishment Clause, if past opinions are any indication.²⁴⁶ Even in highly specified situations, the Court has struggled to reach an agreement on the governing test, as evidenced in *McCreary County* and *Van Orden*, as well as *Lamb’s Chapel* and *Lee v. Weisman*.²⁴⁷ However, for the sake of argument, let us assume that both of the following proposed replacements would garner enough votes to command a majority.

1. Neutrality

First, the neutrality test, notably used in *Rosenberger*, is one of the

²⁴⁵ See *supra* notes 6–7 and accompanying text.

²⁴⁶ In theory, if there were a string of Presidents with the same political affiliation, there would eventually be enough votes to overrule *Lemon*. As of now, the Court appears reluctant to rule on the issue as inferred from a recent certiorari denial in which Justice Thomas argued that the Court should provide a definitive statement on the state of Establishment Clause tests. *Am. Atheists, Inc. v. Duncan*, 637 F.3d 1095 (10th Cir. 2010), cert. denied *sub nom.* *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 565 U.S. 994, 995 (2011) (Thomas, J., dissenting).

²⁴⁷ Carole F. Kagan, *Squeezing the Juice from Lemon: Toward a Consistent Test for the Establishment Clause*, 22 N. KY. L. REV. 621, 644 (1995) (“If Kiryas Joel signals anything, it is that there is no consensus among the current Court for any other test. Even Justice O’Connor, in her eagerness to repudiate the test, throws up her hands in surrender at the idea of proposing an alternative test that would give lower courts guidance in Establishment Clause cases.”). While the makeup of the Court has changed since 1995, this problem persists.

most commonly proposed alternatives to *Lemon*.²⁴⁸ As with *Lemon*, neutrality has shades and various potential manifestations, ranging from heavily emphasizing the Free Exercise Clause's dominance over the Establishment Clause, to a weaker sense of neutrality that would allow the government to consider political divisiveness in excluding religious content in certain circumstances.²⁴⁹ The former would require effectively overruling past decisions, while the latter would be inconsistent with recent limited public forum cases. Moreover, an all-encompassing doctrine of neutrality would mean that accommodations of religion would become the new baseline, with exclusion mandating a strong Establishment Clause rationale.

Consider one commentator's summary of Justice Thomas' view: "[N]eutrality, by definition, means not only that religious groups can receive aid from the government as long as they are not preferred over nonreligious groups, but that they are guaranteed the same aid as nonreligious groups."²⁵⁰ On the basis of that view, we would be forced to reconcile religious symbols cases and school prayer with the view that *all* actions by government merely needs to treat religion and non-religion equally.²⁵¹ Religious displays, like those seen in *Van Orden* or *McCreary County* would be permissible under this theory if the government treated all monuments in the same way—either banning them all, or permitting them all. The state, likely in the form of the moment-of-silence, could allow school prayer provided that it also allowed secular reflection during that same time period. Similarly, graduation benedictions would be permissible if the state afforded equal speech to other viewpoints.

Some might argue that having sectarian state-sponsored prayers alongside other forms of reflection would cheapen religion, while others may argue that in some settings, the majority religion would exert undue pressure on minority faiths that failed to conform.²⁵² The neutrality standard, however,

²⁴⁸ See Paulsen, *supra* note 8, at 810; John T. Manhire, Jr., Comment, *Rosenberger Effectively Harmonizes First Amendment Tensions, but Fails to Lay the Specter of Lemon to Rest*, 7 REGENT U. L. REV. 145, 154 (1996) ("Without even mentioning the *Lemon* test, the Court [in *Rosenberger*] held, 'neutrality is not offended when the government follows neutral criteria and evenhanded policies in extending benefits to groups with diverse viewpoints.'").

²⁴⁹ See Cornelius, *supra* note 7, at 35–36 (arguing for "benign neutrality," which would allow for non-preferential, non-coercive indirect aid to religious groups); see also Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 999–1011 (1990) (describing the various definitions of the concept of "neutrality").

²⁵⁰ Jason E. Manning, Comment, *Good News Club v. Milford Central School: Viewpoint Discrimination or Endorsement of Religion?*, 78 NOTRE DAME L. REV. 833, 866 (2003).

²⁵¹ *Town of Greece* would likely formally reconcile legislative prayer with Justice Thomas' view of neutrality.

²⁵² Lund, *supra* note 92, at 1043–44 ("With each decision, of course, the government sends a message - these are the proper religious beliefs, and those who disagree are wrong. This hurt can be conceptualized along a number of lines. It can be thought of as a denial of equal citizenship, a failure of equal regard, or a rejection of equal political footing. None of these are far from Justice O'Connor's own original formulation over two decades ago, where she explained how 'endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'").

is not concerned with the actual impact of state actions, but rather the *intended* impact of those actions. As a result, it would be a very easy test for courts to apply, since the court would not have to consider the various ways in which “effect” could be interpreted, or the complicated nature of excessive entanglement. Every court could simply ask whether the program was intended to treat religions equally, as well as believers and nonbelievers equally.

2. Coercion

Another proposal adopts coercion analysis, and like neutrality, this appears in various shades.²⁵³ At its most literal, often championed by Justice Scalia, coercion would only exist when the state funded a specific faith through taxes, or mandated adherence to a particular state-sponsored faith.²⁵⁴ Taking some steps away from this dramatic proposition may leave us in a place more reconcilable with our past case law, but would also leave coercion as a context-specific inquiry. However, if the lower court decisions following *Lee v. Weisman* were any guide, such coercion analysis is incredibly subjective, as some predicted.²⁵⁵ Determining “soft” coercion inherently requires the same sort of multi-factor inquiry into effect based on the underlying circumstances that the *Lemon* test is condemned for, including the content of the speech, the speaker, the audience, the importance of the event, and so on.

If we sought simplicity, we could instead ask whether the state is directly funding one particular religious mission over other religions or non-religion via its taxpayers. Some of our current case law appears to fit within this view: particularly after *Mitchell* and *Zelman*, the funding cases have whittled away prohibitions on various forms of aid to a prohibition against direct cash to religious institutions, and *Town of Greece* has made it clear that non-proselytizing legislative prayers are permissible. As for other contexts, coercion would provide significantly easier answers than our current tests. For example, *Van Orden* and *McCreary County* both would have fallen well short of compelling citizens to directly fund a preferred state religion, and lower courts would not be left to struggle with what reasonable observer would consider to be “endorsement.” School prayer, either as private speech or as part of a ceremony would be permissible so long as the school did not mandate one particular religious expression over others. These previously

²⁵³ See Rodney K. Smith, Symposium, *Religion and the Public Schools After Lee v. Weisman: Conscience, Coercion and the Establishment of Religion: The Beginning of an End to the Wandering of a Wayward Judiciary?*, 43 CASE. W. RES. 917, 923–26 (1993).

²⁵⁴ Geisinger & Bodensteiner, *supra* note 29, at 131 (“Justice Scalia has written that the only type of coercion that he deems to violate the Establishment Clause is direct coercion.”).

²⁵⁵ See Ronald C. Kahn, *Religion and the Public Schools After Lee v. Weisman: God Save Us from the Coercion Test: Constitutive Decisionmaking, Polity Principles, and Religious Freedom*, 43 CASE W. RES. 983, 990 (1993).

difficult cases become almost simple, and instead of facing an angry Hydra, we have an easy bright-line rule.

C. *The Lemon test's Remarkable Endurance*

Both of these alternatives have one major problem: they require completely upending our current understanding of the Establishment Clause. First, overruling and replacing *Lemon* with a new test would necessarily require us to re-litigate old case law in light of a new understanding of the Establishment Clause, and this re-litigation would ensure violating the reliance various parties have built up over the past few decades. The practical effects would be devastating, and even if a decade from now the Supreme Court managed to reconcile all of our precedent with a new standard, it is almost inevitable that our understanding of the Religion Clauses would have shifted *again*, leaving us with the same problem. The current status quo offers us stability, and even though the uncertainty inherent in applying *Lemon* is frustrating, it appears to be our best option barring a total sea of change in our understanding of the Establishment Clause.²⁵⁶

Second, moving on from *Lemon* means overruling what the original case, *Lemon v. Kurtzman*, stood for. While the current *Lemon* test has clearly taken on a life of its own, it remains tied to that underlying conception of the Establishment Clause: the state cannot directly fund a religious mission. Even as the Court has altered its thinking and overruled cases that came after *Lemon* due to a change in our assumptions about the relationship between religion and the state, and even as justices have voiced their deep distaste for the test itself, the actual underlying tenets that *Lemon* carries with it are largely accepted. The circuits have embraced the significance of *Lemon's* message as well, witnessed by their continued application of the test in the face of dozens of alternatives espoused by the Court. Given the myriad of other tests and the repeated statements made by several justices on the Court that the Establishment Clause is not governed by any particular test, the lower courts continue to look to *Lemon*. Even though the judiciary's views on religion have shifted since *Lemon* was initially decided, the circuits still understand the basic principle that giving direct aid to a religious mission is fundamentally opposed to our understanding of the Establishment Clause today. For all of their differences, every Establishment Clause test understands that principle.

There is no question that *Lemon* is significantly more complicated to apply now than it was in 1971; if *Lemon's* life depended on its simplicity, it would be dead and gone. Instead of a single test that can be applied uniformly across most contexts, *Lemon* bends and twists based on the facts of the case. Every clarification by the Supreme Court has altered *Lemon*, and each area of

²⁵⁶ Of course, for those who wish to completely change our understanding of the Establishment Clause, the best approach would clearly be to overrule *Lemon*.

law has created its own version of *Lemon*; and even those versions are rarely internally consistent. The three prongs can change dramatically in weight across contexts, appearing dispositive in some settings and dispensable in others. On top of that, the circuit courts have incorporated their own understanding of the Court's proposed modifications and tests, resulting in a different version of *Lemon* not only in each context, but also in each circuit.

However, there is a method to the madness. Despite *Lemon*'s transformation into the mythical Hydra, it continues to embody our understanding of the Establishment Clause and the current state of the government's relationship with religion. *Lemon*'s reliance on differentiating the facts of current cases from a half-century of Establishment Clause precedent results in the most reliable outcomes. The remarkable consistency in outcomes that we see across circuits is no accident: the modern *Lemon* test has filled out, clarifying versions of its original prongs. The circuit courts have understood every new test as a way to utilize *Lemon* and its basic principles, shaping and refining the test to reach uniform outcomes. While a simple binary test is enticing, the past fifty years of case law has shown that our understanding of religion is nuanced, and required filling out *Lemon*'s prongs. As a result, *Lemon* involves an inquiry into precedent as a means to better address the Establishment Clause's tenets. Seemingly, something similar to Justice Breyer's "exercise of legal judgment" approach has won out, with *Lemon* providing a framework for a more exhaustive analysis. The approach is certainly complicated, but ultimately the unanimity in outcomes is telling: *Lemon* carries the weight of the Establishment Clause successfully.

VI. CONCLUSION

As this Article has demonstrated, despite the critics and the pronouncements that it had finally been ignored out of existence, the *Lemon* test is alive and well in the lower courts. Moreover, even though its life is complicated and its form can be daunting, *Lemon* embodies a common understanding of the Establishment Clause that took decades of work to construct. In effect, the modern *Lemon* test is the result of this fifty-year-long journey made by a pluralistic society attempting to agree on religion's relationship with the state: hardly a simple task. Due to our nation's heterogeneity, we are forced to adopt a more nuanced view of the Religion Clauses that requires considering more than *per se* rules and binary distinctions. As inviting as some of the more bright-line proposals are, they all abandon this intricate, commonly endorsed compromise, in favor of a sometimes radically different view of the relationship between religion and the state. *Lemon* has weathered the storm, and has rightfully continued to be the guiding light for the circuits. While its appearance is often times messy, complicated, and intimidating, the Hydra is an oddly comforting analytical tool, and perhaps it is time that we embrace the nature of the beast.

