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The Lemon Test Soured: The Supreme Court's New Establishment Clause Analysis

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RECENT DEVELOPMENTS

The *Lemon* Test Soured: The Supreme Court's New Establishment Clause Analysis

I. INTRODUCTION

Through the relatively short jurisprudential history of the first amendment establishment clause,[1] the United States Supreme

1. The first amendment establishment clause reads: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. Although the United States Supreme Court had discussed the establishment clause several times before Cantwell v. Connecticut, 310 U.S. 296 (1940), made the clause applicable to the states through the fourteenth amendment, the first modern Supreme Court case interpreting the scope of the establishment clause was Everson v. Board of Educ., 330 U.S. 1 (1947). For early interpretations of the clause, see Rouben Quick Bear v. Leupp, 210 U.S. 50 (1908); Bradfield v. Rob-

Court has developed basic criteria to address establishment of religion questions. The Court set forth a three part test in *Lemon v. Kurtzman*[2] to determine whether a particular law or government activity violates the establishment clause. The *Lemon* test evaluates: (1) whether the challenged law or government activity has a secular purpose; (2) whether the primary effect of the law or activity advances or inhibits religion; and (3) whether the law or activity creates excessive entanglement of government with religion.[3] Although the members of the Court have not always agreed on the way that courts should apply these criteria,[4] the Court consistently has acknowledged the *Lemon* test as the foundation of establishment clause analysis.[5] This standard allows the Court to draw lines to protect against the establishment dangers that the drafters of the first amendment sought to prevent.[6]

Two recent Supreme Court decisions, however, cast doubt on the continued vitality of the *Lemon* test as the basic establishment clause line of inquiry. The first case, *Marsh v. Chambers*,[7] presented the question of the constitutionality of state-funded legislative prayer. The Court in *Marsh* neither applied nor addressed the *Lemon* test, but rather upheld the practice primarily on the

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erts, 175 U.S. 291 (1899); Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878).

2. 403 U.S. 602 (1971).

3. *Id.* at 612-13. Although the Court did not set forth definite criteria until Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963) (secular purpose and primary effect), and Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970) (excessive entanglement), the general concerns that the Court addressed in these cases existed in earlier decisions as well. *See* McCollum v. Board of Educ., 333 U.S. 203 (1948); Everson v. Board of Educ., 330 U.S. 1 (1947).

4. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1567-68 (10th ed. 1980).

5. *See* Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982); Widmar v. Vincent, 454 U.S. 263, 271 (1981); Meek v. Pittenger, 421 U.S. 349, 358 (1975); Committee for Pub. Educ. and Religious Freedom v. Nyquist, 413 U.S. 756, 761, 772-73 (1973).

In Larson v. Valente, 456 U.S. 228 (1982), the Court applied a strict scrutiny equal protection analysis to find that a state charitable solicitations statute, which granted clear denominational preference in its exemptions, was unconstitutional. The *Larson* Court determined that the *Lemon* test did not apply to provisions discriminating among religions, though the two tests address the same concerns. *See id.* at 251-52. Strict scrutiny generally renders a law unconstitutional unless the government demonstrates a compelling state interest and shows that the law is closely fitted to further that interest. *See id.* at 246-47; Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); Murdock v. Pennsylvania, 319 U.S. 105, 116-17 (1943). For an in-depth treatment of equal protection strict scrutiny, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000-02 (1978).

6. *See Lemon*, 403 U.S. at 612.

7. 103 S. Ct. 3330 (1983).

basis of its long-standing historical importance.[8] In the second case, *Lynch v. Donnelly*,[9] the challengers attacked the constitutionality of a city-owned and -maintained Christmas nativity display. The *Lynch* Court applied the *Lemon* test, but relied heavily upon the pervasiveness and historical significance of religious symbols in society rather than upon a rigorous *Lemon* analysis.[10]

This Recent Development argues that the Court's apparent trend toward basing establishment clause analysis on the pervasiveness or historical significance of government-supported religious activities represents an undesirable move away from strict examination of the questionable law or activity under the *Lemon* test. Part II briefly examines the theoretical bases of the establishment clause, then traces the Court's applications of each element of the *Lemon* analysis. Part III discusses the *Marsh* and *Lynch* decisions as the most recent Supreme Court additions to establishment clause doctrine. Finally, part IV analyzes two major effects of these decisions: first, the emergence of the historical approach as a significant, though not always appropriate, tool for establishment clause inquiry; and second, the Court's partial abrogation of the *Lemon* test as the settled and rigorous examination of most establishment of religion questions. Part IV concludes that the Court should synthesize its two approaches in order to ensure consistency in establishment clause decisions and adequately protect first amendment values.

II. Legal Background

A. *Establishment Clause Theory*

The Supreme Court often has cited Thomas Jefferson's concept of a "wall of separation"[11] between church and state to describe the constitutional limitations on relations between religion and civil government.[12] This characterization, however, has been only a metaphor and not a standard that the Court actually has applied.[13] The so-called "high and impregnable"[14] wall of separa-

8. *Id.* at 3333-35.

9. 104 S. Ct. 1355 (1984).

10. *Id.* at 1360-61, 1365-66.

11. Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *reprinted in* 8 The Writings of Thomas Jefferson 113 (Washington ed. 1861).

12. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122-23 (1982); Wolman v. Walter, 433 U.S. 229, 236 (1977); Engel v. Vitale, 370 U.S. 421, 425 (1962); Everson v. Board of Educ., 330 U.S. 1, 16, 18 (1947); Reynolds v. United States, 98 U.S. 145, 164 (1878).

13. *See* Larkin v. Grendel's Den, Inc., 459 U.S. at 122-23; Giannella, Lemon *and* Til-

tion is a theory of strict government neutrality toward religion which the Court often has advocated,[15] but never adopted. The Court has avoided a strict interpretation of the establishment clause primarily in recognition of the competing values in the free exercise and establishment clauses,[16] and out of a desire not to deny religion and religious activities the benefits that properly flow from the state to the public.[17] Thus, establishment clause jurispru-

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ton: *The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 151; Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1416 (1981). For a discussion of the vitality of the wall as a concept of separation of church and state, compare Hutchins, *The Future of the Wall*, in THE WALL BETWEEN CHURCH AND STATE 17 (D. Oaks ed. 1963), with Fey, *An Argument for Separation*, *id.* at 26. The solidity of the wall as an absolute barrier to government involvement in religion never has been certain. In *Everson* Justice Black wrote for the Court: "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." 330 U.S. at 18. Having set that strict standard, the *Everson* Court then upheld a state program to pay transportation expenses for students of parochial as well as public schools. Justice Jackson dissented: "[T]he undertones of the opinion . . . seem utterly discordant with its conclusion. . . . [T]he most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'" *Id.* at 19 (Jackson, J., dissenting).

14. *Everson*, 330 U.S. at 18.

15. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306, 319 (1952) (Black, J., dissenting); Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1463 (1981).

16. The first amendment free exercise clause reads: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ." U.S. CONST. amend. I. The tension between the establishment and free exercise clauses is a fundamental, and perhaps innate, first amendment problem. Many activities that the government designs to protect the free exercise of religion—tax benefits and zoning privileges, for example—may threaten to establish certain religions as state-sanctioned. *See* G. GUNTHER, *supra* note 4, at 1546-47; *see also* Thomas v. Review Bd., 450 U.S. 707, 719 (1981); Tilton v. Richardson, 403 U.S. 672, 677 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668-70 (1970); Sherbert v. Verner, 374 U.S. 398, 409 (1963); Everson v. Board of Educ., 330 U.S. 1, 15-16 (1947).

The relationship between the free exercise and establishment clauses and the issue whether one or the other should predominate have been the subject of much debate. *Compare* L. TRIBE, *supra* note 5, at 827-28 (advocating expansive reading of the free exercise clause, less expansive reading of the establishment clause) *with* Note, *supra* note 15, at 1476 (advocating strong interpretation of the establishment clause) *and* Choper, *Defining "Religion" in the First Amendment*, 1982 U. ILL. L. REV. 579 (advocating equal reading of both clauses because of the independent values and emphasis of each clause). For a discussion of the free exercise neutrality theory of establishment clause interpretation, see Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513, 518-21 (1968).

This Recent Development addresses only the Court's recent treatment of the establishment clause. Although free exercise is a vital aspect of first amendment protection of religious liberty, *Marsh* and *Lynch* raise no free exercise issues requiring extensive treatment here.

17. *See, e.g.*, Mueller v. Allen, 103 S. Ct. 3062 (1983) (allowing tuition tax deductions for dependents' education); Tilton v. Richardson, 403 U.S. 672 (1971) (upholding federal

dence has not lent itself to absolutes or mechanical solutions,[18] but rather has been a continuing debate over the government's proper "neutral" stance in activities affecting religion or religious institutions.[19]

This debate has not yielded a clear definition of the purpose of the establishment clause. Although the general concern underlying the principle of the separation of church and state is clear—"union of government and religion tends to destroy government and degrade religion"[20]—the Court has had difficulty developing a more specific statement of policy. Even resort to the writings of the Framers has not produced consistent interpretations. The Court has stated that for the Framers the establishment of religion connoted "sponsorship, financial support, and active involement of the sovereign in religious activity."[21] More recently, however, the Court set forth a narrower purpose: "to foreclose the establishment of a state religion familiar in other Eighteenth Century systems."[22]

The scope of the establishment clause has taken shape largely through a case-by-case evaluation of the establishment dangers that different fact situations present.[23] This approach has not produced great theoretical consistency and has led to criticism that the Court's definitional efforts and line drawing lack a lasting fundamental character.[24] Despite theoretical and doctrinal difficulties,

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construction grants to colleges and universities); Board of Educ. v. Allen, 392 U.S. 236 (1968) (denying challenge to textbook loans to students); Everson v. Board of Educ., 330 U.S. 1 (1947) (allowing school bus transportation). For a discussion of the political neutrality theory of establishment clause interpretation, see Giannella, *supra* note 16, at 519-21.

18. The Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), stated that "[c]andor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id.* at 612. One commentator added, "anyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other is either deluding or deluded. The seeming simplicity of the 'absolutist' construction of the first amendment is only too patently disingenuous . . . ." P. KURLAND, RELIGION AND THE LAW OF CHURCH AND STATE AND THE SUPREME COURT 111 (1962).

19. *See* Committee for Pub. Educ. and Religious Freedom v. Nyquist, 413 U.S. 756, 788 (1973); Tilton v. Richardson, 403 U.S. 672, 677 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 668-70 (1970); Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963); Zorach v. Clauson, 343 U.S. 306, 314 (1952); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

20. Engel v. Vitale, 370 U.S. 421, 431 (1962).

21. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

22. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 (1982).

23. *See* Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

24. *See* Wolman v. Walter, 433 U.S. 229, 265-66 (1977) (Stevens, J., concurring and dissenting); Buchanan, *Accommodation of Religion in the Public Schools: A Plea for Careful Balancing of Competing Constitutional Values*, 28 U.C.L.A. L. REV. 1000, 1021 (1981); Curry, *James Madison and the Burger Court: Converging Views of Church-State Separa-*

however, since *Lemon v. Kurtzman*[25] the Court consistently has asked the same three basic questions to determine whether a particular law or government activity violated the establishment clause:[26] (1) whether the challenged law or government activity has a secular purpose; (2) whether the primary effect of the law or activity advances or inhibits religion; and (3) whether the law or activity creates excessive entanglement of government with religion.[27]

B. *The* Lemon *Criteria*

1. Secular Purpose

The secular purpose test, arguably the criterion that goes directly to the heart of establishment clause objectives,[28] has been relatively simple for the Court to apply. This element alone will strike down a challenged law or government activity if wholly or plainly religious considerations clearly motivated the activity.[29] In *Engel v. Vitale*,[30] the landmark school prayer case, the Court concluded that the nature of prayer was clearly religious and that a law requiring or permitting use of a state-composed prayer[31] in a public schoolroom was part of an unconstitutional government program designed to further religious beliefs.[32] In *Epperson v. Arkansas*[33] the Court held that a law prohibiting public school teachers from teaching an evolutionary theory of man's origin also had a clearly religious purpose.[34] The Court concluded that the state's objective was to prevent discussion contrary to traditional biblical doctrine according to *Genesis*.[35] More recently, in *Stone v. Gra-*

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tion, 56 IND. L.J. 615, 615 (1981); Marty, *Of Darters and Schools and Clergymen: The Religion Clauses Worse Confounded*, 1978 SUP. CT. REV. 171, 182.

25. 403 U.S. 602 (1971).

26. *See* G. GUNTHER, *supra* note 4, at 1567-68.

27. *Lemon*, 403 U.S. at 612-13.

28. *See* L. TRIBE, *supra* note 5, at 835. "The most fundamental requirement in a constitutional system designed to secure religious autonomy is that governmental action at least be justifiable in secular terms." *Id.*

29. *See* Lynch v. Donnelly, 104 S. Ct. 1355, 1362 (1984).

30. 370 U.S. 421 (1962).

31. The prayer recommended by the New York Board of Regents read: " 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country.' " *Id.* at 422.

32. *See id.* at 424-25; *see also* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (mandatory daily Bible readings in public school classrooms are unconstitutional).

33. 393 U.S. 97 (1968).

34. The Arkansas anti-evolution statute prohibited teachers in any state-supported school from teaching or using a textbook advocating the theory " 'that mankind ascended or descended from a lower order of animals.' " *Id.* at 99.

35. *See id.* at 107.

ham,[36] the Court looked beyond the avowed secular purpose of a state requirement that public schools post the Ten Commandments in classrooms[37] to the plainly religious purpose of the statute.[38]

If the Court concludes that the purpose of a law or activity is less than wholly or plainly religious, even where some benefit to religion is obvious or substantial, the law or activity will satisfy the secular purpose requirement. For example, in *Everson v. Board of Education*,[39] the Court considered whether a local government constitutionally could provide transportation for students attending parochial as well as public schools. The Court held that the state, as part of a general program, could pay the transportation expenses of parochial school students,[40] because of the public interest in maintaining programs of general welfare and benefit,[41] and because the statute had a permissible public purpose.[42] Similarly, in *Board of Education v. Allen*,[43] the Court upheld a state statute requiring local public school authorities to lend textbooks without charge to all students, including students attending parochial school.[44] According to the Court, religious schools pursue two goals—religious instruction and secular education—and the state may have a proper interest in supporting secular education.[45]

Simply because a government agency singles out specific religious organizations for benefits does not mean that the agency is acting unconstitutionally. In *Walz v. Tax Commission*[46] the Court

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36. 449 U.S. 39 (1980).

37. The statute declared a secular purpose and required that each posted copy of the Ten Commandments contain a notation in small print explaining the significance of the document as the " 'fundamental legal code of Western Civilization and the Common Law of the United States.' " *Id.* at 41.

38. *Id.* The Court concluded that the Ten Commandments are "undeniably a sacred text" to Judeo-Christian religions, that the Commandments pertain to matters beyond arguably secular concerns, and that the Commandments serve no integrated educational function in the classroom. *Id.* at 41-42; *see also* Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (finding no secular purpose for requiring daily Bible readings in public school classrooms).

39. 330 U.S. 1 (1947).

40. *See id.* at 17-18.

41. *See id.* at 6, 17-18.

42. The Court focused the public purpose discussion on the due process issue, *see id.* at 6, but this concern was apparent in the establishment clause portion of the decision as well, *see id.* at 18.

43. 392 U.S. 236 (1968).

44. *See id.* at 247-48.

45. *See id.* at 245-47.

46. 397 U.S. 664 (1970).

considered the constitutionality of tax exemptions for properties that religious groups used solely for worship.[47] Although the religious benefits of the activity were obvious and substantial, the Court concluded that the legislative purpose of the grants was not to advance religion because the state properly could consider religious groups a beneficial and stabilizing influence in community life. The state, therefore, could award the tax exemptions in the public interest.[48] Similarly, in *Larkin v. Grendel's Den, Inc.*,[49] in which the state gave churches veto power over the issuance of liquor licenses within a certain radius of church property,[50] the Court held that the statute embraced valid secular legislative purposes.[51] Thus, although the Court has struck down government activities that lack any valid secular purpose, this part of the *Lemon* test is relatively easy to pass. The Court generally is reluctant to attribute unconstitutional motives to a state, particularly if the Court can derive a plausible secular purpose from the face of the challenged statute.[52]

2. Primary Secular Effect

The primary effect test has proved analytically more difficult for the Court to apply than the secular purpose criterion, because in every case raising an establishment clause question the challenged law or government activity undeniably provides *some* benefit or hindrance to religion. The problem for the Court is deciding and defining how much benefit or hindrance constitutes a primary effect, because "[t]he test is inescapably one of degree."[53]

The cases provide no certain definitional guidelines. In *McCollum v. Board of Education*[54] the state permitted various religious

47. The individual who challenged the tax exemptions contended that the grant indirectly required him to contribute to religious organizations. *Id.* at 667.

48. *Id.* at 672-73.

49. 459 U.S. 116 (1982).

50. The Massachusetts statute provided that the governing body of a church or school could prevent the liquor license commission from granting a license to any establishment located within a 500-foot radius of the church or school. *See id.* at 117.

51. *Id.* at 123. The federal district court described the purpose of the challenged statute as "protecting spiritual, cultural, and educational centers from the 'hurly-burly' associated with liquor outlets." Grendel's Den, Inc. v. Goodwin, 495 F. Supp. 761, 766 (D. Mass. 1980). The Supreme Court accepted the district court's interpretation, but went on to find that the state could accomplish the purpose of the statute through other means, such as an absolute ban on licenses or a guaranteed hearing. *Grendel's Den, Inc.*, 459 U.S. at 123-24.

52. *See* Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983).

53. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

54. 333 U.S. 203 (1948).

groups to send teachers into public schoolrooms to provide religious instruction during the school day.[55] The Court concluded that the activity was unconstitutional because the state aided sectarian groups by providing pupils for religious classes through the state's compulsory attendance laws.[56] In *Engel v. Vitale*[57] the Court declared that a state school prayer program was unconstitutional[58] because it effectively placed the government's "power, prestige and financial support . . . behind a particular religious belief."[59] Similarly, in *Abington School District v. Schempp*,[60] the Court found unconstitutional mandatory daily Bible readings in public schools because the practice clearly and impermissibly aided religion.[61] Finally, in *Larkin v. Grendel's Den, Inc.*,[62] a case in which a state statute conferred on churches a veto power over liquor licenses, the Court stated that "the mere appearance of a joint exercise of legislative authority by Church and State provide[d] a significant [and unconstitutional] symbolic benefit to religion."[63]

In contrast to the Court's invalidation of laws and government activities that may provide a direct benefit to religion, the Court has refused to strike down other laws and activities whose benefit to religion the Court has described as attenuated[64] or indirect, remote, or incidental.[65] For example, the Court has upheld provision of transportation[66] and textbooks[67] laws for students attending sectarian schools; federal construction grants to church-sponsored col-

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55. In *McCollum* certain members of the Jewish, Roman Catholic, and several Protestant faiths arranged through the local board of education to provide religious classes for public school students in regular classrooms during the school day. Attendance was voluntary, but students released from their classes had to attend the religious instruction. *See id.* at 207-09.

56. *Id.* at 212. *Cf.* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a "released-time" program for students to receive religious instruction off school grounds).

57. 370 U.S. 421 (1962).

58. The New York State Legislature granted the State Board of Regents broad powers over the state public school system. The Board of Regents recommended a daily prayer procedure, which a local board of education adopted as a classroom requirement for each school day. *Id.* at 422-23. The prayer appears at *supra* note 31.

59. *Id.* at 431.

60. 374 U.S. 203 (1963).

61. *Id.* at 225; *see also* Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968).

62. 459 U.S. 116 (1982).

63. *Id.* at 125-26.

64. Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983).

65. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973).

66. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

67. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968).

leges providing both secular and religious instruction;[68] church property tax exemptions;[69] and Sunday closing laws.[70] In these cases, the Court concluded that the benefits to religion did not amount to a primary effect of aiding religion, even though the Court observed that state-subsidized bus fares undoubtedly help children get to church schools;[71] that "free books make it more likely that some children [will] choose to attend a sectarian school;"[72] that construction grants aid sectarian colleges;[73] that granting church property tax exemptions necessarily confers an economic benefit;[74] and that the Sunday closing laws undeniably increase respect for and attendance at religious institutions.[75] Clearly, the Court has employed a balancing process to determine whether a law or activity primarily benefits religion. Although this approach necessitates a subjective weighing of the various perceived impacts on religion, the Court has maintained a rigorous application of the effect standard, even in instances in which the Court ultimately found no impermissible effect.

3. Excessive Entanglement

The secular purpose and primary secular effect requirements of the *Lemon* test have roots in Supreme Court decisions preceding *Lemon*.[76] Similarly, one year before *Lemon*, in *Walz v. Tax Commission*,[77] the Court added a third element to the establishment clause analysis—the requirement that the challenged law or activity must not create "excessive government entanglement with religion."[78] This third criterion consists of two related strands.[79] First,

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68. *See* Tilton v. Richardson, 403 U.S. 672 (1971).
69. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970).
70. *See* McGowan v. Maryland, 366 U.S. 420 (1961).
71. *Everson*, 330 U.S. at 16.
72. *Allen*, 392 U.S. at 244.
73. *Tilton*, 403 U.S. at 679.
74. *Walz*, 397 U.S. at 674.
75. *Nyquist*, 413 U.S. at 679.
76. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236, 242-43 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 266 (1963).
77. 397 U.S. 664 (1970).
78. *Id.* at 674. For arguments for and against including the entanglement criterion, compare Curry, *supra* note 24, at 635-36 (the entanglement test is helpful and "echoes Madison's concern about religious factions") with Ripple, *The Entanglement Test of the Religion Clauses—A Ten-Year Assessment*, 27 U.C.L.A. L. REV. 1195, 1216-17 (1980) (the entanglement test "invites a whole new degree of subjectivity and thus represents . . . the ultimate defeat of attempts to use neutral principles to interpret the religion clauses").
79. *See* Lemon v. Kurtzman, 403 U.S. 602, 613, 622 (1971); G. GUNTHER, *supra* note 4, at 1567 n.1.

the *Walz* Court declared that the establishment clause prohibits excessive continuing administrative entanglements between the government and religious organizations.[80] Second, the Court developed a political divisiveness strand[81] to prevent political division along religious lines.[82]

(a) Administrative Entanglement

In deciding whether the challenged government relationship with religion creates excessive administrative entanglement, the Court has had to undertake detailed factual inquiries.[83] In *Lemon v. Kurtzman*[84] the Court first outlined the administrative entanglement question: courts must examine the character and purposes of the benefited institutions, the nature of the government aid, and the resulting relationship between government and the religious authority.[85] The *Lemon* Court held that a statute providing salary supplements to nonpublic school teachers violated the establishment clause because it created administrative entanglements.[86] The Court reasoned that the supplemental salary program would require "comprehensive, discriminating, and continuing state surveillance."[87] Similarly, the Court has held that when the state provides certain materials and services to nonpublic schools, the state creates excessive administrative entanglement to ensure that schools adhere to state restrictions.[88] Recently, in *Larkin v. Grendel's Den, Inc.*,[89] the Court concluded that the churches' veto power over neighborhood liquor licenses constituted "a fusion of

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80. *Walz*, 397 U.S. at 675.

81. *See* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126-27 (1982); Wolman v. Walter, 433 U.S. 229, 256 (1977) (Brennan, J., concurring and dissenting); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

82. *Lemon*, 403 U.S. at 622.

83. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (evaluating textbooks, testing, diagnostic, therapeutic and remedial services, instructional equipment, and field trip transportation); Tilton v. Richardson, 403 U.S. 672 (1971) (evaluating construction grants).

84. 403 U.S. 602 (1971).

85. *See id.* at 615.

86. The *Lemon* Court also found that the statutes at issue had a secular purpose, but the Court did not address the secular effect question because the Court felt that the excessive entanglement analysis was dispositive. *See id.* at 613-14.

87. *Id.* at 619.

88. *See* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975). In *Wolman* and *Meek* the states of Ohio and Pennsylvania sought to provide nonpublic schools with textbooks, auxiliary services such as therapy and remedial aid, and instructional materials. *See Wolman*, 433 U.S. at 250, 254; *Meek*, 421 U.S. at 372.

89. 459 U.S. 116 (1982).

governmental and religious functions,"[90] and violated the principle of preventing religious or government institutions from intruding upon the other's territory.[91]

The Supreme Court has recognized that some administrative entanglement is inevitable when otherwise valid laws or government activities affect religion.[92] For example, the Court has upheld lump sum federal construction grants to church-related colleges,[93] and government provision of therapeutic and remedial services to nonpublic school students. The Court has concluded that these services were sufficiently separable from the sectarian education process that they did not cause excessive entanglement.[94] In addition, the Court has allowed state parental income tax deductions for elementary and secondary school education expenses,[95] holding that the state's determination whether to allow deductions for sectarian school expenses did not constitute excessive entanglement.[96]

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90. *Id.* 126 (citing Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963)).

91. *Id.* (quoting Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)).

92. *See Grendel's Den*, 459 U.S. at 123; Lemon v. Kurtzman, 403 U.S. at 614; Walz v. Tax Comm'n, 397 U.S. 664, 670 (1970).

93. *See* Tilton v. Richardson, 403 U.S. 672, 685-86 (1971). The Court reasoned that the grants raised no impermissible entanglement problems because of the "nonideological character" of the aid and because the one-time, single-purpose payments created no need for a substantial continuing relationship between the religious and government institutions. *Id.* at 687-88. The Court also emphasized the significant differences in the religious character of church-related higher education on one hand, and elementary and secondary school education on the other, especially in the students' "susceptib[ility] to religious indoctrination." *Id.* at 686; *see also* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691 (1969). Similarly, in Marsh v. Chambers, 103 S. Ct. 3330 (1983), the Court asserted that no administrative entanglement occurred because adult legislators are not subject to indoctrination or coercion by legislative prayer sessions. *Id.* at 3335. For a discussion of *Marsh*, see *infra* notes 107-23 and accompanying text.

94. *See* Wolman v. Walter, 433 U.S. 229, 248 (1977). The *Wolman* Court distinguished therapeutic and remedial services from the act of supplying instructional materials and equipment, the functions of which the state cannot separate into sectarian and nonsectarian elements. *See id.* at 250.

95. *See* Mueller v. Allen, 103 S. Ct. 3062, 3064-65 (1983). The Minnesota statute in question allowed taxpayers to deduct a wide range of expenses that they incurred for their children's education, including tuition, fees, textbooks, and transportation to and from public or private school. Approximately 10% of all Minnesota students attended private schools, and well over 90% of that number attended sectarian schools. *See id.* at 3072 (Marshall, J., dissenting).

96. *Id.* at 3071. The Court reasoned that the discretionary decisions that the state would have to make were not significantly different from the decisions that the Court allowed the state to make in Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); and Board of Educ. v. Allen, 392 U.S. 236 (1968).

(b) Political Divisiveness

The notion of political divisiveness presents the converse entanglement danger, focusing on political division along religious lines, and reflects a fear of church intrusion into secular politics.[97] The political divisiveness strand of the entanglement test may not be an independent ground for finding an establishment clause violation,[98] but this strand has figured prominently in several Supreme Court opinions. In *Lemon v. Kurtzman*[99] the Court observed that only a few religious groups would benefit from public salary support for nonpublic school teachers, but the Court expressed concern about the potential pressures that other religious groups might exert to increase their own aid. The Court also noted the dangers of heightened religious partisanship beyond the ordinary political debate inherent in a democratic system.[100] In *Committee for Public Education and Religious Freedom v. Nyquist*[101] the Court maintained that because of the importance of the competing social interests concerned,[102] the state's financial aid program for nonpublic schools "carrie[d] grave potential for entanglement [through] continuing political strife over aid to religion."[103] Finally, in *Grendel's Den* the Court concluded that a statute granting churches veto power over liquor licenses essentially substituted the discretion of a religious group for the reasoned judgment of a legislative body on "issues with significant economic and political implications."[104]

III. Recent Developments

In *Marsh v. Chambers*[105] and *Lynch v. Donnelly*[106] the Court developed a new approach to evaluating establishment clause issues that departs from the settled *Lemon* analysis. The new inquiry focuses on the asserted traditional or historical significance of the challenged state activity. This approach allows the Court to evaluate establishment clause issues on the basis of the Court's

97. *See* L. Tribe, *supra* note 5, at 866.

98. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 797-98 (1973), *cited with approval in* Lynch v. Donnelly, 104 S. Ct. 1355, 1364 (1984).

99. 403 U.S. 602 (1971).

100. *See id.* at 622-23; *see also* Freund, *supra* note 93, at 1692.

101. 413 U.S. 756 (1973).

102. *Id.* at 794.

103. *Id.*; *see also* Meek v. Pittenger, 421 U.S. 349, 372 (1975).

104. 459 U.S. 116, 127 (1982).

105. 103 S. Ct. 3330 (1983).

100. 104 S. Ct. 1355 (1984).

own interpretation of history and references to the presence of religious elements in public life.

A. Marsh v. Chambers

In *Marsh* the Court addressed the constitutionality of having a state-paid chaplain deliver prayers to open each session of a state legislature. A member of the legislature, a taxpayer, challenged both the prayer practice and the sixteen year tenure of the Presbyterian minister.[107] The Court[108] completely ignored the *Lemon* test[109] and instead focused primarily on the historical significance of legislative prayer. The Court stated that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."[110] As in *Walz v. Tax Commission*,[111] the Court qualified its approach by maintaining that historical patterns standing alone do not justify contemporary constitutional violations,[112] but the Court added that such an "unbroken practice"[113] of legislative prayer deserves significant weight. The unique history of opening legislative assemblies with prayers, and the apparent acceptance of legislative prayer by the drafters of the first amendment, led the Court to conclude that the practice posed no real threat to establishment clause values.[114]

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107. The challenger brought an action under 42 U.S.C. § 1983 (1982), seeking to enjoin the practice as a violation of the establishment clause. The same Presbyterian minister had served as salaried chaplain to the Nebraska legislature for 16 years. The legislature also periodically published the chaplain's prayers at public expense. The federal district court enjoined the publication of the prayers and the court of appeals affirmed. *See* Marsh v. Chambers, 675 F.2d 228 (8th Cir. 1982). The Supreme Court considered only the issue whether the first amendment prohibits a state-employed chaplain from opening legislative sessions with prayer. *See Marsh*, 203 S. Ct. at 3332.

108. Chief Justice Burger wrote the majority opinion, in which Justices White, Blackmun, Powell, Rehnquist, and O'Connor joined.

109. The court of appeals applied the *Lemon* test and concluded that the chaplaincy practice violated all three parts: the purpose and primary effect of the prayer was to promote a particular religious viewpoint, and the use of state funds constituted entanglement. *See Marsh*, 675 F.2d at 234-35.

110. *Marsh*, 103 S. Ct. at 3332-33. The Court noted that a religious invocation precedes sessions of the Supreme Court and other courts: "God save the United States and this Honorable Court." The Court also recognized the early history of congressional chaplains, whom the Framers appointed at nearly the same time that they reached agreement on the language of the Bill of Rights. *Id.* at 3333.

111. 397 U.S. 664 (1970).

112. *Marsh*, 103 S. Ct. at 3334.

113. *See id.* at 3334-45 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970)).

114. *See id.*

Justice Brennan, in a lengthy dissent,[115] protested even a limited abrogation of the *Lemon* analysis. He reasoned that the decision "confirms that the Court is carving out an exception to the Establishment Clause rather than reshaping Establishment Clause doctrine to accommodate legislative prayer."[116] Justice Brennan maintained that if the Court had judged the issue "through the unsentimental eye of our settled doctrine,"[117] the Court would have found legislative prayer unconstitutional. Applying the *Lemon* criteria, he concluded that the legislative prayer in question had a religious purpose, a religious effect, and that it led to excessive entanglement between the government and religion.[118] In addition, Justice Brennan believed that legislative prayer would fail the *Larson* strict scrutiny test,[119] as well as the test that he first set forth in *Schempp*.[120]

Justice Brennan did not reject completely the historical and philosophical reasoning underlying the majority opinion.[121] He argued, however, that the Court's reasoning gave a static and lifeless

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115. Justice Brennan acknowledged that his dissent directly contradicted language in the opinion he wrote 20 years earlier in Abington School Dist. v. Schempp, 374 U.S. 203, 299-300 (Brennan, J., concurring), in which he suggested that legislative prayer may present no establishment clause problem. *See Marsh*, 103 S. Ct. at 3337 & n.2 (Brennan, J., dissenting).

116. *Marsh*, 103 S. Ct. at 3338 (Brennan, J., dissenting).

117. *Id.*

118. *Id.* Justice Brennan concluded that the Nebraska legislature's prayer violated all three parts of the *Lemon* test: the religious purpose of the prayer was self-evident; the practice created indirect religious coercion and placed the state's imprimatur of approval on the prayer; and the prayer was evidence of administrative entanglement and potential, if not actual, political divisiveness over the issue. *See id.* at 3338-39.

119. *See supra* note 5.

120. Justice Brennan often has advocated his own establishment clause test, which the Court never has adopted:

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.

Abington School Dist. v. Schempp, 374 U.S. 203, 294-95 (Brennan, J., concurring); *see also Marsh*, 103 S. Ct. at 3340 n.11 (1983) (Brennan, J., dissenting); Roemer v. Board of Pub. Works, 426 U.S. 736, 770-71 (1976) (Brennan, J., dissenting); Hunt v. McNair, 413 U.S. 734, 750 (1973) (Brennan, J., dissenting); Lemon v. Kurtzman, 403 U.S. 602, 643 (1971) (Brennan, J., concurring); Walz v. Tax Comm'n, 397 U.S. 664, 680-81 (1970) (Brennan, J., concurring).

121. Brennan stated that "[t]he path of formal doctrine . . . can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the nnderlying function of the Establishment Clause, and the forces that have shaped its doctrine." *Marsh*, 103 S. Ct. at 3341 (Brennan, J., dissenting).

meaning to the Framers' work. To be truly faithful to the Framers, Brennan argued, the Court should have limited its use of history to broad purposes, not specific practices.[122] Justice Brennan maintained that a modern interpretation of the purpose of the establishment clause must take into account the diverse religious composition of modern society.[123] He believed that the Court's historical approach failed to consider changes in religion since the time that the Framers wrote the establishment clause.

B. Lynch v. Donnelly

In *Lynch*[124] the Court more fully developed the new establishment clause analysis that it apparently introduced in *Marsh*. The *Lynch* Court addressed the question whether a city constitutionally could include a nativity scene, or crèche, in its downtown Christmas display.[125] The federal district court, applying the *Lemon* test,[126] and the court of appeals, applying the *Larson* strict scrutiny test,[127] both concluded that the city's actions violated the establishment clause.[128] The Supreme Court reversed, holding that, "notwithstanding the religious significance of the crèche," the city did not violate the establishment clause.[129]

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122. *Id.* at 3348 (Brennan, J., dissenting) (citing Abington School Dist. v. Schempp, 374 U.S. 203, 241 (1963)).

123. *See Marsh*, 103 S. Ct. at 3348 (Brennan, J., dissenting). Justice Brennan pointed to other cases in which the Court has avoided an approach that permanently determines the meaning of a constitutional right according to practices existing at the time of its enactment. *See id.* & n.35 (citing Colgrove v. Battin, 413 U.S. 149 (1973) (right to a jury trial)); Frontiero v. Richardson, 411 U.S. 677 (1973) (sex discrimination); Katz v. United States, 389 U.S. 347 (1967) (search and seizure); Trop v. Dulles, 356 U.S. 86 (1958) (cruel and unusual punishment); Brown v. Board of Educ., 347 U.S. 483 (1954) (race discrimination).

124. 104 S. Ct. 1355 (1984).

125. The city of Pawtucket, R.I. owned a Christmas display, including a nativity scene, which the city erected each year prominently in the main shopping district. The display consisted of various figures and decorations that one traditionally associates with the Christmas season, as well as the nativity scene. *See id.* at 1256.

126. Donnelly v. Lynch, 525 F. Supp. 1150, 1168 (D.R.I. 1981).

127. Donnelly v. Lynch, 691 F.2d. 1029, 1034 (1st Cir. 1982).

128. The district court held that the purpose of including the crèche in the display was to endorse and promulgate certain religious beliefs and that the effect was to "affiliat[e] the City with the Christian beliefs that the crèche represents." Donnelly v. Lynch, 525 F. Supp. at 1177. The Court further held that, although including the crèche created no administrative entanglements, the practice posed a danger of political divisiveness and thus threatened excessive entanglement. *See id.* at 1179-80. The First Circuit determined that the display of the crèche was unconstitutional under the strict scrutiny analysis that the Supreme Court adopted in Larson v. Valente, 456 U.S. 228 (1982). The First Circuit held that *Larson* prohibited laws discriminating among religions. *See supra* note 5.

129. *Lynch*, 104 S. Ct. at 1366.

The analytical basis for the Court's decision is not entirely clear. The majority opinion[130] began with an essentially historical approach, maintaining that the Court's interpretations of the establishment clause have comported with the contemporaneous understanding of the rights that the clause guarantees.[131] The Court then recognized the importance of religion in American life.[132] Unlike in *Marsh*,[133] however, the Court did not rely on an exclusively historical analysis, but rather used history ostensibly to reject a rigid absolutist approach to questions of government relations with religion.[134] The Court's introductory history lesson diminished the independent significance of the *Lemon* analysis that followed.

The Court applied the *Lemon* test, not as a fixed approach, but as a useful inquiry in the line drawing process that is necessary in establishment cases.[135] The Court concluded with little difficulty that the city's activity had a secular purpose. The Court reasoned that, because the inclusion of the crèche was not "motivated wholly by religious considerations,"[136] and because the Court found no "purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message,"[137] the display of the crèche suggested no impermissible purpose on the part of the city.[138]

The Court also concluded that the primary effect of including the crèche in the display was not to advance or endorse religion in violation of the establishment clause.[139] The Court did not examine the actual effect of the crèche, but stated merely that any benefit to religion was indirect, remote, and incidental. The Court was unable to discern a greater aid to religion in this case than in any

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130. Chief Justice Burger, who authored the *Marsh* opinion, also wrote the majority opinion in *Lynch*, in which Justices White, Powell, Rehnquist, and O'Connor joined.

131. *Lynch*, 104 S. Ct. at 1359.

132. *Id.* at 1360-61. To bolster its assertion of an unbroken history of official acknowledgement of religion, the Court cited examples such as the national holidays of Thanksgiving and Christmas, military and legislative chaplains, the national motto "In God We Trust," religious paintings in art galleries, and prayer chapels in the Capitol building. *See id.*

133. The *Marsh* Court did not address the *Lemon* test, even following its historical analysis. *See supra* text accompanying note 109.

134. *See Lynch*, 104 S. Ct. at 1359-62.

135. The Court stated: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area." *Id.* at 1362 (citations omitted).

136. *Id.*

137. *Id.* at 1363.

138. *See id.*

139. *See id.*

other case in which the Court had permitted religious activity.[140]

Finally, the entanglement questions posed little difficulty for the majority.[141] The Court adopted the court of appeals' observation[142] that political divisiveness alone has never been sufficient to invalidate otherwise permissible conduct.[143] The Court rejected the argument that the simple fact that the present controversy was in litigation illustrated the conflict resulting from including a crèche in a public display.[144] The majority felt that the crèche engendered a friendly community spirit,[145] noting the district court's finding that the Christmas display had a calm history behind it, with no evidence of apparent conflict.[146]

Beyond the application of the *Lemon* criteria, the Court felt offended by the suggestion that the presence of a nativity scene in a large seasonal holiday display could violate the constitutional prohibition against the establishment of religion. The Court refused to impose a "crabbed reading"[147] of the establishment clause to the detriment of the country's religious heritage,[148] while people celebrate the same holiday in other public places with religious hymns, the national motto proclaims "In God We Trust," religious paintings hang in public art galleries, and legislatures open their sessions with prayers by salaried chaplains.[149] The majority also maintained that "[a]ny notion that these symbols pose a real dan-

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140. *See id.* For the Court to hold that the crèche failed the primary effect test, the Court felt that it would have to conclude that the nativity scene advanced religion more than textbooks and transportation for parochial students, federal building grants to church-related colleges, religious property tax exemptions, Sunday closing laws, and legislative prayer. According to the Court, the crèche did not benefit religion as much as these other activities. *Id.* at 1363-64. The Court then distinguished Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1983), and McCollum v. Board of Educ., 333 U.S. 203 (1948), as cases in which the activity substantially benefited religion. *Lynch*, 104 S. Ct. at 1364.

141. *See Lynch*, 104 S. Ct. at 1364.

142. *Id.*

143. In addition, the Court stated that, because *Lynch* did not involve a direct subsidy to church-sponsored schools, colleges, or other religious institutions, the Court did not have to address the political divisiveness issue. *Id.* (citing Mueller v. Allen, 103 S. Ct. 3062, 3071 n.11 (1983)).

144. The Court asserted: "Curiously, [the district court held] that the political divisiveness engendered by this lawsuit was evidence of excessive entanglements. A litigant cannot, by the very act of commencing a lawsuit, however, create the appearance of divisiveness and then exploit it as evidence of entanglement." *Lynch*, 104 S. Ct. at 1365.

145. *Id.*

146. *Id.*

147. *Id.* at 1366.

148. *Id.* at 1360, 1361.

149. *Id.*

ger of establishment of a state church is far-fetched indeed,"[150] because the fears and political problems that originally spawned the religion clauses are of far less concern today.[151] Thus, the Court echoed the tone of its approach in *Marsh* by harking back to the Framers' day for guidance, and by emphasizing the pervasiveness of religion and religious symbols.

To Justice Brennan, writing for the four dissenting justices, the display of the crèche was clearly unconstitutional. Unlike the majority, the dissent did not focus on the history or the setting of the crèche, but rather on the *Lemon* test. The dissenters found that the city's activity violated all three criteria of the test. First, the dissent reasoned that the distinctively religious nature of the crèche and the implied goal of "keep[ing] 'Christ in Christmas' "[152] demonstrated a sectarian purpose.[153] Second, the dissent found that the crèche gave the appearance that the government put its prestige and public recognition behind the beliefs that people associate with the nativity scene,[154] thus providing "a significant symbolic benefit to religion."[155] Last, the dissenters believed that the strong possibility of future administrative entanglements, and the apparent beginning of a political controversy over the issue within the city posed a significant threat of excessive entanglement between government and religion.[156]

The dissent sharply criticized what it perceived as the two principal theories that the majority used to pass the crèche through the *Lemon* test. The dissent maintained that the Court focused on the public recognition of the holiday and the secular nature of other parts of the display instead of acknowledging the

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150. *Id.* at 1366.

151. *Id.* at 1365 (citing Everson v. Board of Educ., 330 U.S. 1, 8 (1947)). The Court elaborated: "We are unable to perceive the Archbishop of Canterbury, the Vicar of Rome, or other powerful religious leaders behind every public acknowledgement of the religious heritage long officially recognized by the three constitutional branches of government." *Lynch*, 104 S. Ct. at 1365-66.

152. *Lynch*, 104 S. Ct. at 1373 (Brennan, J., dissenting) (quoting Donnelly v. Lynch, 525 F. Supp. 1150, 1173 (D.R.I. 1981)).

153. *Lynch*, 104 S. Ct. at 1373 (Brennan, J., dissenting). Justice Brennan also questioned why the Court did not inquire whether the city had other means available to achieve its secular objectives, as the Court did in Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510 (1983). *See Lynch*, 104 S. Ct. at 1372 n.4 (Brennan, J., dissenting). The majority considered this question irrelevant. *See id.* at 1363 n.7.

154. The dissent stated: "The nativity scene is . . . the chief symbol of [a] characteristically Christian belief . . . . For Christians, that path is exclusive, precious and holy." *Lynch*, 104 S. Ct. at 1377 (Brennan, J., dissenting).

155. *Id.* at 1373 (quoting *Grendel's Den*, 103 S. Ct. at 511).

156. *Lynch*, 104 S. Ct. at 1373-74.

clearly religious significance of the nativity scene.[157] The dissent argued that the secular setting was irrelevant. Although the official public holiday at Christmas is a traditional and arguably acceptable event, active government participation in the holiday is not acceptable.[158] The dissenters argued that funding and maintaining a nativity scene actively and impermissibly supports the purely religious nature of the holiday.[159] According to the dissent, the crèche display fit into none of the categories in which the Court may permit the government to acknowledge religion.[160]

Although the dissent was not concerned about the Court's "less than rigorous application of the *Lemon* test,"[161] the dissent was troubled by the historical and philosophical underpinnings of the majority opinion. The dissent insisted that the history of publicly celebrating Christmas did not support the Court's opinion,[162] and that the majority's entire approach suggested a fundamental misapprehension of the proper role of history in constitutional interpretation.[163] The dissent distinguished the historical analyses in *Walz* and *Marsh* because the Court there limited its historical inquiry to the specific practice under review.[164] In *Lynch,* however, the dissent felt that the Court did not examine closely the specific history of the public celebration of Christmas, or the public display of nativity scenes, but only asserted generally that the government always has acknowledged the role of religion in American life.[165] The history of the establishment clause, the dissent maintained,

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157. *See id.* at 1375-78.

158. *Id.*

159. *Id.*

160. Justice Brennan delineated three types of situations in which the state officially and permissibly may acknowledge religion: (1) if the government acts to accommodate individual religious expression, *see, e.g.,* Zorach v. Clauson, 343 U.S. 306 (1952) (upholding a "released time" program by which the public schools allowed students to attend religious centers for instruction during school hours); (2) if the government practice, although once religious, now exists for purely secular reasons, *see, e.g.,* McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws); and (3) if the government acts ceremonially in acknowledging the religious element as part of American culture, such as the national motto "In God We Trust," *Lynch,* 104 S. Ct. at 1380-82.

161. *Lynch,* 104 S. Ct. at 1370-71. "Although the Court's relaxed application of the *Lemon* test . . . is regrettable, it is at least understandable and properly limited to the particular facts of this case." *Id.* at 1380.

162. *See id.* at 1383-85 (Brennan, J., dissenting).

163. *Id.* at 1382 (Brennan, J., dissenting).

164. *See id.* at 1382-83 (Brennan, J., dissenting).

165. *Id.* at 1383 (Brennan, J., dissenting). Justice Brennan also pointed out that recognition of Christmas as a public holiday did not achieve widespread acceptance until long after the Framers' day and, therefore, recognition of the holiday had not been as continuous as the majority contended. *Id.* at 1385 (Brennan, J., dissenting).

gave no indication of any longstanding public support for allowing the city to display the crèche. The dissent concluded that the Court improperly upheld the activity by using an historical argument without relying on any specific historical evidence.[166]

IV. Analysis

In *Marsh* and *Lynch* the Court moved away from a rigorous application of the *Lemon* analysis and toward a standard that the Court grounded in ambiguous historical references and a blanket recognition of religion in American society. More importantly, the Court suggested that the establishment clause protects only against the establishment of a state church, a much narrower interpretation than the Court adopted in a long line of earlier decisions. Although *Marsh* and *Lynch* arguably are limited in scope,[167] the Court's analytical inquiry signals the beginning of a new establishment clause analysis that is out of step with the Court's traditional approach. This part of the Recent Development criticizes the *Marsh* and *Lynch* opinions on two levels: the Court's historical approach, and the Court's departure from rigorous application of the *Lemon* test.

A. The Historical Approach

One theme that pervades the analysis in *Marsh* and *Lynch* is the Court's opinion that government-funded legislative prayer and public nativity scenes are benign when compared with the dangers of eighteenth century state-established churches.[168] In *Marsh* the Court concluded that the practice of legislative prayer has coexisted with the first amendment principles of nonestablishment and religious freedom since the country's earliest years.[169] The *Lynch* Court pointed to numerous instances in which the government has acknowledged religious holidays and symbols since the 1700s.[170]

166. *See id.* at 1386 (Brennan, J., dissenting).

167. *See id.* at 1370 (Brennan, J. dissenting); *Marsh*, 103 S. Ct. at 3337 (Brennan, J., dissenting). Justice Brennan stated that the *Lynch* Court reached "an essentially narrow result which turns largely upon the particular holiday context." *Lynch*, 104 S. Ct. at 1370. He also maintained that the *Marsh* majority opinion was "narrow and, on the whole, careful," adding that the decision should pose little threat to the overall fate of the establishment clause. In *Marsh*, however, Justice Brennan's dissent may have been tempered by his concurring comment in School Dist. of Abington v. Schempp, 374 U.S. 203 (1963), that legislative prayer may be constitutional.

168. *See Lynch*, 104 S. Ct. at 1365; *Marsh*, 103 S. Ct. at 3336-37.

169. *Marsh*, 103 S. Ct. at 3335.

170. *Lynch*, 104 S. Ct. at 1360.

The majority may have wished to demonstrate its "ability and willingness to distinguish between real threat and mere shadow."[171] In earlier opinions, however, the Court repeatedly refused to accept the argument that government-sponsored religious practices are constitutional because they represent only "minor encroachments" on first amendment principles.[172]

Approaching establishment of religion questions primarily by inquiring into the contemporaneous understanding of the first amendment's guarantees[173] necessarily presumes that a historical survey would best reveal the scope of establishment clause rights in the twentieth century. This assumption presents two related problems. First, as Professor Tribe maintains, the historical record of the Framers' intent in writing the establishment clause is inconclusive.[174] Both the majority and the principal dissent in *Marsh* present strong historical arguments over whether the Framers intended the establishment prohibitions to include legislative prayer.[175]

The *Lynch* Court's historical analysis is even less compelling because publicly sponsored Christmas nativity scenes have a much shorter history than legislative prayer,[176] Sunday closing laws,[177] and church property tax exemptions.[178] The *Lynch* Court's approach certainly does not support an argument that the Framers intended to exclude public nativity scenes from first amendment restrictions.[179]

A second problem with the Court's historical approach is that it overlooks national change between the eighteenth and twentieth

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171. *Marsh*, 103 S. Ct. at 3337 (quoting School Dist. of Abington v. Schempp, 374 U.S. 203, 308 (1963) (Goldberg, J., concurring)).

172. *See* Stone v. Graham, 449 U.S. 39, 42 (1980); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 798 n.56 (1973); School Dist. of Abington v. Schempp, 374 U.S. 203, 225 (1963).

173. *Lynch*, 104 S. Ct. at 1358.

174. *See* L. TRIBE, *supra* note 5, at 816; *see also* Note, *supra* note 15, at 1477 & nn.93-97. *But see* R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION at xiv (1982). Professor Cord claims that he can prove beyond a reasonable douht that the historical record demonstrates that the Framers did not intend a wall of separation between church and state or a strictly neutral interpretation of the first amendment establishment clause. *See id.*

175. *Compare Marsh*, 103 S. Ct. at 3337 *with Lynch*, 104 S. Ct. at 3347-51 (Brennan, J., dissenting) *and The Supreme Court 1982 Term*, 97 HARV. L. REV. 4, 146 (1983) (*Marsh* Court's reliance on historical precedent is ill-founded).

176. *Marsh*, 103 S. Ct. at 3330.

177. McGowan v. Maryland, 366 U.S. 420 (1961).

178. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

179. *See Lynch*, 104 S. Ct. at 1383 n.25 (Brennan, J., dissenting).

centuries. Today the country is far more diverse religiously than in the Framers' time. This change may require a new interpretation of the establishment clause to further the same values that the Framers first sought to protect.[180] The Court suggests in *Marsh* and *Lynch* that it should weigh the establishment dangers of a religious activity by considering the similarity between the questionable activity and a government-established church, because the threat of an official church prompted the Framers to draft the first amendment.[181] Although history may illuminate ultimate constitutional objectives,[182] the Court's interpretation in *Marsh* and *Lynch* is too narrow because it does not protect contemporary religious liberties. The country probably no longer sees state-established religion as a threat, but many fear subtler forms of favoritism and encroachment that the Court failed to consider.

Marsh and *Lynch* are also inconsistent with the broader standard that the first amendment expressly established. Although the religion clauses are "opaque,"[183] the long standing interpretation of the establishment prohibition has followed the language of the first amendment itself: "Congress shall make no law *respecting* an establishment of religion . . . ."[184] The Court has held that a law or government activity that does not support expressly or officially a certain religion nonetheless may be a law or activity "respecting" establishment.[185] Thus, a significant step toward establishment that violates the principles underlying the establishment clause should be enough to invoke constitutional protection.[186]

While in the historical analysis section of the *Marsh* opinion the Court discussed evidence of the Framers' intent, in *Lynch* the Court used a broader historical perspective to emphasize present

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180. *See id.* at 1361; School Dist. of Abington v. Schempp, 374 U.S. 203, 240-41 (1963) (Brennan, J., concurring); Torcaso v. Watkins, 367 U.S. 488, 495 (1961); Giannella, *supra* note 16, at 514-15.

181. *See Lynch*, 104 S. Ct. at 1365-66; *Marsh*, 103 S. Ct. at 3335.

182. *See* Walz v. Tax Comm'n, 397 U.S. 664, 671 (1970).

183. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

184. U.S. CONST. amend. I (emphasis added).

185. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973); *Lemon*, 403 U.S. at 612.

186. The Court's historical approach laudibly and necessarily defeats an extreme "foot in the door" argument, which advocates prohibiting even minor encroachments on establishment clause rights because every encroachment is a logical step toward a state church. The mere absence over a long period of time of significant strides toward establishing an actual state church, however, does not mean that a given law or government activity does not violate the religious freedom principles that prompted the Framers to draft the first amendment.

official acknowledgments of religion, such as the national holidays at Thanksgiving and Christmas, the national motto "In God We Trust," the display of religious paintings in public art galleries, and the presence of prayer chapels in the Capitol building.[187] Relying on a lengthy discussion of the various religious trappings of American society as support for a decision on whether a particular government activity violates the establishment clause represents a move toward vague, unguided analysis rather than an application of any lasting constitutional principles. This line of reasoning ensures perpetuation, rather than rigorous constitutional evaluation, of questionable practices simply because no one previously challenged them. The Court's reasoning threatens to establish as the predominant analytical stronghold Justice Douglas' comment in *Zorach v. Clauson* that "[w]e are a religious people whose institutions presuppose a Supreme Being."[188]

B. The Lemon *Test*

The Supreme Court often has stated that the *Lemon* criteria embody the primary concerns underlying the principles that the establishment clause protects.[189] The Court consistently has held that a statute or government activity must satisfy the *Lemon* test to pass muster under the establishment clause.[190] The Court just as consistently, however, has refused to adopt officially the *Lemon* analysis as the only test to evaluate establishment of religion questions.[191] The flexibility that establishment of religion cases require to avoid unduly infringing on free exercise rights justifiably may prevent the Court from adopting the *Lemon* test as the Court has adopted sole guidelines in other areas of constitutional law.[192] The

187. *See Lynch*, 104 S. Ct. at 1360. The dissent distinguished the majority's official acknowledgement of religion either as permissible gestures toward free exercise or as devoid of any genuine religious significance. *See id.* at 1376-80.

188. 343 U.S. 306, 313 (1952). *See The Supreme Court 1982 Term*, *supra* note 175, at 146-47 (the Court no longer should rely on *Zorach* as useful precedent).

189. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973); Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). *But cf.* Giannella, *supra* note 13, at 185 (criticizing the *Lemon* test because it makes no reference to the neutral role of government).

190. *See, e.g.*, Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 510 (1982).

191. Despite the *Lemon* test's status as a well-settled principle of constitutional law, Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983), the Court generally regards the test only as a "convenient, accurate distillation" of prior evaluations, Meek v. Pittenger, 421 U.S. 349, 358 (1975), a "helpful signpost," Hunt v. McNair, 413 U.S. 734, 741 (1973), or an "often useful inquiry," *Lynch*, 104 S. Ct. at 1362.

192. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 103 S. Ct. 2875, 2881 (1983); Cen-

Court's failure to apply the *Lemon* test rigorously in *Lynch* and at all in *Marsh*, however, suggests that the Court is growing dissatisfied with the secular purpose, secular effect, and no excessive entanglement requirements. The Court may perceive the *Lemon* test as too restrictive, often requiring an unwarranted intrusion into other legitimate interests.[193] This new trend in establishment clause jurisprudence significantly weakens the *Lemon* test as a rigorous analytical tool. Under the Court's historical approach, once it has explored the Framers' intent, or examined the religious character of past government behavior, and reasoned that either the historical background or the relatively benign nature of the challenged activity creates a presumption in favor of permitting the activity, then the Court no longer feels compelled to rely on the *Lemon* test.

In *Marsh* the Court inexplicably did not even find the *Lemon* test relevant, and in *Lynch* the Court applied the *Lemon* criteria extremely narrowly. First, the *Lynch* Court inquired only whether the government had any secular purpose for the crèche display, and rejected a test requiring exclusively secular objectives.[194] The Court did not consider whether the government's purpose was primarily secular. The Court may not have wanted to examine too closely the motivation behind the government's conduct.[195] In other cases, however, the Court has inquired into questions of intent beyond the prima facie assertions,[196] and in *Lynch* evidence existed of a religious purpose behind the display.[197] The *Lynch*

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tral Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980) (articulating a four part analysis for deciding commercial speech cases, a test that the Court later cited as the definitive inquiry); *see also* Metromedia, Inc. v. San Diego, 453 U.S. 490, 507 (1981).

193. The *Lynch* Court, however, did attempt to reaffirm its opposition to the establishment of religion and its intention to protect the genuine objectives of the establishment clause. *See* 104 S. Ct. at 1366.

194. *See id.* at 1361-62, 1372 & n.4 (Brennan, J., dissenting).

195. The Court has been reluctant to attribute unconstitutional motives to a government action, particularly when the Court can derive a plausible secular purpose from the face of the statute. Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983); *see* Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); L. TRIBE, *supra* note 5, at 837. *But see* Stone v. Graham, 449 U.S. 39 (1980) (per curiam) (rejecting the avowed secular purpose of the activity); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (same).

196. *See* Stone v. Graham, 449 U.S. 39, 41 (1980); *cf.* Epperson v. Arkansas, 393 U.S. 97, 107-08 & n.16 (1968) (fundamentalist sectarian views were the clear motivation for the statute).

197. *See Lynch*, 104 S. Ct. at 1373 & n.5 (Brennan, J., dissenting). Justice Brennan cited the district court's finding that the considerable amount of correspondence sent to the

majority interpreted the *Lemon* test to require a wholly religious purpose for striking down a law or activity,[198] while the dissent implied that anything less than a wholly secular goal would suffice.[199] A better approach would allow inquiry into government intent without a strong presumption of secular motives, but also would require a challenger to show that the predominant purpose of the activity is not secular.[200] In addition, the Court should consider whether alternative means are available to accomplish valid secular objectives without infringing on establishment rights.[201] Furthermore, the Court should continue to recognize the presence or absence of a public interest or purpose behind the activity, a central element in several major establishment decisions.[202]

A second indication that the *Lynch* Court applied the *Lemon* criteria extremely narrowly is that the Court applied the primary effect test essentially only to compare the benefits to religion in the *Lynch* case with the benefits to religion in a long line of other cases.[203] The Court distinguished *Grendel's Den* and *McCollum,* cases concerning substantial aid to religion,[204] and then stated that indirect, remote, or incidental benefits to religion do not satisfy the primary effect requirement. While examining prior holdings and articulating a standard are a proper introduction to discussion of the specific case before the Court, the *Lynch* Court never addressed the actual effect of the crèche display.[205] The Court did

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mayor of the city generally supported the view that the challenge to the constitutionality of the crèche represented an attack on religious life and an attempt to deny the majority of the community a means of publicly expressing its beliefs. The district court further found that "the City has accepted and implemented the view of its predominantly Christian citizens that it is a 'good thing' to have a crèche in a Christmas display, . . . because it is a good thing to 'keep "Christ in Christmas."' " *Donnelly v. Lynch,* 525 F. Supp. at 1173.

198. *See Lynch,* 104 S. Ct. at 1362.

199. *See id.* at 1373 (Brennan, J., dissenting).

200. *Cf.* L. TRIBE, *supra* note 5, at 835-36. Professor Trihe maintains that if something is arguably nonreligious, it is sufficiently secular to pass the secular purpose test, a relatively low threshold.

201. *See supra* note 153.

202. *See, e.g.,* Board of Educ. v. Allen, 392 U.S. 236, 245-47 (1968); Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947). Professor Choper believes that a crucial question in establishment clause analysis is how to determine whether the government's purpose is to further the general welfare of society or to advance religion. *See* Choper, *supra* note 5, at 606.

203. *See Lynch,* 104 S. Ct. at 1363-64.

204. *See supra* notes 54-56 & 62-63 and accompanying text.

205. In other cases, the Court has considered the actual effect of the challenged law or government activity. *See, e.g.,* Mueller v. Allen, 103 S. Ct. 3062, 3067-71 (1983); Larkin v. Grendel's Den, Inc., 103 S. Ct. 505, 511 (1982); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774-94 (1973); School Dist. of Abington v. Schempp, 374 U.S. 203, 224 (1963).

not answer the challengers' contention that display of the crèche clearly and impermissibly places the government's imprimatur of approval on the symbols and beliefs of a particular religion. The Court merely made summary comparisons to other establishment cases and concluded, with little support, that the benefits to religion in *Lynch* were indirect, remote, and incidental. The Court should focus on the specific case presented, without undue reliance on other cases that presented entirely different facts.

A final indication that the *Lynch* Court applied the *Lemon* test extremely narrowly is that the Court sharply cut back the impact of the entanglement test. Although in *Lynch* the administrative relations between the city government and the religious community were de minimis,[206] the Court suggested that only comprehensive, enduring administrative surveillance and entanglement would satisfy the administrative strand of the entanglement test.[207] The Court also declined to hold that political divisiveness could serve as an independent ground for invalidating conduct under the establishment clause. Whether the Court is implying that the political divisiveness strand of the entanglement analysis is now a useless inquiry, or that on the facts in *Lynch* the political divisiveness issue was not sufficient to override the secular purpose and effect tests is not clear. If the Court intended to abandon political divisiveness analysis altogether, then it blatantly repudiated the vital establishment clause concern of minimizing political dissension and conflict over purely religious issues.[208]

C. Synthesis

The *Marsh* and *Lynch* decisions establish an analytical precedent that fails to provide adequate protection against impermissible government involvement in religious activity. Through these decisions the Court has diluted the authority of the *Lemon* test by allowing the historical or pervasive nature of a particular religious activity to become the primary focus of establishment clause analysis.

Marsh and *Lynch* leave unclear the precise effect of historical analysis on future establishment clause decisions. First, the Court

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206. *Lynch*, 104 S. Ct. at 1364.

207. *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602, 619-22 (1971)).

208. The future of the political divisiveness test is unclear. The *Lynch* Court simply ratified its earlier statement in Mueller v. Allen, 103 S. Ct. 3062, 3071 n.11 (1983), that the political divisiveness test applies only to direct government subsidies to parochial schools, parochial school teachers, or other religious institutions. *See Lynch*, 104 S. Ct. at 1363.

may be developing a fourth criterion—the history or pervasive nature of the activity—that it will weigh in conjunction with the three *Lemon* criteria. Second, the new analysis may create an implied exemption to the three part *Lemon* test, wherein historical or pervasiveness considerations simply override the *Lemon* criteria. Last, and most threatening to establishment protections, *Marsh* and *Lynch* may signal that the secular purpose, primary secular effect, and excessive entanglement criteria no longer carry significant weight, and that the Court will decide establishment cases using a more amorphous standard grounded in uncertain interpretations of the history and pervasiveness of religion in American life.

The Court should consider the long standing significance of a religious expression or an activity's contemporaneous existence with the drafting of the first amendment without decimating the *Lemon* test. If the Court wishes to develop further these considerations as independent grounds to uphold a government-sponsored religious activity, its decisions should address squarely the effect of this new analysis on the stringent and protective *Lemon* test. Historical analysis, however, should not usurp the *Lemon* standard. At most, the Court should balance its historical inquiry against a strict application of the *Lemon* criteria or should consider historical evidence only in the context of each *Lemon* criterion. Legitimate contemporary concerns about the government's role in religion, which may differ from historical fears, require that the Court reaffirm its commitment to the *Lemon* test as the foundation of establishment clause analysis.

V. Conclusion

The Supreme Court's two latest establishment clause decisions mark a significant analytical departure from the three part *Lemon* test that the Court applied in a long line of prior cases. *Marsh* and *Lynch* demonstrate the Court's apparent attempt to exclude from the scope of establishment clause protection minor encroachments that the Court believes either do not pose the actual dangers which the Framers feared in the eighteenth century church, or that merely constitute the government's routine historical recognition of religion in American society. The Court's continued use of the new historical approach threatens not only uniformity in establishment clause jurisprudence under the *Lemon* test, but also the fundamental first amendment protections that the traditional approach has secured. First, historical review cannot yield a definitive interpretation of the Framers' intent. Second, historical analy-

sis does not protect adequately against contemporary establishment dangers that the first amendment drafters did not or could not anticipate. Last, the Court's idea of pointing to other, distinguishable official acknowledgements of religion does not justify the government's active participation in religious activity. The Supreme Court should reaffirm its commitment not only to establishment clause principles, but also to the *Lemon* test as a rigorous analytical framework that protects those principles.

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