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THE PERSISTENCE OF *LEMON*

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I. INTRODUCTION

Lemon v. Kurtzman sits at the center of one of the most controversial and complex areas of constitutional law—the interpretation of the Establishment Clause.[1] The case also may be the most maligned case in all First Amendment jurisprudence.[2] Jurists and academics from across the ideological spectrum have attacked *Lemon* and its infamous test to no end.[3] Some have even posited that the 2019 *American Legion v. American Humanist Association* decision rang the death knell for the *Lemon* test.[4]

And yet, the *Lemon* test persists. Despite numerous calls for *Lemon*'s demise, the case has never been expressly overruled in its entirety.[5] Therefore, the case remains within the available analytical framework for judicial resolution of most Establishment Clause cases. Indeed, even after *American Legion*, most district and circuit courts have used *Lemon* to analyze Establishment Clause issues, aside from those involving religiously expressive public monuments, displays, symbols, mottos, and ceremonies.[6]

The objective of this Article is not to serve as a standard-bearer or an apologia for *Lemon*. Instead, it works from a baseline that the *Lemon* test is not perfect and is not the best test for all Establishment Clause cases. Rather, this Article is designed to explain the mechanisms of why *Lemon* has

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[1] *See, e.g.*, Zelman v. Simmons-Harris, 536 U.S. 639, 688 (2002) (Souter, J., dissenting) (arguing that the Supreme Court's Establishment Clause jurisprudence is in "doctrinal bankruptcy"); Wallace v. Jaffree, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) (deeming the Court's Establishment Clause doctrine "neither principled nor unified").

[2] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); *see also* Steven K. Green, *The "Irrelevance" of Church-State Separation in the Twenty-First Century*, 69 SYRACUSE L. REV. 27, 54 (2019) (noting the negative status of *Lemon* among some jurists); Claudia E. Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 828 n.37 (2014) (discussing the extensive judicial criticism of the *Lemon* test).

[3] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) (bemoaning the "strange Establishment Clause geometry of crooked lines and wavering shapes [*Lemon*'s] intermittent use has produced").

[4] *See, e.g.*, Roger Byron, *Lemon is Dead*, THE FEDERALIST SOC'Y: FEDSOC BLOG (Mar. 2, 2020), https://fedsoc.org/commentary/fedsoc-blog/lemon-is-dead ("Whatever else may be said, *American Legion* tolls the end of the *Lemon* era. Its sun has set. Its reign is over.").

[5] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2098 (2019) (Thomas, J., concurring) (arguing that the failure of the Court to overrule *Lemon* in its entirety was an error).

[6] *Am. Legion*, 139 S. Ct. at 2081 n.16 (Alito, J., plurality opinion).

persisted and will likely continue to persist as a tool, among several interpretive approaches, for the examination of claimed First Amendment violations in the realm of education law.[7]

To do so, this Article will explore the *Lemon* case, its legacy or aftermath (depending on one's perspective), its continued persistence, and its likely endurance into the future. This Article will start by briefly outlining the Establishment Clause and the complex jurisprudence that has followed its interpretation, specifically in the area of education law. From there, this Article will take a close look at *Lemon* and examine its legacy by contrasting education law cases that followed its framework as precedent with other cases that criticized the *Lemon* test. Then, this Article will analyze the extent of *American Legion*'s impact on Establishment Clause analysis in the lower federal courts, which will demonstrate that these courts continue to use the *Lemon* test in education law cases.

Next, this Article will consider why *Lemon* has continued to persist in education law Establishment Clause jurisprudence since the Supreme Court made its decision fifty years ago. This part will discuss how the lack of a formal overruling of the case has resulted in *Lemon* continuing to be a valid analytical method for lower courts to employ in Establishment Clause decision-making. This part will subsequently argue that lower courts' continued usage of the *Lemon* test is not an error; it is, instead, a mere alignment with the hierarchical precedent doctrine. Next, it will explore the reasons why the Supreme Court has yet to expressly overrule *Lemon* in its entirety and why the Court has continued to use *Lemon* in some of its education law cases.

Finally, the Article will argue that *Lemon*'s enduring persistence also signals: (1) the likelihood of its continued use by lower courts in the future; and (2) its continued preservation in some form by the Court. Until it is expressly overruled, *Lemon* provides lower courts with an articulable constitutional guideline to support their decisions—the application of which reinforces judicial authority to some degree and provides a better alternative to judicial fiat. And it seems unlikely that a majority of the Court will reach a consensus to expressly overrule *Lemon* in its entirety, given that it could destabilize an area of First Amendment jurisprudence that is of critical importance in our democracy. Essentially, taking this action of finality with the *Lemon* test might prove to be the ultimate cautionary tale of "be careful what you wish for." Therefore, this Article will conclude that, despite the rampant criticism, there is a valid method to the madness for why *Lemon* has continued to endure for fifty years and why it will likely continue to persist, at least for education law Establishment Clause cases, in the future.

[7] Unless stated otherwise, the references in this Article to education law or school law apply specifically to the K–12 school environment.

II. THE ESTABLISHMENT CLAUSE & *LEMON V. KURTZMAN*

A. An Overview of the Establishment Clause

The Establishment Clause of the First Amendment of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion . . . ."[8] This religion clause applies to all official federal, state, and local governmental action, given its incorporation through the Fourteenth Amendment's Due Process Clause as articulated by the Supreme Court's 1947 decision of *Everson v. Board of Education*.[9] There are at least seven broad categories of Establishment Clause cases, which include:

> (1) religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies; (2) religious accommodations and exemptions from generally applicable laws; (3) subsidies and tax exemptions; (4) religious expression in public schools; (5) regulation of private religious speech; . . . (6) state interference with internal church affairs; [and (7)] [a] final, miscellaneous category, including cases involving such issues as Sunday closing laws, and church involvement in governmental decisionmaking . . . .[10]

Due to the sparsity of the language within the clause and the variety of Establishment Clause cases that arise, there is not one ready-made test that the Supreme Court applies in its establishment jurisprudence.[11]

This divergent decision-making extends to the Court's analysis of Establishment Clause educational law cases. Rather than employing a unitary approach, the Court has used a variety of analytical frameworks here.[12] Prior to *Lemon*, these included a purpose and primary effect test, neutrality

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[8] U.S. CONST. amend. I.

[9] *See* Lynch v. Donnelly, 465 U.S. 668, 678 (1984) (noting the Establishment Clause's application to "legislation or official conduct to determine whether . . . it establishes a religion or religious faith, or tends to do so."); Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 507 (2006) (outlining the various federal, state, and local government actions that give rise to claims of Establishment Clause violations); Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).

[10] *Am. Legion*, 139 S. Ct. at 2081 n.16 (Alito, J., plurality opinion) (citations omitted).

[11] *See* McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 875 (2005) ("The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions."); Bd. of Educ. v. Grumet, 512 U.S. 687, 720 (1994) (O'Connor, J., concurring) (explaining the necessity of different analytical approaches for different types of Establishment Clause cases); Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 591 (1989) (rejecting the notion that Establishment Clause doctrine can be encapsulated into "a single verbal formulation"); *Lynch*, 465 U.S. at 678 (noting that the Establishment Clause "is not a precise, detailed provision in a legal code capable of ready application").

[12] *See* Khaled A. Beydoun, *Bisecting American Islam? Divide, Conquer, and Counter-Radicalization*, 69 HASTINGS L.J. 429, 487–490 (2018) (outlining the range of tests used in interpreting the Establishment Clause).

analyses, a coercion analysis, and a historical approach.[13] The absence of a singular test in this area of law has resulted in a difficult-to-decipher opacity that, at a first (or second or third) glance, seems to drill down to consistent inconsistency. For the Court, the defining feature of its Establishment Clause jurisprudence in the area of education law has been "line-drawing [in order to] determin[e] at what point a dissenter's rights of religious freedom are infringed by the State," no matter the analytical framework it has applied.[14] In *Lemon*, however, the Court bluntly admitted it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[15]

B. An Extended Examination of Lemon v. Kurtzman

A close look at the *Lemon* decision is warranted in any critical examination of this case. At issue in *Lemon* were two state statutes in Rhode Island and Pennsylvania that provided state financial aid to church-related K-12 schools.[16] Both were challenged under the First Amendment Religion Clauses and the Fourteenth Amendment's Due Process Clause.[17]

The Rhode Island Salary Supplement Act enacted in 1969 pertained to teachers at nonpublic elementary schools; these schools served about one-quarter of the state's students.[18] Of these students, approximately 95% attended Roman Catholic church-affiliated schools.[19] The statute authorized state officials to pay nonpublic elementary school teachers of secular subjects a supplement of up to 15% of their annual salary.[20] The Act was enacted based on the state legislature's "finding that the quality of education available in nonpublic elementary schools [had] been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers."[21] A condition for eligibility for the salary supplement was an attestation in writing that the teacher would not teach any religion courses while receiving a supplement.[22] All of the 250 teachers who applied for the salary supplement taught at Roman Catholic nonpublic schools.[23]

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[13] *See, e.g.*, Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963) (stating that governmental action violates the Establishment Clause "[i]f either [the purpose or the primary effect of the government action] is the advancement or inhibition of religion"); Engel v. Vitale, 370 U.S. 421, 425, 430–31 (1962) (applying a neutrality approach, emphasizing the coercive pressure of government-supported religious conformity, and finding an Establishment Clause violation for school prayer based on the colonial history of seeking religious freedom in America).

[14] Lee v. Weisman, 505 U.S. 577, 598 (1992).

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

[16] *See id.* at 606.

[17] *See id.*

[18] *See id.* at 607–08.

[19] *See id.*

[20] *See id.* at 607.

[21] *Id.*

[22] *See id.* at 608.

[23] *Id.*

Pennsylvania enacted the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968 based on a legislative finding that state financial support of nonpublic schools' delivery of "purely secular educational objectives" would fulfill the educational goals of the state.[24] Under this statute, the state would "directly reimburse[] nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials" that were part of the schools' "secular educational service[s]."[25] Pursuant to the law, Pennsylvania entered into reimbursement contracts with 1,181 nonpublic K-12 schools that served over one-fifth of the state's student body.[26] Of these students, more than 96% were pupils of church-related schools—most of which were "affiliated with the Roman Catholic church."[27]

In evaluating the constitutionality of these statutes, the Court candidly acknowledged the intricacy of the First Amendment Religion Clauses.[28] It then analyzed the text of the Establishment Clause, emphasizing that this text "did not simply prohibit the establishment of a state church or a state religion, an area history shows [the Clause's authors] regarded as very important and fraught with great dangers."[29] Instead, the text extends to laws respecting establishment, "in the sense of being a step that could lead to such establishment . . . ."[30]

Given that the text of the Establishment Clause does not provide a precise test, the Court determined the starting point of its analysis was the "consideration of the cumulative criteria developed by the Court over many years."[31] Based on this precedent, the Court gleaned "[t]hree such tests"—the sum articulation of which henceforth has been deemed the *Lemon* test: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'"[32]

In applying this framework to the Rhode Island and Pennsylvania statutes, the Court determined that both statutes had secular legislative purposes under the first prong because the legislatures clearly stated their intent was "to enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[33] The Court gave deference to

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[24] *Id.* at 609
[25] *Id.* at 609–10.
[26] *Id.* at 610.
[27] *Id.*
[28] *See id.* at 612.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)) (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
[33] *Id.* at 613.

this legislative intent, as it found there was no indication of an undermining sham legislative purpose.[34]

As to the second prong, the Court declined to decide whether each statute's "principal or primary effect [was] one that neither advances nor inhibits religion."[35] However, the Court signaled that such an inquiry would be a very close one given the states' recognition of the significant religious missions of church-related schools, the substantiality of the schools' religion-oriented activities, and the statutory restrictions to ensure government financial support was exclusive to the schools' secular, rather than religious, educational services.[36] Consequently, the Court concluded that "[a]ll these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses."[37]

The Court did not resolve this principal or primary effect question because it "conclude[d] that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[38] In defining the objective of this entanglement prong, the Court determined that it was "to prevent, as far as possible, the intrusion of either [state or religion] into the precincts of the other" while recognizing that "total separation between church and state . . . is not possible in an absolute sense."[39] Consequently, the Court rejected the Jeffersonian notion of complete separation of church and state as part of its entanglement analysis.[40] Instead, the Court asserted that "[j]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[41] Thus, "to determine whether the government entanglement with religion is excessive," the Court would "examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[42]

1. The Entanglement Analysis for the Rhode Island Statute

This entanglement examination led the Court to find that the Rhode Island statute was an unconstitutional violation of the Establishment Clause.[43]

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[34] *Id.*
[35] *Id.* at 612–14.
[36] *See id.* at 613.
[37] *Id.*
[38] *Id.* at 613–14.
[39] *Id.* at 614.
[40] *See id.*
[41] *Id.*
[42] *Id.* at 615.
[43] *See id.* at 607, 614.

In analyzing the characters and purposes of the institutions that were benefited by the Rhode Island statute, the Court first outlined the district court's factual findings that the sole beneficiaries of the statute—Roman Catholic elementary schools—were located in close proximity to parish churches in order to allow "convenient access for religious exercises since instruction in faith and morals is part of the total educational process"; were adorned with overtly religious symbols that included crosses, crucifixes, religious paintings, and religious statues; and featured teaching faculties primarily composed of "nuns of various religious orders."[44] These findings by the district court led to its conclusion that the parochial schools were integral to the Catholic Church's religious mission, were powerfully effective at inculcating the church's religious doctrine, and "involve[d] substantial religious activity and purpose."[45]

Based on those findings, the Supreme Court determined that "[t]he substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid."[46] This finding mirrored the legislature's concerns that resulted in strict controls within the statutory scheme to ensure that secular education was the only recipient of state financial support.[47]

The Court proceeded to differentiate the target of this statute's financial support from its past precedent that upheld the provision of state financial aid to church-related schools for "secular, neutral, or nonideological services, facilities, or materials."[48] In the present case, unlike "[b]us transportation, school lunches, public health services, and secular textbooks supplied in common to all students," the statutory supplement was directed toward teachers.[49] Whereas the secularity of a textbook was discernable, "a teacher's handling of a subject is not."[50] Subsequently, the Court highlighted the danger "that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education."[51]

Applying this premise to the record, the Court determined "these dangers [were] present to a substantial degree."[52] The lay teachers, most of whom practiced the Catholic faith, were "employed by a religious organization, subject to the direction and discipline of religious authorities,

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[44] *Id.* at 615.
[45] *Id.* at 616.
[46] *Id.*
[47] *See id.*
[48] *Id.* at 616–17.
[49] *See id.*
[50] *Id.* at 607, 617.
[51] *Id.* at 617.
[52] *Id.*

and work[ed] in a system dedicated to rearing children in a particular faith."[53] Of all the relevant Roman Catholic schools' principals, all but two were nuns appointed by the Roman Catholic Bishop of Providence's appointed representative or the "Mother Provincial of the order whose members staff the school."[54] Lay teachers were interviewed by that appointed representative and the principal; the parish priest for the school negotiated the teachers' salaries and signed their contracts.[55] The church schools' handbook "advise[d] teachers to stimulate interest in religious vocations and missionary work" in furtherance of their mission and noted that "[r]eligious formation [was] not confined to formal [religious] courses."[56] Consequently, the Court determined that "[r]eligious authority necessarily pervade[d] the school system."[57]

The Court explicitly stated that it did not impart bad faith or an intent to evade the Constitution's limits on these teachers in finding impermissible government entanglement with religion here.[58] Instead, the Court

> recognize[d] that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.[59]

Consequently, the "potential for impermissible fostering of religion" was inherently present in this educational environment.[60]

Given that reasonable potentiality, in order to ensure that state "subsidized teachers do not inculcate religion," as that would transverse the limits of the Religion Clauses, the state would be required to engage in "comprehensive, discriminating, and continuing state surveillance" of these aid recipients.[61] The Court concluded that "[t]hese prophylactic contacts will involve excessive and enduring entanglement between state and church," which could not be sustained under the Establishment Clause.[62]

Finally, the Court determined an impermissible entanglement inhered in a provision of the Rhode Island statute that excluded eligibility for teachers who worked at nonpublic schools "whose average per-pupil expenditures on secular education equal[ed] or exceed[ed] the comparable

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[53] *Id.* at 618.
[54] *Id.* at 617.
[55] *See id.*
[56] *See id.* at 618.
[57] *Id.* at 617.
[58] *See id.* at 618.
[59] *Id.* at 618–19.
[60] *Id.* at 619.
[61] *Id.*
[62] *Id.*

figures for public schools."[63] To determine eligibility, the state was required to examine the church schools' records to apportion expenditures to either secular education or religious activity.[64] The Court was clear that "[t]his kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids."[65] The entanglement at the heart of the Court's concern was not an excessive overrunning of government by religion or a church; instead, it was "a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[66] Consequently, the Court stated it could not "ignore . . . the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses" through the state enforcement of this provision of the Rhode Island statute.[67]

2. The Entanglement Analysis of the Pennsylvania Statute

Next, the Court determined that the Pennsylvania statute was a violation of the Establishment Clause as it failed to pass muster under the entanglement prong of the precedential framework.[68] The Pennsylvania statute provided direct reimbursement to nonpublic schools for their secular education expenditures in the form of "teachers' salaries, textbooks, and instructional materials."[69] Like the Rhode Island statutory analysis, the Court found "the very [statutory] restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state."[70] Also, like the Rhode Island law, the Pennsylvania statute required the state to examine church-related school accounts to distinguish the costs of secular services from those of religious instruction.[71] These factors violated the entanglement prong.[72]

The Pennsylvania statute had "the further defect of providing state financial aid directly to the church-related schools."[73] This fact alone distinguished the statute from those at issue in *Board of Education v. Allen* and *Everson*, where "state aid was provided to the student[s] and [their] parents—not to the church-related school."[74] This direct and continuing cash subsidy, as well as its "comprehensive measures of surveillance and controls" of secular education eligibility and post-audit inspection of the "church-

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[63] *Id.* at 620.
[64] *See id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *See id.* at 607, 620.
[69] *Id.* at 609–10.
[70] *Id.* at 620–21.
[71] *See id.* at 621.
[72] *See id.*
[73] *Id.*
[74] *Id.*

related school's financial records[,] . . . create[d] an intimate and continuing relationship between church and state" in violation of the entanglement prong and, therefore, the Establishment Clause.[75]

3. Divisive Political Potential of Both the Rhode Island and the Pennsylvania Statutes As Further Proof of Impermissible Entanglement of Government with Religion

The Court concluded its Establishment Clause analysis of both statutes by finding that "[a] broader base of entanglement . . . is presented by the divisive political potential of these state programs."[76] Given the significant number of pupils within each state that attended church-related schools that were impacted by these statutes, the Court determined that the state assistance provided by these laws would, no doubt, engender "political divisions along religious lines[, which] was one of the principal evils against which the First Amendment was intended to protect."[77] The Court determined that this was hazardous; "a threat to the normal political process," in conflict with the history of the nation; and contrary to the intent of the "Constitution's authors [who] sought to protect religious worship from the pervasive power of government" and "political division along religious lines."[78] As a result, the Court—in a nod to *Everson*, which was at "the verge" of constitutional propriety—determined these two statutes went beyond this threshold.[79] The notion of a progression argument towards the establishment of state churches and state religion was persuasive to the Court here because "involvement or entanglement between government and religion serves as a warning signal" of the "evil against which the Religion Clauses were intended to protect."[80] The Court emphasized that this was a momentum that can be difficult to stop, especially when there is "difficulty of perceiving in advance exactly where the 'verge' of the precipice lies."[81]

4. Conclusion

In the opinion's conclusion, the Court emphasized the enormous contributions that church-related schools had made to the nation and made clear that its opinion did not disparage these educational entities.[82] After doing so, the Court stated the key issue of the case was not "[t]he merits and benefits of these schools."[83] Instead, "[t]he sole question [was] whether

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[75] *Id.* at 621–22.
[76] *Id.* at 622.
[77] *Id.*
[78] *Id.* at 622–23.
[79] *See id* at 624 (implicitly referencing Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).
[80] *Id.* at 624–25.
[81] *Id.* at 624.
[82] *Id.* at 625.
[83] *Id.*

state aid to these schools can be squared with the dictates of the Religion Clauses."[84] In answering that question, the Court concluded:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.[85]

Here, the line was drawn at impermissible and excessive entanglement with these statutes, and the Court determined that they both violated the Establishment Clause.[86]

III. THE LEGACY OF *LEMON*

A. Applications of Lemon *and Alternative Approaches in Supreme Court Education Law Establishment Clause Cases*

After *Lemon* was decided, the Supreme Court applied its three-pronged purpose, primary effect, and entanglement test in multiple education law Establishment Clause decisions.[87] According to Justice Blackmun, in the twenty years after *Lemon*, the Court decided thirty-one Establishment Clause cases—thirty of which relied upon the principles in *Lemon*.[88] These decisions included both cases that analyzed the Establishment Clause in the context of the provision of state financial aid to church-related schools or their attendees, as well as cases involving religious exercises in public schools.[89]

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[84] *Id.*

[85] *Id.*

[86] *Id.* The Supreme Court denied the Petition for Rehearing that was filed in the case after the issuance of its opinion. *See* Lemon v. Kurtzman, 404 U.S. 876, 876 (1971) (denying the motion for supplemental opinion and petition for rehearing).

[87] *See Lemon*, 403 U.S. at 612–13. *See generally* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000) (applying the *Lemon* test in a school law Establishment Clause case); Agostini v. Felton, 521 U.S. 203 (1997); Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226 (1990) (plurality opinion); Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Sch. Dist. v. Ball, 473 U.S. 373 (1985), *overruled by Agostini*, 521 U.S. 203; Aguilar v. Felton, 473 U.S. 402 (1985), *overruled by Agostini*, 521 U.S. at 203; Mueller v. Allen, 463 U.S. 388 (1983); Stone v. Graham, 449 U.S. 39 (1980); Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980); Sloan v. Lemon, 413 U.S. 825 (1973); Levitt v. Comm. for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973).

[88] *See* Lee v. Weisman, 505 U.S. 577, 603 n.4 (1992) (Blackmun, J., concurring) (providing these Supreme Court decision statistics). The lone noted exception was *Marsh v. Chambers*, 463 U.S. 783 (1983).

[89] Valerie C. Brannon, *Evaluating Federal Financial Assistance Under the Constitution's Religion Clauses*, CONG. RSCH. SERV. (Sep. 9, 2020), https://fas.org/sgp/crs/misc/R46517.pdf; *see Lee*, 505 U.S. at 603 n.4 (Blackmun, J., concurring) (noting in the twenty years after the *Lemon* decision "no case involving religious activities in public schools . . . failed to apply vigorously the *Lemon* factors").

1. Post-*Lemon* Establishment Clause Cases Involving Provision of Public Aid to Religiously-Affiliated Schools or Their Attendees' Families

Building upon its findings in *Everson*, *Allen*, and *Lemon*, the Supreme Court took up several decisions throughout the 1970s that used the three-pronged *Lemon* test to analyze the constitutionality of state statutes that directly or indirectly provided conditional reimbursements or grants to private church-related schools or their attendees.[90] These decisions found both violations of and compliance with the Establishment Clause.[91]

For example, in *Committee for Public Education and Religious Liberty v. Nyquist*, the Court found that a New York law authorizing "direct money grants from the State to 'qualifying' nonpublic schools [including sectarian schools] to be used for the 'maintenance and repair of . . . school facilities and equipment to ensure the health, welfare, and safety of enrolled pupils'" was a violation of the Establishment Clause, because it had the primary effect of advancing religion under the second prong of *Lemon*.[92] Similarly, it found New York's direct aid tuition reimbursement program to parents of children in nonpublic schools also failed this effect test because the "effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions."[93]

On the same day, the Court used the *Lemon* test in *Sloan v. Lemon* to evaluate the Pennsylvania Parent Reimbursement Act for Nonpublic Education.[94] The Act directly reimbursed parents of students in nonpublic K-12 schools for part of tuition expenses, which was designed to "avoid the 'entanglement' problem that flawed its prior [invalidated] aid statute."[95] The Court declared the law, which provided aid to families in a state where more than 90% of the nonpublic schoolchildren attended religiously-affiliated schools, unconstitutional because its primary effect advanced religion.[96] Unlike the provision of bus transportation in *Everson* or secular textbooks in *Allen*, this tuition grant program "preserve[d] and support[ed]

[90] *See infra* notes 92–100 and accompanying text; *see also* Levitt v. Comm. for Pub. Ed. & Religious Liberty, 413 U.S. 472, 474, 479, 482 (1973) (finding that a New York statute that allowed for state reimbursement of student testing and recordkeeping costs to private church-related schools had "the primary effect of advancing religion" in violation of the Establishment Clause Lemon test); New York v. Cathedral Acad., 434 U.S. 125, 133 (1977) (applying *Lemon* in a case involving the provision of public aid to nonpublic religiously-affiliated schools for state-mandated recordkeeping and testing services).

[91] *See generally* Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); *Sloan*, 413 U.S. 825; *Regan*, 444 U.S. 646.

[92] *Nyquist*, 413 U.S. at 762, 773–74 (citing *Lemon*, 403 U.S. at 612–13).

[93] *Id.* at 780, 783.

[94] *Sloan*, 413 U.S. at 827.

[95] *Id.* at 827, 829.

[96] *See id.* at 830, 835.

religion-oriented institutions," going beyond the "verge" of constitutional permissibility.[97]

However, the Court also applied *Lemon* in some of these public aid school law cases to conclude that they did pass muster under the three-pronged framework. For example, in *Committee for Public Education and Religious Liberty v. Regan*, the Supreme Court analyzed a New York statute passed after the Court had struck down its predecessor through the use of the *Lemon* test.[98] This law "authoriz[ed] the use of public funds to reimburse church-sponsored and secular nonpublic schools for performing various testing and reporting services mandated by state law."[99] Applying *Lemon*, the Court determined the statute did not violate the Establishment Clause because it had a secular purpose and effect, and it did not create excessive entanglement between government and religion.[100]

Similarly, in the 1983 *Mueller v. Allen* decision, the Court used *Lemon* to determine a Minnesota statute that permitted a tax deduction for education-related expenses was not a violation of the Establishment Clause.[101] Here, the Court outlined how the three-part *Lemon* test guided the general nature of the Court's inquiry involving the Establishment Clause and public benefits being directed to the families of children in nonpublic parochial schools.[102] While noting the *Lemon* test was "well settled," the Court also found that *Lemon* "provide[d] 'no more than a helpful signpost' in dealing with Establishment Clause challenges."[103] It then proceeded to apply the *Lemon* prongs to determine that the law did have a secular purpose, did not have the primary effect of advancing religion, and did "not 'excessively entangle' the state in religion."[104]

However, the *Lemon* test has not been applied in all cases involving the provision of government benefits to and tax exemptions for religiously-affiliated nonpublic schools or their attendees. For example, in the 1993 *Zobrest v. Catalina Foothills School District* case, the Court determined that the state provision of a sign-language interpreter to a hearing-impaired student at a Roman Catholic private high school, pursuant to the Individuals with Disabilities Education Act ("IDEA"), was not a violation of the Establishment Clause because it was a "neutral government program dispensing aid not to schools but to individual [disabled] children."[105] Despite the underlying

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[97] *Id.* at 832 (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947)).
[98] Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 649 (1980) (citing Levitt v. Comm. for Pub. Ed. & Religious Liberty, 413 U.S. 472 (1973)).
[99] *Id.* at 648.
[100] *See id.* at 648, 653, 657, 660 (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).
[101] Mueller v. Allen, 463 U.S. 388, 390, 394 (1983).
[102] *See id.* at 394.
[103] *Id.* (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).
[104] *See id.* at 394–403 (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).
[105] *See* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 3, 13–14 (1993).

circuit court's application of *Lemon*, the Supreme Court did not apply it or even reference it in its analysis.[106]

Four years later, in *Agostini v. Felton*—another case involving the provision of public aid to nonpublic religiously affiliated schools—the Court applied a modified *Lemon* test when analyzing the constitutionality of New York City's provision of public school teachers for remedial educational instruction in parochial schools pursuant to Title I of the Elementary and Secondary Education Act of 1965.[107] Here, the Court stated that the evaluation of whether government aid violates the Establishment Clause requires the inquiry of "whether the government acted with the purpose of advancing or inhibiting religion" and "whether the aid has the 'effect' of advancing or inhibiting religion."[108] Although the Court did not cite *Lemon* for these propositions, the first two prongs of the *Lemon* framework are clearly the foundation for these inquiries.[109] Rather than squarely addressing the government's purpose, the Court determined that the program did not have "the impermissible effect of advancing religion."[110] From there, the Court addressed the excessive entanglement issue, which it deemed a consistent and necessary aspect of its Establishment Clause jurisprudence.[111] It found that it had "considered entanglement both in the course of assessing whether an aid program [had] an impermissible effect of advancing religion" and "as a factor separate and apart from 'effect.'"[112] The Court noted that both approaches were similar as they examined the characteristics of the benefited institution and the nature of the state aid.[113]

Rather than treating this inquiry independently, the Court folded the third prong of *Lemon* into the second prong to treat entanglement "as an aspect of the inquiry into a statute's effect."[114] In doing so, the Court determined that there would be no need for pervasive monitoring of the Title I teachers to ensure that they would not "inculcate religion simply because they happen to be in a sectarian environment."[115] Consequently, the Court held that there was no excessive entanglement.[116]

The 1999 plurality decision in *Mitchell v. Helms* utilized the *Agostini* two-factor approach—rather than the *Lemon* three-pronged approach—to uphold a federal school-aid program that distributed funds to government

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[106] *See id.* at 5, 10–11.
[107] *See* Agostini v. Felton, 521 U.S. 203, 222–35 (1997).
[108] *Id.* at 222–23.
[109] *Id.* at 222, 232.
[110] *Id.* at 230.
[111] *See id.* at 232–35.
[112] *Id.* at 232 (citing Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 674 (1970); Lemon v. Kurtzman, 403 U.S. 602, 612–613 (1971)).
[113] *See id.*
[114] *Id.*
[115] *Id.* at 234.
[116] *See id.*

agencies to loan educational materials to public and private schools, which included many religiously-affiliated schools.[117] The plurality of the Court stated, "*Agostini* . . . modified *Lemon* for purposes of evaluating aid to schools and examined only the first and second factors . . . ."[118] Given the commonality of considerations in the second and third prongs of this test, the Court stated it "recast *Lemon*'s entanglement inquiry as simply one criterion relevant to determining a statute's effect."[119]

Finally, in the Court's last-to-date substantive analysis of a disputed Establishment Clause claim, the majority made no reference to *Lemon*.[120] *Zelman v. Simmons-Harris* involved an Ohio program that provided tuition aid to eligible families for students to attend public or private schools of their choice.[121] Instead of citing *Lemon*, it applied the *Agostini* factors to determine whether the law had the "'purpose' or 'effect' of advancing or inhibiting religion."[122] In doing so, the Court determined: (1) the program "was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system"; and (2) it did not have an impermissible effect of advancing or inhibiting religion as it was "a program of true private choice" that was "entirely neutral with respect to religion."[123] Therefore, it was not a violation of the Establishment Clause.[124]

While *Zelman* has been painted as being completely non-reflective of *Lemon*, this view was not shared by Justice O'Connor in her concurring opinion.[125] She expressly recognized that the test employed by the majority was not a "major departure from this Court's prior Establishment Clause jurisprudence" and, instead, was the modified *Lemon* test from *Agostini*, which merely "folded the entanglement inquiry into the primary effect inquiry."[126] Justice O'Connor, who authored the majority opinion in *Agostini*, also noted that "[a] central tool in our analysis of cases in this area has been the *Lemon* test."[127]

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[117] *See* Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion).

[118] *Id.* at 807.

[119] *Id.* at 808.

[120] Zelman v. Simmons-Harris, 536 U.S. 639, 653–63 (2002). Although the Court has reviewed cases involving the provision of public benefits that can be used for K-12 private religious school tuition since *Zelman*, those cases were determined on standing grounds or did not present adverse positions on the application of the Establishment Clause. *See* Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2254 (2020) (noting the lack of dispute on the permissibility of a K-12 state scholarship program under the Establishment Clause); Ariz. Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 146 (2011) (resolving an Establishment Clause challenge to a state K-12 school tuition tax credit program on standing grounds).

[121] *Zelman*, 536 U.S. at 645.

[122] *Id.*at 648–49 (quoting Agostini v. Felton, 521 U.S. 203, 222–23 (1997)).

[123] *Id.* at 649, 662–63.

[124] *See id.* at 663.

[125] *See id.* at 668–70 (O'Connor, J., concurring).

[126] *See id.* at 668 (citing *Agostini*, 521 U.S. at 222–23; Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)).

[127] *Id.*

2. Post-*Lemon* Establishment Clause Cases Involving Religious Exercises in Public Schools

The Court also applied the *Lemon* test to a series of education law decisions involving religious exercises in public schools, where much of the analysis focused on the secular legislative purpose prong of *Lemon*. In its 1980 *Stone v. Graham* memorandum opinion, the Court determined that a Kentucky statute that required "the posting of a copy of the Ten Commandments" in every public school classroom violated the secular purpose prong of *Lemon* and was, therefore, unconstitutional under the Establishment Clause.[128] Analogously, in its 1985 decision of *Wallace v. Jaffree*, the Court found that an Alabama prayer and meditation statute violated the Establishment Clause, as it failed the secular purpose prong of *Lemon*.[129] Here, the Court found that the "statute had *no* secular purpose," as the express purpose of the legislation was "'to return voluntary prayer' to the public schools."[130] Similarly, in its 1987 *Edwards v. Aguillard* decision, the Supreme Court reaffirmed the *Lemon* test, where it found that a Louisiana creationism statute failed to pass constitutional muster under that test's first prong.[131]

The Court continued to apply *Lemon* in its education law jurisprudence for decades after the decision. For example, in *Santa Fe Independent School District v. Doe*, the Court's last-to-date religious activities in public schools case, the Court referenced the *Lemon* factors as the general guides for Establishment Clause analysis.[132] It then utilized the secular purpose prong of the *Lemon* test to determine a school district's policy that permitted the delivery of a student invocation prior to football games was an Establishment Clause violation.[133] Here, the Court found the first prong of *Lemon* was not satisfied because

> the text of the . . . policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the . . . policy specifies only one, clearly preferred message—that of Santa Fe's traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not

[128] Stone v. Graham, 449 U.S. 39, 39, 41–42 (1980).
[129] *See* Wallace v. Jaffree, 472 U.S. 38, 40, 60–61 (1985).
[130] *Id.* at 56–57 (emphasis added).
[131] *See* Edwards v. Aguillard, 482 U.S. 578, 580, 582–83, 583 n.4, 596–97 (1987).
[132] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (quoting Mueller v. Allen, 463 U.S. 388, 394 (1983)).
[133] *See id.* at 314–16.

> a content-neutral regulation that creates a limited public forum [for student speech].[134]

The Court concluded the purpose of the policy was to "endors[e] school prayer."[135] Thus, the "simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation."[136]

Despite the numerous majority opinions by the Supreme Court that cited and used *Lemon* to analyze education law Establishment Clause claims, the *Lemon* test was not used in all of the education law cases that followed *Santa Fe*. For example, the Court in *Lee v. Weisman* used neutrality and coercion analyses, rather than the *Lemon* test, to determine that a Rhode Island policy allowing public school administrators to invite clergy members to deliver prayers at middle and high school graduation ceremonies was a violation of the Establishment Clause.[137] The *Lee* Court, however, expressly declined the litigants' request to reconsider *Lemon*; instead, it found that the pervasiveness of the government involvement in religious activity "to the point of creating a state-sponsored and state-directed religious exercise in a public school . . . suffice[d] to determine the question" of constitutionality.[138]

B. Criticisms of Lemon *and* American Legion v. American Humanist Association

Due in part to the lack of a uniform application of the *Lemon* test in the Supreme Court's Establishment Clause jurisprudence, the case has become a target for derision by some jurists and scholars.[139] Justice Scalia repeatedly drove "pencils through the [*Lemon*] creature's heart."[140] Judge Easterbrook deemed the *Lemon* standards to be "hopelessly open-ended."[141] Professors argued the case created doctrinal chaos by transforming this area of First Amendment decision-making into an area of "unstructured expansiveness."[142]

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[134] *Id.* (citing Lemon v. Kurtzman, 403 U.S. 602, 612 (1971)).
[135] *Id.* at 315.
[136] *Id.* at 316.
[137] *See* Lee v. Weisman, 505 U.S. 577, 580, 587–88 (1992).
[138] *Id.* at 587.
[139] *See, e.g.*, McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) (pejoratively referring to the "brain-spun '*Lemon* test'"); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("*Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys . . . .").
[140] *Lamb's Chapel*, 508 U.S. at 398 (Kennedy, J., concurring).
[141] Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 869 (7th Cir. 2012) (Easterbrook, J., dissenting).
[142] *See* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 118–20 (1992); Douglas 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, 1380–88 (1981).

For these critics, many found *Lemon*'s reckoning day with the Court's decision in *American Legion v. American Humanist Association*.[143] In *American Legion*, a majority of the Court agreed that the Bladensburg Peace Cross, a public memorial for soldiers who lost their lives in World War I, was not a violation of the Establishment Clause.[144] This decision produced seven different opinions: six in support of the view that there was no Establishment Clause violation and one in dissent.[145] Among these fractured opinions, one of the few points of consensus is that the decision did not expressly overrule *Lemon* in its entirety.[146] Justice Thomas, one of *Lemon*'s most vocal critics, acknowledged this in his concurrence, stating that the Court should have instead "overrule[d] the *Lemon* test in all contexts."[147]

While the Court did not expressly overrule *Lemon*, a majority of the Justices did agree that *Lemon* is no longer the appropriate constitutional test for public religious displays and monuments. Here, the plurality wrote that although "*Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking," it had "shortcomings" that were evidenced by the Court's post-*Lemon* declinations to use the test in some cases.[148] For this plurality, it was clear "the *Lemon* test [alone] could not resolve" the multitudinous array of Establishment Clause cases appealed to the Court.[149] It emphasized the harsh criticism of the test by several Justices, and it noted that *Lemon* had been "lamented by lower court judges[] and questioned by a diverse roster of scholars."[150]

As a result, the plurality determined that cases "that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious association," like the one before it, should not be analyzed under *Lemon*.[151] Instead, lower courts should use an "application of a presumption of constitutionality for longstanding monuments, symbols, and practices."[152] The plurality "look[ed] to history for guidance" and used *Marsh v. Chambers*, which "conspicuously ignored *Lemon*," as its

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[143] *See generally* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067 (2019).

[144] *Id.* at 2074, 2090.

[145] *See generally id.* Given the number of these opinions, it can be difficult at first read to assess a clear understanding of the common ground of the Justices in resolving this issue. *See* Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1325 (11th Cir. 2020) (noting this difficulty). What is of critical importance to this Article is whether the Court reached any consensus in this case on the place of *Lemon* in Establishment Clause jurisprudence.

[146] *See Am. Legion*, 139 S. Ct. at 2097–98 (Thomas, J., concurring) (noting what the Court failed to do).

[147] *Id.* at 2097.

[148] *Id.* at 2080 (plurality opinion). Justice Alito was joined by Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh in this plurality opinion. *Id.* at 2074.

[149] *Id.* at 2080.

[150] *Id.* at 2081.

[151] *Id.* at 2081–82.

[152] *Id.*

paradigmatic example of this approach.[153] This ended the plurality's discussion of *Lemon*—without a directive that *Lemon* was expressly overruled in its entirety.

Although he joined Justice Alito's opinion in full, Justice Kavanaugh also wrote a concurring opinion that argued the "Court no longer applies the old test articulated in *Lemon*."[154] In doing so, he claimed that the *Lemon* test, if "fairly applied," does not provide an adequate explanation for any of the Court's Establishment Clause decisions since its first articulation.[155] However, in discussing education law cases within these decisions, Justice Kavanaugh seemed to round off the edges of his conclusions. With respect to cases that involve "government benefits and tax exemptions [that go to] religious organizations," he wrote the outcomes in those cases "are not easily reconciled with *Lemon*."[156] However, he cited *Mueller v. Allen* here, which expressly applied the three-pronged *Lemon* test to uphold a state law.[157] In school prayer cases, Justice Kavanaugh wrote that the Court applied a coercion analysis rather than *Lemon*.[158] Here, he omitted the use of *Lemon* in *Santa Fe*'s holding on the unconstitutionality of government-sponsored school prayers, and he also omitted the other religious exercises in schools jurisprudence that applied *Lemon*.[159] By obscuring or omitting precedent that did not fit within his world view, Justice Kavanaugh concluded that "the Court's decisions over the span of several decades demonstrate that the *Lemon* test is not good law . . . ."[160] However, Justice Kavanaugh did not close the loop on this analysis by expressly calling for the overruling of *Lemon*.[161]

Justice Gorsuch's concurrence focused on standing.[162] However, he still waded into the mire, stating the plurality correctly found that *Lemon* "was a misadventure."[163] Justice Gorsuch called *Lemon* a "mess"; asserted that "no one has any idea about the answers to [the *Lemon*] questions"; referenced the score of individuals who criticized the case and called for its removal; and noted that none of the Justices could "defend *Lemon* against these criticisms . . . ."[164] He summarized the plurality's directives to lower

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[153] *See id.* at 2087 (citing Marsh v. Chambers, 463 U.S. 783 (1983)). In *Marsh*, the Court upheld the constitutionality of the Nebraska Legislature's use of an official chaplain to begin each legislative session with a prayer. *See generally Marsh*, 463 U.S. 783.

[154] *Am. Legion*, 139 S. Ct. at 2092 (Kavanaugh, J., concurring) (citation omitted).

[155] *See id.*

[156] *Id.* at 2092–93.

[157] *See id.* at 2092 (citing Mueller v. Allen, 463 U.S. 388, 394-403 (1983) (upholding a Minnesota law that permitted state deductions for tuition, textbook, and transportation expenses related to K-12 education, including private religious education)).

[158] *See id.* at 2093 (citing Lee v. Weisman, 505 U.S. 577 (1992)).

[159] *See id.*.

[160] *Id.*

[161] *See id.* at 2093–94.

[162] *See generally id.* at 2098–103 (Gorsuch, J., concurring).

[163] *Id.* at 2101.

[164] *Id.*

courts this way: apply *Town of Greece* and not *Lemon* when assessing the constitutionality of religiously expressive public monuments, symbols, or practices.[165] Yet, although he deemed "*Lemon* now shelved," he did not determine that it was now expressly and entirely overruled.[166]

Unlike his colleagues, Justice Thomas did call for *Lemon* to be expressly overruled in his concurring opinion. Justice Thomas agreed with the plurality's rejection of the "long-discredited" *Lemon* test for claims "involving 'religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies.'"[167] However, he "would take the logical next step and overrule the *Lemon* test in all contexts" for three reasons.[168] First, the "test has no basis in the original meaning of the Constitution."[169] Second, it "has been manipulated to fit whatever result the Court aimed to achieve."[170] And third, it "continues to cause enormous confusion in the States and the lower courts."[171] To Justice Thomas, it was obvious that *Lemon* "does not provide a sound basis for judging Establishment Clause claims."[172] However, the underlying circuit court's application of *Lemon* signaled to him that it was not obvious to everyone.[173] Consequently, Justice Thomas wrote, "It is our job to say what the law is, and because the *Lemon* test is not good law, we ought to say so."[174]

Justice Ginsburg's dissent, joined by Justice Sotomayor, did not mention *Lemon*.[175] Neither did Justice Breyer in his separate concurring opinion, but he did reassert his longstanding adherence to the principle "that there is no single formula for resolving Establishment Clause challenges."[176] Still, he joined Justice Alito's plurality that rejected the *Lemon* test for the evaluation of public monuments.[177] Justice Kagan concurred with the overall decision of the plurality but not with its opinion on *Lemon*.[178] While "agree[ing] that rigid application of the *Lemon* test does not solve every Establishment Clause problem," she thought that the case demonstrated that its "focus on purposes and effects is crucial in evaluating government action in this sphere . . . ."[179]

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165 *See id.* at 2102.
166 *Id.* at 2102–03.
167 *Id.* at 2097 (Thomas, J., concurring).
168 *Id.*
169 *Id.*
170 *Id.*
171 *Id.*
172 *Id.* at 2098.
173 *See id.*
174 *Id.*
175 *See id.* at 2104–13 (Ginsburg, J., dissenting).
176 *Id.* at 2090 (Breyer, J., concurring).
177 *Id.* at 2074, 2080–84.
178 *Id.* at 2094 (Kagan, J., concurring).
179 *Id.*

C. The Impact of American Legion on Lemon

What has been the impact of *American Legion* on *Lemon*? There is no consensus on this question either. After *American Legion*, several jurists declared the official death of *Lemon*.[180] Other courts found the *Lemon* test was "sort of" dead in that it was no longer good law for the evaluation of the constitutionality of public religious displays, ceremonies, and monuments since those Establishment Clause cases would rely on an "approach that focuses on the particular issue at hand and looks to history for guidance."[181] Still, others noted that, although *Lemon* was criticized, its test remains valid in Establishment Clause jurisprudence.[182] Several courts have found that the *Lemon* test still remains good law because the Court did not expressly overrule it in *American Legion*, and they have continued to apply this test in their evaluation of a variety of Establishment Clause claims.[183]

This lack of consensus on *American Legion*'s impact on the continued application of *Lemon* is not surprising for several reasons. First, as the Eleventh Circuit candidly stated, "[D]ivining any sort of clear rule from the seven separate opinions in *American Legion* is a challenge."[184] Second, it seems that almost nothing in Establishment Clause analysis can capture complete consensus.[185] Therefore, the question of "the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence" has arisen (again).[186]

All of the circuit courts that have squarely addressed the issue of *American Legion*'s impact on the *Lemon* test in the context of longstanding religiously expressive monuments, ceremonies, and displays have followed the dictate of the six Justices in that case, rejecting such an application.[187]

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[180] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 4 F.4th 910, 946 (9th Cir. 2021) (Nelson, J., dissenting from denial of rehearing en banc) (arguing the "Supreme Court has effectively killed *Lemon*" (citing *Am. Legion*, 139 S. Ct. at 2067)).

[181] *See, e.g.*, Kondrat'yev v. Pensacola, 949 F.3d 1319, 1322, 1325 (11th Cir. 2020) (quoting *Am. Legion*, 139 S. Ct. at 2087).

[182] *See, e.g.*, Janny v. Gamez, 8 F.4th 883, 904 (10th Cir. 2021).

[183] *E.g.*, Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 528–29 (E.D. Ky. 2020); Case v. Ivey, 542 F. Supp. 3d 1245, 1278 (M.D. Ala. 2021).

[184] *Kondrat'yev*, 949 F.3d at 1325.

[185] *See* Amanda Harmon Cooley, *Framers' Fidelity and Thicket Theory in Educational Establishment Clause Jurisprudence*, 58 SAN DIEGO L. REV. 1, 4 (2021) (discussing the fractured state of Establishment Clause jurisprudence and its scholarly commentary).

[186] Van Orden v. Perry, 545 U.S. 677, 686 (2005); *see also* University of Dayton School of Law Symposium: Lemon at 50: Has the Supreme Court Soured on Its Bitter Fruits? (Sep. 24, 2021) (on file with the *University of Dayton Law Review*) (posing a question on the fate of *Lemon*); Derrick R. Freijomil, Comment, *Has the Court Soured on* Lemon*?: A Look into the Future of Establishment Clause Jurisprudence*, 5 SETON HALL CONST. L.J. 141, 201 (1994) (questioning whether *Lemon* would continue to be used in Establishment Clause jurisprudence).

[187] *See* Woodring v. Jackson Cnty., 986 F.3d 979, 981 (7th Cir. 2021) (applying *American Legion*, rather than *Lemon*, to uphold the constitutionality of a nativity scene on government property); *Kondrat'yev*, 949 F.3d at 1321 (applying *American Legion* to find that *Lemon* is no longer good law for Establishment Clause cases involving religious public monuments and holding that the presence of a cross on city property does not violate the Establishment Clause); Perrier-Bilbo v. United States, 954 F.3d 413, 424 (1st Cir. 2020), *cert. denied*, 141 S. Ct. 818 (2020) (holding that *American Legion* expressly rejected

However, several of these courts have also acknowledged that *Lemon* is still good law in other contexts. For example, the Seventh Circuit acknowledged that, while "unpopular" and "often . . . unhelpful," *Lemon* "has never [been] formally overruled" by the Court.[188] The Tenth Circuit also acknowledged the continued precedential value and existence of *Lemon*, noting that, while the case is "certainly not the exclusive" test for all Establishment Clause jurisprudence, it "remains a central framework for Establishment Clause challenges."[189] Further, the Tenth Circuit expressly applied the *Lemon* test to determine that a police officer's directive to a criminal defendant to "Praise the Lord" was not an Establishment Clause violation.[190] In doing so, the court acknowledged *American Legion*'s failure to "offer a replacement test," even though it "cast doubt on the viability of the *Lemon* test . . . ."[191]

The only circuit court to evaluate an education law Establishment Clause claim after *American Legion* was the Ninth Circuit. However, in these two decisions, the court avoided any references to either *American Legion* or *Lemon*.[192] In *Kennedy v. Bremerton School District*, the Ninth Circuit rejected a free exercise claim and found that the Establishment Clause required a public school district to stop one of its high school coaches from praying on the school football field with many of his players after games.[193] In doing so, the court relied on *Santa Fe* rather than *American Legion* or *Lemon*.[194] Similarly, in *California Parents for the Equalization of Educational Materials v. Torlakson*, the Ninth Circuit rejected a claim that state history-social science standards violated the Establishment Clause by applying *Lee* rather than *Lemon* or *American Legion*.[195]

Although there have been no circuit court decisions that have squarely addressed *American Legion*'s impact on *Lemon* in education law cases, the *Lemon* test has been cited and used approvingly in several district courts' Establishment Clause decisions regarding institutions of higher

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Lemon for these cases and holding that "the phrase 'so help me God' in the naturalization oath" was not a violation of the Establishment Clause); Freedom from Religion Found., Inc. v. Cnty. of Lehigh, 933 F.3d 275, 278, 281 (3d Cir. 2019) (finding the same inapplicability of *Lemon* to this category of cases per *American Legion* and upholding the constitutionality of a 75-year-old county seal that featured a Latin cross).

188 *Woodring*, 986 F.3d at 988 (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2080–81 (2019)).

189 Janny v. Gamez, 8 F.4th 883, 904 (10th Cir. 2021).

190 Aguilera v. City of Colo. Springs, 836 F. App'x 665, 669–70 (10th Cir. 2020), *cert. denied* (citing Medina v. Cath. Health Initiatives, 877 F.3d 1213, 1230 (10th Cir. 2017).

191 *Id.* at 670 n.7.

192 *See generally* Kennedy v. Bremerton Sch. Dist., 991 F.3d 1004 (9th Cir. 2021); Cal. Parents for the Equalization of Educ. Materials v. Torlakson, 973 F.3d 1010 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 2583 (2021).

193 *Kennedy*, 991 F.3d at 1009–10.

194 *See id.* at 1017 (citing Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 315 (2000)).

195 *Cal. Parents for the Equalization of Educ. Materials*, 973 F.3d at 1021 (citing Lee v. Weisman, 505 U.S. 577, 593 (1992)).

education and K-12 schools. For example, in *Irish 4 Reproductive Health v. United States Department of Health and Human Services*, the United States District Court for the Northern District of Indiana used the *Lemon* test to determine there was a plausible claim for relief that a federal settlement agreement exempting the University of Notre Dame from federal contraceptive provision regulations violated the Establishment Clause.[196] Similarly, in *Sabra v. Maricopa County Community College District*, the United States District Court for the District of Arizona also used the *Lemon* test to dismiss an Establishment Clause claim contesting a module that discussed Islamic terrorism in a community college world politics class.[197]

In a similar decision by the United States District Court for the District of New Jersey, the district court used the *Lemon* test to find that the inclusion of materials on Islam in a world religion unit at a K-12 public school did not violate the Establishment Clause.[198] Here, in *Hilsenrath ex rel. C.H. v. School District of Chathams*, the court noted while the "Establishment Clause test is in flux," *Lemon* has long been the general default test.[199] Further, it found the *Lemon* test to be the appropriate test for the analysis of the Establishment Clause in the "public school context."[200]

At least three additional district courts have taken the same analytical approach in evaluating Establishment Clause claims in the K-12 public school context since *American Legion*. In *Danville Christian Academy, Inc. v. Beshear*, the United States District Court for the Eastern District of Kentucky applied the *Lemon* test to determine that an Establishment Clause claim was unlikely to invalidate the Kentucky governor's executive order that transitioned schools to virtual learning to mitigate the spread of COVID-19.[201] In *Freedom from Religion Foundation, Inc. v. Mercer County Board of Education*, the United States District Court for the Southern District of West Virginia also stated that *Lemon* was the applicable test for evaluating Establishment Clause claims that arise out of religious exercises in public schools.[202]

Finally, in *Coble ex rel. J.H.C. v. Lake Norman Charter School, Inc.*, the United States District Court for the Western District of North Carolina

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[196] Irish 4 Reprod. Health v. U.S. Dep't of Health & Hum. Servs., 434 F. Supp. 3d 683, 693, 709 (N.D. Ind. 2020).

[197] Sabra v. Maricopa Cnty. Cmty. Coll. Dist., 479 F. Supp. 3d 808, 817 (D. Ariz. 2020).

[198] Hilsenrath *ex rel.* C.H. v. Sch. Dist. of Chathams, 500 F. Supp. 3d 272, 289–90 (D.N.J. 2020).

[199] *Id.* at 289.

[200] *Id.* at 289–90 (quoting Doe v. Indian River Sch. Dist., 653 F.3d 256, 282 (3d Cir. 2011)).

[201] Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 529 (E.D. Ky. 2020) ("The Order [had] the secular purpose of slowing the spread of COVID-19; it [had] the primary effect of limiting school gatherings—both secular and religious; and Danville Christian develop[ed] no substantive argument that Governor Beshear's Order foster[ed] government entanglement with religion.").

[202] Freedom from Religion Found., Inc. v. Mercer Cnty. Bd. of Educ., No. 1:17-00642, 2021 WL 1169378, at *8 (S.D.W. Va. Mar. 26, 2021) (denying a motion to dismiss an Establishment Clause claim based on a Bibles in Schools program).

expressly applied *Lemon*, rather than *American Legion*, to an Establishment Clause claim arising out of teaching a book of poetry at a public school.[203] Here, the plaintiff urged the court to use *Van Orden v. Perry* and *American Legion*, rather than *Lemon*, to evaluate the Establishment Clause claim.[204] The court instead found that it "is clear that *Lemon* controls the Establishment Clause analysis in cases involving curriculum in public schools," given the lack of any analogous facts to *Van Orden* and *American Legion*. [205] Finally, the court noted that Justice Kavanaugh's concurrence in *American Legion* "fail[ed] to cite any school curriculum cases that do not expressly rely on *Lemon*."[206] It subsequently determined there was no Establishment Clause violation.[207]

Based on this case survey, there is a consensus among lower federal courts that *Lemon* is no longer good law for Establishment Clause cases involving religiously expressive public displays, monuments, and ceremonies. However, these same courts still cite *Lemon* as one interpretive approach that remains good Establishment Clause law, especially for education law cases.

IV. WHY DOES LEMON PERSIST?

The question that needs answering is not: "Is *Lemon* a nullity?" *Lemon* is still being applied post-*American Legion*—at least in some education law cases, which do not involve claims arising out of religiously expressive public displays, monuments, and ceremonies. Instead, the key question is: "Why does *Lemon* persist?" The answer is actually a simple and straightforward one: the Supreme Court. *Lemon* persists because, for half a century, the Court has been unable to acquire a majority consensus in a unitary opinion to expressly overrule *Lemon* in its entirety, despite being sufficiently able to find a majority to overrule other cases during those fifty years. As a result, under the hierarchical precedent doctrine, *Lemon* remains good law for the resolution of education law cases by lower federal courts. Further, until the Supreme Court expressly overrules *Lemon* in its entirety, it is appropriate for federal courts to continue applying *Lemon* as one interpretive tool in this notoriously difficult decision-making area of school law. Any criticism of lower federal courts that do so, especially by the Court itself, is hollow criticism indeed.

The next inquiry must include a determination of why the Court has been unable to end the legacy of *Lemon* despite many instances of its own

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[203] Coble v. Lake Norman Charter Sch. Inc., No. 3:20-CV-00596-MOC-DSC, 2021 WL 1685969, at *7, n.3 (W.D.N.C. Mar. 4, 2021).
[204] *Id.*
[205] *Id.*
[206] *Id.*
[207] *Id.* at *12.

members calling for such a fate. The answer to that question has everything to do with *Lemon*'s past—specifically, the fact that *Lemon* was an appropriate (yet not perfect) synthesis of the Court's existing Establishment Clause precedent, which was to be used as just one analytical guideline. It was never designed to be the exclusive test for these cases. Additionally, this alignment of *Lemon* with foundational and seminal First Amendment case law, especially in the area of education law, is likely the reason for the Court's inability to expressly overrule it in its entirety.

A. Lower Courts Are Appropriately Applying Lemon *in Education Law Establishment Clause Cases Under the Hierarchical Precedent Doctrine*

"The truth is, the fault lies here."[208] These are the words Justice Gorsuch used in his concurring opinion in *American Legion* to acknowledge the Court's culpability in lower courts' confusion about core Establishment Clause standing principles.[209] The Court is equally culpable in allowing *Lemon* to persist, especially in light of the criticism that has been levied against it by so many of its Justices. Quite simply, *Lemon* persists because the Court has been unable to acquire a majority consensus in a unitary opinion to expressly overrule it in its entirety. Even Justice Scalia, one of *Lemon*'s most vociferous critics, tacitly acknowledged that the Court had not expressly overruled the decision in a single majority opinion.[210] Therefore, under the hierarchical precedent doctrine, *Lemon* is still good law for education law cases, and it is appropriate for the lower federal courts to continue to apply it.[211]

The Court has not mentioned *Lemon* in a majority opinion since *American Legion*. In fact, there have only been three references to *Lemon* by any Supreme Court justice after *American Legion*, all by Justice Thomas. Each of these references either implicitly or expressly recognize that the "Court has not overruled *Lemon*."[212] Lower federal courts have used this

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[208] Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2101 (2019) (Gorsuch, J., concurring).

[209] *See id.*

[210] *See* McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 890 (2005) (Scalia, J., dissenting) ("[A] majority of the Justices on the current Court (including at least one Member of today's majority) have, *in separate opinions*, repudiated the brain-spun '*Lemon* test' that embodies the supposed principle of neutrality between religion and irreligion.") (emphasis added); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Over the years, however, no fewer than five of the currently sitting Justices *have, in their own opinions, personally* driven pencils through the [*Lemon*] creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so.") (emphasis added).

[211] *See Lamb's Chapel*, 508 U.S. at 399.

[212] Georgia v. Public.Resource.Org, Inc., 140 S. Ct. 1498, 1520 n.10 (2020); *see also* Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2070 (2020) (Thomas, J., concurring) (derisively referencing the phenomenon of the "Court usually [going] to great lengths to avoid governmental 'entanglement' with religion, particularly in its Establishment Clause cases"); Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2265 (2020) (Thomas, J., concurring) (criticizing the "infamous test in *Lemon*" as part of his disavowal of the endorsement test).

same reason for their continued use of *Lemon* after *American Legion* in establishment cases, like school law cases, that do not consider the constitutionality of religiously expressive public monuments, displays, or ceremonies.[213] Because the Supreme Court has only thrown stones and failed to take the one necessary step to stop the application of *Lemon* in education law cases, the continued judicial usage of the *Lemon* test is a valid approach that complies with the hierarchical precedent doctrine.

The straightforward hierarchical precedent doctrine stands in stark contrast to the labyrinthine Establishment Clause doctrine. Under this doctrine, lower courts are bound by controlling higher courts' relevant precedent.[214] This axiomatic doctrine with a tandem application of the Supremacy Clause has created an indefeasible rule of constitutional law that all lower federal courts and all state courts are required to adhere to the precedent created by the Supreme Court's constitutional decisions.[215]

This foundational principle of the American judicial system is not controversial, even within the polemical state of Establishment Clause jurisprudence.[216] It is a key judicial tenet "grounded in formalism . . . ."[217] As a result, the Supreme Court's constitutional precedents remain binding on all of the courts in the nation "until [the Court] sees fit to reexamine [them]."[218]

Lower federal courts are acting in accordance with this hierarchical precedent doctrine through their application of *Lemon* in religious exercises in public school cases or the modified *Lemon* test as stated in *Agostini* in cases

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[213] *See* Danville Christian Acad., Inc. v. Beshear, 503 F. Supp. 3d 516, 528–29 (E.D. Ky. 2020) (noting that although the *Lemon* test has been criticized by the Court, "it has not been officially overruled, and the Sixth Circuit has stated that it is still the proper test for analyzing claims involving the Establishment Clause"); Irish 4 Reprod. Health v. U.S. Dep't of Health & Hum. Servs., 434 F. Supp. 3d 683, 709 (N.D. Ind. 2020) ("Although the *Lemon* test has been much criticized, the Seventh Circuit continues to faithfully apply it.").

[214] *See* Hubbard v. United States, 514 U.S. 695, 713 n.13 (1995) (articulating this binding precedent rule).

[215] U.S. CONST. art. VI, cl.2; *see* Wallace v. Jaffree, 472 U.S. 38, 47 n.26 (1985) ("Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court." (quoting Hutto v. Davis, 454 U.S. 370, 375 (1982))); Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1850 (2013) (labeling this rule "indefeasible and absolute").

[216] *See* Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power"*, 80 B.U. L. REV. 967, 969 (2000) (discussing the basic accord on the principle of hierarchical precedent in constitutional analysis); Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 189 (2016) (deeming the "Supreme Court's Establishment Clause jurisprudence . . . largely incoherent"); Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713 (2001) (discussing the lack of "unified Establishment Clause doctrine"); Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 674 (1992) (stating "the Supreme Court's Religion Clause case law has reached the point where it is described on all sides as confused, inconsistent, and incoherent").

[217] Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 441 (2019).

[218] JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 1B ¶ 0.402[1], at I–10 (2d ed. 1996).

involving the provision of public aid to religiously-affiliated schools. Any criticism by the Supreme Court of the continued use of *Lemon* lacks resonance because: (1) the Court is the genesis of the case; (2) it is the cause for its persistence; and (3) it is the creator of the judicial inefficiencies that flow from any reversals of lower courts' use of the *Lemon* test pursuant to the hierarchical precedent doctrine. We need only look to Justice Scalia to acknowledge the Court's culpability here:

> But the Court's snub of *Lemon* today (it receives only two "see also" citations, in the course of the opinion's description of *Grendel's Den*) is particularly noteworthy because all three courts below (who are not free to ignore Supreme Court precedent at will) relied on it, and the parties (also bound by our case law) dedicated over 80 pages of briefing to the application and continued vitality of the *Lemon* test. In addition to the other sound reasons for abandoning *Lemon*, it seems quite inefficient for this Court, which in reaching its decisions relies heavily on the briefing of the parties and, to a lesser extent, the opinions of lower courts, to mislead lower courts and parties about the relevance of the *Lemon* test.[219]

If such an ardent critic of *Lemon* can acknowledge the Court's role in the persistence of the *Lemon* case, there has to be a reason underlying the Court's continued failure to overrule this case completely.

B. The Supreme Court Likely Has Not Expressly Overruled Lemon in Its Entirety Based on the Case's Precedential Alignment with the Court's Foundational Education Law Establishment Clause Jurisprudence

Amidst all of this criticism of *Lemon*, why has the Supreme Court not expressly overruled it in the last fifty years? The answer to this question is directly connected to *Lemon*'s past—specifically, the case's precedential alignment with the Court's seminal education law Establishment Clause jurisprudence, starting with *Everson*. Further, the *Lemon* test's first two prongs are a direct outgrowth of the *Allen* test, which was an express adoption of the *Schempp* secular purpose and neutrality primary effect test, and its third prong is an imperfect reiteration of the *Walz v. Tax Commission* holding. While the third prong is a modification of a case outside of the area of education law (but reflective of precedent analyzing a government benefit to a religiously-affiliated institution), this prong also reflects the *Illinois ex rel. McCollum v. Board of Education* decision's essential findings on the need for freedom from governmental entanglements with religion.

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[219] Bd. of Educ. v. Grumet, 512 U.S. 687, 750–51 (1994) (Scalia, J., dissenting) (citations omitted).

Why does this precedential alignment matter to the continued persistence of *Lemon*? It matters because the effect of an express overruling of a test, which directly reflects a multitude of the Court's foundational Establishment Clause cases, could create a significant ripple effect throughout this area of education law. By doing so, the Court could weaken an already unstable area of its First Amendment jurisprudence, which could lead to an even worse jurisprudential outcome than the application of what some have deemed a bad test.[220]

1. *Lemon*'s Foundational Alignment with *Everson v. Board of Education*

At the outset of its discussion of the Establishment Clause, the Court in *Lemon* cited *Everson*, which upheld the constitutionality of a township board of education's reimbursement of parents for the transportation costs to bus their children to private Catholic parochial schools pursuant to a New Jersey statute.[221] *Everson* was the Court's first extended substantive examination of the Establishment Clause in an education law case.[222] In *Everson*, the Court relied heavily on James Madison's conceptions of liberty and neutrality to determine that the objective of the First Amendment religion clauses was "to provide . . . protection against governmental intrusion on religious liberty."[223]

This Madisonian principle "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."[224] Consequently, "[s]tate power is no more to be used so as to [inhibit] religions than it is to favor them."[225] In applying this approach, the Court cited the *Pierce v. Society of Sisters* fundamental right to bring up one's child through the allowance of sending that child to a private religious school to fulfill the parent's obligation under state compulsory education laws.[226] This nod to *Pierce* provided the foundation for the Court to conclude that the state action in *Everson* was not an Establishment Clause violation as it did "no more than provide a general

[220] *See* McCreary Cnty. v. Am. C.L. Union of Ky., 545 U.S. 844, 900 (2005) (Scalia, J., dissenting) ("As bad as the *Lemon* test is, it is worse for the fact that, since its inception, its seemingly simple mandates have been manipulated to fit whatever result the Court aimed to achieve.").

[221] Lemon v. Kurtzman, 403 U.S. 602, 611–12 (1971) (citing Everson v. Bd. of Educ., 330 U.S. 1, 3 (1947)) ; *see Everson*, 330 U.S. at 3 (upholding the constitutionality of a New Jersey statute that permitted "local schools districts to make rules and contracts for the transportation of children to and from school").

[222] *See* John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 MICH. L. REV. 279, 284 (2001) (stating that "[t]he modern Establishment Clause dates from [*Everson*]").

[223] *See Everson*, 330 U.S. at 13.

[224] *Id.* at 18.

[225] *Id.*

[226] *Id.* (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[227]

By using the "foundation of modern Establishment Clause doctrine" as its starting point for analysis, the Court in *Lemon* appropriately aligned with its seminal relevant education law precedent.[228] The Court also emphasized that the majority in *Everson* signaled that its decision upholding this statute was on "'the verge' of forbidden territory under the Religion Clauses."[229] Through this emphasis, *Lemon* reaffirmed that *Everson* is the tipping point for constitutionality in related education law cases.

2. The First Two Prongs of the *Lemon* Test's Alignment with *Board of Education v. Allen*, *School District of Abington Township v. Schempp*, and *Everson v. Board of Education*

The *Lemon* Court's reliance on established Establishment Clause education law precedent did not end with *Everson*. It also expressly cited *Allen* for the basis of its first two prongs.[230] In *Allen*, the Court found that a New York statute that required local school authorities to lend free textbooks to all students, including students attending parochial schools, was not a violation of the Establishment Clause because the statute had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[231] This holding quoted the legislative purpose and primary effect standard from its decision in *Schempp*.[232]

In *Schempp*, the Court determined that a Pennsylvania statute and a Baltimore rule that required Bible readings in public schools violated the Establishment Clause.[233] In analyzing these religious exercises in public schools, the Court built upon its own direct consideration of the Establishment Clause "eight times in the past score of years" to articulate an explicit "test":

> [W]hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause

[227] *Id.*
[228] David E. Steinberg, *Thomas Jefferson's Establishment Clause Federalism*, 40 HASTINGS CONST. L.Q. 277, 309 (2013).
[229] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (quoting *Everson*, 330 U.S. at 16).
[230] *Id.* at 612 (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
[231] *Allen*, 392 U.S. at 238, 243 (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 222 (1963)).
[232] *Id.* at 243 (citing *Schempp*, 374 U.S. 203).
[233] *Schempp*, 374 U.S. at 205, 211.

> there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[234]

Here, the *Schempp* court cited directly to *Everson*.[235]

This close examination of the first two prongs of the *Lemon* test demonstrates that *Lemon* is the direct progeny of *Allen*, *Schempp*, and *Everson*. These three cases are foundational within the Court's canon of education law Establishment Clause cases, and their overruling or significant weakening would have a tremendous impact on the Court's jurisprudence in this area. Certainly, this must be one contributing factor to why the Court continues to allow the *Lemon* test to be one available analytical approach for First Amendment school law issues.

3. The Third Prong of the *Lemon* Test's Alignment with *Walz v. Tax Commission*, *Illinois ex rel. McCollum v. Board of Education*, and *Everson v. Board of Education*

This leaves the third prong of the *Lemon* synthesized precedential test: "the statute must not foster 'an excessive government entanglement with religion.'"[236] Here, the Court expressly quoted *Walz v. Tax Commission*, but it did not incorporate the complete *Walz* proposition that the Court must "be sure that the end result—the effect—is not an excessive government entanglement with religion."[237] In *Agostini*, the Court recognized this difference, stating that it had "considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion and as a factor separate and apart from 'effect.'"[238] *Agostini* folded the third prong of *Lemon* into the second prong to treat entanglement "as an aspect of the inquiry into a statute's effect."[239] However, the Court did not state that the *Lemon* test was thereby modified in perpetuity for all Establishment Clause cases; rather, it emphasized that both entanglement inquiries employed similar factors.[240]

Walz, which upheld the constitutionality of property tax exemptions for churches, incorporated several of the Court's seminal education law decisions.[241] It expressly cited *Everson* and *Engel v. Vitale* as the basis for the "development and historical background of the First Amendment."[242]

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[234] *Id.* at 222.
[235] *Id.* (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947)).
[236] Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).
[237] *See id.*; *Walz*, 397 U.S. at 674.
[238] Agostini v. Felton, 521 U.S. 203, 232 (1997) (quoting *Lemon*, 403 U.S. at 612–13) (citing *Walz*, 397 U.S. at 674).
[239] *Id.* at 233.
[240] *See id.* at 232–33.
[241] *See Walz*, 397 U.S. at 667, 672-76.
[242] *Id.* (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947); Engel v. Vitale, 370 U.S. 421 (1962)).

The Court also analogized the facts of *Walz* to those in *Everson* and *Allen*.[243] It further characterized this education law precedent as a success story in the difficult area of Establishment Clause jurisprudence:

> With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a "tight rope" and one we have *successfully* traversed.[244]

In applying this precedent, the Court in *Walz* first directly applied without citation the *Schempp* test and determined that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion . . . ."[245] After determining that the exemption's purpose was permissible under the Establishment Clause, the Court proceeded to make "sure that the end result—*the effect*—is not an excessive government entanglement with religion."[246] Therefore, although *Schempp* was not cited expressly for the *Walz* entanglement gloss that was ultimately incorporated by *Lemon*, its underlying framework of purpose and primary effect was certainly present.

Further, *Lemon*'s incorporation of the *Walz* excessive entanglement prong is the precedential progeny of the Court's education law Establishment Clause jurisprudence. This third prong can be directly tied back to *Everson*, the first substantive examination of an Establishment Clause education law claim. It also reflects *McCollum*, the first case to examine the constitutionality of religious exercises in public schools.

The excessive entanglement prong of *Lemon* that quoted *Walz* "harkens back to . . . *Everson*."[247] In *Everson*, the Court premised the interpretation of the Establishment Clause on baseline principles that included how "[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*."[248] This part of *Everson* aligned with "the Madisonian concern that secular and religious authorities must not interfere with each other's respective spheres of choice and influence."[249] As Justice Blackmun cogently

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[243] *See id.* at 671–72.
[244] *Id.* at 672 (emphasis added).
[245] *Id.*
[246] *Id.* at 674 (emphasis added).
[247] Lee v. Weisman, 505 U.S. 577, 603 n.3 (1992) (Blackmun, J., concurring).
[248] Everson v. Bd. of Educ., 330 U.S. 1, 15–16 (1947).
[249] *Lee*, 505 U.S. at 603 n.3 (Blackmun, J., concurring).

argued in his concurrence in *Lee*, the excessive entanglement prong of *Lemon* incorporated *Everson*'s reflection of this Madisonian principle.[250]

The entanglement prong of *Lemon* does not just reflect *Everson*; it also incorporates the Court's first analysis of an Establishment Clause claim related to religious exercises in public schools: *McCollum*.[251] In *McCollum*, the Court invalidated an Illinois provision requiring a weekly thirty minutes of religious education in the public schools taught by religious teachers employed by private religious groups.[252] In its decision, the Court found an impermissible intertwinement of the state and religion—essentially, an excessive entanglement of government and religion.[253] The Court incorporated the key *Everson* neutrality principle into this analysis:

> To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.[254]

In Justice Frankfurter's concurrence in *McCollum*, he wrote it was imperative that "the public school must keep scrupulously free from entanglement in the strife of sects" because it was "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people . . . ."[255] This notion of the necessity of freedom of the public school as an institution of the government from entanglement with religion was also a key finding of the majority decision of the Court in *McCollum*; moreover, Justice Frankfurter made clear that this was a strongly rooted and "firmly established" principle of American history.[256]

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[250] *Id.* (citation omitted).
[251] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 217 (1948).
[252] *See generally id.*
[253] *Id.* at 231(Frankfurter, J., concurring).
[254] *Id.* at 211–12 (majority opinion).
[255] *Id.* at 216–17 (Frankfurter, J., concurring).
[256] *Id.* at 211-12, 216-17. It is important to note, however, that the Blaine Amendment cited by Justice Frankfurter has since been deemed a "doctrine, born of bigotry" towards Catholics. Mitchell v. Helms, 530 U.S. 793, 829 (2000) (plurality opinion). For more discussion of the origins and applications of this entanglement prong, see Stephanie H. Barclay, *Untangling Entanglement*, 97 WASH. U.L. REV. 1701 (2020).

Justice Frankfurter also relied upon Madison's advocacy against government and religious entanglements in his concurrence by referencing the 1785 *Memorial and Remonstrance*, which is often cited as a touchstone by the Supreme Court in its Establishment Clause jurisprudence.[257] In the *Memorial and Remonstrance*, Madison cautioned against the accretions of the intermeddling of state and religion and praised the Revolutionaries for their actions at first sight of such encroachment.[258] He continued to make his disdain for entanglement of government with religion clear in 1788, during the Virginia convention's ratification of the Constitution, where he stated that "there is not a shadow of right in the federal government to intermeddle with religion. Its least interference would be a most flagrant usurpation."[259]

In its incorporation of the *Walz* excessive entanglement prong, *Lemon* relied upon core precedent in the area of the Court's Establishment Clause education law jurisprudence—that of *Everson* and *McCollum* with their reflections of Madisonian neutrality that could be traced back to the drafting and ratification of the Constitution. Consequently, like with its first two prongs, a decision by the Court to expressly overrule *Lemon* would have a significant effect on the Court's education law Establishment Clause foundations. This concern must be a reason why, in part, the Court has continued to allow *Lemon* to persist as precedent in the area of education law.

V. WHY *LEMON* WILL LIKELY CONTINUE TO PERSIST FOR EDUCATION LAW ESTABLISHMENT CLAUSE CASES

The final question for analysis is how *Lemon* will fare in the future for education law Establishment Clause cases. Based on the lower courts' approaches in the two years since *American Legion*, it seems likely they will continue to apply the *Lemon* test in school law cases because the test provides a reasoned and valid foundation for decision-making. Further, it seems the Supreme Court will continue to preserve the *Lemon* test as an interpretive option for school law cases in order to avert the destabilization of this area of jurisprudence.

A. The Lemon *Test Provides a Reasoned Foundation for Judicial Analysis of Education Law Establishment Clause Cases*

In an area of law where constitutional scholars and Supreme Court Justices struggle to perceive the lines of demarcation of state establishment of

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[257] *McCollum*, 333 U.S. at 214–17; *see also* Edwards v. Aguillard, 482 U.S. 578, 605–06 (1987) (discussing the impact of the *Memorial and Remonstrance* on the Virginia law).

[258] *See* JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (1785), *reprinted in* 2 THE WRITINGS OF JAMES MADISON 183, 185–86 (Gaillard Hunt ed., 1901) ("Because, it is proper to take alarm at the first experiment on our liberties.").

[259] Daniel A. Spiro, *The Creation of a Free Marketplace of Religious Ideas: Revisiting the Establishment Clause after the Alabama Secular Humanism Decision*, 39 ALA. L. REV. 1, 12 (1987) (citations omitted).

religion, public schools need guidance in crafting educational regulations and evaluating claims of potential traversing of these lines. Awash in a sea of tests and often lost in the maze of the Court's case law, lower courts also need an accessible analytical tool to analyze Establishment Clause cases that allows for reasoned judgments.[260] Among "every plausible textual, historical, and policy argument" utilized by the Court in Establishment Clause cases, the *Lemon* test provides one good law guideline for courts to use in reasoned judgment of First Amendment claims outside of the *American Legion* subset.[261]

The Supreme Court has acknowledged the impossibility of having a universal rule for all First Amendment decision-making and has concluded that the proper analytical approach must take place "on a case-by-case basis."[262] The *Lemon* test is but one guideline in Establishment Clause decision-making. Although it might not be the best test or the only test that should be applied, the *Lemon* framework provides the lower federal courts with precedential touchstones that dovetail with the Court's longstanding education law Establishment Clause jurisprudence. As a result, judicial applications of the three-part *Lemon* test allow the courts to show their work in constitutional interpretation and avoid a harmful *ipse dixit* or "know it when we see it" approach to Establishment Clause determinations.[263]

Avoidance of decision-making that appears haphazard, inconsistent, and inscrutable is vitally important in the area of First Amendment education law claims because it works to protect against the perceived delegitimization of this constitutional decision-making.[264] In order to provide a just and reasoned opinion, a court has to have a foundation upon which to reason.[265] The *Lemon* test provides one of those foundations—a foundation that remains good law to apply under the hierarchical precedent doctrine.

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[260] *See* Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (deeming the Establishment Clause a maze).

[261] Comment, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 88 (1963); *see also* Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 877–78 (2013) (outlining the necessity of reasoned judgment in the Supreme Court's constitutional jurisprudence).

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

[263] *Ipse Dixit*, BLACK'S LAW DICTIONARY (7th ed. 1999) (defining "*ipse dixit*" as "'he himself said it'"; it is "[s]omething asserted but not proved"); William P. Marshall, *"We Know It When We See It": The Supreme Court Establishment*, 59 S. CAL. L. REV. 495, 495–98, 537 (1986) (criticizing the Supreme Court's inconsistent, "we know it when we see it" approach to Establishment Clause interpretation since *Everson*).

[264] *See, e.g.*, Amanda Harmon Cooley, *Justiciability and Judicial Fiat in Establishment Clause Cases Involving Religious Speech of Students*, 22 U. PA. J. CONST. L. 911, 969–70, 674–77 (2020) (arguing that a school law federal decision that failed to mention the Constitution, the Establishment Clause, or any case law was an illegitimate, harmful decision and jurisprudential error (citing Schultz v. Medina Valley Indep. Sch. Dist., No. 11-50486, 1–2 (5th Cir. June 3, 2011), *available at* https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0005.pdf).

[265] *See* Mary B. Trevor, *From Ostriches to Sci-Fi: A Social Science Analysis of the Impact of Humor in Judicial Opinions*, 45 U. TOL. L. REV. 291, 302 (2014) (discussing the importance of clear, credible explanations in judicial opinions).

The continued use of reasoned applications of *Lemon* in these decisions reinforces the legitimacy and authority of the lower federal courts, despite criticism of this case.[266] Providing reasoned legal judgment through these applications works against the degradation of constitutional interpretation that occurs when courts—instead—take a convoluted approach or an avoidance approach that gives rise to a public perception of results-oriented jurisprudence.[267] Examples of these latter decision-making approaches are chaotic and not reflective of a "government of laws . . . [and] a government of rules."[268] Conversely, relying upon a controlling precedent like *Lemon*, which has never been expressly overruled (despite opportunities to do so) and aligns with the foundational precedent of the Supreme Court's relevant jurisprudence, can hardly be deemed undisciplined.

As such, there is continued utility in the application of *Lemon* by courts in evaluating religious activities in public schools and public aid to religiously affiliated schools or their attendees. Such precedential reliance is what makes "reasoned judgment—and what makes it reasoned rather than judicial fiat."[269] Giving reasons for a judicial holding by applying the *Lemon* framework fulfills the "necessary condition of rationality" that should be at the heart of any judicial determination.[270]

In conclusion of this point and to be clear, this Article is not advocating the use of the *Lemon* test as the exclusive means to analyze all Establishment Clause cases or even all school law Establishment Clause cases. Such a "Grand Unified Theory" simply does not exist here.[271] As the Court made clear in *Walz*, "The course of constitutional neutrality in this area cannot be an absolutely straight line . . . ."[272] Calling for a singular bright-line rule for this decision-making would not be an appropriate reflection of the "pluralistic American society in which these cases arise."[273] Having the space for a variety of methods of Establishment Clause interpretation of education law cases, in order to allow some necessary "play

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[266] *See* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1936 (2008) (arguing that judicial authority results from the provision of "reasons for . . . rules, commands, orders, or instructions").

[267] *See generally* Andrew Cohen, *Judge-Bashing Comes to the 2012 GOP Race*, ATLANTIC (Dec. 27, 2011), https://www.theatlantic.com/politics/archive/2011/12/judge-bashing-comes-to-the-2012-gop-race/250385/ (criticizing a Fifth Circuit Establishment Clause "blithely dispatched" decision that provided no express application of any Establishment Clause precedent as the product of the circuit court's desire to reach a certain result and as "a convenient cop-out by a federal court unwilling to address the merits of the Supreme Court's school prayer precedent").

[268] Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting).

[269] Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 205–06 (2009).

[270] Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995).

[271] *See, e.g.*, Bd. of Educ. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) (noting that although "[i]t is always appealing to look for a single test, a Grand Unified Theory that would resolve all the cases that may arise under a particular Clause . . . the same constitutional principle may operate very differently in different contexts.").

[272] Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

[273] Cooley, *supra* note 264, at 990.

in the joints," as long as they align with Madisonian neutrality and the Court's jurisprudential precedent, is a net positive and is recognizant of the "different and conflicting world-views [that] can [and do] co-exist within" our nation.[274] And there is still a binding, yet-to-be overruled precedent to support the continued use by the lower federal courts of the *Lemon* test as one method of interpretation in complex education law Establishment Clause cases.[275]

B. The Supreme Court Will Likely Continue to Preserve the Lemon *Test for Education Law Cases to Avert the Destabilization of this Area of Jurisprudence*

The complete scrapping of *Lemon* would strike at the already shaky foundations of the Court's education law Establishment Clause doctrine. By overruling *Lemon* in its entirety, the Court would expose a multitude of its education law cases to corollary significant weakening. These cases include not only those foundational cases upon which *Lemon* was based—*Everson*, *McCollum*, *Allen*, and *Schempp*—but also those cases that applied the *Lemon* test to reach their holdings. This potential domino effect could have deleterious implications on the stability of the Court's longstanding precedents in this area—leaving the lower federal courts with no guidance as to how they should decide these cases—and could undercut the legitimacy of the Court as an institution. Because of these potential harms, it seems likely that the calls for *Lemon*'s complete demise, if realized, would ultimately be much more trouble than they are worth.

To completely overrule *Lemon* and its infamous test would be to unravel a thread in Establishment Clause jurisprudence that connects back to the Court's seminal case of *Everson*. This concern runs in both directions, as the elimination of *Lemon* could also lead to the perception that education law cases that relied upon *Lemon* are no longer good law. Thus, it seems unlikely that the Court will expressly overrule *Lemon* in its entirety. To do so would be a major change to the Court's longstanding education law Establishment Clause jurisprudence, and it would destabilize an area of jurisprudence that is already perceived to be built upon shifting sands.[276] This would be a perilous gambit that could lead to the erosion of a fundamental component of "our constitutional scheme" and ultimately of the power of the Court itself.[277]

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[274] *Walz*, 397 U.S. at 669; Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1402 (2006).

[275] *See* Mueller v. Allen, 463 U.S. 388, 392–93 (1983) (noting "that the Establishment Clause presents especially difficult questions of interpretation and application" in the area of education law).

[276] *See* Richard H. Fallon, Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 72 (2017) (arguing that "diversity and multiplicity in Establishment Clause doctrine are endemic and ineradicable").

[277] Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) (cautioning the Court to be cognizant of "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded").

In addition to these concerns regarding the instability of the corpus of Supreme Court case law that analyzes the Establishment Clause in the school law context, removing *Lemon* from the constitutional decision-making toolbox would lead to increased inconsistency among lower federal courts in terms of how they handle these cases. This could create judicial distortions that would instill the types of "divisive forces" into American public schools that Justice Felix Frankfurter argued vitally needed to be kept at bay by courts when analyzing education law Establishment Clause cases.[278] These distortions are of especial significance in this area of First Amendment law because "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[279]

Having access to *Lemon* as a constitutional test, among others, allows for the judiciary to engage in the "delicate" interpretation the Establishment Clause requires.[280] The case provides a mechanism for decision-making based on a reason, which is certainly a better outcome than making decisions in this area based on judicial fiat alone. Justice Scalia even admitted this peril, arguing that "[t]o replace *Lemon* with nothing is simply to announce that we are now so bold that we no longer feel the need even to pretend that our haphazard course of Establishment Clause decisions is governed by any principle."[281]

Therefore, it seems likely that *Lemon* will continue to persist—at least in the area of education law—to avoid the deterioration of this critical area of First Amendment jurisprudence. Justice Kagan's approach in her concurrence in *American Legion*, along with the tacit acknowledgment of some legitimacy of *Lemon* in some cases by the plurality in that case, tilt towards the continued existence of *Lemon* as available binding precedent in this area of constitutional decision-making.[282] Chief Justice Roberts has also made clear that he has an abiding concern with maintaining the legitimacy and perception of legitimacy of the Court when determining whether it should expressly overrule a past precedent.[283] This led to a hesitance by the Roberts Court, in its earlier terms, to overrule the Court's past precedents at the same rate as preceding Courts, which might continue to be the trend if the current Justices ascribe to the same view.[284] Further, by continuing to allow *Lemon*'s existence, it provides a potentially useful strawman for future

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[278] Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring).

[279] Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[280] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 226 (1963).

[281] Bd. of Educ. v. Grumet, 512 U.S. 687, 751 (1994) (Scalia, J., dissenting).

[282] *See* Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2094 (2019) (Kagan, J., concurring).

[283] *See* Thomas J. Molony, *Taking Another Look at the Call on the Field:* Roe, *Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL'Y 733, 807 n.535 (2020) (discussing this concern of Chief Justice Roberts).

[284] *See* William Baude, *Precedent and Discretion*, 2019 SUP. CT. REV. 313, 316 (2020) ("[T]he Roberts Court overrules precedent less often than the Rehnquist, Burger, or Warren Courts.").

majority and dissenting opinions.[285] Finally, the express overruling of *Lemon* would lead to a sizeable gap in the availability of puns and clever turns of phrase for judicial opinions, law review articles, and symposia that rely on the case's survival.[286]

Still, there are some indicators that the Court might actually take this determinative step. The increasing reliance of the Court on the primacy of history in Establishment Clause jurisprudence for the rejection of alleged First Amendment violations could result in the invalidation of *Lemon*.[287] Additionally, of late, the conservative Justices on the Roberts Court have not shied away from overruling past precedent, "especially when they are seen as unsupported by originalist principles," which could signal that they might be willing to do the same with *Lemon*.[288] The post-*American Legion* transition in ideology on religious liberty and First Amendment jurisprudence with its subsequent impact on voting bloc majorities that occurred with the confirmation of Justice Amy Coney Barrett could indeed be the catalyst for the ultimate end of *Lemon*.[289]

However, the balance at this time appears to tip towards the continued preservation of *Lemon* as an available analytical tool for courts in their determination of Establishment Clause cases involving religious activities in public schools and provision of public aid to religiously affiliated schools or their attendees. This acknowledges the case's alignment with the Court's foundational precedent in education law Establishment Clause jurisprudence. The maintenance of *Lemon* by the Supreme Court also averts the harms that occur when judicial decision-making strays from the greater values of

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[285] *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia, J., concurring) ("The secret of the *Lemon* test's survival, I think, is that it is so easy to kill . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him."); *id.* at 400 n.* (acknowledging that, despite his criticism of *Lemon*, he joined the majority opinion in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987), which utilized the *Lemon* test).

[286] What a horror it would be to not pithily expound upon the ghoul that refuses to die if the Court does expressly drive a final nail in Lemon's coffin! *Lamb's Chapel*, 508 U.S. at 398 (Scalia, J., concurring) (likening the *Lemon* test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried"); *see also, e.g.*, Josh Blackman, *This Lemon Comes as a* Lemon*: The* Lemon *Test and the Pursuit of a Statute's Secular Purpose*, 20 GEO. MASON U. CIV. RTS. L.J. 351, 351 (2010) ("*Lemon* is a curious fruit. Unlike the proverbial wolf who comes not in wolf's clothing, but in sheep's clothing, this *lemon comes as a lemon*.") (citation omitted).

[287] A majority of the justices in "*American Legion* [made] reasonably clear . . . that history and tradition play a crucial role in Establishment Clause analysis." Kondrat'yev v. City of Pensacola, 949 F.3d 1319, 1327 (11th Cir. 2020) (citing Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2087 (2019) (plurality opinion)). However, the primacy of history analytical approach does not jibe with a proper constitutional analysis of school law cases given the lack of public schools at the time of the Founding. *See* Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987) ("[A] historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.").

[288] Dan T. Coenen, *Reconceptualizing Hybrid Rights*, 61 B.C. L. REV. 2355, 2413 n.275 (2020).

[289] *See, e.g.*, Joshua J. Prince, *Supreme Court's Zeal to Secure Religious Rights*, NEV. LAW. (Jan. 2021), at 8 (discussing the significant ideological differences between Justice Ginsburg and Justice Barrett and predicting that the Court's religious liberty cases will continue to trend in the direction of upholding religious rights claims with Justice Barrett's replacement of Justice Ginsburg on the Court).

consistency and transparency.[290] These harms can include the perceived subversion of principled reasoning by federal courts, irreversible destabilization of an area of Supreme Court jurisprudence, and an ultimate sacrifice of judicial authority and legitimacy of the highest court in the land.[291] Consequently, it seems unlikely that the Supreme Court will expressly overrule *Lemon* in its entirety (at least for now).

VI. CONCLUSION

Establishment Clause jurisprudence is complex.[292] As the Court candidly acknowledged in *Lemon*, "The language of the Religion Clauses of the First Amendment is at best opaque . . . ."[293] Because of the divergent analyses that the Court has applied in its interpretation of this clause in myriad settings, this constitutional doctrine has been subject to intense criticism by jurists and scholars alike.[294] Given this antagonism, it should be little surprise that individual analytical approaches within that hotbed corpus, like the *Lemon* test, would also gain their fair share of notoriety and critique.[295]

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[290] *See* A. Christopher Bryant & Kimberly Breedon, *How the Prohibition on "Under-Ruling" Distorts the Judicial Function (and What to Do About It)*, 45 PEPP. L. REV. 505, 522 (2018) (discussing the problems that result from the dissolution of the "requirements of consistency and transparency" in judicial decision-making).

[291] *See* Payne v. Tennessee, 501 U.S. 808, 852 (1991) (Marshall, J., dissenting) (arguing that "fidelity to precedent" is the source for public "conception of 'the judiciary as a source of impersonal and reasoned judgments'" (quoting Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970))); Evelyn Keyes, *Judicial Strategy and Legal Reason*, 44 IND. L. REV. 357, 381–82 (2011) ("[T]he integrity and functionality of the [judicial] system depends upon the shared expectation that lawmakers and judges will play by the rules of the game, i.e., that they will follow the rules and precedents produced by the system itself."); Donald J. Kochan, *The "Reason-Giving" Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEO. J. LEGAL ETHICS 261, 267–68 (2013) ("[R]eason-giving demands a check of power and helps the governed determine whether those in power are acting within their constraints . . . . [T]his helps to engender a more democratic relationship with the giver and receiver. Reasons add legitimacy and deviations from given reasons tend to call action into question." (footnotes omitted)).

[292] *See* Lynch v. Donnelly, 465 U.S. 668, 678–79 (1984) (emphasizing the complexity of Establishment Clause interpretation).

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

[294] *See, e.g.*, Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411, 418 (1995) (discussing the variety of Establishment Clause controversies the Court has examined "in myriad educational settings"); Doe v. Elmbrook Sch. Dist., 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting) ("The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance."); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 227 (2008) (describing Establishment Clause jurisprudence as almost incomprehensible); Fallon, *supra* note 276, at 60 (labeling this doctrine "notoriously confused and disarrayed"); Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 670–71, 676 (2013) (concluding that this area of constitutional law is "under perpetual clouds of instability, illegitimacy, and controversy").

[295] *See* Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 35 (2007) ("Commentators and jurists on all sides of the debate about the proper scope of the Establishment Clause have long agreed that Establishment Clause doctrine is a chaotic and contradictory mess."); David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 142 (1995) ("The specific holdings of the Court interpreting the Establishment Clause have been so inconsistent that most commentators long ago stopped trying to reconcile the cases."); *see also, e.g.*, Card v. City of Everett, 520 F.3d 1009, 1023–24 (9th Cir. 2008) (Fernandez, J., concurring) ("The still stalking *Lemon* test and the other tests and factors, which have floated to the top of this chaotic ocean from

However, *Lemon* has never been expressly and entirely overruled by a majority of the Supreme Court. Therefore, pursuant to the axiomatic hierarchical precedent doctrine, its use remains a valid interpretive approach to construing the Establishment Clause for lower federal courts in many cases.[296] The only subset of Establishment Clause cases to which *Lemon* should no longer be applied based on a majority consensus of the Court in *American Legion* includes cases involving religious text or imagery on public monuments, symbols, displays, or ceremonies.

As to the remainder of the categories of Establishment Clause jurisprudence, and certainly to those education law cases involving religious exercises in public schools, *Lemon* is still binding precedent for lower federal courts.[297] And there is arguable utility in its continued use, given that it provides a guideline in a murky area of jurisprudence that allows for reasoned judgments that reinforce judicial authority. While the *Lemon* test might not be the best test and certainly is not the only test, its usage is an improvement over Establishment Clause education law decisions that have ignored the existing relevant precedent by issuing unprincipled, summary opinions of judicial fiat. Its use provides analysis that goes beyond the "mere platitudes" the Court warned against in *West Virginia Board of Education v. Barnette*.[298] In sum, the application of the *Lemon* test by federal courts in this area supports judicial formalism—a likely reason for its continued persistence in lower federal courts' decision-making until and unless the Supreme Court overrules the case in its entirety.

Why has the Supreme Court not taken this step? It is likely because *Lemon* is the progeny of seminal Establishment Clause cases involving religious activities in public schools and the provision of public aid to religiously affiliated schools and their attendees. Maintaining the stability of this jurisprudence is vital for the important institutions of K-12 education within the constellation of the American republic, and it recognizes the special circumstances of the public school in Establishment Clause doctrine.[299]

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time to time in order to answer specific questions, are so indefinite and unhelpful that Establishment Clause jurisprudence has not become more fathomable.") (citation omitted).

[296] *See* Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 820 (1994) ("[T]he doctrine of hierarchical precedent . . . constitutes a virtually undiscussed axiom of adjudication . . . ." (footnote omitted)); Hubbard v. United States, 514 U.S. 695, 713 n.13 (1995) ("We would have thought it self-evident that the lower courts must adhere to our precedents.").

[297] *See* Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 570 (1991) (arguing proper jurisprudential approaches are premised on "principled, constitutional theories," even if they are different approaches).

[298] W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

[299] *See* Illinois *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 231 (1948) ("The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny."); Lee v. Weisman, 505 U.S. 577, 596–97 (1992) (highlighting the differences of Establishment Clause cases that arise in "the public school context" versus other environments).

Conversely, the complete overruling of *Lemon* could destabilize the Court's foundational education law Establishment Clause jurisprudence and could implicitly call into question the validity of the precedent upon which *Lemon* was based. It could also impart a message to lower federal courts that there is no longer any test upon which they can evaluate these types of claims. And that is something that truly could cause doctrinal chaos.[300] Consequently, because of this cascade of potential harms, it seems likely that the Supreme Court will continue to retain the *Lemon* test for Establishment Clause analysis of certain education law claims.

Because of the expansive and varying categories of Establishment Clause cases, this jurisprudence can never be one-size-fits-all.[301] There is no "litmus-paper test" here.[302] The Court has rightfully acknowledged this.[303] Cautious and careful judicial scrutiny is necessary for this area. For fifty years, the *Lemon* test has been a tool—among others—used by lower federal courts and by the Supreme Court in their attempts to achieve this type of reasoned and reasonable inquiry. Thus, *Lemon* will likely continue to be an available constitutional mechanism for this incredibly important subset of Establishment Clause cases. And if not, this persistence of *Lemon* might ultimately morph into a lament for it.

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[300] *See* McConnell, *supra* note 142, at 118–20 (discussing the "doctrinal confusion" *Lemon* has created).

[301] *See* Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) ("Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.").

[302] Comm. for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

[303] *See id.*