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The "Lemon Test," Even with All its Shortcomings, Is Not the Real Problem in Establishment Clause Cases

Ivan E. Bodensteiner
Valparaiso University, ivan.bodensteiner@valpo.edu

THE "LEMON TEST," EVEN WITH ALL ITS SHORTCOMINGS, IS NOT THE REAL PROBLEM IN ESTABLISHMENT CLAUSE CASES

IVAN E. BODENSTEINER

I take this opportunity to welcome everyone and to thank the student organizations and the students responsible for doing a great job in developing this program.

As indicated this panel deals with the "Lemon Test". When I first heard of the "Lemon Test", I wondered how a test with this name could possibly be taken seriously. By analogy to the used car business, the name certainly suggests something about the test that is not particularly good. When I discovered that the test was named after a case,[1] I then understood that "lemon" was not intended to be descriptive.

Whether the test is good or bad is not necessarily the real issue. Obviously when the Court decides a case relying on the "Lemon Test" and I agree with the result, then the test seems quite adequate and appropriate. However, when the Court relies on the "Lemon Test" and I disagree with the result, then I have serious problems with the "Lemon Test". Before we become too critical of the "Lemon Test", I believe we should caution against expecting too much of any test in this difficult area of constitutional law. When we search for tests and standards to provide guidance in interpreting the first amendment, I think there is a tendency to expect too much, i.e., a test, standard, or formula that makes it relatively easy to decide any case that comes along. In an area of the law as complex as the first amendment, that is not really possible. Frankly, I'm glad it is not possible because it would take some of the fun out of constitutional law. Further, a nice, precise test or formula that would mechanically determine the outcome of cases would decrease the need for creative lawyers.

I think the factors listed by the Court in *Lemon* at a minimum encourage us to discuss the same issues, and maybe that is all we can expect of any standard or test in this area of constitutional interpretation. Under the *Lemon* framework governmental action must have three characteristics

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

in order to withstand an Establishment Clause[2] challenge: it must have a secular purpose, the primary or essential effect must be secular, and there cannot be excessive church-state entanglement.[3]

The term "secular" must be given a broad or generous interpretation.[4] If government can point to a secular purpose, its action is not struck down simply because the secular purpose coincides with religious beliefs.[5] Such an interpretation could invalidate laws making murder illegal. Thus, for example, Sunday closing laws, which developed out of religious beliefs and practices, have satisfied this requirement.[6] Although some legislators may have supported a bill, such as one to provide assistance to the homeless, because of religious beliefs, government can certainly establish[7] a secular purpose for such legislation.[8] With a few notable exceptions,[9] the Court has found a sufficient secular purpose and gone on to address the other two factors. In these cases there appears to have been some merger of the secular purpose and secular effects tests.[10]

Even if government conduct satisfies the secular purpose requirement, it violates the Establishment Clause if its essential effect is non-secular, i.e., any non-secular effect must be remote, indirect, and incidental.[11] Certain types of effects are absolutely prohibited: discrimination among different

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2. While the "Lemon Test" applies to free exercise cases too, I will limit my discussion to its application in Establishment Clause cases.

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

4. As stated in Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987), "[w]hile the Court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham." Justice O'Connor says that, while the secular purpose requirement alone is rarely determinative, it serves an important function because "[i]t reminds government that when it acts it should do so without endorsing a particular religious belief or practice that all citizens do not share." Wallace v. Jaffree, 472 U.S. 38, 75-76 (1985) (O'Connor, J., concurring).

5. Harris v. McRae, 448 U.S. 297, 319 (1980).

6. McGowan v. Maryland, 366 U.S. 420, 445 (1961).

7. As noted in L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-9, at 1210 (2d ed. 1988), there are several unanswered questions about the nature of the government's burden in this area, e.g., does the state have to present evidence of a secular purpose and if so how much, will specific evidence be required, absent specific evidence will a particular purpose be imputed, will the goal be to determine the actual motive of legislators, and how carefully will the state's asserted purpose be scrutinized?

8. This example is used by Justice Scalia in his dissenting opinion in Edwards v. Aguillard, 482 U.S. 578, 615 (1987) (Scalia, J., dissenting).

9. Edwards v. Aguillard, 482 U.S. 578 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980) (per curiam); Epperson v. Arkansas, 393 U.S. 97 (1968).

10. Professor Tribe says "in each of the cases, the Court seemed to take into account the law's likely non-secular effect as well as its non-secular purpose." L. TRIBE, *supra* note 7, at 1213.

11. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783-84 n.39 (1973).

religious denominations, except to lift a government imposed burden on free exercise; lending of state powers to religious bodies; and borrowing by the state of the "aura of legitimacy" from religion.[12] Other effects are more problematic and require a searching inquiry to determine whether the non-secular effect is remote, indirect, and incidental. This leads to an examination of whether the secular purpose or effect can be sufficiently separated from the religious effect. Justice O'Connor says "[t]he relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion]."[13] Some of the most difficult cases arise when government provides aid to parochial schools or to the students attending such schools.[14]

Finally, the "Lemon Test" prohibits excessive church-state entanglement. Such entanglement might take the form of a close working or supervisory relationship between church and state;[15] government turning traditional government power over to religious bodies;[16] government action or aid that leads to religiously motivated political divisiveness;[17] government regulation, particularly in the employment relationship, which leads to litigation seeking exemptions for religious organizations;[18] and government inquiry, through courts or agencies, into religious beliefs or doctrine.[19] These different forms of entanglement are discussed in detail elsewhere.[20]

In looking at the Court's use and application of the "Lemon Test," I would like to focus on two cases, *Marsh v. Chambers*[21] and *Lynch v. Donnelly*.[22] These cases are interesting because in *Marsh*, decided in 1983, the Court seemed to abandon the test but quickly returned to it the next year when it decided *Lynch*. *Marsh* involved a challenge to Nebraska's state-paid legislative chaplain at a time when the position had been filled by the same person for sixteen years. The court of appeals held that the state's practice violated the Establishment Clause,[23] a result that the "Lemon Test" would seem to compel. I think it must be conceded that the court of appeals was correct in concluding that the practice violates all three of the

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12. L. TRIBE, *supra* note 7, at 1214.

13. Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

14. Professor Tribe identifies five factors which "are often relevant and sometimes dispositive" in such cases. L. TRIBE, *supra* note 7, at 1219-20.

15. *See, e.g.*, Aguilar v. Felton, 473 U.S. 402, 414 (1985).

16. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 125-27 (1982).

17. *See, e.g.*, Mueller v. Allen, 463 U.S. 388, 403-04 n.11 (1983); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 797-98.

18. *See, e.g.*, Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 305-06 (1985); Widmar v. Vincent, 454 U.S. 263, 272 n.11 (1981).

19. *See, e.g.*, Thomas v. Review Bd., 450 U.S. 707, 716 (1981).

20. *See* L. TRIBE, *supra* note 7, at 1226-42.

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

22. Lynch v. Donnelly, 465 U.S. 668 (1984).

23. Chambers v. Marsh, 675 F.2d 228 (8th Cir. 1982).

factors: there is no secular purpose or secular effect and it leads to excessive entanglement.[24] Nevertheless using a historical test the Court upheld Nebraska's practice. Because the framers of the first amendment were familiar with government-paid legislative chaplains (the first congress had chaplains for both houses), the Court concluded that the framers could not have believed that the practice violates the Establishment Clause.[25] This departure from the "Lemon Test" was not really explained by the Court. If you want to be somewhat cynical, you might suggest that the majority decided to uphold the practice but could not do so under the "Lemon Test" and therefore just ignored it. Maybe the majority was "result oriented" and the historical test allowed it to reach the "right" result.[26] But is it the correct result? Why do we need prayers at the beginning of legislative sessions? Such prayers don't appear to improve the quality of the product. My point is not to persuade you that a historical approach to constitutional interpretation is inherently bad. However, use of the *Marsh* historical approach in interpreting other provisions, such as the fourteenth amendment, scares me. I am thinking, for example, of cases involving discrimination against racial minorities. Needless to say, there were a number of racially discriminatory practices in place when the thirteenth and fourteenth amendments were passed in the 1860s. Should the Court say today that because the framers of these Reconstruction amendments were aware of the practices, they could not have viewed such practices as violating the thirteenth and fourteenth amendments? I think not. It is not clear why a practice existing at the time an amendment was adopted should be exempted from the principle embodied in that amendment. Fortunately, the Court has not applied the *Marsh* rationale in other cases, probably because of the rather unique circumstances—when the first amendment was adopted the framers of the first amendment had just selected the chaplains for the first Congress.[27]

Another case I would like to comment on is *Lynch*, decided a year after *Marsh*. In this case the Court upheld a city's display of a city-owned and maintained creche, which was part of a larger Christmas display. While noting that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area,"[28] the Court

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24. Justice Brennan apparently agrees since he stated: "In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would unanimously find the practice to be unconstitutional." *Marsh*, 463 U.S. at 800-01 (Brennan, J., dissenting).

25. *Marsh*, 463 U.S. at 787-88.

26. As pointed out by Justice Brennan, it is far from clear that a historical approach compels the result reached by the Court. *Marsh*, 463 U.S. at 800 n.10 (Brennan, J., dissenting).

27. This distinguishes *Marsh* from the situation when the thirteenth and fourteenth amendments were passed. While there were obviously discriminatory laws in effect in the country, the framers of these amendments had not just enancted such laws.

28. Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

returned to the "Lemon Test" and concluded that the city's purpose was secular, that the effects of the creche were no more religious than those allowed in other cases, and that the creche did not create administrative entanglement.[29] The holding in *Lynch* is ambiguous at best and certainly gave little guidance to the lower courts.[30] For example, it is not clear which aspects of the display in the City of Pawtucket made it acceptable; what the significance is of the comment that the primary effects of the creche were no more religious than those approved in earlier cases; and how the Court could conclude that government display of the creche would not be seen as an endorsement of religion.[31] Even more disturbing, display of the creche appears to indicate endorsement of the Christian faith.[32] Is the Court suggesting that the nativity scene or creche, like the Christmas tree, which apparently has religious roots, has been secularized? Even if one agrees that religious symbols can be secularized over a period of time, I question whether the nativity scene or creche has reached secular status. No matter how much you dress it up with reindeer, Christmas trees, and other things, it seems to me that the creche still conveys a religious message. I am not sure that you can mask that message by surrounding it with a number of more secular items. Would one who does not accept the beliefs of a "mainstream" religion see the creche as anything but a religious symbol associated with Christianity? If we agree that the situation litigated in *Lynch* presents at least a close Establishment Clause question, why does government insist on getting into the creche business? Is it really necessary? Isn't there plenty of non-government space to accommodate all the creches needed? Government display of creches is particularly curious in light of the fact that so long as such displays present close Establishment Clause questions, there will be litigation, the defense of which costs the taxpayers considerable sums of money even if the municipality wins. If the municipality loses, it ends up paying the plaintiff's costs, too, including attorney fees.[33]

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29. *Lynch*, 465 U.S. at 680-84.

30. In a subsequent case, County of Allegheny v. American Civil Liberties Union, ___ U.S. ___, 109 S. Ct. 3086 (1989), the Court admitted that the "rationale of the majority opinion in *Lynch* is none too clear." *Id.* at 3101. Applying *Lemon*, it decided that a creche standing alone in the Allegheny County Courthouse violates the Establishment Clause whereas the display of the Chanukah menorah outside the City-County Building next to a Christmas tree and a sign saluting liberty does not have the prohibited effect of endorsing religion. As to the creche, *Lynch* was distinguished by contrasting the "setting;" the menorah "setting" was more like that in *Lynch* and therefore not in conflict with the Establishment Clause.

31. *Lynch*, 465 U.S. at 683 ("Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums.").

32. *Lynch*, 465 U.S. at 700-02 (Brennan, J., dissenting).

33. *See* 42 U.S.C. § 1988 (1982) (providing fee awards to prevailing plaintiffs in civil

A final comment relates to the significance of the Establishment Clause and other important constitutional provisions. Those in power or those in the majority—whether it be based on race, religion or some other characteristic—can generally take care of themselves and don't need to rely on the Constitution for protection. This suggests, of course, that the Constitution is most important to those who are not in power. For example, the first amendment protections are far more important to those who are politically powerless. If you control the power structure, you do not have to be too concerned about what you say. It's those who want to take on the power structure who need the Constitution. The same is true when dealing with racial discrimination. Those who are in the minority are generally not in power and most in need of protection from the Reconstruction era amendments. When considering Establishment Clause challenges and asking whether something offends people, it is crucial to consider the view of those associated with minority or "non-mainstream" religions. It should not take too much imagination on the part of a Christian to understand why a non-Christian would be offended by government display of a creche, even one surrounded by Christmas decorations such as trees.[34] Government display can reasonably be interpreted as government support or endorsement. Therefore, isn't it terribly insensitive for any unit of government, which supposedly represents all people, to display a creche or other religious symbols? If we can force ourselves to look at such government displays from the view of someone with different religious beliefs, or maybe no religious beliefs, then I believe it is easier to understand the importance of the Establishment Clause and the issues when applying the clause. I submit that the majority in *Lynch* was not very sensitive to the Court's duty to protect non-Christian religious views and beliefs.

Despite its shortcomings, the "Lemon Test" is flexible enough to lead to what I believe would be a better result in both *Marsh* and *Lynch*. Adherence to almost any reasonable application of *Lemon* would lead to a different result in *Marsh*, striking down government-paid legislative chaplains.

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rights actions).

34. A participant in the audience indicated he did not understand why it offends someone to see a public display of a religious symbol of a religion in which he or she does not participate; is it because of a militant secularism in our society or has the Establishment Clause of the first amendment generated the conflict over religion. This may raise questions about the sincerity of those who challenge public display of religious symbols, but in my experience representing plaintiffs in such a case they (including some affiliated with the Catholic church) are sincere in asserting that they are offended by a public religious display on government property which they must pass regularly. Very religious people, affiliated with "mainstream" religions, do not want government in the religion business. They believe that if organized religions have to rely on government endorsement, all religious institutions are ultimately weakened. If government can endorse or support their religion today, what is to prevent an even more avidly religious government from endorsing or supporting another religion tomorrow?

Certainly it is strange that the "Lemon Test" was temporarily abandoned just to uphold Nebraska's practice. Honest recognition of the real purpose, and certainly the actual effects, of a creche, no matter how well it is surrounded by arguably secular decorations, would lead to a different result in *Lynch*. This is particularly true in light of the fact that there is no apparent reason why government needs legislative chaplains or creche displays.