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## Impact of 2001 - 2016 Supreme Court Establishment Clause Cases

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## **Impact and Analysis of Supreme Court Establishment Clause Cases Between 2001 – 2016**

### **Introduction**

Two of America's founding fathers Thomas Jefferson and James Madison, were among the first who argued for "[a] wall of separation between church and state."<sup>1</sup> This concept was later included in the Constitution's First Amendment. The First Amendment reads "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>2</sup> These simple sentences have been the source of vigorous debate especially since the clauses concerning the relationship between government and religion often have been intertwined.

An essential aspect of the First Amendment is the Establishment Clause that prohibits the government from making any law "respecting an establishment of religion."<sup>3</sup> This clause has been interpreted to not only forbid the government from establishing an official religion but also prohibiting government actions that excessively favor one religion over another.<sup>4</sup> At an absolute minimum, the Establishment Clause was intended to prohibit the federal government from declaring and financially supporting a national religion, which existed in many other countries at the time of America's founding.<sup>5</sup> This idea has become vital to the values Americans hold dear. Throughout history, religious freedom and tolerance have been celebrated, and most of that is due to the Establishment Clause.

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<sup>1</sup> "The Constitution of the United States," Amendment 1.

<sup>2</sup> *ibid*

<sup>3</sup> *ibid*

<sup>4</sup> *ibid*

<sup>5</sup> *ibid*

This study will look at United States Supreme Court cases from 2001-2016. During those 16 years, the Court decided 1,276 cases.<sup>6</sup> Of those cases, only 24, a little under 2 percent, involved religious issues. Of those 24 religious cases only 10, less than 1% involved establishment clause issues.<sup>7</sup> These ten cases are the focus of this paper. While these numbers may not seem significant, it is critical to keep in mind these decisions do not just impact the two parties at trial. The decisions decide how far-reaching or how limited everyone's constitutional rights are.

There is currently little research done on these 16 years regarding these decisions. There is also no clear indication how we must view our religious rights or even how these decisions may influence future cases. When researching Supreme Court Establishment Clause cases, I noticed very little research had been done on more recent cases. In 2001 I was 5 years old, meaning that while I was attending public school and saying the Pledge of Allegiance in the morning or having a Christmas party with my classmates the Supreme Court was making decisions on whether or not that was appropriate. These decisions impacted me, but I knew nothing about them. We must understand how the views our religious rights or figure out whether these decisions will influence future case.

My analysis of these 10 Establishment Clause cases will be organized around three separate aspects that affected their outcomes: standing, purpose and effect, and the lemon test. I did not read these cases with those three aspects in mind. During my initial reading I would write down any case or theme I found important. Once I had completed my first read-through I compared all of the cases used and the major case takeaways. It was then I noticed how

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<sup>6</sup> Supreme Court of the United States. "Opinions of the Court 2001 - 2016."

<sup>7</sup> *ibid*

important Lemon Test, Purpose and Effect, and Standing was in each of these decision. I kept these things in mind and read through the cases again. One of these three things was always a major deciding factor in each of the 10 cases. These three distinct factors created a certain outcome in the Supreme Court and are the principle focus of this paper.

Many of the cases also have similar issues such as a taxpayer standing. Despite the fact Americans have been paying taxes since the early 1900s Court's don't have a set way to figure out when or if taxpayers have standing. Standing, as you will see, is often a way for Court's to avoid hearing a case, leaving us with no precedent or answers. Purpose and Effect is highly subjective; many different facts have to be taken into account to decide if a law's purpose and effect violates the establishment clause. By looking at purpose and effect court's can analyze legislators' and Americans' choices when trying to decide if something is or isn't Constitutional. Deciding what test to use when reviewing a case ultimately ensure a certain outcome. Catering a test to get a desired outcome is never more apparent when looking at the application of the Lemon test. The Lemon test is used quite frequently, but sometimes the court's shift and decide to use a different test even though no significant factors have changed. Through these three lenses, you can see how religious rights have changed, and many questions as to the future of our religious rights have gone unanswered.

## **Standing**

The United States current doctrine in regards to standing is that a person cannot bring a suit challenging the constitutionality of a law unless the plaintiff can demonstrate he/she/it is or will "imminently" be harmed by the law.<sup>8</sup> Otherwise, the court will rule that the plaintiffs "lack

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<sup>8</sup> Lujan v. Defenders of Wildlife (90-1424), 504 U.S. 555 (1992)

standing” to bring the suit, and will dismiss the case without considering the merits of the claim of unconstitutionality.<sup>9</sup> In essence, the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or particular issues.<sup>10</sup> To have a court declare that something violates the Establishment Clause, there must be a valid reason for the lawsuit. The party suing must have something to lose to sue.<sup>11</sup>

In *Elk Grove Unified Sch. Dist. v. Newdow*, originated in United States Court of Appeals for the Ninth Circuit, Newdow's daughter attended public school in the Elk Grove Unified School District in CA. Elk Grove teachers began school days by leading students in a voluntary recitation of the Pledge of Allegiance, including the words "under God" added by a 1954 Congressional act. Newdow sued in federal district court in California in June 2002, arguing that making students listen - even if they choose not to participate - to the words "under God" violates the establishment clause of the U.S. Constitution's First Amendment.

In a 2002 opinion authored by Justice Stevens, the Supreme Court in a unanimous decision minus Scalia who did not participate, found that Newdow did not have standing to sue, due to the fact he didn't have sufficient custody over his daughter. According to the published decision only a parent with “Sole legal custody as to the rights and responsibilities to make decisions relating to the health, education, and welfare of.” The order stated that the two parents should “Consult with one<sup>12</sup> another on substantial decisions relating to” the child’s “psychological and educational needs.” Rather than analyzing the Congressional act of 1954 that

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<sup>9</sup> *Lujan v. Defenders of Wildlife* (90-1424), 504 U.S. 555 (1992)

<sup>10</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1

<sup>11</sup> *Lujan v. Defenders of Wildlife* (90-1424), 504 U.S. 555 (1992)

<sup>12</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1

changed the Pledge of Allegiance or debating if it was appropriate to be said in public schools, the Supreme Court decided this was more of a family issue rather than a legal one with standing.

Since it found that *Newdow* did not have standing, the Court failed to even reach the constitutional question. Many wonder if this was how the Court genuinely felt or if they were just trying to put off tackling such a controversial Constitutional question. If this case did have standing it would have impacted all United States public schools, which would either have an established right to say the Pledge of Allegiance or be required to change their policy and or routine of saying it in the morning.

The question of whether or not taxpayers have standing was sent to the Supreme Court from United States Court of Appeals for the Seventh Circuit in 2006 *Hein v. Freedom from Religion Foundation*. After taking office, President Bush created the Office of Faith-Based and Community Initiatives, a program aimed at allowing religious, charitable organizations to compete alongside non-religious ones for federal funding. "Private and charitable community groups, including religious ones. . . have the fullest opportunity permitted by law to compete on a level playing a field, so long as they achieve valid public purpose" and adhere to "the bedrock principles of pluralism, nondiscrimination, evenhandedness, and the neutrality."<sup>13</sup> Another executive order instructed various executive departments to hold conferences promoting the Faith-Based Initiative.

The Freedom from Religion Foundation sued, alleging that the conferences favored religious organizations over non-religious ones and thereby violated the Establishment Clause of the First Amendment, their challenge did not focus on whether it was wrong to allow religious organizations to try and get Federal funding. Rather, they argued that it is not appropriate for

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<sup>13</sup> Executive Office of the President Exec. Order No. 13199, 3 CFR 752

conferences to try to promote Faith-Based organizations because it appears they are favoring religious organizations rather than treating all organizations equally.

The Court ruled in a 5-4 decision written by Justice Alito that citizens do not have standing as taxpayers to bring Establishment Clause challenges against Executive Branch programs that are funded by appropriations for general administrative expenses. The Court's opinion stated that to have standing a taxpayer must not only challenge a policy on the basis of the Establishment Clause but also bring the challenge against a congressional expenditure. Since no specific congressional appropriation was implicated in the suit, the Court ruled that there was no "Case or Controversy."<sup>14</sup>

Justice Souter wrote a dissent and was joined by Justice Stevens, Ginsburg, and Breyer. The dissenters believed that the Flast test should have been used. The two-part Flast test originated in *Flast v. Cohen*, it stated that the taxpayer must establish: 1. A logical link between the status and the type of Congressional enactment attacked and 2. A nexus between that status and precise nature of the constitutional infringement alleged. Justice Souter stated "it would be a mistake to think that [this] case is unique in recognizing standing with a plaintiff without injury to flesh or purse."<sup>15</sup> This dissent was over looked and the court's continued to use different tests for different cases, even if the facts appeared similar.

*Hein v. Freedom from Religion Foundation* used a two-part test for determining whether a federal taxpayer has the standing to challenge an allegedly unconstitutional expenditure. The first step is for the Taxpayer to establish a logical link between their Taxpayer status and the legislative enactment being attacked.<sup>16</sup> The fact that it is the citizen's tax money being used isn't

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<sup>14</sup> *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587

<sup>15</sup> *ibid*

<sup>16</sup> *ibid*

enough for someone to have a say, the injury must be solely due to taxes. If that is established, then the Taxpayer must show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not merely that the enactment is generally beyond the powers delegated to Congress.<sup>17</sup>

In *Hein v. Freedom from Religion Foundation*, The Foundation hasn't explicitly been harmed by the conferences. Moreover, the fact that an individual pays taxes to the Federal government is rarely enough to give an individual standing to challenge a Federal program so the Foundation could not demonstrate the link necessary to prove it had standing to sue. An Establishment Clause challenge isn't enough for an exception to be made.

Could an exception have been made? Yes, the Court could easily have decided that because this case involved the Establishment Clause, standing should have been granted. This test for standing is also not often used, in the Court's history this test for standing has been used only a few times since being established in the 1960s<sup>18</sup>. Did the Court genuinely feel that the Foundation didn't have standing? Or was this once again a way for the court to bow out and not attempt to overturn an Executive Order? By using specific tests, the Court can create a particular outcome. Justice Souter argued in dissent that "When executive agencies spend identifiable sums of tax money for religious purposes, no less than when Congress authorizes the same thing, taxpayers suffer injury."<sup>19</sup> He saw the importance of keeping tax money and religion separate and would possibly have found these Executive Orders in violation of the Establishment Clause had standing been granted.

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<sup>17</sup> *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587

<sup>18</sup> *Flast v. Cohen*, 392 US 83 (1968)

<sup>19</sup> *Hein v. Freedom from Religion Foundation, Inc.*, 551 U.S. 587

Due to the fact these Executive Orders were never reviewed in regards to whether or not they infringe upon the Establishment Clause, it is still unclear how much say Taxpayers have in regards to their money and religious purposes. This case could have made it easier for Taxpayers to get standing in these types of situations or changed the Establishment Clause's meaning by allowing actions such as conferences in favor of religion to take place.

Taxpayers once again fought for standing in *Arizona Christian School Tuition Organization v. Winn*, 2010 a case that originated in the United States Court of Appeals for the Ninth Circuit.<sup>20</sup> Winn challenged the constitutionality of Arizona's tuition tax credit, alleging it violated the Establishment Clause of the First Amendment because it funneled money to private religious schools. It was clear that anyone suing would have to prove that religious students were expressly given money for tuition rather than a student not attending a religious school. A violation such as this is almost impossible for someone to prove without a trial and closer look at the case.

Using the same *Flast* test that was used in *Hein v. Freedom from Religion Foundation*, the majority in the 5-4 decision written by Justice Kennedy and joined by Justice Roberts, Scalia, Thomas, and Alito held that the challengers to the tax credit in Arizona lacked standing under Article III. Dismissing this case once again blocked taxpayers from being able to question how their money is spent, even when it could favor a religion. Justice Ginsburg, Breyer, Sotomayor, and Kagan thought the case was not about the general prohibition on taxpayer standing and therefore couldn't be resolved on that basis.

Many cases are dismissed due to lack of standing, even when the cases involve the Establishment Clause. How can the Establishment Clause be effective if it isn't being used to

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<sup>20</sup> *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125

review Federal action because certain tests prevent petitioners? Should standing be able to block cases that may, in fact, endanger or thwart decisions about American religious rights? Should minor things such as only having partial custody of your daughter shouldn't be what stops Court's from making decisions that are so salient?

Deciding what test to use was a major deciding factor in *Hein* and *Arizona* if the *Flast* test hadn't been applied then the outcome might have changed. So why was it used? To ensure a particular verdict was reached? It is hard to believe that the Supreme Court thought *Flast* would always produce the right answer when it came to Taxpayer standing. In the *Arizona* decision it even stated that "a law or practice, including a tax credit, disadvantages a particular religious group or a particular nonreligious group, the disadvantaged party would not have to rely on *Flast* to obtain redress for a resulting injury."<sup>21</sup> Why would this be included in a decision where the *Flast* test was indeed used? It is easy to speculate that this was added so court's wouldn't be forced to use this test in future decisions, leaving it open for future court's to use it or ignore it as they see fit.

The Constitution was put in place to benefit and protect Taxpayers, yet it is hard for them to gain standing and question it. Taxpayers currently must have a proven injury if they want to claim a religious establishment clause violation. I am sure some Americans would not be happy to find that their money can be used to fund religious conferences, programs, and private schools. Not only is their money being used, but they also have no right to object. The Court itself admits that there is a "general rule that taxpayers lack standing to object to expenditures alleged to be unconstitutional."<sup>22</sup> Assuming a Taxpayer doesn't have standing or choosing a test that

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<sup>21</sup> *Arizona Christian School Tuition Organization v. Winn*, 563 U.S. 125

<sup>22</sup> *ibid*

determines an outcome doesn't help keep church and state separate, it just sweeps issues under the rug.

### **Purpose and Effect**

A second deciding factor in hearing First Amendment cases centered on purpose and effect rulings. The Establishment Clause is applied to the States through the Fourteenth Amendment. The Fourteenth prevents a State from enacting laws that have the “purpose” or “effect” of advancing or inhibiting religion.<sup>23</sup> It is important to note that both of these elements have to be present. A law that is passed may not purposely effect religion, but if when enacted the legislation does effect religion it will still be a violation.

The first case in 2001 that deals with the Establishment Clause is *Zelman v. Simmons-Harris*.<sup>24</sup> In a United States Court of Appeals for the Sixth Circuit Case, Ohio's Pilot Project Scholarship Program was examined. The program provides tuition aid in the form of vouchers for individual students in the Cleveland City School District to attend participating public or private schools of their parent's choosing.<sup>25</sup> Both religious and nonreligious schools in the district may participate. Tuition aid is distributed to parents according to financial need, and where the support is spent depends solely upon where parents choose to enroll their children. In the 1999-2000 school year, 82 percent of the participating private schools had a religious affiliation, and 96 percent of the students participating in the scholarship program were enrolled in religiously affiliated schools.<sup>26</sup>

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<sup>23</sup> *Establishment Clause Overview*, Newseum Institute, Sept. 2011. Accessed 19 Mar. 2018.

<sup>24</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639

<sup>25</sup> *ibid*

<sup>26</sup> *ibid*

Ohio's program did survive scrutiny under the Establishment Clause in a 5-4 decision because there were choices available that had no state interference. Chief Justice Rehnquist described it as a "True private choice" when writing the opinion.<sup>27</sup> Justice O'Connor, Scalia, Kennedy, and Thomas joined in the majority. Ohio's program is part of Ohio's general undertaking to provide educational opportunities to children; government aid reaches religious institutions only by way of the deliberate choices of numerous individual recipients.<sup>28</sup>

Justice Stevens dissent supported by Souter, Ginsburg, and Breyer, stating that "The 96.6% reflects, instead the fact that too few nonreligious school desks are available and few, but religious schools can afford to accept more than a handful of voucher students.... For the overwhelming number of children in the voucher scheme, the only alternative to the public schools is religious."<sup>29</sup> He and the other Justices believed that this decision completely undermined the Establishment Clause. Seeing how many people had chosen the route of religious school made it apparent to these Justices that religion *was* being aided by this legislation.

The reasoning behind the court's decision may not be apparent to everyone who just sees secular and religious schools can both benefit from public funds. The Court even discussed the danger of this causing the public to perceive "That the State is endorsing religious practices and beliefs." Technically this government act benefits religion, but that wasn't their intent, and it was citizens' own choices that created an effect making the law something that benefited secular and religious schools over public schools.

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<sup>27</sup> *Zelman v. Simmons-Harris*, 536 U.S. 639

<sup>28</sup> *ibid*

<sup>29</sup> *ibid*

One result of *Zelman* was to narrow the definition of what “effect” means when applied to the Establishment Clause. It was previously understood that if a law in effect advanced or inhibited religion, it was unconstitutional. Now a law in effect can promote or inhibit religion, but only if individual choices rather than government choices are the driving force of the overall effect. Future cases may now have a harder time proving that a law has a religious impact because to do so would require discounting the roles of citizens rather than viewing citizens’ decisions and legislations’ intentions.

### **Lemon Test**

In 1970, the Supreme Court invented a three-part test for Establishment Clause analysis in *Lemon v. Kurtzman*.<sup>30</sup> According to the Lemon test government action violates the Establishment Clause unless it 1. has significant non-religious purpose, 2. does not have the primary effect of advancing or inhibiting religion, and 3. doesn’t promote excessive entanglement between government and religion.<sup>31</sup>

These three prongs are sometimes referred to as the Purpose, Effect, and Entanglement prongs. Justice Scalia later wrote: “Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys.”<sup>32</sup> What did Scalia and others find so problematic about this formulation? One problem concerned manipulation of the Purpose and Effects prongs. A smart legislator or judge can almost always identify some secular purpose to a law or regulation, and can almost always

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<sup>30</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

<sup>31</sup> “The Lemon Test.” *Pew Research Center: Religious & Public Life*, Pew Research Center, 14 May 2009. Accessed 2018.

<sup>32</sup> Taylor, Justin. “45 Years Ago: The Supreme Court Devises the ‘Lemon Test.’” *The Gospel Coalition (TGC)*, The Gospel Coalition (TGC), June 2016. Accessed 2018.

find some ways in which a regulation advances or inhibits religion. As a result, left with mediocre judgments about how much of a purpose or how much of an effect a specific policy has/can have.

In the 2004 *Cutter v. Wilkinson*, The Religious Land Use and Institutionalized Persons Act was analyzed.<sup>33</sup> The Religious Land Use and Institutionalized Persons Act prohibited the government from imposing a substantial burden on prisoners' religious exercise unless the burden furthered a "compelling government interest."<sup>34</sup> Prisoners in Ohio alleged in federal district court then the United States Court of Appeals for the Sixth Circuit that prison officials violated RLUIPA by failing to accommodate the inmates' exercise of their "nonmainstream" religions. Prison officials argued that the act improperly advanced religion and thus violated the First Amendment's Establishment Clause.

Using the Lemon test, the court unanimously decided that this act did not violate the Establishment Clause in an opinion authored by Justice Ginsburg. "This Court has long recognized that the government may . . . accommodate religious practices. . . without violating the Establishment Clause"<sup>35</sup> The Court reasoned that the law was an effort to alleviate the "government-created burden" on religious exercise that prisoners faced. Nevertheless, the prisoners' case was unsupported because there was also no proof that discrimination existed between mainstream and non-mainstream religions.

In this case, the Lemon test was used to once again limit what some people believe are religious rights. Prisoners thought they had individual rights when it came to practicing their religious beliefs, but according to the court, the only real constitutional problem could arise if

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<sup>33</sup> *Cutter v. Wilkinson*, 544 U.S. 709 (2005)

<sup>34</sup> The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc

<sup>35</sup> *Cutter v. Wilkinson*, 544 U.S. 709 (2005)

The Religious Land Use and Institutionalized Persons Act was enforced improperly. There is a fine line between freedom to exercise your religious beliefs and the Establishment Clause, but this case has made it slightly more explicit.

Many people see Christianity as the dominate religion and some even believe government has a hand in that. Thomas Van Orden sued in Texas United States Court of Appeals for the Fifth Circuit that a Ten Commandments monument on the state capital building grounds represented an unconstitutional government endorsement of religion.<sup>36</sup> Orden argued in the 2004 case *Van Orden v. Perry* that this violated the First Amendment Establishment Clause because it is government promoting religion.

The Court held in a 5-4 decision written by Chief Justice Rehnquist that the Establishment Clause didn't bar the monument on the grounds of the Texas state capitol building.<sup>37</sup> The majority, which included Justices Scalia, Kennedy, Thomas, and Breyer, agreed that the monument recognized the Ten Commandments historical meaning rather than it's religious meaning stating "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause."<sup>38</sup>

On the other hand, Justice Stevens, O'Connor, Souter, Ginsburg offered a dissent, stating that in formulating a ruling for this case, the court had to consider whether the display had any significant relation to the specific and secular history of the state of Texas or United States as a whole. Ultimately, Justice Stevens who authored the dissent asserted that the display in fact "has no purported connection to God's role in the formation of Texas or the founding of our Nation [.

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<sup>36</sup> *Van Order v. Perry*, 545 U.S. 677

<sup>37</sup> *ibid*

<sup>38</sup> *ibid*

.] "<sup>39</sup> In other words, it could not be protected on the basis that it was a display dealing with secular ideals, since it mentioned God, rather than Texas history, and therefore was Texas endorsing Christian values.

There is no reason given as to why the Lemon test was not used in this case as it was in other Establishment clause cases. Most of the Justices such as Scalia, Kennedy, and Rehnquist who have criticized the Lemon test also are all the same Justices that are in the majority. Did not using the Lemon test allow them to acquire the desired outcome?

Consideration of the third part of the Lemon test might have created a very different outcome. The third question for the Lemon test is "Does not foster excessive entanglement between government and religion." Apparently people agree that it is an entanglement or they wouldn't have sued. Some Texans would see placement of the Ten Commandments on state capital grounds as an entanglement of government and religion even with their historical significance. It is still unclear why the Lemon test wasn't used, and we can only speculate how it may have changed the governments' role in making sure they refrained from displaying religious monuments, painting, and statues.

The debate of whether or not the Ten Commandments should be allowed in public areas was not put to rest by *Van Orden v. Perry*; it was revisited again in 2004 with the *McCreary County v. ACLU* case,<sup>40</sup> which also involved the Ten Commandments in a public area. The American Civil Liberties Union (ACLU) sued three Kentucky counties in federal district court for displaying framed copies of the Ten Commandments in courthouses and public schools. The

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<sup>39</sup> *Van Orden v. Perry*, 545 U.S. 677

<sup>40</sup> *McCreary County v. ACLU of Kentucky*, 545 U.S. 844

ACLU argued the displays violated the First Amendment's Establishment Clause, which prohibits the government from passing laws "respecting an establishment of religion."

Unlike in *Cutter v. Wilkinson*, this 5-4 opinion on *McCreary County v. ACLU* ruled that the displays violated the Establishment clause because they did serve the purpose of advancing religion.<sup>41</sup> The Lemon test was used to make this determination, but another element was added: you not only have to answer the three questions but take into account what the average observer would think. The reason behind this decision was because an ordinary observer wouldn't see it as a "Creed of Ethics."<sup>42</sup> Everyone sees the Ten Commandments as religious text. I have yet to hear anyone learning the Ten Commandments as a Creed of Ethics, but they do learn in it Church. This case included a lot of information about surroundings, the purpose of the place, and what other things were displayed there. These were significant factors in deciding the case but were previously never mentioned when conducting the Lemon test in the past. By adding this to the Lemon test, you can see the Supreme Court is trying to expand and revive the test rather than create a new test.

Interestingly, there are Supreme Court decisions about religious monuments in public areas that do not rely on the Lemon Test. Veterans of Foreign Wars built a wooden cross on top of Sunrise Rock in the Mojave National Preserve (Preserve) as a memorial to those who died in World War I. The original cross no longer exists but the monument has been rebuilt several times.<sup>43</sup> In 2006 *Salazar v. Buono* Frank, Buono, a former Preserve employee, filed a suit in

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<sup>41</sup> *McCreary County v. ACLU of Kentucky*, 545 U.S. 844

<sup>42</sup> *ibid*

<sup>43</sup> *Salazar v. Buono*, 559 U.S. 700

California federal district court seeking to prevent the permanent display of the cross. He argued the cross display on federal property violated the Establishment Clause.<sup>44</sup>

Once again the court considered a case involving a religious monument on public grounds, but this time the Lemon test was not used. In a 5-4 decision, the Court decided in an opinion authored by Justice Souter joined by Justice Roberts, Scalia, Kennedy, Thomas, and Alito said the cross could remain.<sup>45</sup> The court just asked one question ‘Can Buono's suit be maintained when he is merely offended by the fact that public land on which a cross is displayed is not a forum for other religious symbols?’ The answer is no. "A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." The Court then went on to express that the goal of avoiding governmental endorsement doesn't require eradication of all religious symbols in the public realm. For example, a cross by the side of a public highway marking where a state trooper died wouldn't be taken as a statement of governmental support for a certain belief. Simply asking a this specific question isn't something that can be applied to most cases and hasn't been used since. It also seems to disregard the earlier case in which observer's thoughts and feelings were taken into account, here Buono is an offended person who viewed the cross as government-supported religion.

Justice Scalia wrote a dissenting opinion that was backed by Justice Rehnquist, Kennedy, and Thomas, in which he argued that public acknowledgement of the God of Christianity, Judaism, and Islam is permissible under the First Amendment. "If religion in the public forum had to be entirely nondenominational, there could be no religion in the public forum at all."<sup>46</sup>

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<sup>44</sup> Salazar v. Buono, 559 U.S. 700

<sup>45</sup> *ibid*

<sup>46</sup> McCreary County v. ACLU of Kentucky, 545 U.S. 844

While government cannot favor religion over irreligion the dissenters believe that the public can express their religion or favor a religion as they wish and government should not interfere as it is in this majority.

The town of Greece, New York, is governed by a five-member town board that conducts official business at monthly public meetings. Starting in 1999, the town meetings including an opening prayer given by an invited member of the local clergy. The town did not adopt any policy regarding who may lead the prayer or its content, but in practice, Christian clergy members delivered the vast majority of the prayers at the town's invitation.<sup>47</sup> In 2013, *Town of Greece v. Galloway*, Susan Galloway and Linda Stephens sued the town arguing that the town's practices violated the Establishment Clause since Christianity was favored over other faiths.<sup>48</sup>

In a 5-4 decision authored by Justice Kennedy and joined by Justice Roberts, Scalia, = Thomas, and Alito, the Court reversed the Second Circuits appeals decision and held that the practices did not violate the Establishment Clause.<sup>49</sup> Once again we see that the Justices don't want to get rid of religion or prevent it. "The line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers."<sup>50</sup> Justice Breyer filed a dissent that focused more on the case facts; he was joined by Justice Ginsburg, Sotomayor, and Kagan. They all believed that the town must do more to make its legislative prayer inclusive of other faiths.

No test was used, instead the Court decided that the language of the Establishment Clause was never meant to prohibit legislative prayer. This determination was made with a series of

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<sup>47</sup> *Town of Greece v. Galloway*, 572 U.S

<sup>48</sup> *ibid*

<sup>49</sup> *ibid*

<sup>50</sup> *ibid*

“inquiries.” Asking questions such as if ‘God’ was generic or was the term “Christ” used instead.<sup>51</sup> This is a very unusual way to establish a ruling especially when there are other tests they could have used? So why nitpick at terminology? Did they feel it was the best way to decide this case or was it to ensure a certain result?

If you were to apply the Lemon test to this case, the result might have been very different. Praying before a town council meeting does not only entangle government and religion, but the prayer itself serves a significant purpose. This means that this case fails two of the three-parts within the Lemon test.

The Lemon test was brought back in 2016 *Trump v. International Refugee Assistance Project*.<sup>52</sup> On March 6, 2017, President Trump issued Executive Order No. 13,780 directs that entry of nationals from six of the seven countries designated in EO-1 be suspended for 90 days from the effective date of the order, citing a need for time to establish adequate standards to prevent infiltration by foreign terrorists.<sup>53</sup> Section 6(a) directs that applications for refugee status and travel of refugees into the United States under the United States Refugee Admissions Program (USRAP) be suspended for 120 days from the effective date.<sup>54</sup>

After analyzing all of President Trump's statements using the Lemon test a 6-3 per curiam majority found Executive Order 13780 unconstitutional. Justice Thomas, Alito, and Gorsuch dissented. It was decided to be unconstitutional because the Executive Order "cannot be divorced from the cohesive narrative linking it to the animus that inspired it," and that a "reasonable observer would likely conclude that [the order's] primary purpose is to exclude

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<sup>51</sup> *Town of Greece v. Galloway*, 572 U.S

<sup>52</sup> *International Refugee Assistance Project v. Trump*, 857 F. 3d 554

<sup>53</sup> Executive Order No. 13,780 (EO-2). Section 2(c)

<sup>54</sup> *ibid*

persons from the United States on the basis of their religious beliefs."<sup>55</sup> So once again the court is back to using the Lemon test and taking into account observers.

Having a set test when reviewing First Amendment Establishment clause cases would seem to create uniformity among decisions. Although the Lemon test is a useful tool Justices don't have to use it. Out of the six cases in this section, only half of them were subject to the Lemon test. It is understandable that one test is not going to fit with every single Establishment Clause, but there is no guidance or explanation as to why one test is or isn't used. It is entirely up to the Supreme Court's discretion which can lead us to believe they pick and choose tests that create a certain outcome. Even the test itself is not set in stone, as we see in *McCreary County v. ACLU*<sup>56</sup> for which the Lemon test was used, but it was different from the test used in *Cutter v. Wilkinson*.<sup>57</sup> The elements in these cases seem quite similar to *Van Orden v. Perry* and *McCreary County v. ACLU*, they both have the Ten Commandments on public grounds, but the cases resulted in completely different outcomes. In *Van Orden*, the monument was allowed where as a similar monument was found to be a violation of the Establishment Clause in the *McCreary* case.

## **Conclusion**

There is currently no indication as to what test will or won't be used in future cases. Should we apply the Lemon test when deciding if it is ok to put up a Christmas tree in a public area? Can we say God Bless America at the end of a speech or would that not be appropriate terminology? Should we take into consideration how the average person would feel about seeing

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<sup>55</sup> *International Refugee Assistance Project v. Trump*, 857 F. 3d 554

<sup>56</sup> *McCreary County v. ACLU of Kentucky*, 545 U.S. 844

<sup>57</sup> *Cutter v. Wilkinson*, 544 U.S. 709 (2005)

a cross or statue of a religious figure? The answer, unfortunately, is “it depends.” It depends on what case you are looking to for precedent and what test the Justices will use when reviewing future cases.

There is no reasoning as to why the Lemon Test should or shouldn't be used. Even in the opinions there is no mention of why one test was used over another. The Lemon Test is ill or unevenly applied. When the Lemon test is applied in cases like *McCreary County v. ACLU* and *Trump v. International Refugee Assistance Project* the outcome is a much more liberal outcome. When the Lemon Test isn't used like *Van Orden v. Perry*, *Salazar v. Buono*, and *Town of Greece v. Galloway* the outcome the outcome is conservative. This is way to distinct of a patter to truly believe the Lemon Test is being properly applied.

The legal definition for what constitutes standing has not changed in the eyes of the court, but those rules don't always seem to apply to when it comes to taxpayers or even apparently if you don't have full custody over your children. Future cases may etch out more set rules for when taxpayer do or don't have standing, but as of right now it is primarily just the discretion of the court. Court's may be over burdened with cases as it is, but more cases involving taxpayers need to be allowed in.

Even something as seemingly simple as 'effect' has been changed by the Supreme Court's decision. Due to a Supreme Court's ruling a law's effect can promote or inhibit religion. That is why Americans have to be vigilant when it comes to religious cases. Despite the fact our founding fathers have put this ideal in place, even today through lawsuits we see that keeping church and state separate is an ongoing battle. Although some government action implicating religion is permissible, and indeed unavoidable, it is not clear just how much the Establishment Clause tolerates. We cannot eradicate religion in government, schools, or other public places.

Most of us, Judges included, are religious, and we all have a right to practice and share our beliefs. By analyzing this issue case by case we can see the system we have isn't perfect, but I would rather debate these issues than not be allowed to practice my religion or be forced to practice someone else's.

### 2001 – 2016 Establishment Clause Cases

| Case  | Year | Supreme Court Justices |            |             |           |            |           |           |             |           |
|---|------|------------------------|------------|-------------|-----------|------------|-----------|-----------|-------------|-----------|
|   |      | CJ Rehnquist           | J. Stevens | J. O'Connor | J. Scalia | J. Kennedy | J. Souter | J. Thomas | J. Ginsburg | J. Breyer |
| Zelman v. Simmons-Harris                              | 2001 | Green                  | Red        | Green       | Green     | Green      | Red       | Green     | Red         | Red       |
| Elk Grove Unified Sch. Dist. v. Newdow                | 2002 | Green                  | Green      | Green       | Grey      | Green      | Green     | Green     | Green       | Green     |
| Cutter v. Wilkinson                                   | 2004 | Green                  | Green      | Green       | Green     | Green      | Green     | Green     | Green       | Green     |
| Van Orden v. Perry                                    | 2004 | Green                  | Red        | Red         | Green     | Green      | Red       | Green     | Red         | Green     |
| McCreary County v. ACLU                               | 2004 | Red                    | Green      | Green       | Green     | Red        | Green     | Red       | Red         | Green     |
| Hein v. Freedom From Religion Foundation              | 2006 | Green                  | Red        | Green       | Green     | Red        | Green     | Red       | Red         | Green     |
| Salazar v. Buono                                      | 2009 | Green                  | Red        | Green       | Green     | Green      | Red       | Red       | Green       | Green     |
| Arizona Christian School Tuition Organization v. Winn | 2010 | Green                  | Green      | Green       | Green     | Red        | Red       | Green     | Green       | Green     |
| Town of Greece v. Galloway                            | 2013 | Green                  | Green      | Green       | Green     | Red        | Red       | Green     | Red         | Green     |
| Trump, v. International Refugee Assistance Project    | 2016 | Green                  | Green      | Red         | Green     | Green      | Red       | Green     | Green       | Red       |
| <b>Green = Majority</b>                               |      |                        |            |             |           |            |           |           |             |           |
| <b>Red = Minority</b>                                 |      |                        |            |             |           |            |           |           |             |           |