

IMPACT AND ANALYSIS OF SUPREME COURT ESTABLISHMENT CLAUSE CASES BETWEEN 2001 - 2016

Nicole Cumming
Lee Honors College
Western Michigan University

"[a] wall of separation between church and state."

- Thomas Jefferson and James Madison
- 1st Amendment
 - “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.”
- Forbids government from establishing an official religion
- Prohibits government actions that excessively favor one religion over another

2001 – 2016 Supreme Court Cases

- 1,276 Cases Decided
- Less than 2% involved religious issues
- Less than 1% involved establishment clause issues
- Importance?

At A Glance

2001									
Case Name and Citation	CJ Rehnquist	J. Stevens	J. O'Connor	J. Scalia	J. Kennedy	J. Souter	J. Thomas	J. Ginsburg	J. Breyer
Zelman v. Simmons-Harris, 536 U.S. 639		3	1			3	2	2	3
2002									
Case Name and Citation	CJ Rehnquist	J. Stevens	J. O'Connor	J. Scalia	J. Kennedy	J. Souter	J. Thomas	J. Ginsburg	J. Breyer
Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1	1		2				3		
2004									
Case Name and Citation	CJ Rehnquist	J. Stevens	J. O'Connor	J. Scalia	J. Kennedy	J. Souter	J. Thomas	J. Ginsburg	J. Breyer
Cutter v. Wilkinson, 544 U.S. 709									
Van Orden v. Perry, 545 U.S. 677	*	3	2	1		3	2	3	3
McCreary County v. ACLU, 545 U.S. 844					*				
2006									
Case Name and Citation	CJ Roberts	J. Stevens	J. Scalia	J. Kennedy	J. Souter	J. Thomas	J. Ginsburg	J. Breyer	J. Alito
Hein v. Freedom From Religion Foundation, Inc., 551 U.S. 587			1	2		1			*
2009									
Case Name and Citation	CJ Roberts	J. Stevens	J. Scalia	J. Kennedy	J. Thomas	J. Ginsberg	J. Breyer	J. Alito	J. Sotomayor
Salazar v. Buono, 559 U.S. 700	1	1	2	*	2	1	2	3	1
2010									
Case Name and Citation	CJ Roberts	J. Scalia	J. Kennedy	J. Thomas	J. Ginsberg	J. Breyer	J. Alito	J. Sotomayor	J. Kagan
Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125									
2013									
Case Name and Citation	CJ Roberts	J. Scalia	J. Kennedy	J. Thomas	J. Ginsberg	J. Breyer	J. Alito	J. Sotomayor	J. Kagan
Town of Greece v. Galloway, 572 U.S.		2	*	1	2	2	2	2	2
2016									
Case Name and Citation	CJ Roberts	J. Kennedy	J. Thomas	J. Ginsberg	J. Breyer	J. Alito	J. Sotomayor	J. Kagan	J. Gorsuch
Trump. v. International Refugee Assistance Project, 582 U.S.									

Tabel Key		Joined a Dissent	Decisions that do not note an argument date were decided without oral argument.
Delivered the Courts Opinion		Filed a Concurrence	Decisions that do not note a Justice delivering the Court's opinion are per curiam
Filed a Dissent		Filed a Concurrence/Dissent	Multiple concurrences and dissents within a case are numbered, with joining votes numbered accordingly.
Did not Participte in Decision		Joined a Concurrence	An asterisk (*) in the Court's opinion denotes that it was only a majority in part or a plurality.
Joined Court Opinion		Joined a Concurrence/Dissent	A dash (~) denotes that the Justice concurred or dissented without filing a separate opinion.

Main Focus

- Standing
- Purpose and Effect
- Lemon Test



STANDING

What is Standing?

“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.”

– Lujan v. Defenders of Wildlife

- 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.
- Court will rule that the plaintiff “lack standing” to bring the suit, and will dismiss the case

Elk Grove Unified Sch. Dist. v. Newdow, 2002

Unanimous Decision

Majority Opinion by Justice Stevens

Facts: Newdow's daughter attended public school in the Elk Grove Unified School District in CA. Her teachers began school days by leading students in a voluntary recitation of the Pledge of Allegiance, including the words "under God"

Issue: Newdow sued arguing that making students listen - even if they choose not to participate - to the words "under God" violates the establishment clause.

Conclusion: Newdow did not have standing, due to the fact he didn't have sufficient custody over his daughter.



Stevens

Ginsburg

Souter

Breyer

O'Connor

Kennedy

Rehnquist

Thomas

Hein v. Freedom from Religion Foundation, 2006

5-4 Decision

Majority Opinion by Justice Alito

Facts: 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. Another executive order instructed various executive departments to hold conferences promoting the Faith-Based Initiative.

Issue: 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.

Conclusion: 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.



Stevens

Ginsburg

Souter

Breyer

Kennedy

Roberts

Alito

Scalia

Thomas

AZ Christian School Tuition Organization v. Winn, 2010

5-4 Decision

Majority Opinion by Justice Kennedy

Facts: Arizona taxpayers challenged the constitutionality of Arizona's tuition tax credit. They alleged the tax credit violated the Establishment Clause of the First Amendment because it funneled money to private religious schools.

Issue: 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.

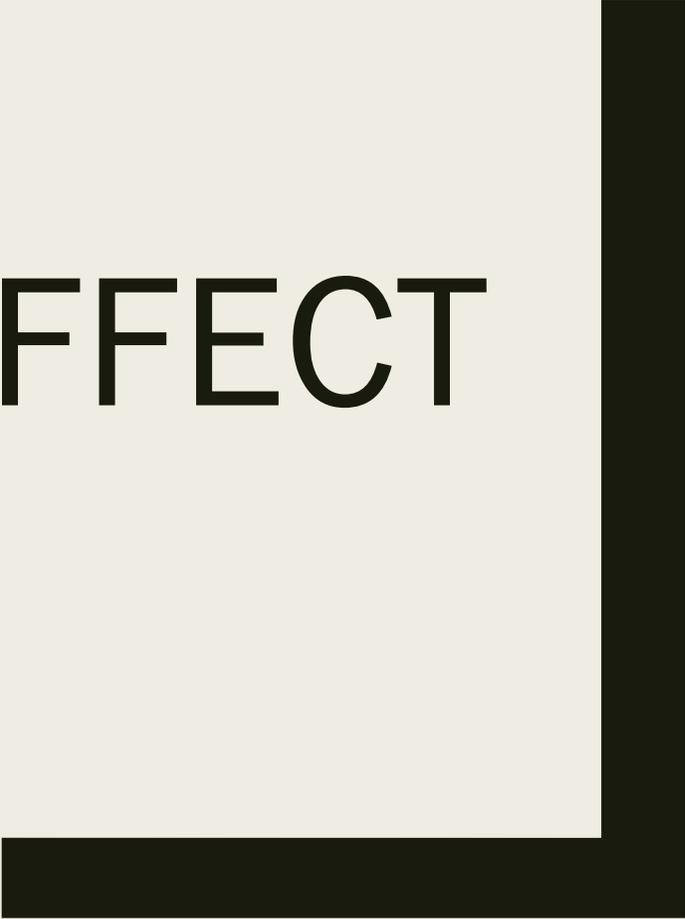
Conclusion: The majority held that the challengers to the tax credit in Arizona lack standing under Article III. Dismissing this case has once again blocked taxpayers from being able to question how their money is spent, even when it could favor a religion.



Ginsburg Sotomayor Kagan Breyer Kennedy Roberts Alito Scalia Thomas

Flast Test

- Two Part Test
- Step One: Taxpayer to establish a logical link between their Taxpayer status and the legislative enactment being attacked.
- Step Two: 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.



PURPOSE AND EFFECT

Purpose and Effect Explained

- The Establishment Clause is applied to the States through the Fourteenth Amendment.
- Prevents a State from enacting laws that have the “purpose” or “effect” of advancing or inhibiting religion.
- Both of these do not elements have to be present.

Zelman v. Simmons-Harris, 2001

5-4 Decision

Majority Opinion by Chief Justice Rehnquist

Facts: Ohio's Pilot Project Scholarship Program provides tuition aid vouchers for individual students in the Cleveland City School District to attend participating public or private schools of their parent's choosing. Tuition aid is distributed to parents according to financial need. 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.

Issue: Does Ohio's school voucher program violate the Establishment Clause?

Conclusion: Ohio's program did survive the scrutiny under the Establishment Clause in a 5-4 decision because there were choices available that had no state interference. "True private choice"



Stevens

Ginsburg

Souter

Breyer

O'Connor

Kennedy

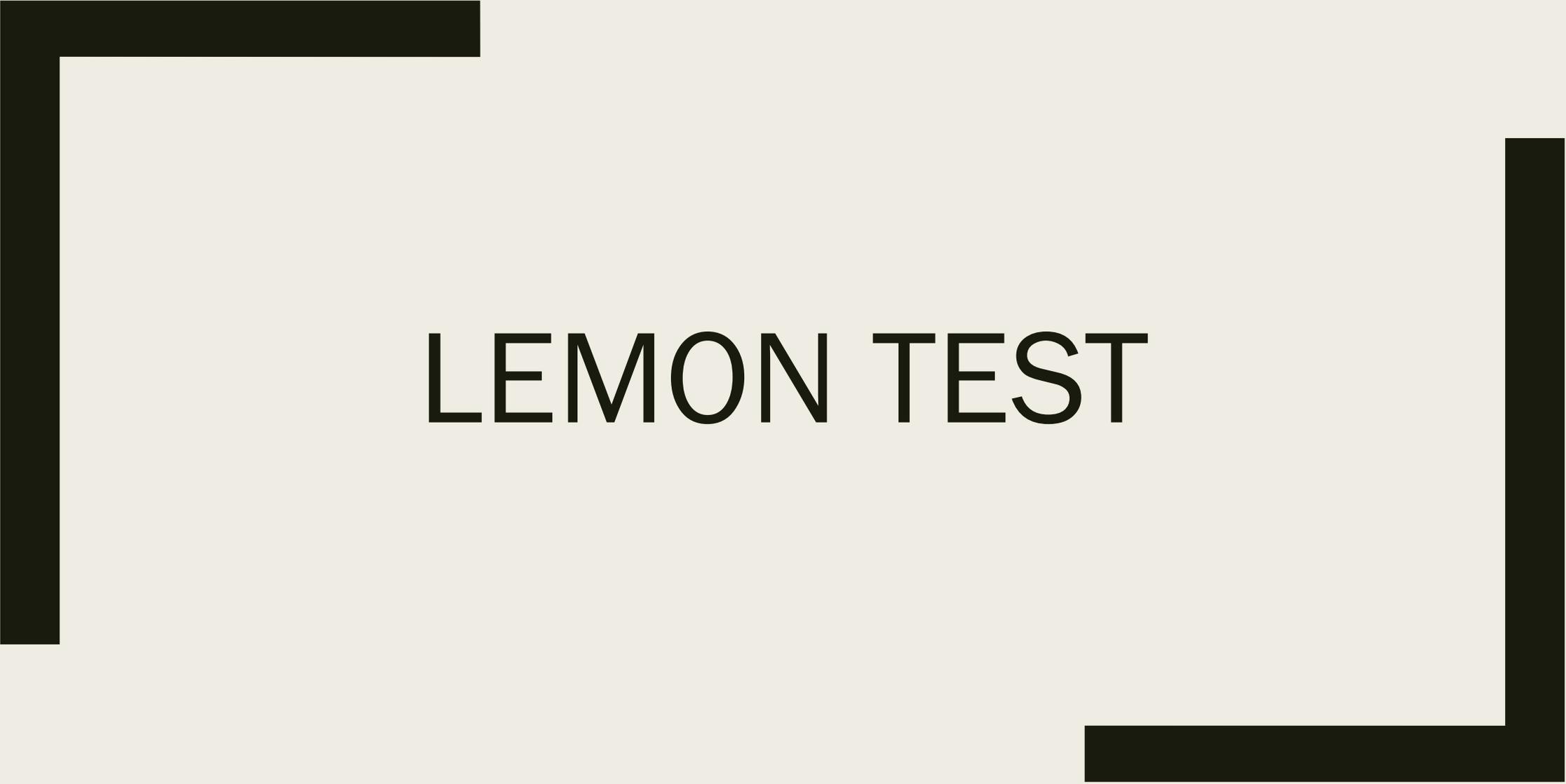
Rehnquist

Scalia

Thomas

Aftermath of *Zelman*?

- Public Perception
- Narrowed the definition of what “effect” means when applied to the Establishment Clause



LEMON TEST

What is the Lemon Test?

1970 the Supreme Court invented a three-part test for Establishment Clause analysis in *Lemon v. Kurtzman*.

- Violates the Establishment Clause
 - Does not have significant non-religious purpose
 - Has the primary effect of advancing or inhibiting religion
 - Promotes excessive entanglement between government and religion.

Lemon Test Effective?

“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.”

– Justice Scalia, 1993

- Why Problematic?

Cutter v. Wilkinson, 2004

Unanimous Decision

Majority Opinion by Justice Ginsburg

Facts: 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."

Issue: Prisoners alleged that prison officials violated RLUIPA by failing to accommodate the inmates' exercise of their "non-mainstream" religions. Prison officials argued that the act improperly advanced religion and thus violated the First Amendment's establishment clause.

Conclusion: No violation. The Court reasoned that the law was an effort to alleviate the "government-created burden" on religious exercise that prisoners faced. There was also no proof that discrimination existed between mainstream and non-mainstream religions.



Stevens

Ginsburg

Souter

Breyer

O'Connor

Kennedy

Rehnquist

Scalia

Thomas

Van Orden v. Perry, 2004

5-4 Decision

Majority Opinion by Chief Justice Rehnquist

Facts: Van Orden sued, arguing a Ten Commandments monument on the grounds of the state capitol building represented an unconstitutional government endorsement of religion.

Issue: Does the monument on the state capitol grounds violate the establishment clause, which bars the government from passing laws "respecting an establishment of religion"?

Conclusion: The monument recognized the Ten Commandments historical meaning rather than its religious meaning, stating "simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the establishment clause."



Stevens

Ginsburg

Souter

Breyer

O'Connor

Kennedy

Rehnquist

Scalia

Thomas

McCreary County v. ACLU, 2004

5-4 Decision

Majority Opinion by Justice Souter

Facts: The American Civil Liberties Union (ACLU) sued three Kentucky counties for displaying framed copies of the Ten Commandments in courthouses and public schools.

Issue: Does the Ten Commandments display in courthouses and public schools violate the establishment clause, which bars the government from passing laws "respecting an establishment of religion"?

Conclusion: Displays violated the Establishment clause because their purpose had been to advance religion. An ordinary observer would not see it as a "Creed of Ethics."



Salazar v. Buono, 2009

5-4 Decision

Majority Opinion by Justice Kennedy

Facts: 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. Buono filed a suit seeking to prevent the permanent display of the cross on federal property.

Issue: Did the cross display violate the Establishment Clause?

Conclusion: The cross could remain. It is not enough that Buono is simply offended by the cross displayed on public land. The goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm.



Stevens

Ginsburg

Sotomayor

Breyer

Kennedy

Roberts

Alito

Scalia

Thomas

Town of Greece v. Galloway, 2013

5-4 Decision

Majority Opinion by Justice Kennedy

Facts: 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 began with a 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.

Issue: Does the town's practice violate the Establishment Clause, since Christianity was favored over other faiths?

Conclusion: The prayers in questions were allowed at the meetings. 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.”



Ginsburg

Sotomayor

Kagan

Breyer

Kennedy

Roberts

Scalia

Alito

Thomas

Trump v. International Refugee Assistance Project, 2016

6-4 Decision

Per Curiam Opinion

Facts: President Trump issued Executive Order No. 13,780 which directs that entry of nationals from six of the seven countries designated in the EO 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.

Issue: Is President Trump's Executive Order constitutional?

Conclusion: No. The EO "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 persons from the United States on the basis of their religious beliefs."



Ginsburg

Kennedy

Roberts

Breyer

Kagan

Sotomayor

Thomas

Alito

Gorsuch

Lemon Test Effective?

- Uniformity?
- Justice do not have to use it.

Lemon Test Used



McCreary County v. ACLU



Trump v. International Refugee Assistance Project

No Lemon Test Used



Van Orden v. Perry



Salazar v. Buono



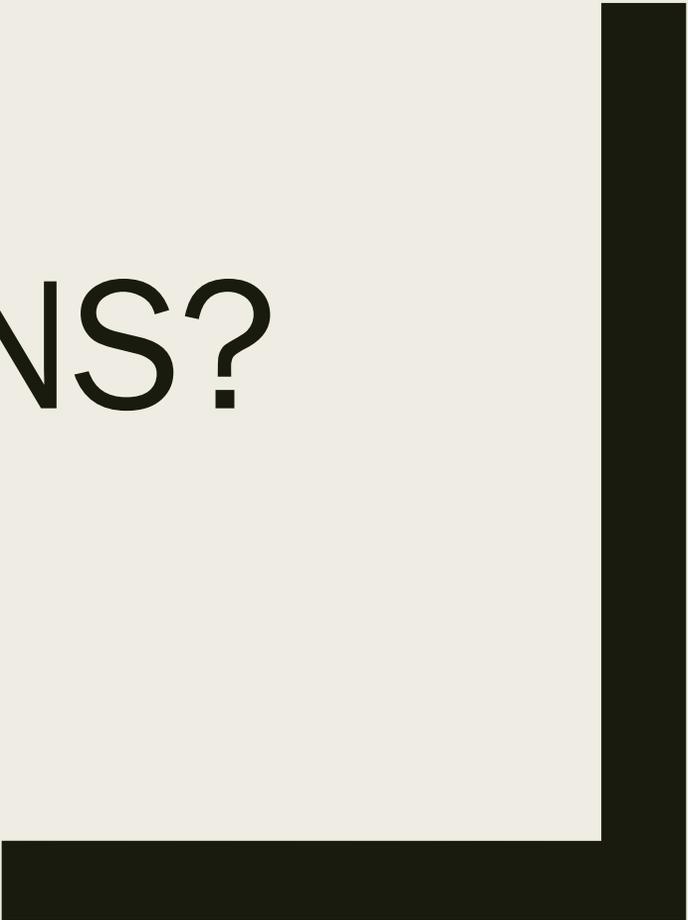
Town of Greece v. Galloway

Conclusion

- What tests will or won't be used in the future?
- Taxpayers Standing
- Moving Forward

References

- "The Constitution of the United States," Amendment 1.
- Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1
- Hein v. Freedom from Religion Foundation, Inc., 551 U.S. 587
- Arizona Christian School Tuition Organization v. Winn, 563 U.S. 125
- Zelman v. Simmons-Harris, 536 U.S. 639
- Lemon v. Kurtzman, 403 U.S. 602 (1971)
- Cutter v. Wilkinson, 544 U.S. 709 (2005)
- Van Order v. Perry, 545 U.S. 677
- McCreary County v. ACLU of Kentucky, 545 U.S. 844
- Salazar v. Buono, 559 U.S. 700
- Town of Greece v. Galloway, 572 U.S.
- International Refugee Assistance Project v. Trump, 857 F. 3d 554
- Full reference list available within full text paper



ANY QUESTIONS?