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Legal Sidebar

# Supreme Court May Reconsider Establishment Clause Jurisprudence in Challenge to Cross Display: Part One

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On February 27, in *American Legion v. American Humanist Association*, the Supreme Court is scheduled to hear oral argument on the constitutionality of a large cross that was erected as a war memorial in Prince George's County, Maryland. Last year, the U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) held that the cross display violated the First Amendment's Establishment Clause. The Supreme Court agreed to review this decision, considering not only whether the memorial is unconstitutional, but also what test should govern this inquiry. The case thus presents the Court with the opportunity to clarify its Establishment Clause jurisprudence—an area of the law that scholars and judges alike routinely deride for lacking clear legal rules. It also offers the first significant opportunity for the newest members of the Court, Justices Gorsuch and Kavanaugh, to weigh in on this area of the law.

This is a two-part Legal Sidebar. This first part briefly reviews existing jurisprudence, explaining the various tests that the Court has used to analyze Establishment Clause claims and ending with a focus on recent decisions considering the constitutionality of public monuments that contain religious symbols. Part Two focuses on *American Legion*, reviewing the lower court decision and the parties' arguments before the Supreme Court. It then discusses ways the Court might resolve the case, as well as the significant implications the Court's decision could have for Congress.

## Various Approaches to the Establishment Clause

The Establishment Clause provides that the government "shall make no law respecting an establishment of religion." This language most obviously prohibits the government from establishing an official national religion, and the Court has also long understood the Clause to prevent other government aid directed toward religion, as well. However, judges—and even the Framers of the Constitution—have debated the precise scope of this prohibition. While the Supreme Court has often referred to government "neutrality" toward religion as the guiding principle, this neutrality standard has itself been subject to divergent interpretations. Broadly speaking, scholars have identified two diametric views of the Establishment Clause: a separationist view and an accommodationist view. The Court has embraced both views, at various times.

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The separationist view stems from the idea that the Establishment Clause creates "a wall of separation between church and State." This characterization of the Clause comes from Thomas Jefferson, whose work served as the basis for the First Amendment's Religion Clauses. One example of this approach came in *Everson v. Board of Education*, decided in 1946, where the Court said that the government cannot "aid one religion, aid all religions, or prefer one religion over another." However, a number of Justices have argued against strict separationism, instead embracing a more accommodationist approach. As Justice Kennedy said in a 1989 dissent, "[r]ather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society." Thus, the Court has recognized that the Constitution does not "require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."

The Supreme Court has adopted both separationist and accommodationist positions in its opinions on the Establishment Clause. For decades, the Court has applied what has become known as the *Lemon* test—a test that can be described as separationist. In *Lemon v. Kurtzman*, decided in 1971, the Supreme Court outlined a three-part test: to be constitutional, (1) a government action "must have a secular legislative purpose;" (2) "its principal or primary effect must be one that neither advances nor inhibits religion;" and (3) it "must not foster an excessive government entanglement with religion." In *Lynch v. Donnelly*, in a concurring opinion the Court later adopted, Justice O'Connor argued that the first and second prongs of the *Lemon* test are focused on government "endorsement" of religion: "The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." In later opinions, Justice O'Connor clarified that courts should ask whether a "*reasonable observer* would view a government practice as endorsing religion." Scholars have said that this nonendorsement principle represents a more accommodationist test than the original articulation of *Lemon*, even if it is ultimately a relatively separationist position.

But the Court has not always used the *Lemon* test, or the nonendorsement version of that test, to analyze disputed government actions. In particular, judges arguing for a more accommodationist view of the Establishment Clause have said that government support for religion should be considered constitutional if that government support is grounded in historical tradition. Thus, for example, when it considers the constitutionality of government-sponsored prayer at certain public events, the Court has primarily assessed such practices by reference to historical context, rather than the *Lemon* test, upholding prayers that fit within longstanding "tradition" and are "part of the fabric of our society" so long as the government is not coercing participation in religion or proselytizing. While he was a lower court judge, Justice Kavanaugh authored a concurring opinion in which he analyzed an Establishment Clause claim involving "government-sponsored religious speech at" a "public event[]" by reference to "the Nation's history and tradition." Other Justices have embraced this historical view in broader contexts. For example, in a recent opinion dissenting from a denial of certiorari, Justice Thomas, joined by Justice Gorsuch, argued that the proper approach to evaluating Establishment Clause claims was to "focus on whether a government practice is supported by this country's history and tradition."

In the past, Justices Thomas and Scalia took what may be an even more accommodationist view: looking to historical understandings of the Establishment Clause, they have argued that the government violates that Clause only if it coerces "religious orthodoxy" or "financial support *by force of law and threat of penalty*." Thus, Justice Thomas has argued that "the Framers" understood "establishment" to refer only to *legal* coercion—which is distinct, in the views of Justices Scalia and Thomas, from the "psychological coercion" that they say the Court has sometimes found to violate the Establishment Clause.

## Establishment Clause Evaluation of Religious Displays

The Court's divisions on the Establishment Clause have been especially apparent in cases evaluating the constitutionality of government monuments that contain religious symbols. Perhaps most notably, in 2005, a majority of the Court in *Van Orden v. Perry* could not agree on a single rationale for rejecting a challenge to a Ten Commandments display on the grounds of the Texas State Capitol. The State Capitol grounds included other historical monuments, and the Ten Commandments display itself contained imagery besides the text of the commandments. In an opinion joined by three other Justices, Chief Justice Rehnquist concluded that the *Lemon* test was "not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds." "Instead," the plurality said, its decision to approve the display was "driven both by the nature of the monument and by our Nation's history." Justice Breyer provided the fifth vote to uphold the monument. In his concurrence, he expressed his belief that in the "fact-intensive" application of the Establishment Clause, there could be "no test-related substitute for the exercise of legal judgment." In his view, the facts "surrounding the display's placement on the capitol grounds and its physical setting," along with the history of the public's reception of that monument, suggested that the purpose and effect of the display were secular rather than religious. Justice Breyer also expressed concern that a "contrary conclusion" in that case would "exhibit a hostility toward religion" that could "create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."

But in *McCreary County v. ACLU*, issued the same day as *Van Orden*, a majority of the Court (the *Van Orden* dissenters, joined by Justice Breyer) did apply *Lemon* to hold that a different Ten Commandments display—in which two counties posted stand-alone displays of the Ten Commandments on the walls of their courthouses—violated the Establishment Clause. In striking down the *McCreary County* displays, the Court emphasized that the "clearly religious" text of the Commandments "stood alone," not as part of any secular display or "traditionally symbolic representation." In addition, the Court believed that the circumstances surrounding the posting of the commandments and subsequent iterations of the displays emphasized the religious character of the display.

Perhaps in light of the "mixed messages" the Supreme Court has sent, lower courts have resolved Establishment Clause challenges by attempting to draw factual analogies to previously decided cases rather than engaging in the more theoretical debate described above. Looking to prior cases in which the Supreme Court has reviewed public monuments, lower courts have applied the *Lemon* test while also following Justice Breyer's opinion in *Van Orden*, viewing religious display inquiries as "context-specific and fact-intensive."

## Roberts Court Era

As described above, Justice O'Connor played a significant role in the modern debate over the meaning of the Establishment Clause. The Roberts Court has decided relatively few cases concerning the scope of the Establishment Clause since the retirement of Justice O'Connor in 2005, giving little insight into how the new Justices who have joined the Court since then view these issues. In one case interpreting the First Amendment's Free Exercise Clause, *Trinity Lutheran Church of Columbia, Inc., v. Comer*, Chief Justice Roberts wrote an opinion for the Court holding that a state policy excluding churches from a grant program impermissibly discriminated "against religious exercise." Justice Sotomayor dissented from this opinion, joined by Justice Ginsburg, saying that in her view, it would violate the Establishment Clause for a state to "directly fund religious exercise." *Trinity Lutheran* thus suggests that the Roberts Court may hold a more accommodationist view of the Religion Clauses as a whole.

Likely the most significant Establishment Clause case decided in recent years was *Town of Greece v. Galloway*, in which the Court held that a town did not violate the Establishment Clause by opening its board meetings with a prayer. Justice Kennedy wrote the opinion of the Court, assessing the practice's

constitutionality by referring to the "tradition" of prayers that the Court had previously upheld and by looking to historical practice. In a portion of his opinion that was joined only by Chief Justice Roberts and Justice Alito, Justice Kennedy also ruled that the prayers were not impermissibly coercive, again by looking to historical practice, saying that a "reasonable observer" would be "acquainted with this tradition" of legislative prayer and would understand that the purpose of the prayers was to acknowledge religion, not to proselytize.

*American Legion* will present the Court with the opportunity to clarify whether the *Lemon* test remains good law, or whether instead lower courts should be analyzing more Establishment Clause claims under the "history and tradition" analysis followed in cases like *Town of Greece*. Part Two of this Sidebar discusses *American Legion* in more detail.

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