COMPARING NEW JERSEY ESTABLISHMENT CLAUSE PRECEDENT WITH SUPREME COURT PRECEDENT AFTER THE HOLDING IN *AMERICAN LEGION V. AMERICAN HUMANIST ASSOCIATION*

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I. Introduction

a. Establishment Clause Background

The First Amendment has two provisions concerning religion: the Establishment Clause and the Free Exercise Clause.[1] The Free Exercise Clause states that "Congress shall make no law prohibiting the free exercise of religion."[2] The Establishment Clause prohibits the government from "establishing" a religion.[3] This paper will focus on the Establishment Clause[4] which states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5]

The Establishment Clause of the First Amendment "forbids an established church or anything approaching it."[6] The Constitution does not require complete separation of church and state, instead it "mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any."[7] While courts resolve Establishment Clause cases, they "reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or state upon the other, and the reality that total separation of the two is not possible."[8]

The Establishment Clause prohibits the government from making any law "respecting an establishment of religion."[9] It also

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[1] Collins v. African Methodist Episcopal Zion Church, No. 04C-02-121, 2006 Del. Super. LEXIS 549 (Super. Ct. Mar. 29, 2006).

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

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

[7] *Id.*

[8] *Id.* at 672.

[9] *Establishment Clause*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/establishment_clause.

prohibits the government from preferring religion over non-religion or vice versa.[10] Some government action implicating religion is impossible to avoid, therefore, the Establishment Clause tolerates it to a certain extent.[11]

In determining Establishment Clause issues, courts have disagreement as to how to resolve them. The one thing that all academic commentators agree with is that there is something wrong with courts resolution of Establishment Clause issues.[12] "A common thread running through this criticism is that the court has failed to develop and articulate an underlying theory as to the meaning of the Establishment Clause and its function in our constitutional system."[13] Much of the criticisms that these academic critics discuss is about the Lemon Test as discussed in further detail below.[14]

b. The Lemon Test

In determining whether or not something violates the Establishment Clause, some courts look to the Lemon Test that was first established in 1973 in the Supreme Court case of *Lemon v. Kurtzman*.[15] The Lemon Test states that "a governmental action will violate the Establishment clause if: (1) the action does not have a secular purpose; (2) the primary effect of the action is to advance or inhibit religion; or (3) the action fosters excessive entanglement with religion."[16] Therefore, the Lemon Test measures three prongs: purpose, effect, and entanglement.[17] A government action whose primary purpose is religious, or that has effects that inhibit or promote religion, or that excessively entangle the government in a religion, violates the Establishment Clause.[18]

While the Lemon Test may be a good way to resolve Establishment Clause issues, it is not without its critics. According to one of the critics, the Lemon Test is "irrelevant or indeterminate

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[10] *Id.*
[11] *Id.*
[12] Robert A. Sedler, *Understanding the Establishment Clause: The Perspective of Constitutional Litigation*, 43 WAYNE L. REV. 1317, 1318-19 (1997).
[13] *Id.*
[14] *Id.*
[15] Lemon v. Kurtzman, 411 U.S. 192 (1973).
[16] Harris v. City of Chicago, 218 F.Supp.2d 990, 993 (N.D. Ill. 2002).
[17] *Id.*
[18] *See generally Lemon*, 411 U.S. at 192.

when applied to most serious Establishment Clause issues."[19] Another critic of the Lemon Test argues that "the broad disagreements about the meaning and viability of the Lemon Test have rendered the test 'only an imperfect tool for enforcing the separation principle,' and have 'produced an area of law that is chaotic and utterly unpredictable.'"[20] Moreover, it is apparent that the Lemon Test produces concerns in its application.

II. Supreme Court Precedent on the Establishment Clause

a. The Lemon Test

The Lemon Test was first established in *Lemon v. Kurtzman* in 1973. To determine Establishment Clause challenges, the court must ask whether a challenged government action has a secular purpose, has a principal or primary effect that neither advances nor inhibits religion, and does not foster an excessive government entanglement with religion.[21] More discussion on the Lemon Test is referenced above.

b. The Endorsement Test

The Supreme Court has also applied tests other than the Lemon Test to determine Establishment Clause issues. The first test that the Supreme Court has implemented is the Endorsement Test. In the case of *Lynch v. Donnelly*, Justice O'Connor, in her concurring opinion, changed the Lemon Test by consolidating the purpose and effect prongs of the Lemon Test to form the Endorsement Test.[22] In the *Lynch* case, the Supreme Court held that the city's inclusion of a nativity scene in its holiday display did not violate the Establishment Clause.[23] The Court explained that this display did not have the effect of endorsing Christianity or the

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[19] *See* Sedler, *supra* note 12, at 1320; *see also* Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686-87 (1992).

[20] *See id.*; *see also* Steven G. Gey, *Religious Coercion and the Establishment Clause,* 1994 U. ILL. L. REV. 463, 467, 469 (1994).

[21] *See Lemon*, 403 U.S. at 602; *see also* Am. Legion v. Am. Humanist Ass'n, 139 S.Ct. 2076, 2078-79 (2019).

[22] *Lynch*, 465 U.S. at 691-92.

[23] *Id.* at 687.

effect of disapproving non-Christian religions because no one would contend that the celebration of this holiday counts as government endorsement of religion.[24]

A major problem with the Endorsement Test is that it has produced inconsistent results when applied to similar cases.[25] In *Allegheny v. ACLU*, the Endorsement Test was applied to the facts and it produced conflicting results with *Lynch* even though the facts were similar in nature.[26] The Court held that because the nativity scene stood alone in *Allegheny*, that this violated the Establishment Clause because it appeared to be a government endorsement of religion.[27] Thus, in considering *Lynch* and *Allegheny* together, the conclusion is that a nativity scene is essentially absolved of any religious context if there are non-religious objects that surround it and, therefore, does not have the effect of endorsing any particular religion.[28]

The Court in *Allegheny* assumes two certain facts. First, it is assumed that people all share the view that a religious symbol becomes less of a religious symbol when it is surrounded by other images.[29] This is undoubtedly bound to produce inconsistent results when applied by different courts. Second, *Allegheny* overlooks the notion that a religious symbol, practice, or activity keeps its religious background regardless of whatever is surrounding it.[30] Because of this, the reasoning that is used in applying the Endorsement Test is responsible for producing inconsistent results when applied.[31]

c. The Coercion Test

The Supreme Court has also applied the Coercion Test in determining Establishment Clause issues. The Court in *Lee v. Weisman* applies this test.[32] In *Lee*, the Court held that prayers that

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[24] *Id.* at 692.
[25] Murdock v. Unum Provident Corp., 265 F. Supp. 2d 539, 541 n.3 (W.D. Pa. 2002).
[26] County of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 602 (1989), *abrogated by* Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014) [hereinafter *Allegheny*].
[27] *Id.* at 598.
[28] *Id.*; *see generally Lynch*, 465 U.S. at 668; *see also Allegheny*, 492 U.S. at 573.
[29] *See generally Allegheny*, 492 U.S. at 573.
[30] *See id.*; *see also Lynch*, 465 U.S. at 708.
[31] *Id.* at 118-19.
[32] Lee v. Weisman, 505 U.S. 577 (1992).

are given during graduation ceremonies in public schools were unconstitutional under the Establishment Clause.[33] The Court determined that the Constitution guarantees that the "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in any way which 'established a state religion or religious faith, or tends to do so.'"[34] Even though the non-believing students were not required to attend the graduation ceremony and did not have to listen to the prayers, the religious activity of the prayers placed the government in the position of forcing students to choose between going to graduation and not going to graduation, which "compelled attendance and participation in an explicit religious exercise."[35] Therefore, the Court in *Lee* held that a government activity that either directly or indirectly forces anyone to practice or support a religion or an exercise of religion is unconstitutional under the Establishment Clause.[36]

The Coercion Test is distinct because it focuses on the effect that the government practice has on an individual.[37] Under this test, a Court could find that a government practice is constitutional when the facts show that the purpose of this practice was religious in nature.[38] As an example, in *Aronow v. United States*,[39] the national motto of "In God We Trust" on currency was deemed constitutional because "it did not have the effect of government sponsorship of a religious exercise."[40] The Court did not consider the purpose of the government adopting this motto, "notwithstanding the Court's acknowledgement of the purpose for congressional adoption of the motto as being based upon the religious history and foundation of government."[41]

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[33] *Id*. at 598.
[34] *Id*. at 587.
[35] *Id*. at 583, 584-95, 598.
[36] *Id*.
[37] *Lee*, 505 U.S. at 593-95 (Justice Kennedy explained that the Establishment Clause guarantees that government may not have the effect of coercing anyone to support or participate in religion. This interpretation of the Establishment Clause does not acknowledge the purpose of the government practice in question).
[38] *Id*.
[39] Aronow v. United States, 432 F.2d 242 at 243 (9th Cir. 1970).
[40] Michele Hyndman, *Tradition Is Not Law: Advocating A Single Determinative Test for Establishment Clause Cases*, 31 THURGOOD MARSHALL L. REV. 101, 120 (2005).
[41] *Id*.

Due to the fact that the Coercion Test ignores the purpose prong, there are gaps that allow some governmental interference with religion and allow inconsistent results throughout the courts among Establishment Clause cases.[42]

d. The Tradition Argument

The last alternative test is the tradition argument. Because the Coercion and Endorsement Tests both do not produce consistent outcomes or a solid framework in the decision of Establishment Clause cases, the Supreme Court adopted another test.[43] Even though the Court established this new test, the problem of inconsistency in the results is still prevalent.[44] Courts are using the tradition argument to "secure government practices that have been part of American history, thereby validating challenges to the Establishment Clause based on history."[45] Though there is another analysis, this new argument does not resolve the inconsistency issues that are already a problem with the analysis of Establishment Clause issues.[46]

The Supreme Court in *Marsh v. Chambers* demonstrates how courts will apply the tradition argument.[47] In that case, "the Supreme Court upheld the Nebraska's legislature's practice of opening legislative sessions with prayer performed by a government paid chaplain."[48] The Court held that because of the long history and tradition of religious invocations spoken by clergy members to begin legislative sessions, that this practice did not violate the Establishment Clause.[49] In *Marsh*, the Court relied solely on tradition and history, ignoring any of the previously mentioned Establishment Clause tests.[50] This tradition argument disregards the issues in its application that are necessary to determine if a governmental practice is constitutional under the Establishment Clause and should not be frequently used by the courts, if at all.[51]

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[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 120-21.
[46] Hyndman, *supra* note 40, at 121.
[47] Marsh v. Chambers, 463 U.S. 783 (1983).
[48] Hyndman, *supra* note 40, at 121.
[49] *Id.*
[50] *Id.* at 121-22.
[51] *Id.*

The aforementioned issue is not the sole issue that is presented under the tradition argument. The first fault in the tradition argument is that courts can essentially make the argument that if any governmental practice is a tradition it cannot violate the Establishment Clause.[52] In applying the tradition argument, courts have held that governmental practices that have only been "traditions" for a few years satisfied the tradition argument along with those "traditions" that have been observed for over two hundred years.[53] Courts have not yet provided any specific guidelines for what constitutes as a tradition under the tradition argument and lacks standards that are necessary for courts to apply this analysis.[54]

The last issue with the tradition argument is that, because the word "tradition" is not defined, courts can apply it arbitrarily when they want to hold or strike down a government practice.[55] Therefore, the issue of inconsistent results is also inherent in the tradition argument.

e. Supreme Court Case Law on the Establishment Clause

i. Lynch v. Donnelly

The first Supreme Court precedent on the Establishment Clause that I will discuss is *Lynch v. Donnelly* which was decided in 1984.[56] As previously mentioned, the Court in *Lynch* had to determine whether or not the city's inclusion of a nativity scene in its holiday display violated the Establishment Clause.[57] To determine this, the Court does not explicitly apply the Lemon Test. The Court realizes that there will never be total separation between church and state, and they say that they must simply "reconcile the inescapable tension" between the two.[58] The Court further states that the Constitution does not require complete separation of

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[52] *Id.* at 123.
[53] *Id.*
[54] Hyndman, *supra* note 40, at 123.
[55] *Id.* at 125.
[56] *Lynch*, 465 U.S. at 668.
[57] *Id.*
[58] *Id.* at 672.

church and state, rather, the Constitution mandates accommodation of all religions and forbids hostility toward any.[59]

The *Lynch* Court says that for each Establishment Clause case, there must be line drawing, and no per se rule can be framed, thus rejecting the Lemon Test.[60] Because the Establishment Clause is not precise and detailed, there is no easy application.[61] The purpose of the Establishment Clause "was to state an objective, not to write a statute."[62] The Clause erects a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[63]

The Court finds it helpful in determining whether or not something violates the Establishment Clause to see "whether the challenged law or conduct has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and whether it creates an excessive entanglement of government with religion."[64] Yet, the Court has emphasized its unwillingness to be confined to any single test or criteria in this area.[65] The Court also rejects looking only at the religious component of the government practice.[66] The Court says that "focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."[67] Overall, the Court determines that there was insufficient evidence to establish that the city's inclusion of the nativity scene in their holiday display was purposeful to express some kind of governmental advocacy of a particular religious message which would violate the Establishment Clause.[68] Because the city's inclusion of the nativity scene depicted origins of that holiday, there was a legitimate secular purpose, and the inclusion of the nativity scene did not violate the Establishment Clause.[69]

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[59] *See id*. at 673; *see also Zorach v. Clauson,* 343 U.S. 306, 314-15 (1952); People of State of Ill. *ex rel.* McCollum v. Bd. of Ed. of Sch. Dist. No. 71, Champaign Cnty., Ill., 333 U.S. 203 (1948).
[60] *Lynch*, 465 U.S. at 678.
[61] *Id*.
[62] *See id*.; *see also* Walz v. Tax Comm'n of New York, 397 U.S. 664, 668 (1970).
[63] *See Lynch*, 465 U.S. at 679; *see also Lemon*, 403 U.S. at 614.
[64] *Lynch*, 465 U.S. at 679; *see generally Lemon*, 411 U.S. at 192.
[65] *See id*.; *see also Tilton v. Richardson,* 403 U.S. 672, 677–78 (1971).
[66] *Id*. at 679.
[67] *Id*. at 679-80.
[68] *Id*.
[69] *Id*. at 681.

ii. McCreary County v. American Civil Liberties Union of Kentucky

The next case that will be discussed is *McCreary County v. ACLU*[70] that was decided by the Supreme Court in 2005. In *McCreary*, the Court was faced with the question as to whether copies of the Ten Commandments which were put up in certain courthouses violated the Establishment Clause.[71] The display was "readily visible to . . . county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote."[72]

The Court begins by stating that "when the government acts with the ostensible and predominant purpose of advancing religion, it violates the central Establishment Clause value of official religious neutrality, there being no neutrality when the government's ostensible object is to take sides.[73] In *McCreary*, the Court declined the Counties' request to abandon Lemon's purpose test.[74] The Court says that "examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country.[75]

The Court continues by saying that scrutinizing purpose makes practical sense in an Establishment Clause analysis, "where an understanding of official objective emerges from readily discoverable fact" set forth in a statute's text, legislative history, and implementation or comparable official act.[76] The Court further agrees with the Lemon Test by saying that *Lemon* requires the secular purpose "to be genuine, not a sham, and not merely secondary to a religious objective."[77]

The appraisal of the counties' claim of a secular purpose for the display of the Ten Commandments and other historical

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[70] McCreary Cnty., Ky. v. Am. C.L. Union of Ky., 545 U.S. 844 (2005) [hereinafter *McCreary*].
[71] *Id*. at 851.
[72] *See McCreary*, 545 U.S. at 852; *see also* Am. C.L. Union of Ky. v. McCreary Cnty., KY, 96 F. Supp. 2d 679, 684 (E.D. Ky. 2000); Am. C.L. Union of Ky. v. Pulaski Cnty., KY, 96 F. Supp. 2d 691, 694 (E.D. Ky. 2000).
[73] *See McCreary*, 545 U.S. at 860; *see also Corp. of Presiding Bishop of Church of Jesus Christ of Latter—day Saints v. Amos.,* 483 U.S. 327, 335 (1987).
[74] *McCreary*, 545 U.S. at 845.
[75] *See id.* at 861*; see also Gen. Dynamics Land Sys., Inc. v. Cline,* 540 U.S. 581, 600 (2004).
[76] *See McCreary*, 545 U.S. at 862; *see also* Wallace v. Jaffree, 472 U.S. 38, 74 (1985)
[77] *McCreary*, 545 U.S. at 846.

documents in courthouses could take the evolvement of the display into account, for purposes of action brought by organization alleging that the display violated the Establishment Clause of the First Amendment.[78] Also, there was a ceremony for the posting of the Ten Commandments in which a pastor was present, who testified to the "certainty of the existence of God."[79] Therefore, one could reasonably assume that the Counties meant to emphasize a religious message.[80]

After the counties were sued, the Ten Commandments exhibits were modified to include "additional insight."[81] In the new display, the Ten Commandments were not hung alone.[82] The reason for doing this was to "emerge from the pervasively religious text of the Commandments themselves.[83] "Instead, the second version was required to include the statement of the government's purpose expressly set out in the county resolutions, and underscored it by juxtaposing the Commandments to other documents with highlighted references to God as their sole common element."[84] The court mentions that even this display "presented an indisputable, and undisputed, showing of an impermissible purpose."[85]

A third display of the Ten Commandments was then posted.[86] The outcome of this was an "exhibit" that placed the Ten Commandments with other documents that the Counties deemed to be significant in the foundation of the American government.[87] With this third display, the Counties argued that the display had new purpose.[88] This new purpose included "a desire to educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."[89] Even though the counties had a strong argument, the Court did not agree with them.[90]

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[78] *Id*. at 868.
[79] *Id*. at 869.
[80] *Id*.
[81] *Id*.
[82] *McCreary*, 545 U.S. at 870.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*.
[87] *Id*. at 871.
[88] *McCreary*, 545 U.S. at 871.
[89] *Id*.; *see American C.L. Union of Ky*., 145 F.Supp.2d at 848.
[90] *McCreary*, 545 U.S. at 871.

The Court in *McCreary* goes on to discuss the historical record of the Establishment Clause.[91] The Court states that there is evidence "that the Framers intended the Establishment Clause to require governmental neutrality in matters of religion, including neutrality in statements acknowledging religion."[92] "The very language of the Establishment Clause represented a significant departure from early drafts that merely prohibited a single national religion, and the final language instead 'extended [the] prohibition to state support for religion in general.'"[93] Eventually, the Court determines that "the Establishment Clause [is left] with edges still to be determined."[94] "Historical evidence thus supports no solid argument for changing course (whatever force the argument might have when directed at the existing precedent)," whereas public disclosure at the present time certainly raises no doubt about the value of the interpretative approach invoked for 60 years now."[95] Overall, the Court finds ample support in favor of finding a predominately religious purpose behind the Counties' third display of the Ten Commandments and holds that the display violates the Establishment Clause.[96]

iii. Van Orden v. Perry

The next case that I will discuss is *Van Orden v. Perry* which was also decided by the Supreme Court in 2005. In this case, Justice Rehnquist held that that the Lemon Test was not useful in making the Court's determination.[97] This case had to determine whether erection by Texas of a passive monument on its Capitol grounds violated the Establishment Clause.[98] The Court's analysis would be driven both by nature of the monument and by the nation's history.[99] The display was typical of unbroken history, dating back to 1798, of official acknowledgements by all three branches of government of religion's role in American life.[100] While the Ten

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[91] *Id*. at 878.
[92] *Id*.
[93] *Id*.; *see Lee*, 505 U.S. at 614-15.
[94] *McCreary*, 545 U.S. at 879.
[95] *Id*. at 881.
[96] *Id*.
[97] Van Orden v. Perry, 545 U.S. 677 (2005).
[98] *Id*.
[99] *Id*.
[100] *Id*.

Commandments are a religious symbol, they also have an undeniable historical meaning and the Establishment Clause was not violated by the monument's display of them.[101]

The Court further discusses that there has been official acknowledgement of the role of religion in America.[102] The Court then discusses former President George Washington and how both houses passed resolutions allowing him to ussie a Thanksgiving Day proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer, to be observed, by acknowledging, with grateful hearts, the many and signal favors of Almighty God."[103] "President Washington's proclamation directly attributed to the Supreme Being the foundations and successes of our young Nation:"[104]

The Court discusses that the role played by the Ten Commandments in American history are common throughout the country and that they need only look in the courtroom for proof.[105] The Ten Commandments, obviously, have religious significance and therefore, the monument in question has religious significance.[106] Yet, because the Ten Commandments have an "undeniable historical meaning," the Court holds that "simply having religious content or promoting message consistent with a religious doctrine does not run afoul of the Establishment Clause.[107]

Though this is true, there are limits to the display of religious messages and symbols.[108] The Court mentions the decision in *Stone*, which held that a Kentucky statute requiring the posting of the Ten Commandments in every public-school classroom was unconstitutional.[109] But here, "the placement of the Ten Commandments monument on the Texas State Capitol grounds is a far more passive use of those texts than was the case in *Stone*,

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[101] *Id.*
[102] *Van Orden*, 545 U.S. at 677 (recognizing the role of God in America's history has been shown in past decisions. In *Sch. Dist. of Abington Twp.*, the Court held that 'religion has been closely identified with our history and government,' and in *Engel v. Vitale*, the Court said that "the history of man is inseparable from the history of religion.").
[103] *Id.*
[104] *Id.* at 686-87.
[105] *Id.*
[106] *Id.* at 690.
[107] *Id.*
[108] *Van Orden*, 545 U.S. at 690.
[109] *Id.*

where the text confronted elementary school students every day."[110] Because "Texas treated its Capitol grounds monuments as representing the several strands in the State's political and legal history," "the inclusion of the Ten Commandments monument in this group has a dual significance, partaking of both religion and government" and does not violate the Establishment Clause.[111]

iv. Conclusion

In conclusion, the Supreme Court has not entirely rejected the Lemon Test but has also used different other tests to determine Establishment Clause challenges.

III. New Jersey Precedent on Establishment Clause Challenges

a. *Ran-Dav's County Kosher v. State*

Ran-Dav's County Kosher v. State is a case regarding the Establishment Clause which was decided by the New Jersey Supreme Court in 1992.[112] This case is about sellers of kosher foods who are bringing an action challenging the state's kosher regulations.[113]

The Court begins by saying that the basic analysis for determining Establishment Clause issues is the Lemon Test.[114] However, the court states that in cases of state action that create unjust preferences, there is a different analysis which controls.[115] "A law that creates 'explicit and deliberate distinctions between different religious organizations' must be regarded 'as suspect and [subject to] strict scrutiny in adjudging its constitutionality'" is further deemed to be the "Larson Standard."[116] However, the court declines to invoke the Larson Standard, and determines that the analysis can be complete under the Lemon Test.[117]

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[110] *Id.* at 691.
[111] *Id.* at 691-92.
[112] Ran-Dav's Cnty. Kosher, Inc. v. New Jersey, 129 N.J. 141 (1992).
[113] *Id.*
[114] *See id.* at 152; *see also Lemon,* 403 *U.S.* at 612-13.
[115] *Ran-Dav's Cnty. Kosher, Inc.*, 129 N.J. at 152.
[116] *See id.*; *see also* Larson v. Valente, 456 U.S. 228, 246 (1982).
[117] *Id.* at 153.

The Court does go through the Lemon test and looks at the religious qualifications of those selected to enforce certain regulations.[118] The court begins by analyzing the entanglement prong of the Lemon Test because it is the more germane in assessing the constitutional validity.[119] "In considering whether the kosher regulations foster excessive government entanglement with religion," the court makes note that the regulations impose religious standards on establishments who are purporting to be kosher.[120] As a result of this, Jewish law is intertwined with the secular law of the state.[121]

The Court realizes that the religion of state employees does not usually mean anything in their work, but it is because of the work that they do in this case that the Court finds that the appointment by the state of those officials confirms that the regulations themselves have a religious meaning.[122]

The Court says that to survive an Establishment Clause challenge under Lemon's purpose prong, the regulations must have a valid secular purpose.[123] State action is unconstitutional under this when there is "no question that the statute or activity was motivated wholly by religious considerations."[124] The court determines that the regulations involve the state excessively in religious matters and generate significant effects serving to advance religious interests.[125]

The Court then looks to the effects prong of the Lemon Test. The effects prong is violated "when the government fosters a close identification of its powers and responsibilities with those of any- or all- religious denominations."[126] The court determined that because the individuals are being used by the state in their religious capacity to interpret and enforce state law, the religious and civil authority that they have is indistinguishable and violates the effects

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[118] *See Ran-Dav's Cnty. Kosher, Inc.*, 129 N.J. at 141; *see also Lemon*, 91 S.Ct. at 211.
[119] *Id.* at 154.
[120] *Id.*
[121] *Id.* at 155.
[122] *Id.* at 157-58.
[123] *Id.* at 166.
[124] *Id.*
[125] *See Ran-Dav's Cnty. Kosher, Inc.*, 129 N.J. at 164*; see also* Sch. Dist. of City of Grand Rapids v. Ball, 473 U.S. 373, 388 (1985), *overruled by* Agostini v. Felton, 521 U.S. 203 (1997).
[126] *See Ran-Dav's Cnty. Kosher, Inc.*, 129 N.J. at 164; *see also Sch. Dist. of City of Grand Rapids*, 473 U.S. at 388.

prong.[127] The court continues in saying that "even a symbolic union between government and religion would contravene the effects prong of the Establishment Clause."[128]

The court then revisits the entanglement prong of the Lemon test which prohibits excessive government involvement in religious matters. This is an important element of the analysis because there is a "premise that both religion and government can best work to achieve their lofts aims if each is left free from the other within its respective sphere."[129] Even though it is inevitable that there will be some sort of entanglement between church and state, the "concept of a 'wall' of separation is a useful signpost."[130]

Overall, the court holds that the kosher regulations violate the Establishment Clauses of the state and federal constitution.[131] This New Jersey Supreme Court case makes it completely evident that it is applying the Lemon Test by going through a full step-by-step analysis. This is the analysis that the court wholly uses to determine whether the regulations violate the Establishment Clause of the federal and state constitutions.

b. *New Jersey State Bd. of Higher Educ. v. Board of Directors of Shelton College*

The next case that will be discussed is *New Jersey State Bd. of Higher Educ. v. Board of Directors of Shelton College* which was decided by the New Jersey Supreme Court in 1982.[132] In this case, the State Board of Higher Education was seeking an injunction restraining a college operated by a church from engaging in any form of educational instruction, offering any credits, or granting any degrees until it obtained a license authorizing it to do so.[133]

This Court also applies the Lemon test in making their Establishment Clause determination.[134] Even though the court does not go through the entire analysis, this is not at issue because only

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[127] *See Ran-Dav's Cnty. Kosher, Inc.*, 129 N.J. at 164.
[128] *Id.*
[129] *See id*; *see also* Reynolds v. United States, 98 U.S. 145 (1878).
[130] *See Ran-Dav's Cnty. Kosher, Inc.*, 129 N.J. at 164; *see also* Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982).
[131] *Ran-Dav's Cnty. Kosher, Inc.*, 129 N.J. at 167.
[132] New Jersey State Bd. of Higher Educ. v. Bd. of Dirs. of Shelton College, 90 N.J. 470 (1982).
[133] *Id.*
[134] *Id.* at 487.

the entanglement prong of the analysis in question. The Defendants in this case assert that the "regulatory scheme creates an excessive state entanglement with religion."[135] However, this Court agrees that the Establishment Clause permits minor state supervision of religiously oriented schools, excessive entanglement is what is prohibited.[136]

Therefore, because none of the education statutes or regulations here in question mandates "active involvement of the sovereign in religious activity," the court found that there was no excessive entanglement and the issue in question did not violate the Lemon Test.[137]

c. *Matter of Estate of Dickerson*

The next case that will be discussed is *Matter of Estate of Dickerson* which was decided by the New Jersey Superior Court in 1983.[138] This case is about a public school who filed an action to determine the legality of restrictions of privately funded scholarship trusts for students who intended to study for the Protestant ministry.[139]

This Court mentions the Lemon Test and says that the three-part analysis simply assists in answering the ultimate question of whether sponsorship, financial support, and act of involvement of the sovereign in religious activity has been demonstrated.[140] Therefore, the Lemon Test simply serves as "guidelines."[141]

The court begins by discussing the secular purpose prong and holds that assisting students in obtaining an education is a secular purpose, for purposes of the Establishment Clause of the First Amendment, even when that education has a religious dimension to it.[142] The court also holds that the scholarship trusts also pass the effects prong of the Lemon Test as well.[143] The primary effect of the

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[135] *Id*. at 488.
[136] *See id*.; *see also* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976).
[137] *See New Jersey State Bd. of Higher Educ.*, 90 N.J. at 488; *see also Walz*, 397 U.S. at 668.
[138] Matter of Est. of Dickerson, 193 N.J. Super. 353 (1983).
[139] *Id*.
[140] *Id*. at 364.
[141] *Id*.
[142] *See id*. at 365; *see also* Bd. of Ed. of C. Sch. Dist. No. 1 v. Allen, 392 U.S. 236 (1968).
[143] *Id*.

administration of these scholarships is to encourage those to study for the Protestant Ministry by assisting students, not to advance religion.[144] The last prong of the Lemon Test which the court discusses is the entanglement prong.[145] Determining whether a student is wants to pursue a career in the Protestant Ministry is not administratively entangling.[146] Overall, there are legitimate purposes for the restrictions of this trust.[147] Therefore, the trusts which preference students who are studying for the Christian or Protestant Ministry are valid.[148]

d. *Gallo v. Salesian Soc., Inc.*

The next case that will be discussed is *Gallo v. Salesian Soc., Inc.* which was decided by the New Jersey Superior Court in 1996.[149] This case is about a woman lay teacher who sued a Catholic all-boys high school, religious order that ran the school, and principal of the school for age and sex discrimination following her termination.[150]

This Court also applies the Lemon Test. For a statute to withstand the Establishment Clause challenge, it must have secular legislative purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and it must not foster excessive government entanglement with religion.[151] However, only the excessive government entanglement with religion prong was at issue.[152]

In this case, the court held that there is no excessive government entanglement between government and religion.[153] The defendants did not argue that their religion mandated age or sex discrimination against the plaintiff, they explained that plaintiff's termination was due to budgetary restrictions.[154] Therefore, the court held that the lay teacher's sex and age discrimination lawsuit against a Catholic high school under the law against discrimination

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[144] Matter of Est. of Dickerson, 193 N.J. Super. at 365.
[145] *Id.* at 367.
[146] *Id.*
[147] *Id.* at 371.
[148] *Id.* at 372.
[149] Gallo v. Salesian Soc., Inc., 290 N.J. Super. 616 (1996).
[150] *Id.* at 622.
[151] *Id.* at 644.
[152] *Id.*
[153] *Id.* at 648.
[154] *Id.*

was not unconstitutional excessive entanglement between government and religion in violation of the Establishment Clause.[155]

e. *McKelvey v. Pierce*

The next case that will be discussed is *McKelvey v. Pierce* which was decided by the New Jersey Supreme Court in 2002.[156] This case is about a former priesthood candidate who brought action for common law breach of contract for education against the diocese and several priests.[157]

The court in McKelvey also used the Lemon Test to determine whether or not the Establishment Clause was violated. However, only the excessive entanglement prong is at issue.[158] The court states that the issue of entanglement under the Establishment Clause "is measured by the 'character and purposes' of the institution affected, the nature of the benefit or burden imposed, and the 'resulting relationship between the government and the religious authority."[159]

The court goes into more detail about this prong. For purposes of determining whether a particular government action does not foster excessive entanglement with religion, courts will look at two dimensions of entanglement: substantive and procedural.[160] Substantive entanglement may occur when a church's core right to decide who may propagate its religious beliefs is at stake.[161] Procedural entanglement may result "from a protracted legal process pitting church and state as adversaries."[162]

Even though this court does not go into every prong of the Lemon Test, it is clear that they are using Lemon to make the Establishment Clause determination. The Court applies the third prong, entanglement, because it is the legal question that they are seeking to answer. Overall, the Court remanded the case back to the lower court for further analysis.[163]

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[155] *Gallo*, 290 N.J. Super. at 648.
[156] McKelvey v. Pierce, 173 N.J. 26 (2002).
[157] *Id*. at 32.
[158] *Id*. at 41.
[159] *See id*.; *see also* Rayburn v. Gen. Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1170 (4th Cir. 1985).
[160] *McKelvey*, 173 N.J. at 41.
[161] *Id*. at 42.
[162] *See id*. at 43; *see also Rayburn*, 772 F.2d at 1171.
[163] *Id*. at 59.

IV. Holding in *American Legion v. American Humanist Association*

Recently, the United State Supreme Court in *American Legion v. American Humanist Ass'n*, held that a cross-shaped World War I memorial owned and maintained by the Maryland-National Capital Park and Planning Commission did not violate the Establishment Clause.[164] In making the decision of this case, the unanimous Court refused to apply the Lemon Test and continued on in the option to discuss the inherent issues in applying it.[165] Even though the Court explicitly rejects the Lemon Test, it fails to provide any new or further guidelines in the determination of Establishment Clause violations.[166]

The underlying facts of *American Legion* are as follows: In 1918, residents of Prince George's County in Maryland, started to raise funds for a memorial to honor the county's soldiers who died in World War I.[167] The residents decided to design this memorial in the shape of a cross, and eventually American Legion took over the project.[168] Once completed, the cross stood on a large pedestal, thirty-two feet tall, and was inscribed with words such as "valor" and "endurance," with a plaque naming the local men who died in the war and stating that the memorial was dedicated to them.[169] In 1961, the Maryland-National Capital Park and Planning Commission took over the Cross.[170] Since acquiring the Cross, the Commission had spent $117,000 in maintaining the memorial, and had forecasted an additional $100,000 for repairs.[171] In 2014, the American Humanist Association and three residents of Washington, D.C. and Maryland brought suit against the Commission alleging that its ownership, maintenance, and display of the cross on public property violated the Establishment Clause.[172]

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[164] *See First Amendment-Establishment Clause- Government Display of Religious Symbols-American Legion v. American Humanist Ass'n*, 133 HARV. L. REV. 262, 262 (2019) [hereinafter *Government Display*]; *see also Am. Legion*, 139 S. Ct. at 2067.
[165] *See Government Display*, *supra* note 164; *see also Am. Legion*, 139 S. Ct. at 2080-85.
[166] *See Government Display*, *supra* note 164.
[167] *See id.* at 263.; *see also Am. Legion*, 139 S. Ct. at 2076.
[168] *See Government Display*, *supra* note 164, at 263.
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*

The lower district court granted summary judgment in favor of the defendants.[173] The Court analyzed the First Amendment claim under both the Lemon Test and the "legal judgment" test developed in Justice Breyer's concurrence in *Van Orden v. Perry*, and overall determined that the cross did not violate the Establishment Clause.[174]

Under the *Lemon* analysis, the Commission's maintenance of the cross had the secular purpose of honoring "our Nation's fallen soldiers,"[175] "it did not have the primary effect of endorsing religion,[176] and it avoided any excessive entanglement between government and religion."[177]

Under the "legal judgment" test established by Justice Breyer, "the cross's context and history indicated that it did not violate the Establishment Clause's basic purpose of preserving a healthy separation of church and state."[178] The court determined that, under either test, the defendants should prevail.[179]

The Fourth Circuit later reversed the lower court's ruling.[180] The Judge hearing the case chose to apply the Lemon Test.[181] She determined that the cross satisfied the secular purpose prong,[182] but failed both the primary effect and excessive entanglement prongs.[183] The Judge hearing that case determined that the cross failed the effect prong because a reasonable observer would perceive the cross

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[173] *Id.*

[174] *See Government Display*, *supra* note 164, at 263; *see also Van Ordern*, 545 U.S. at 677.

[175] *See Government Display*, *supra* note 164, at 263; *see also Am Humanist Ass'n*, 147 F.Supp.3d at 385 (quoting Salazar v. Buono, 559 U.S. 700, 715 (2010)).

[176] *See Government Display*, *supra* note 164, at 263-64*; see also Am. Humanist Ass'n*, 147 F.Supp.3d at 387.

[177] *See Government Display*, *supra* note 164, at 264*; see also Am. Humanist Ass'n*, 147 F.Supp.3d at 388.

[178] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 147 F.Supp.3d at 388-89.

[179] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 147 F.Supp.3d at 389.

[180] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n v. Md.-Nat'l Cap. Park & Plan. Comm'n*, 874 F.3d 195, 200 (4th Cir. 2017).

[181] *See Government Display*, *supra* note 164, at 264; *see also* Am. Humanist Ass'n, 874 F.3d at 204-05.

[182] *See Government Display*, *supra* note 164, at 264; *see also* Am. Humanist Ass'n, 874 F.3d at 204-05.

[183] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 874 F.3d at 195.

to be a government endorsement of Christianity."[184] The Judge further held that the cross failed the excessive entanglement prong of the Lemon Test "because the Commission spent government funds to maintain the cross, and because the commission was displaying the 'hallmark symbol of Christianity in a manner that dominates its surrounding.'"[185]

The Supreme Court of the United States later reversed.[186] Justice Alito identified four reasons why the Court generally declines to apply the Lemon Test to cases involving "longstanding monuments, symbols, and practices."[187] Due to the fact that these monuments, symbols, or practices were "established long ago," being able to identify their original purpose under the first part of the Lemon Test is extremely hard to do[188] Another reason that Justice Alito provides if that the passage of time may create many different purposes that make the purpose prong of the Lemon Test even more difficult to evaluate.[189] A third reason why is because, as time passes, a religious monument, symbol, or practice may be embedded into a community's secular "landscape and identity."[190] Finally, removing longstanding religious monuments, symbols, or practices can appear to be "aggressively hostile to religion."[191] Justice Alito ended his opinion by holding that the *Lemon Test* does not apply to "established, religiously expressive monuments, symbols, and practices."[192] Instead, these traditions enjoy "a strong presumption of constitutionality."[193]

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[184] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 874 F.3d at 206 (quoting Buono v. Norton, 371 F.3d 543, 545 (9th Cir. 2004)).
[185] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 874 F.3d at 211-12.
[186] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2074.
[187] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2082;
[188] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2082.
[189] *See Government Display*, *supra* note 164, at 264; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2082-83.
[190] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2084.
[191] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2084.
[192] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2085.
[193] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2085.

Justice Alito, in his opinion, did not apply a formal test or specific guideline in making the Court's determination to be applied to longstanding monuments.[194] Instead, he conducted a historical analysis to determine whether the cross embodied "respect and tolerance for differing views, an honest endeavor to achieve inclusivity and nondiscrimination, and a recognition of the important role that religion plays in the lives of many Americans."[195] Justice Alito concludes his opinion by saying that the cross did not meet these criteria, and said that the cross "carries special significance" relating to World War I due to the crosses that "marked the graves of American soldiers killed in the war."[196] The Cross also had historical importance for the community.[197] Justice Alito further states that the cross was a memorial to remember "the death of particular individuals," many of whose graves were marked by a cross, made it "natural and appropriate" to use the shape of the cross as the monument.[198] Simply put, the cross's history and context made it sufficiently secular to withstand the Establishment Clause.[199]

V. What is New Jersey Likely to do with this New Precedent?

As stated throughout this paper, the original standard for conducting an Establishment Clause analysis is the Lemon Test.[200] This test states that whatever is being challenged as violating the Establishment Clause must have a secular purpose, its principal or primary effect must be one that neither advances nor inhibits religion, and the statute must not foster an excessive government entanglement with religion.[201] This does not mean that there must be absolute separation between church and state, as the Lemon Test

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[194] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2089.
[195] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2089.
[196] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2089.
[197] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2089.
[198] *See Government Display*, *supra* note 164, at 265-66; *see also Am. Humanist Ass'n*, 139 S. Ct. at 2090.
[199] *See Government Display*, *supra* note 164, at 265-66.
[200] *Lemon,* 403 U.S. at 612-13.
[201] *Id*.

proscribes only "excessive" government entanglement with religion.[202]

Though the Lemon Test was the basic standard for determining proper application of the Establishment Clause, state laws that create "explicit and deliberate distinctions between different religious organizations" must be regarded as "suspect and [subject to] strict scrutiny in adjudging their constitutionality."[203] Generally though, to determine whether something violates New Jersey Constitution's prohibition against establishment of religion, the Supreme Court has followed the Lemon Test: whether it has a secular purpose, whether it's primary effect neither advances nor inhibits religion, and whether it fosters excessive governmental entanglement with religion.[204]

However, "where the conduct itself is undertaken directly by government officials or personnel, the third element" of the test, i.e., excessive government entanglement, "is effectively embraced by the other standards of the test."[205] "If direct government action constitutes a 'religious' practice under the initial components of the three-prong test . . . then, by definition, government itself can be said to be actually and directly engaged and, obviously, and inextricably 'entangled' in religion.[206] Moreover, if the activity does not offend either standard, then in a constitutional sense, religion is not involved.[207]

VI. Conclusion

In conclusion, it is unlikely that New Jersey is going to react much with respect to the recent holding in *American Legion*. The Supreme Court of the United States has continuously rejected the Lemon Test and has unsuccessfully applied other standards in regarding Establishment Clause cases and New Jersey has not reacted greatly to their holdings. Even though Supreme Court decisions are influential on state courts, they are not binding, and New Jersey does not have to use the holding in *American Legion* to make their Establishment Clause determinations.

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[202] *Id*.
[203] *See Ran-Dav's County Kosher, Inc.*, 129 N.J. at 141; *see also Larson*, 456 U.S. at 246.
[204] Right to Choose v. Byrne, 450 A.2d 925 (N.J. 1982).
[205] Marsa v. Wernik, 86 N.J. 232, 242-43 (1981).
[206] *Id*. at 243.
[207] *Id*.

Even though the Supreme Court has continuously rejected the Lemon Test, New Jersey courts have generally accepted and applied the Lemon standard. Possibly in the future, if the Supreme Court has further Establishment Clause cases and provides a test that is not likely to result in different and inconsistent outcomes with similar fact patterns, New Jersey may be more apt to accept the test. But because there has not been a Supreme Court Establishment Clause test that would produce equitable results up to this point, there is no need for New Jersey to accept any of the aforementioned tests. It will be interesting to watch how the Supreme Court determines Establishment Clause cases in the future, and how New Jersey courts are likely to react.