

MODULE 9

The Establishment Clause, Part I

Lemon · Allegheny · Van Orden · Town of Greece · American Legion · Kennedy · Nathan

First Amendment Law · Fall 2026 · Professor Jorge R. Roig

Two clauses, two questions

The government must neither burden religion nor promote it.

FREE EXERCISE

- Is government burdening religion?
- Module 8.

ESTABLISHMENT

- Is government promoting religion?
- This module.

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

Three theories of the clause

What does “establishment” forbid?

STRICT SEPARATION

- A wall between church and state.
- Everson, 1947.

NEUTRALITY

- No favoring religion or a religion.
- Endorsement, 1984–2019.

ACCOMMODATION

- Acknowledge religion; don't coerce.
- Kennedy, 2022.

Everson: government cannot “aid one religion, aid all religions, or prefer one religion over another.”

The rule no theory disputes

Preferring one faith over another gets strict scrutiny.

LARSON, 1982

- A rule aimed at newer faiths.
- Struck.

KIRYAS JOEL, 1994

- A school district for one sect.
- Struck.

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”

The Lemon test, 1971

For fifty years, the default test.

1

Secular purpose

A legitimate secular aim.

2

Primary effect

Neither advances nor inhibits religion.

3

No entanglement

Not excessive, with religion.

All three? Some? The Court never said. That was the problem.

Lemon had been dying for decades

Hollowed out, then abandoned.

1971

Lemon: three prongs.

1985

Aguilar: vans outside the gates.

1997

Agostini: prongs 2 and 3 merge.

2019

American Legion: Lemon set aside.

2022

Kennedy: Lemon abandoned.

Kennedy: “this Court long ago abandoned Lemon and its endorsement test offshoot.”

Endorsement: Lynch and Allegheny

Holiday displays, and what a reasonable observer sees.

LYNCH, 1984

- Crèche with Santa and a tree.
- Upheld.

ALLEGHENY: CRÈCHE

- Alone on the courthouse stairs.
- Struck.

ALLEGHENY: MENORAH

- Beside a tree and a sign.
- Upheld.

O'Connor, J.: endorsement tells nonadherents “that they are outsiders, not full members of the political community.”

The Ten Commandments, 2005

Decided the same day. Opposite results.

VAN ORDEN: THE CAPITOL

- One monument among many.
- Upheld: history, setting.

McCREARY: THE COURTHOUSES

- Posted, then revised twice.
- Struck: a religious purpose.

Breyer, J.: “I see no test-related substitute for the exercise of legal judgment.”

Legislative prayer: history decides

The exception that became the rule.

MARSH, 1983

- A paid legislative chaplain.
- Upheld: the First Congress did it.

TOWN OF GREECE, 2014

- Clergy open town meetings.
- Upheld: tradition, no coercion.

The clause “must be interpreted ‘by reference to historical practices and understandings.’”

American Legion: the Bladensburg cross

A 1925 war memorial, now on public land.

THE MEMORIAL

- Built by private citizens, 1925.
- Kept up by the State.

THE COURT, 7-2

- Upheld. Lemon not applied.
- Old monuments: presumed valid.

From “does it look like endorsement?” to “does it coerce anyone?”

Kennedy v. Bremerton, 2022

A coach prays at midfield after the game.

THE FACTS

- Prayer at the 50-yard line.
- Players joined; he was put on leave.

THE COURT, 6-3

- Private religious expression.
- Lemon: abandoned.

“[M]utual respect and tolerance, not censorship and suppression, for religious and nonreligious views alike.”

Kennedy: whose prayer, whose purpose?

The dissent's photographs, and the exam question.

THE DISSENT

- Three photographs in the opinion.
- Players kneeling around him.

THE EXAM MOVE

- Whose purpose? The District's.
- Which act? Disciplining him.

The District's purpose was to obey the Establishment Clause.

Old regime, new regime

What changed between Lemon and Kennedy.

THE OLD REGIME

THE NEW REGIME

THE TEST

Lemon; endorsement.

History and tradition.

THE QUESTION

Does it look like endorsement?

Does it coerce anyone?

NEUTRALITY

Keep away from religion.

Accommodate religion.

From how it looks to what it does.

The coercion spectrum

Where does a practice fall between the poles?

A CLEAR VIOLATION

- Children praying in class.
- Custody; a captive audience.

THE MIDDLE: KENNEDY

- After the game, on the field.
- Free to go, but it's the coach.

PLAINLY PRIVATE

- Grace at the team dinner.
- Parents there; free to leave.

Coercion falls as age and rank rise: the child, the senior, the legislator, the judge.

Current case: Nathan v. Alamo Heights

Texas puts the Ten Commandments in every classroom.

S.B. 10

- Ten Commandments, every classroom.
- A fixed text, size and place.

THE FIFTH CIRCUIT, 9–8

- Stone fell with Lemon.
- No founding-era hallmark.

“With Lemon extracted, there is nothing left of Stone.”

Nathan: may a lower court drop Stone?

The principal dissent: only the Supreme Court can.

THE MAJORITY

- Stone was built on Lemon.
- It fell with Lemon.

THE DISSENTS

- Only the Court overrules Stone.
- Classroom pressure is coercion.

Ramirez, J.: “as an inferior court,” we must “adhere strictly to” Stone.

For discussion: five measures

A hypothetical. Every case in this module is in play.

THE MEASURES

- A new monument at the courthouse.
- Locker-room prayer before games.
- Clergy open meetings; “please stand.”
- Commandments with other documents.
- A tax credit for old congregations.

QUESTIONS FOR DISCUSSION

1. Old or new?
2. Where on the spectrum?
3. Who asks you to stand?
4. Ripe? In what context?
5. A preference by proxy?

Module 9 on one slide

One line per rule.

THE LINE, ONE RULE AT A TIME

- Never prefer one faith: strict scrutiny (Larson).
- Lemon governed fifty years; it is abandoned (Kennedy).
- Endorsement went with it (Lynch; Allegheny).
- History and tradition decide (Town of Greece; Kennedy).
- Coercion is still forbidden: how much is too much?

Next — Module 9A, asynchronous: schools and money.