

THE ESTABLISHMENT CLAUSE AND FIRE TRUCK SANTAS: A GUIDE TO A LITIGATION-FREE HOLIDAY SEASON

*Jacob Shobe, Staff Editor, Vol. 31*¹

Picture this: a large bearded man dressed in red driving through your town late at night on top of a fire truck with sirens and lights at full bear. Does it sound appealing? Well, if you're lucky enough to live in a town that puts on an annual fire truck Santa parade, this image is a reality.² Every year, fire departments across the United States use their resources and personnel to spread the holiday spirit around their towns.³ However, some legal roadblocks may exist for this joyous affair.

I. THE ESTABLISHMENT CLAUSE

The Establishment Clause of the First Amendment of the United States Constitution states that "Congress shall make no law respecting an establishment of religion"⁴ There exist three traditional approaches to applying the Establishment Clause: strict separation, neutrality, and accommodation.⁵ Strict separationists would erect a "high wall" between religion and government, prohibiting all interactions between the two.⁶ Those who follow the neutrality approach would have the government act as a passive bystander to religious affairs, only interfering when religion and law oppose one another.⁷ Accommodationists believe the government should accommodate

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² *Santa Parade*, SOUTH KING FIRE, <https://southkingfire.org/300/Santa-Parade> (last visited Aug. 16, 2024).

³ *Id.*

⁴ U.S. CONST. amend. I.

⁵ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1524, 1524 (7th ed. 2023).

⁶ *Id.*

⁷ *Id.* at 1525.

all faiths and that the Establishment Clause should primarily “serve to prevent the government from making other religions feel unwelcome.”⁸

The separation between church and state is so intertwined with the American way of life that the phrase is now common vernacular, as seen throughout pop culture.⁹ The Supreme Court has long upheld this principle by enacting a “wall” between the two endeavors.¹⁰ However, the modern Supreme Court seems keen on lowering this wall.¹¹ This falling wall gives many previously prohibited religious activities a new stamp of legality. Although fire truck Santa parades are a long-standing tradition, the plain religious symbolism forces them into gray areas within the law. However, the Court’s recent decision in *Kennedy v. Bremerton School District* may have painted these parades’ areas of the law a new shade of green. This article will examine the legality of fire truck Santa parades following the *Kennedy* decision and outline steps local municipalities can take to move toward a litigation-free holiday season.

II. CRITERIA FOR RELIGIOUS ENTANGLEMENT

Historically, Santa Claus jurisprudence followed the neutrality approach.¹² Because Santa Claus has become both a national and religious icon, courts found no problem with municipalities holding Santa-related events as long as they are not blatantly religious affairs.¹³ This approach allowed townships across the country to throw Santa parades where a firefighter would dress up as Santa Claus and drive around the township without worrying about possible litigation.

⁸ CHEMERINSKY, *supra* note 6, at 1526.

⁹ See *The Gentlemen: All Eventualities* (Netflix Mar. 7, 2024) (stating that keeping business and family separate is akin to the “separation between church and state”); see generally *Succession: Church and State* (HBO May 21, 2023).

¹⁰ *Engel v. Vitale*, 370 U.S. 421, 425 (1962).

¹¹ David Smith, *Alarm as US Supreme Court Takes a Hatchet to Church-State Separation*, GUARDIAN (July 2, 2022), <https://www.theguardian.com/law/2022/jul/02/us-supreme-court-religion-church-state-separation#:~:text=In%20its%20trio%20of%20provocative,protected%20by%20the%20first%20amendment>.

¹² Donald Scarinci, *Santa is Welcome, but Be Careful About Religious Displays*, FIRST AMEND. MUSEUM (Dec. 19, 2022), <https://firstamendmentmuseum.org/santa-is-welcome-but-be-careful-about-religious-displays/>.

¹³ *Id.*

However, the Court’s most recent landmark Establishment Clause decision, *Kennedy*, requires courts to analyze religious activity through a “historical practices and understanding” lens.¹⁴ Although vague, Justice Gorsuch outlined six criteria for what the Founding Fathers determined to be government-religion entanglement in his concurrence in *Shurtleff v. City of Boston*.¹⁵ These criteria may give guidance to Gorsuch’s mysterious historical analysis requirement and are as follows:

(1) Government control over doctrine and personnel of established churches; (2) Government-mandated attendance of the established church; (3) Punishment of dissenting churches and individuals; (4) “Restrictions on dissenters’ political participation; (5) “Government financial support for established churches; and (6) Government use of established churches to carry out civil functions.¹⁶

Shurtleff’s emphasis on an “established church” does not necessarily mean that the government must declare a religion to be the “established church.”¹⁷ Instead, it would treat these specific government actions towards any church as equivalent to establishing it as the government’s church.¹⁸

These new criteria likely remove Santa Parades from their previous gray area because they do not fall within the Founders’ original criteria for an Establishment Clause violation. The “control over doctrine and personnel” likely fails concerning the Santa Parades, but the answer is slightly ambiguous. Regarding purely the activity of the parade, the government is the sole authority of both the doctrine and the personnel, given that they put on the parade and their

¹⁴ *Kennedy v. Bremerton School District*, 597 U.S. 507, 535 (2022).

¹⁵ *Shurtleff v. City of Boston*, 596 U.S. 243, 286–88 (2022) (Gorsuch, J., concurring) (citing Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110–12, 2131 (2003)).

¹⁶ Stephanie Taub & Kayla Ann Toney, *A Cord of Three Strands: How Kennedy v. Bremetson School District Changed Free Exercise, Establishment, and Free Speech Clause Doctrine*, 24 FED. SOC’Y REV. 1 (2023) (citing *Shurtleff*, 596 U.S. at 286–88 (2022) (Gorsuch, J., concurring)).

¹⁷ *Shurtleff*, 596 U.S. at 285–86 (2022) (Gorsuch, J., concurring).

¹⁸ *Santa Parade*, *supra* note 2.

employees run it.¹⁹ However, the Founders’ intention for this criterion likely requires more.²⁰ It will probably fail because the government is not controlling the doctrine or personnel of a third-party religious organization. The government is merely directing their employees to carry out the parade.²¹ Thus, the fire truck Santa parades pass the first historical Establishment Clause analysis stage.

The second criterion for the Founders’ historical analysis, government-mandated attendance of the established church, might prove difficult for would-be fire truck Santa parade throwers. The term “attendance” is slightly vague. It could mean passive observance or going out of one’s way to observe.²² If courts construe it to mean the former, they may consider the transient nature of the parades as forcing the attendance of those whose houses the Santas pass by. As the fire trucks weave in and out of neighborhoods with loud noises and flashing lights, they may be forcing the “attendance” of those whose houses they pass by. Although operating with a slight disregard to the Establishment Clause is not new for these parade throwers, keeping the parades out of neighborhoods and away from houses may guarantee safety from potentially litigious homeowners.

The third and fourth criteria of the Founders’ intention for the Establishment Clause, punishment of dissenting churches and individuals and restrictions on dissenters’ political participation, would likely prove no issue for the fire truck Santa parades. There is little, if any, evidence of a municipality punishing dissenters or absentees. However, suppose a Santa Parade

¹⁹ *Santa Parade*, *supra* note 2.

²⁰ *Shurtleff*, 596 U.S. at 285–88 (2022) (Gorsuch, J., concurring).

²¹ *Santa Parade*, *supra* note 2; *see also Parades*, SPRING LAKE PARK - BLAINE - MOUNDS VIEW FIRE DEPARTMENT, <https://sbmfire.org/news-events/parades/> (last visited Aug. 26, 2024).

²² *Attend*, THE MERRIAM-WEBSTER DICTIONARY (Revised ed. 2022).

municipality felt the need to do so. In that case, the American people can rest assured knowing they may have a cause of action under the First Amendment’s Establishment Clause.

The fifth criterion, the government financially supporting established churches, will likely face a similar analysis as the first. Although the government is spending significant time and funds putting these parades together, the government is not putting these resources into another organization.²³ For the government to support established churches financially, it needs to put financial resources into the church.²⁴ In the case of the fire truck Santas, the personnel, trucks, lights, and other things required to put on the parades are all owned and operated by the local fire departments, a branch of the government.²⁵ Thus, the Establishment Clause would not prohibit fire truck Santa Parades under the grounds of the government funding established churches.

The sixth criterion, the government using churches to carry out civil functions, also likely does not apply to the fire truck Santa parades. In putting on these parades, the government does not use another organization or established church to carry out the parade. Like the first and fifth criteria, the government is putting forth its own resources and carrying out the parade by itself. Additionally, whether or not driving loud fire trucks around town at night is a civil function is, at least, up for debate.²⁶ The blatant religious imagery combined with the deviation from traditional fire department duties may place these parades outside of a civil function.

III. CONCLUSION

Thanks to modern Establishment Clause jurisprudence, fire truck Santa parades are likely not in violation of the Establishment Clause as the modern court would construe it.²⁷ However,

²³ *Santa Parade*, *supra* note 2; *see also Parades*, *supra* note 21.

²⁴ *Shurtleff*, 596 U.S. at 285–88 (2022) (Gorsuch, J., concurring).

²⁵ *Id.*

²⁶ *Engel v. Vitale*, 370 U.S. 421, 425–26 (1962)(stating that the government’s designed function was not to put on religious programming).

²⁷ *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022); *Shurtleff*, 596 U.S. 243 (2022).

keeping the loud fire trucks outside of neighborhoods, while also being a nice thing to do for people late at night, may protect municipalities from their more litigious citizens. Santa Claus is a national and religious icon,²⁸ and knowing that local fire departments can still parade him around their town should allow everyone a jollier holiday season. Happy holidays!

²⁸ Scarinci, *supra* note 12.