

Religious Liberty and THE SUPREME COURT

Overview

The U.S. Supreme Court fulfills its constitutional role by deciding cases arising under the U.S. Constitution. Its rulings guide the federal court system and affect the lives of every American. The meaning of the First Amendment's protection of freedom of religion has been debated and reinterpreted by the Court. Originally, Bill of Rights protections only applied to the federal government, but many were later incorporated by the Supreme Court to the states through the Fourteenth Amendment. With state governments limited by the First Amendment's religious liberty protections, court challenges to state laws by those who believe their religious rights have been infringed have increased—as has debate about the amendment's scope and limits. Because public schools are government-funded, they are often the focus of Establishment Clause cases.

"[T]he only foundation for a useful education in a republic is to be laid in RELIGION. Without this, there can be no virtue, and without virtue there can be no liberty."

– BENJAMIN RUSH, *THOUGHTS UPON THE
MODE OF EDUCATION PROPER IN A REPUBLIC*, 1786

"A union of government and religion tends to destroy government and degrade religion."

– SUPREME COURT JUSTICE HUGO BLACK, *ENGEL V. VITALE*, 1962

Learning GOALS

Understand how the doctrine of incorporation broadened the application of the First Amendment.

Understand the facts of landmark Establishment Clause Supreme Court cases.

Evaluate arguments about the scope of the Establishment Clause.

Assess the Supreme Court's interpretations of the First Amendment with respect to religion in public schools.

MATERIALS

- ✎ **Essay:** Religious Liberty and the Supreme Court
- ✎ **Handout A:** Key Question
- ✎ **Handout B:** Document-Based Question
- ✎ **Handout C:** Organizing Documents

TIME

One 50-minute class period.

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BACKGROUND/HOMEWORK

Have students read **Essay: Religious Liberty and the Supreme Court** and answer the questions.

Note to teacher: This essay focuses on the Supreme Court, the Establishment Clause, and public schools. For additional background essays on Supreme Court cases and religious liberty, please visit www.BillofRightsInstitute.org/ReligiousLiberty.

WARM-UP [10 minutes]

- A. As a large group, go over the answers to the comprehension and critical thinking questions from the **Essay**.
- B. Distribute one or both of the key questions on **Handout A: Key Question**.
Note: You may choose to have the whole class do the same key question or have half the class work on each. Have students work with a partner to read and discuss the key question.

ACTIVITY [40 minutes]

- A. Distribute **Handout B: Document-Based Question** as well as **Handout C: Organizing Documents**. Students should record their initial response to the Key Question on **Handout C**, and record their response again after carefully reviewing the documents.
- B. Depending on students' background knowledge, literacy skills, and familiarity with document-based questions, you may choose to:
 - ✎ Have students work individually to complete **Handouts B** and **C** together and write their essays for homework.
 - ✎ Have students work in pairs to complete **Handouts B** and **C** together and write their essays in class next time.
 - ✎ Assign three documents from **Handout B** to each pair of students. Have them complete the corresponding sections of **Handout C**, and then jigsaw to form new groups made up of one student each who reviewed each document. Essays can be written for homework or in class next time.
 - ✎ Read the documents on **Handout B** and go over the scaffolding questions and **Handout C** as a large group. Essays can be written for homework or in class next time.

Have students write a detailed outline and/or their essay in response to the Key Question. Emphasize to students that they should not try to predict a “correct” answer, or predict what the Court would likely do. Rather, they should evaluate each document and develop their own reasoned argument.

A. Have students read the Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools published by the U.S. Department of Education. Have them compile a list of questions they still have regarding the relationship between church and school. Have students write a letter to the appropriate official with their questions or consult with your school district's legal counsel for answers.

B. If you chose to have half the class write a response to each scenario, have students work in pairs to discuss the differences between the two scenarios. List two ways the scenarios differ. Are these differences significant enough to change their constitutional implications?

[illegible]

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The Constitution (1789) established a government of limited powers. The Constitution gave the national government no grant of power to regulate religion, and forbade the use of religious tests for public office. The First Amendment (1791) denied Congress the power to set up or recognize a national religion, or to pass laws stopping people from exercising their beliefs in a peaceful manner. The federal Constitution and Bill of Rights applied only at the national level, and the Supreme Court heard only a few cases involving religious freedom during the 18th and 19th centuries.

INCORPORATION

The Fourteenth Amendment (1868) was ratified after the Civil War to protect the civil rights of the freedmen. It reads in part: “No state shall... deprive any person of life, liberty, or property, without due process of law.” Over time, the Supreme Court began interpreting this clause to mean that some Bill of Rights protections would apply to state governments. State governments could not abridge rights that the Court has found are “fundamental to ordered liberty.” Applying Bill of Rights protections to state and local governments is called the doctrine of incorporation.

In the 1940 case of *Cantwell v. Connecticut*, the Supreme Court applied the Free Exercise Clause of the First Amendment to the states. Seven years later, in *Everson v. Board of Education*, the Court did the same with the Establishment Clause. The application of the First Amendment’s protection of religion to state and local governments set the stage for an increasing number of conflicts over the constitutional relationship between religion and government.

ESTABLISHMENT CLAUSE TESTS

Through a number of landmark cases, the Supreme Court has developed tests to decide if government action on religion rises to the

level of establishing religion. One test is called the Lemon Test (from the case *Lemon v. Kurtzman*, 1971) about using public money to pay for religious schools’ secular textbooks). The “Lemon Test” held that a law does not violate the Establishment Clause if: (1) it has a secular, civic purpose; (2) its principal effect neither aids nor hurts a religion; and (3) government and religion are not overly entangled.

Another Supreme Court test is called the Coercion Test. This test holds that, while government may recognize and accommodate religion, government violates the Establishment Clause if it (1) coerces people to support or participate in religion against their will or (2) provides direct aid to religion in a way that would tend to establish a state church.

The Endorsement Test allows government involvement with religious activity as long as such involvement is “generally understood not to endorse” a religious message or teaching. The activity also cannot send a message to nonbelievers that they are not full members of the political community.

Some Court observers note that the Court is moving towards “accommodation” or “non-preferentialism” with respect to religion. For example, government-funded tuition vouchers may give indirect aid to religious private schools as well as non-religious schools, as long as true private choice exists.

PUBLIC SCHOOLS AND THE ESTABLISHMENT CLAUSE

Because public schools are funded by government, they are often the focus of Establishment Clause conflicts. The Supreme Court has consistently held that public school officials must remain neutral among religions, as well as between religion and

non-religion. The Court has also consistently upheld the religious liberty rights of individual students in public schools.

Public schools cannot force students to pray or require them to take part in religious activities in school. In 1962, the Court ruled in *Engel v. Vitale* that a state could not authorize a voluntary, non-denominational prayer for recitation at the start of each school day. State laws requiring display of the Ten Commandments in classrooms were struck down in *Stone v. Graham* (1980). In *Wallace v. Jaffree* (1985), the Court invalidated a state law setting aside a brief period for “meditation or voluntary prayer.”

The Court has generally held that state-sponsored religious activity at school-sponsored events violates the Establishment Clause as well. The Court ruled against clergy-led prayer at middle school graduation ceremonies in *Lee v. Weisman* (1992). In 2000, the Court held that officials could not allow high school students to vote on a prayer to be read at athletic events in *Santa Fe Independent School District v. Doe*.

The Court has also considered the complicated issue of government funds in private and religious schools. In *Mitchell v. Helms* (2000), the Court held that the government could pay for computer equipment for public, private, and religious schools. The Court upheld the tuition voucher system of Cleveland, Ohio, in *Zelman v. Simmons-Harris* (2002). The Court concluded that even though religious schools received public funds, the system provided true private choice and was designed for a secular purpose of the better education of children.

STUDENT RIGHTS

The Court has also made clear that students have religious liberty rights in public schools. The Court makes the distinction between government (or public school) speech endorsing religion—which the Establishment clause prohibits—and private (student) speech endorsing religion, which the free-speech and free-exercise clauses protect. Religious activities at school must be truly student-initiated and student led, and within the school’s guidelines for good order and discipline.

Students have the right to pray alone or in groups or to discuss their faith with classmates, as long as they aren’t disruptive or coercive. They may express their religious views in class assignments or discussions, as long as it is relevant to the subject under consideration and meets the requirements of the assignment. But students may not force others to participate in religious exercises.

Schools which allow any extra-curricular clubs may not discriminate against certain student clubs because they have a religious purpose. The Court held that public secondary schools must give voluntary religious groups the same access to facilities that other extracurricular groups enjoy (*Board of Education of Westside Community Schools v. Mergens*, 1990).

As long as government is directly involved in education, schools will continue to be the site of Establishment Clause conflicts. The debate about the constitutional relationship between religion and government continues to challenge Americans today. Understanding the history and interpretations of the First Amendment is critical to an informed discussion.

critical THINKING

1. How does the First Amendment protect freedom of religion?
2. Why did the Supreme Court begin hearing more First Amendment-related cases after the 1940s?
3. How has the Supreme Court interpreted the First Amendment with respect to religion in public schools?
4. How might another right protected by the First Amendment—freedom of speech—potentially apply in cases of religion and public schools?

A

KEY QUESTION

Directions: Read the Key Question. Then, using the documents on **Handout C** as well as your own knowledge of history and the Constitution, compose a well-written essay in response.

KEY QUESTION #1

Jason is the valedictorian of Hodgetown Public High School. Following tradition, Jason will give a speech at graduation. Also following tradition, school officials will review his speech before he delivers it. Jason puts his heart into his address, and he wants to make personal connections with his classmates. When officials review Jason's speech, they tell him he has to take out his references to Jesus Christ. Jason refuses.

Compose a well-written essay in which you support either Jason's right to deliver his speech as written or the constitutionality of the school's actions.

KEY QUESTION #2

Jason is the valedictorian of Hodgetown Public High School. Following tradition, Jason will give a speech at graduation. Jason puts his heart into his address, and he wants it to make personal connections with his classmates. He delivers his speech, which contains multiple references to his Christian faith and his belief in Jesus Christ, at the graduation ceremony. The next day, an atheist family files suit against Hodgetown School District.

Compose a well-written essay in which you support either Hodgetown School District or the atheist family.

DOCUMENTS

Document A: The Northwest Ordinance, 1787

Document B: The First Amendment, 1791

Document C: The Fourteenth Amendment, 1868

Document D: *Engel v. Vitale*, 1962

Document E: First Graders Pray in Classroom, 1966

Document F: *Tinker v. Des Moines Independent Community School District*, 1969

Document G: Dissenting Opinion, *Wallace v. Jaffree*, 1985

Document H: *Bethel School District v. Fraser*, 1986

Document I: *Board of Education of Westside Community Schools v. Mergens*, 1990

Document J: *Lee v. Weisman*, 1992

Document K: *Capitol Square Review and Advisory Bd. v. Pinette*, 1995

Document L: *Adler v. Duval*, 11th Cir. 2001

B

DOCUMENT-BASED QUESTION

DOCUMENT A: The Northwest Ordinance, 1787

Art. 1: No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship or religious sentiments, in the said territory....

Art. 3: Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged....

1. What protection for free religious exercise did the Northwest Ordinance provide?
2. What reasons did Congress list for its proclamation that schools and education should be encouraged?
3. This law was written before the establishment of a public school system. What forms might “encouragement” of schools have taken?

DOCUMENT B: The First Amendment, 1791

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.

1. Underline the five freedoms protected by the First Amendment.
2. To which level of government did these limitations apply in 1791?
3. Is freedom of religion the only protection that might apply to the situation in the Key Question? Why or why not?

DOCUMENT C: The Fourteenth Amendment, 1868

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

1. How has the Supreme Court interpreted this amendment to broaden the application of certain Bill of Rights protections?

DOCUMENT D: *Engel v. Vitale*, 1962

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.

1. In the Key Question scenario, is Jason's speech backed by the "power, prestige and financial support of government"? Why or why not?

DOCUMENT E: First Graders Pray in Classroom, 1966



1. The Supreme Court overturned public school-required prayer as unconstitutional in 1962. What are some reasons this scene might have taken place in South Carolina in 1966?

DOCUMENT F: *Tinker v. Des Moines Independent Community School District*, 1969

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are “persons” under our Constitution. ... In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. ... The prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

1. According to this decision, do students have a right to free speech in schools?
2. How far does that right go?

DOCUMENT G: Dissenting Opinion, *Wallace v. Jaffree*, 1985

[In this case,] the Court strikes down an Alabama statute because the State wished to “characterize prayer as a favored practice.” It would come as much of a shock to those who drafted the Bill of Rights as it will to a large number of thoughtful Americans today to learn that the Constitution, as construed by the [Supreme Court] majority, prohibits the Alabama Legislature from “endorsing” prayer. George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of “public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God.” History must judge whether it was the Father of his Country in 1789, or a majority of the Court today, which has strayed from the meaning of the Establishment Clause.

1. In this decision, the Court struck down Alabama’s law allowing teachers to set aside a moment of silence for “meditation or voluntary prayer.” On what basis does this dissenting Justice object to the ruling?
2. How persuasive is his reasoning?

DOCUMENT H: *Bethel School District v. Fraser*, 1986

[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings

1. What does the Court say about the rights of students?

DOCUMENT I: *Board of Education of Westside Community Schools v. Mergens*, 1990

[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis The proposition that schools do not endorse everything they fail to censor is not complicated.

1. In the Key Question scenario, would Jason's valedictory address be an example of "government speech endorsing religion," "private speech endorsing religion," neither, or both? Explain.

DOCUMENT J: *Lee v. Weisman*, 1992

The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the state, and, from a constitutional perspective, it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the state.

1. Why is the Court concerned with whether a choice would be "attributable to the state"?
2. In the Key Question scenario, would the content of Jason's speech be "attributable to the state"? Why or why not?

DOCUMENT K: *Capitol Square Review and Advisory Bd. v. Pinette*, 1995

[P]rivate religious speech...is as fully protected ... as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

1. In the Key Question scenario, would Jason's valedictory address be an example of "private religious speech"? Why or why not?

DOCUMENT L: *Adler v. Duval*, 11th Cir. 2001

While school officials may make private religious speech their own by endorsing it, schools do not endorse all speech that they do not censor.

1. Rephrase the Circuit Court's statement in your own words.



ORGANIZING DOCUMENTS

Directions: Read the Key Question and skim over Documents A-L. Record your initial response to the Key Question, and then read the documents over again carefully, answering the accompanying questions. Finally, decide what position you will argue in your essay.

**My preliminary answer after reading the Key Question
and skimming all the documents (circle one):**

The actions of Hodgetown Public School were / were not constitutional.

DOCUMENT	DATE, AUTHOR, AND TYPE OF DOCUMENT	BRIEF SUMMARY	DOES THIS DOCUMENT SUPPORT OR REFUTE MY ANSWER? EXPLAIN.
<i>Document A</i>			
<i>Document B</i>			
<i>Document C</i>			
<i>Document D</i>			
<i>Document E</i>			
<i>Document F</i>			

DOCUMENT	DATE, AUTHOR, AND TYPE OF DOCUMENT	BRIEF SUMMARY	DOES THIS DOCUMENT SUPPORT OR REFUTE MY ANSWER? EXPLAIN.
<i>Document G</i>			
<i>Document H</i>			
<i>Document I</i>			
<i>Document J</i>			
<i>Document K</i>			
<i>Document L</i>			
<i>Other information</i>			

My answer after completing the document analysis (circle one):

The actions of Hodgetown Public School were / were not constitutional.